

September 11, 2006

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TO: Local Agency Formation Commission

FROM: Executive Officer

SUBJECT: Attorney General's Opinion: No. 06-210: Incorporation and General Taxes

Attached is correspondence from LAFCO's Legal Counsel William D. Smith and California's Attorney General Bill Lockyer regarding the ability to condition the approval of an incorporation proposal on voter approval of a general tax. As concluded by the Attorney General, LAFCO may condition its approval of incorporation on voter approval of a general tax. Majority voter approval would be necessary for the general tax. The Attorney General also concluded that approval of the proposed tax by a simple majority vote of the members of LAFCO would apply (i.e., five members of LAFCO). Your Legal Counsel has concluded that while the Attorney General does not believe a two-thirds vote of LAFCO would be required, the Commission's action may be subject to legal challenge. Please refer to the attached opinion for further discussion of these incorporation and legal issues.

MICHAEL D. OTT  
Executive Officer

MDO:tjc

Attachment



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August 15, 2006

Mr. Michael Ott  
Executive Officer  
San Diego Local Agency Formation Commission  
1600 Pacific Hwy, Room 452  
San Diego, California 92101

**RECEIVED**  
AUG 17 2006  
SAN DIEGO LAFCO

Re: Attorney General Opinion on Ability of LAFCO to Condition Approval of an Incorporation on Voter Approval of a General Tax

Dear Mr. Ott:

After consultation with you, this office requested an Attorney General's opinion on the ability of the Local Agency Formation Commission ("LAFCO") to (1) condition approval of an incorporation on voter approval of a general tax, and (2) whether LAFCO must act by a two-thirds vote of its members in adopting such a condition. The issue arises because an incorporation might not be financially feasible unless the city receives tax revenue in addition to that normally allocated to a new city. In addition, Proposition 218 provides that a general tax election must be consolidated with a "regularly scheduled election for members of the governing body," (Cal. Const. art. XIIC, § 2 (b)) and Proposition 62 requires that an ordinance or resolution proposing a general tax be "approved by a two-thirds vote of all members of the legislative body of the local government." (Gov't Code § 53724(b).)<sup>1</sup>

<sup>1</sup> Proposition 218 provides that a general tax; that is, a tax imposed for general governmental purposes, may be approved by at an election by a majority vote as opposed to a "special tax," a tax imposed for specific purposes, which requires a two-thirds vote. Cal. Const. art. XIIC, §§ 1(a), 1(d), 2(b) and 2(d).

Opinion of Attorney General. The attached Opinion of the Attorney General concludes:

1. The Commission may condition its approval of an incorporation on voter approval of a general tax. Government Code section 57132, which requires the incorporation election to be held on a regular election date, satisfies the requirement contained in Proposition 218 that the general tax election be consolidated with a regularly scheduled general election for members of the governing body.

2. Proposition 62 applies only to public agencies that may "impose" a general tax; and, therefore, since the Commission does not impose the tax, but merely conditions the incorporation on voter approval of the tax, the Proposition 62 provision requiring approval of the proposed tax by a two-thirds vote of all members of the governing body does not apply to the Commission.

Analysis. Attorney General opinions are not binding on the courts, but tend to be given considerable respect, particularly when dealing with issues of government law. We believe the reasoning contained in the attached opinion, particularly as to question (1) is sound. We believe the Attorney General's answer as to question (2) is reasonable but still subject to potential challenge should LAFCO not achieve a two-thirds vote of all of its members in approving an incorporation subject to a general tax condition.

Very truly yours,

JOHN J. SANSONE, County Counsel

By   
WILLIAM DEAN SMITH, Senior Deputy

WDS:clc  
06-00161  
Enc.

