LAFCO COUNSEL MEMORANDUM

Date: October 4, 2010

To: Members of the Santa Barbara Local Agency Formation Commission

From: William M. Dillon
Senior Deputy County Counsel

cc: Bob Braitman, Executive Officer, LAFCO

Subject: **Analysis of GWSD objections to Executive Officer's Certificate of Filing**

Introduction.

This Counsel memorandum is being submitted concurrently with a Staff Report from the Santa Barbara Local Agency Formation Commission ("LAFCO") Executive Officer regarding objections and issues raised by the Goleta West Sanitary District ("GWSD") to the City of Goleta's application for detachment of territory from the GWSD. This memorandum responds to two overarching objections raised by GWSD, which are:

1. Has the City's application for detachment lapsed?
2. If the application has not lapsed, are there grounds for the Commission to reverse the Executive Officer's action to deem the application complete and issue a certificate of filing?

The specific objections raised and Counsel's analysis and recommendations follow.

Issue: Has the City's Application Lapsed?

GWSD Objection. GWSD argues in its letter of August 16, 2010 that the City's application for the detachment has lapsed. Generally, the GWSD argues that because 18 months passed between the time the Executive Officer deemed the City's application incomplete and the City resubmitted, there has been a violation of either substantive or procedural due process. GWSD further argues that this result is required under the "rule of reason." Additionally, GWSD points out that the Ventura LAFCO has a rule requiring an applicant to respond within 90 days after receiving an application incompleteness letter or else the application treated as lapsed. GWSD states that "LAFCOs across the state have adopted formal and informal rules regarding the lapse of an incomplete

application." Other than the Ventura rule, GWSD cites no other LAFCO that has such a rule. GWSD cites no law in support of its due process arguments.

Analysis. The chronology of events is relevant to the Commission's consideration of this issue. As shown below, the City initially submitted its application for the detachment in early February 2009, the Executive Officer deemed it incomplete less than 2 weeks later, and the City responded by submitting an "Addendum" to its application approximately 18 months later. The key dates of note are as follows:

- February 4, 2009. City files application for detachment.
- February 6, 2009. Executive Officer mails notice to interested parties per Government Code § 56658(b).
- February 11, 2009. GWSD files letter objecting to adequacy of City's application.
- February 17, 2009. Executive Officer letter to City determining that application is incomplete.
- June 29, 2010. GWSB letter asking that LAFCO "formally terminate" proceedings for lack of activity.
- July 26, 2010. City response to LAFCO Executive Officer with Addendum to City's Detachment Application.
- July 28, 2010. Executive Officer deems City's application complete. Certificate of Filing issued.
- July 28, 2010. Executive Officer letter to GWSD stating City's application has been deemed complete. Invites further information from GWSD as to the proceedings.
- August 16, 2010. GWSD letter stating LAFCO should find that City's application has "lapsed."

First, key to this analysis is the fact the Santa Barbara LAFCO has no rule requiring that an application be deemed lapsed, terminated, abandoned or anything of that nature if the applicant does not respond to the incompleteness determination with a prescribed period. While such a rule could be considered by the Commission, no such rule currently exists.

Second, because LAFCO has no such rule, the City as the applicant had no notice that its application might be deemed to have lapsed. Therefore, any determination by LAFCO to unilaterally determine the application has been lapsed would penalize the City because it never had noticed of such a requirement.

Third, the practice and rules of other LAFCO's do not offer any resolution on this issue. The Executive Officer Mr. Braitman did an informal survey of the practices by other LAFCO's as to application completeness timelines. The responses Mr. Braitman received indicated that 4 of the 14 LAFCO's that responded said they have a formal policy. Two stated they had no policy but would contact the applicant after 6 months to determine if the application was active and to inform the applicant the file would be

closed if more information was not submitted within 30 days. Ten LAFCO's reported they have no rules on this topic. A summary of the responses is as follows:

1. Yolo LAFCO - response with 180 days
2. El Dorado LAFCO – response required within 6 months.
3. Kern LAFCO – response within 1 year. Extension of 90 days may be requested.
4. Santa Cruz LAFCO – response within 1 year.
5. Riverside LAFCO – No formal policy, but contact applicant if no activity after 6 months and state application will be closed if no response within 30 days.
6. San Bernardino LAFCO – Same approach as Riverside.
7. Los Angeles LAFCO – No policy. Some applications as old as 5 years.
8. Mendocino LAFCO – No policy.
9. Napa LAFCO – No policy. Some applications dormant for 2 to 3 years.
10. San Luis Obispo LAFCO – no policy.
11. Santa Clara LAFCO – no policy.
12. Siskiyou LAFCO – no policy.
13. Tulare LAFCO – no policy.
14. Tuolumne County LAFCO – no policy.

Counsel concludes that these responses do not indicate a trend that would reasonably put applicants throughout the State on notice that an application to a LAFCO would expire after any set period of time. Additionally, even if there was a statewide practice to adopt such rules, for the reasons stated in the next point, Counsel is uncomfortable with the Commission attempting to implement such a policy on an *ad hoc* basis.

Fourth, while there is a rational basis for the Commission to adopt a rule regarding application incompleteness timelines, Counsel does not recommend such a policy be implemented without adoption of a rule that has been publicly noticed and after a public hearing. Generally, a public agency may change substantive requirements that apply to an application that is being processed. (*See Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, regarding zoning applicable to application being processed.) The requirements in *Stubblefield* were changed via an ordinance amendment, i.e., formal rulemaking procedures, including notice and full hearings. When applicable rules are changed through such legislative actions, they are entitled "a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." (*Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752.) Conversely, where a plaintiff complains that existing rules are being intentionally applied in an arbitrary manner, such actions are not entitled to such deference. (*Id.*, and see *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control District* (2003) 113 Cal.App.4th 597, 605 re equal protections claim

for the "class of one" based on allegations of intentional improper application of existing requirements.)

Fifth, any determination now that the City's application has lapsed is complicated by the fact GWSD's objection was made after the Executive Officer deemed the application complete on July 28, 2010. Although on June 29, 2010, GWSD asked LAFCO to "formally terminate" the City's application for inactivity, GWSD did not argue that the application had lapsed until August 16, 2010. This objection is, therefore, not timely and Counsel recommends it be deemed waived.

Conclusion. Counsel recommends the Commission find that the City's application has not lapsed for the following reasons:

1. LAFCO does not have a rule or policy requiring an incomplete application be resubmitted within a specified period of time;
2. If a requirement for the resubmittal of an incomplete application were created now, the City would not have been given timely notice of such requirement;
3. The rules and practices of other LAFCO's throughout the State do not suggest the application should be deemed lapsed. Additionally, even if the statewide trend were more pronounced, this trend does not give the City notice of such a requirement in this case.
4. If the Commission wishes to implement a timeline requirement for the resubmittal of an incomplete application, this is better done through noticed rulemaking rather than a case by case basis.
5. The City's application was deemed complete by the Executive Officer on July 28, 2010. This action occurred before GWSD made the objection on August 16, 2010; hence, the objection is not timely and is waived.

Other related issues are moot. GWSD raises additional issues in its letter of August 16, all of which are based on the assumption that the City's application has lapsed. These include an assertion that a new property tax exchange agreement must be executed between the City and County, a claim that the City must adopt a new resolution initiating a new proceeding, and an objection that the Executive Officer must issue a new notice under Section 56658(a) for the receipt of a new application.

If the Commission accepts Counsel's recommendation that the Commission find that the City's application has not lapsed, then all of these issues are moot as they are predicated on an assumption that the City submitted a new application on July 28, 2010 rather than an addendum to its original application. If the Commission determined the application has lapsed, then these issues require additional analysis.

CERTIFICATE OF FILING.

In its August 17, 2010 letter, GWSD asked the Commission to direct the Executive Officer to rescind the issuance of the certificate of filing because GWSD asserted the application was incomplete "as a matter of law." The issues raised by GWSD are summarized below and are followed by Counsel's comments and analysis.