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

BILL LOCKYER  
Attorney General

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OPINION	:	No. 06-210
of	:	August 11, 2006
BILL LOCKYER	:	
Attorney General	:	
GREGORY L. GONOT	:	
Deputy Attorney General	:	

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THE HONORABLE JOHN J. SANSONE, COUNTY COUNSEL, COUNTY OF SAN DIEGO, has requested an opinion on the following questions:

1. May a local agency formation commission condition its approval of the incorporation of a city upon voters within the proposed city approving a general tax?
2. If so, may the commission's resolution imposing the condition be adopted by majority vote?

## CONCLUSIONS

1. A local agency formation commission may condition its approval of the incorporation of a city upon voters within the proposed city approving a general tax.
2. A local agency formation commission's resolution imposing a condition that the voters of a proposed city approve a general tax may be adopted by majority vote.

## ANALYSIS

The Legislature has enacted the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Gov. Code, §§ 56000-57550; "Act"),<sup>1</sup> previously known as the Cortese-Knox Local Government Reorganization Act of 1985, which provides for the establishment of a local agency formation commission ("LAFCO") in each county (§§ 56325-56337) "to encourage orderly growth and development and the assessment of local community services needs." (See *Antelope Valley-East Kern Water Agency v. Local Agency Formation Com.* (1988) 204 Cal.App.3d 990, 994; see also § 56001; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 495; *Placer County Local Agency Formation Commission v. Nevada County Local Agency Formation Commission* (2006) 135 Cal.App.4th 793, 797-798; *San Miguel Consolidated Fire Protection Dist. v. Davis* (1994) 25 Cal.App.4th 134, 151).

The primary function of a LAFCO is "[t]o review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization" of local agencies. (§ 56375; see *McBail & Co. v. Solano County Local Agency Formation Com.* (1998) 62 Cal.App.4th 1223, 1228; *Las Tunas Beach Geologic Hazard Abatement Dist. v. Superior Court* (1995) 38 Cal.App.4th 1002, 1007-1008.) "Changes of organization" include city incorporations, district formations, annexations to or detachments from a city or district, disincorporations of cities, dissolutions of districts, and certain mergers and consolidations. (§ 56021.) " 'Reorganization' means two or more changes of organization initiated in a single proposal." (§ 56073.)

In performing its duties, a LAFCO conducts public hearings, where it receives oral and written protests, objections, and evidence. (§ 56666; see *Las Tunas Beach Geologic Hazard Abatement Dist. v. Superior Court, supra*, 38 Cal.App.4th at p. 1009.) In exercising its legislative and political power (*San Miguel Consolidated Fire Protection Dist. v. Davis*,

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<sup>1</sup> All references hereafter to the Government Code are by section number only.

*supra*, 25 Cal.App.4th at p. 152), a LAFCO adopts resolutions approving or disapproving proposals, with or without conditions (§§ 56880, 57100, subd. (e)). If a resolution approving a proposal is adopted, further proceedings relative to the proposal are conducted by the LAFCO as the “conducting authority” (§ 56029). These proceedings may culminate in an election involving the affected residents or landowners. (§§ 57100-57204.)

The questions presented for resolution concern a LAFCO’s decision to condition its approval of the incorporation of a city upon the approval by the voters of a general tax for the proposed city.<sup>2</sup> May it impose such a condition on the incorporation proposal, and if so, may its resolution imposing the condition be approved by majority vote of the LAFCO members?

1. Voter Approval of a Tax

The Legislature has given LAFCOs express authority to impose conditions when approving a city’s incorporation. Section 56886 states in part:

“Any change of organization or reorganization may provide for, or be made subject to one or more of, the following terms and conditions. . . .

“.....

“(s) The levying of assessments, including the imposition of a fee pursuant to Section 50029 or 66484.3 or the approval by the voters of general or special taxes. . . .

“.....”

General taxes constitute one of “a virtually limitless array of factors” upon which a LAFCO may condition its approval of a change of organization. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 912 [discussing section 56844, predecessor of section 56866].)