Appealability of Executive Officer's Action. As a threshold matter, the Commission should determine if the Executive Officer's determination to issue a certificate of filing is appealable. Under the Cortese Knox Hertzberg Act, the executive officer of LAFCO is assigned the responsibility to determine if an application is complete and, once so determined, he or she has a mandatory duty to issue a certificate of filing. In particular, Government Code section 56658 mandates that once an application is accepted for filing, the executive officer shall "immediately issue a certificate of filing" to the applicant and set the matter for a hearing before the Commission in 90 days. In particular, the Act states:

> Gov. Code § 56658
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> "**(g)** When an application is accepted for filing, the executive officer shall immediately issue a certificate of filing to the applicant. . . . From the date of issuance of a certificate of filing, or the date upon which an application is deemed to have been accepted, whichever is earlier, an application shall be deemed filed pursuant to this division.
>
> . . .
>
> "**(i)** Following the issuance of the certificate of filing, the executive officer shall proceed to set the proposal for hearing and give published notice thereof as provided in this part. The date of the hearing shall be not more than 90 days after issuance of the certificate of filing or after the application is deemed to have been accepted, whichever is earlier. Notwithstanding Section 56106, the date for conducting the hearing, as determined pursuant to this subdivision, is mandatory." (Emphasis added.)

The Act does not provide any procedures for appeal of such determinations to the Commission. Since the Act assigns the duty to determine whether to accept an application for filing to the executive officer and there is no appeal provision, Counsel recommends that any review in this instance be extremely limited. In particular, Counsel points out that there are specific timelines for a hearing on the application within 90 days after the certificate of filing has been issued.[1] In light of these timelines and the omission

[1] Under Section 56658(i), the City is entitled to have its application heard by LAFCO no later than 90 days after issuance of the certificate of filing. The City stated in its letter of September 20, 2010 that it did not object to the October 14 hearing being limited to a consideration of the procedural issues raised by GWSD, but urged that "this accommodation to GWSD preclude any further attempts to thwart Goleta's application from being considered by LAFCO."

of any statutory appeal procedure in the Act for issuance of a certificate of filing, Counsel recommends that a *de novo* appeal is not appropriate.

Some review, however, is proper. Indeed, there are limited instances where the Attorney General's Office has opined that a certificate of filing will be considered "void" if certain statutory requirements in the Act are not followed. For example, in the context of a voter petition to initiate a reorganization, the Attorney General concluded that where a petition is presented to LAFCO more than 60 days after the collection of the last signature, the Legislature specifically directed in the Act that LAFCO shall "treat the petition as not initiating the proceedings." (71 Ops. Atty.Gen. 344 (1988), citing former §§ 56705 & 56706.) In such instances, the Attorney General concluded that the "these express consequences . . . demonstrate a mandatory legislative intent with respect to the effect of the time limitation upon subsequent governmental actions." (*Id.*) In such instances, "the Legislature has indicated the jurisdictional nature of a failure to meet the statutory deadline." (*Ibid.*, emphasis added.) Therefore, the issuance of a certificate of filing under such circumstances would be "void." (*Id.*)

The grounds for concluding a certificate of filing is "void" are rare and, indeed, provisions similar to former Section 56706 are not generally found elsewhere is the Cortese Knox Hertzberg Act. Under the Act, most of the determinations of the executive officer call for the exercise of discretion. On matters of discretion, Counsel recommends that the Commission not second guess the executive officer's decisions because it is his office rather than the Commission that has the statutory responsibility to determine application completeness and issue a certificate of filing. (See e.g., Gov. Code § 56658(a).)

Below, Counsel discusses the issues raised in GWSD's appeal to determine if any are jurisdictional in nature and therefore require the certificate of filing to be declared void. Generally, it appears that the issues raised concern the adequacy of the information submitted rather that whether the statutory requirements for an application have been met. These issues go to the merits of the application for detachment and should be considered by the Commission when it hears the application on the merits.

Specific Issues Raised by GWSD. The issues raised in the GWSD letter are as follows:

1. Does the Application lack the required map and "legal description" of the detachment boundaries?

GWSD. GWSD states in its August 17 letter that that under Government Code section 56652, "each application must include . . . a map and legal description of the detachment area boundaries." GWSD also argues that application lacks vital information such as the location and ownership of infrastructure.

Analysis. Under the Cortese Knox Hertzberg Act, the executive office is not required to obtain a "legal description" of the boundaries of the proposed boundary change. Rather, the Act allows for the exercise of discretion by the executive officer to determine the adequacy of description of the boundaries. In particular, Government Code section 56652 provides:

> **Gov. Code § 56652. Form and contents of applications**
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> Each application shall be in the form as the commission may prescribe and shall contain all of the following information:
>
> **(a)** A petition or resolution of application initiating the proposal.
>
> **(b)** A statement of the nature of each proposal.
>
> **(c) A map and description, acceptable to the executive officer, of the boundaries of the subject territory** for each proposed change of organization or reorganization.
>
> **(d)** Any data and information as may be required by any regulation of the commission.
>
> **(e)** Any additional data and information, as may be required by the executive officer, pertaining to any of the matters or factors which may be considered by the commission.
>
> **(f)** The names of the officers or persons, not to exceed three in number, who are to be furnished with copies of the report by the executive officer and who are to be given mailed notice of the hearing. (Emphasis added.)

The plain language of Section 56652(c) requires a "map and description of the property, acceptable to the executive officer, of the boundaries of the subject area." There are two conclusions that can be drawn from the language. First, the statute does not require a "legal" description of the proposed detachment area. Second, the language of Section 566652(c) makes clear that the description of the property must be "acceptable to the executive officer". Such language clearly provides the executive officer with discretion to determine if the description submitted is satisfactory to meet LAFCO's requirements for processing the application and to submit it to the Commission for a hearing on the merits.

Therefore, Counsel concludes that the executive officer has discretion to determine if the City's description of the proposed boundaries is adequate. Additionally, nothing in the statute requires that such description be a "legal" description.

Mr. Braitman's has advised that the description in the application is sufficient to satisfy the recordation requirements of the County Assessor's Office and the State Board of Equalization. Counsel recommends that the Commission defer to the Executive Officer's exercise of discretion in this matter.

GWSD also states the application is inadequate because it fails to include a map of the location and ownership of infrastructure for the area. GWSD points to nothing in the statute that requires such a map to be included with an application.

Certainly, under Section 56652(e) – which is quoted above - the executive officer may require such information as part of an application; but the statute does not *per se* require such information or that if such information were required, its omission would be a jurisdictional bar to the Commission's consideration of the application. Therefore, Counsel see no grounds to declare the certificate of filing to be void.

Further, if the executive officer wished to require such information, he or she need not necessarily have the information provided on a map. Counsel is informed that such information has either been submitted with the City's application or is already available to the Mr. Braitman.

2. Adequacy of information regarding a plan for providing services.

Objection. GWSD states that the plan for providing services does not meet the requirements of Government Code section 56653.

Analysis. Government Code section 56653(a) requires that whenever a local agency submits a resolution of application to LAFCO, the application shall include "a plan for providing services within the affected territory." Section 56653(b) provides general categories of information that shall be submitted. It states:

> **"Section 56653(b).** The plan for providing services shall include all of the following information and any additional information required by the commission or the executive officer:
>
> **"(1)** An enumeration and description of the services to be extended to the affected territory.
>
> **(2)** The level and range of those services.
>
> **(3)** An indication of when those services can feasibly be extended to the affected territory.
>
> **(4)** An indication of any improvement or upgrading of structures, roads, sewer or water facilities, or other conditions the local agency would impose or require within the affected territory if the change of organization or reorganization is completed.
>
> **(5)** Information with respect to how those services will be financed."

In its letter of February 11, 2009, GWSD objected to the brief description of services to be provided within the City's original application. (*Id.* at p. 3.) In response to a letter from Mr. Braitman, the City filed an addendum to its application on July 26, 2010 and included with it a 3 page plan for providing services. The Plan submitted includes a description for each of the statutorily required 5 items listed in Section 56653(b) and also attached the following:

- Goleta Sanitary District Service Proposal Letter

- City of Goleta proposed budget
- Property tax exchange agreement
- Bartle Wells Goleta West Sanitary District Financial Review.

The statute does not provide any details or standards as to how much information is needed for each item listed in Section 56653(b). In light of Section 566652(e), which authorizes the executive officer to require "any additional data and information" necessary, certainly the executive officer has discretion to require additional information. But on the narrow issue of whether the application meets the minimum requirements of the Act, Counsel concludes the application may be accepted by the executive officer.