In 82 Ops.Cal.Atty.Gen. 180 (1999), we concluded that a LAFCO could condition approval of a change of organization upon the continued collection of a previously established and collected tax. In the circumstances presented there, we found that the approval process of the Act in effect “complements” the constitutional requirements for

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<sup>2</sup> “ ‘Incorporation’ means the incorporation, formation, creation, and establishment of a city with corporate powers.” (§ 56043.)

voter approval of taxes, fees, and charges when they have previously been established and approved by the electorate:

“In summary, then, a change of organization or reorganization involves taxes, assessments, fees, and charges that have previously been established and approved by the electorate where constitutionally or statutorily required. The rates and duration remain the same, as does the methodology in arriving at the amount of revenue to be collected. The Act provides a protest and election process for approving the proposed changes. (§§ 57075-57078.) In effect, the Act complements articles XIII C and XIII D rather than conflicts with them. [Citations.]” (*Id.* at pp. 188-189.)

“Articles XIII C and XIII D” referenced in our 1999 opinion generally require voter approval before imposing any taxes, assessments, fees, or charges. (See Cal. Const., art. XIII C, § 2; art. XIII D, § 3.)<sup>3</sup> With respect to a city’s imposition of general taxes, subdivision (b) of section 2 of article XIII C provides:

“No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.”

Accordingly, when a LAFCO conditions approval of the incorporation of a city upon voters within the proposed city approving a general tax, such voter approval may be given by majority vote in keeping with the mandate of article XIII C.

Here, the electorate’s approval of the tax may take place at the same time the incorporation itself is approved. Section 57132 prescribes that “[t]he election on the question of the change of organization . . . shall be called and held on the next regular election date occurring at least 88 days after the date upon which the resolution calling the election was adopted.” Although an incorporation election is sometimes referred to as a “special election” in the Act (see, e.g., §§ 57000, subd. (e), 57115, subd. (a), 57140, 57144), the election must take place on a “regular election date” (§ 57132), thus satisfying the

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<sup>3</sup>Further references to the Constitution are by article number only.

constitutional requirement of being “consolidated with a regularly scheduled general election” (art. XIII C, § 2, subd. (b); see Elec. Code, §§ 324, 1000).

Section 56886 provides the answer to the first question. We conclude that a LAFCO may condition its approval of the incorporation of a city upon voters within the proposed city approving a general tax.

## 2. Majority vote by LAFCO

The second question presented concerns whether a LAFCO may adopt by majority vote a resolution requiring voter approval of a general tax in order for the city to be incorporated. Normally, a LAFCO acts by majority vote. (See § 56880.) Is the majority vote requirement affected by Proposition 62, a statutory initiative approved by the voters in 1986 (see *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235; *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1306-1307), which requires an ordinance or resolution proposing a general tax to be “approved by a two-thirds vote of all members of the legislative body of the local government” (§ 53724, subd. (b))?

Proposition 62 applies to local governments and districts that have the ability to “impose” a general tax. Section 53723 states:

“No local government, or district, whether or not authorized to levy a property tax, may impose any general tax unless and until such general tax is submitted to the electorate of the local government, or district and approved by a majority vote of the voters voting in an election on the issue.”

In the context of Proposition 62, entities that may impose a general tax have been referred to as “taxing authorities” or as having “local taxing power.” (See *Santa Clara County Local Transportation Authority v. Guardino, supra*, 11 Cal.4th at p. 250; *McBrearty v. City of Brawley* (1997) 59 Cal.App.4th 1441, 1447-1448.)

A LAFCO does not have the authority to “impose” a tax. (See *City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, 550 [a LAFCO “has only those express (or necessarily implied) powers which are specifically granted to it by statute”].) Under section 56886, subdivision (s), a LAFCO does not impose a tax; rather, as a condition of approving incorporation, it specifies that the voters are to approve imposition of a tax. Proposition 62 thus has no application to the vote taken by a LAFCO pursuant to section 56886, subdivision (s).

We conclude in answer to the second question that a LAFCO's resolution imposing a condition that the voters of a proposed city approve a general tax may be adopted by majority vote.

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