Counsel notes that the Executive Officer's analysis of the merits of the application may find deficiencies with the plan for services. Such an analysis will factor into whether the Executive Officer recommends approval of the reorganization. Additionally, the Commission is charged with the responsibility and full discretion to review the City's the plan for services when the Commission considers the application on the merits.

GWSD's objections to the plan for services appear to go to the merits of the application rather than its completeness. Therefore, Counsel recommends the Commission defer to the Executive Officer's exercise of discretion. Additionally, GWSD has identified no grounds that would suggest the certificate of filing is void. Therefore, GWSD's objection should be denied.

Other GWSD Issues: GWSD "technical issues" with Application:

GWSD raises several issues which look to be "technical" in nature regarding the application. The issues raised are:

- Post-detachment services for the properties located within the boundaries Embarcadero Municipal Improvement District look to be not served by either GWSD or the City.
- A concern is raised about services to properties located in Isle Vista, which will continue to be serviced by GWSD even if the detachment is approved.
- A concern about "flow" obligations.
- A concern about contractual obligations and complexities.

Analysis. Counsel notes that these objections do not demonstrate any violation of the Cortese Knox Hertzberg Act that suggests the certificate of filing must be considered void. Mr. Braitman has informed Counsel that these types of issues can be and often are addressed when the Commission considers an application on the merits and, if approved, the Commission may imposes appropriate terms and conditions pursuant to its authority under Government Code section 56886. Indeed, under the Act, the Commission has broad authority and may order or authorize new indebtedness; issuance or sale of bonds; acquisitions; improvements; the disposition, sale, transfer or division of property or any money or funds; priority of right of use of any public improvements or facilities; the

levying of assessments; extension or continuation of charges or fees; and "any other matters necessary or incidental to any of the terms and conditions specified in . . . section [56886]."

Additionally, when the Commission considers this matter on the merits, it will be able to fully weight to complexities of the proposal and determining if it should be approved. Therefore, these issues can be deferred until the Executive Officer does a full analysis of the proposal and submits his Staff Report and recommendations to the Commission.

3. GWSD argues the application is too vague to make environmental review possible.

GWSD argues the application is too vague to facilitate environmental review.

Analysis. As a threshold matter, Counsel notes that it is the Executive Officer's duty to initially identify whether the proposed detachment is a project under CEQA and what level of analysis is necessary. Until that determination is made by Mr. Braitman, it is not ripe for review by the Commission.

A change in jurisdictional boundaries, such as a detachment or annexation, is not per se a "project" under the California Environmental Quality Act ("CEQA"). The key is to determine if the proposed reorganization involves any proposed changes in land uses, such as new zoning for the area subject to the reorganization.

In a landmark case, the Supreme Court in *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263 looked at when a LAFCO approval of an annexation may be a "project" for purposes of CEQA. That case involved the annexation of the 677-acre ranch to a city. As proposed, the annexation would remove the property from agricultural zoning controlled by the county and place it within the authority of a city which had prezoned the use for "residential, commercial and recreational" purposes. (*Ibid.*, at p. 281.) On these facts, the court concluded it was apparent that the annexation would "culminate in physical change to the environment" and was therefore a project subject to CEQA; but the Court also went on to stress that its holding was not intended to imply that "any ... approval of any annexation to any city may have a significant effect on the environment." (*Ibid.*)

In the same year as *Bozung*, the Supreme Court again took up this issue in *Simi Valley Recreation & Park Dist. v. Local Agency Formation Com.* (1975) 51 Cal.3d 648 and concluded a detachment that did not result in different zoning was not a project subject to CEQA because it "did not make any change whatever in the uses to which the land might be put." (*Ibid.* at p. 666.) The Court said this was an organization change rather than one that would possibly affect the environment and stated that CEQA should not be applied "to every change of organization or personnel which may affect future determinations relating to the environment." (*Ibid.*) Based on these facts, the detachment was not a project subject to CEQA.

Issues concerning budgets, financing, contractual arrangements, and ownership of infrastructure are certainly important issues for consideration by the Commission. These types of issues, however, generally do not need to be analyzed under CEQA.

The CEQA Guidelines list projects that are categorically exempt from CEQA and include "Class 19" which includes "annexations to cities or special districts of fully developed territory . . ." The Executive Officer will determine initially if this exemption applies to the City's application.

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