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OPINION	:	No. 80-1105
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of	:	<u>APRIL 9, 1981</u>
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The Honorable Milton Goldinger, County Counsel, Solano County, has requested an opinion on the following questions:

1. Are the provisions of section 54784 of the Government Code constitutional which require the disqualification of a city member of a Local Agency Formation Commission (LAFCO) where an annexation proposal under consideration affects his city, but which require no similar disqualification as to the county members of LAFCO?

2. Does the failure of section 54784 of the Government Code to provide for the disqualification of county members of LAFCO as well as city members with respect to annexation proposals violate the one-man, one-vote requirement of the Equal Protection Clause?

## CONCLUSIONS

1. The fact that section 54784 of the Government Code does not provide for the disqualification of county members of LAFCO as well as the interested city member with respect to an annexation proposal does not render that section unconstitutional.

2. The failure of section 54784 of the Government Code to provide for the disqualification of county members as well as the interested city members of LAFCO with respect to annexation proposals does not violate the one-man, one-vote requirement of the Equal Protection Clause.

## ANALYSIS

Local Agency Formation Commissions (LAFCOs) are established in each county pursuant to the Knox-Nisbet Act, Government Code section 54773 *et seq.*<sup>1</sup> The duties of LAFCO are essentially to review and approve or disapprove proposals for the incorporation, disincorporation or consolidation of cities, the exclusion of territory therefrom, the formation of special districts, the development of certain redevelopment project areas, and the annexation of territory to local agencies, including cities. (§ 54790.) Also, LAFCOs are assigned similar duties with respect to changes of organization and reorganization of special districts by the District Reorganization Act of 1965.

The composition of LAFCOs varies somewhat depending upon the number of cities in the county and other factors. (See generally, §§ 54780, 54781, 54782, 54782.6 and 54785.) Solano County, a county with more than one city which has not opted to expand its commission to seven members to include special district representatives (§ 54782.6), has a five member LAFCO appointed pursuant to section 54780, which provides:

“There is hereby created in each county a local agency formation commission. Except as provided in Sections 54781 and 54782, the commission shall consist of five members, selected as follows:

(a) Two representing the county, appointed by the board of supervisors from their own membership. The board of supervisors shall appoint a third supervisor who shall be an alternative member of the commission. He is authorized to serve and vote in place of any supervisor on the commission who is absent or who disqualifies himself from participating in a meeting of the commission.

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<sup>1</sup> All section references are to the Government Code unless otherwise indicated.

In the event the office of a regular county member becomes vacant the alternate member is authorized to serve and vote in his place until the appointment and qualification of a regular county member to fill the vacancy.

(b) Two representing the cities in the county each of whom shall be a city officer, appointed by the city selection committee. The city selection committee shall also designate one alternate member who shall be appointed and serve pursuant to section 54784.

(c) One representing the general public appointed by the other four members of the commission.”

The focus of this opinion request is upon section 54784, which sets forth the manner in which city members and city alternates are selected, and then, in its penultimate sentence, provides for the disqualification of the interested city member in counties with more than two cities when LAFCO is considering a city annexation proposal. Section 54784 provides:

“In each county containing two or more cities, regular and alternate city members to the commission shall be appointed by the city selection committee organized in the county pursuant to and in the manner provided in Article 11 (commencing with section 50270) of Chapter I of Part 1 of Division I of Title 5. Regular members of the commission shall be appointed by such city selection committee pursuant to Section 54780. The city selection committee shall appoint one alternate member to the commission in the same manner as it appoints a regular member. If one of the regular city members is absent from a commission meeting, or disqualifies himself from participating in a meeting, or is automatically disqualified from participating therein pursuant to this section, the alternate member is authorized to serve and vote in his place for that meeting. *Except in the case of counties with not more than two cities, when the commission is considering a proposal for the annexation of territory to a city of which one of the members of the commission is an officer, the member is disqualified from participating in the proceedings of the commission with respect to the proposal and the alternate member shall serve and vote in his place for such purpose.*

“In the event the office of a regular city member becomes vacant the alternate member is authorized to serve and vote in his place until the appointment and qualification of a regular city member to fill the vacancy.” (Emphasis added.)

In 61 Ops. Cal. Atty. Gen. 396 (1978) we concluded that this section precluded a city member of LAFCO who was disqualified under this section from then

addressing LAFCO concerning the annexation in his capacity as a city officer. In doing so, we pointed out that section 54784 appeared to constitute a limited reinstatement by the Legislature of the common law rule which prevents the holding of incompatible offices.

However, in 63 Ops. Cal. Atty. Gen. 748 (1980) we further interpreted section 54784 in conjunction with section 34784.1 which permits “[e]ach local agency formation commission . . . [to] adopt rules and regulations with respect to disqualification of members from participating in the review of a proposal.” We concluded that section 54784.1 “would sanction a rule or regulation which would permit a city officer-LAFCO member in a county with more than two cities to participate in proceedings which involved an annexation proposal with respect to that member’s city” despite the disqualification provisions of section 54784. (63 Ops. Cal. Atty. Gen. at p. 752, emphasis added.)

With this background, we now proceed to the questions presented for resolution.

1. The Constitutionality of the Disqualification Provision in View of the Absence of a Similar Disqualification for County Members

The first question presented is whether section 54784 is constitutional in view of the fact that it requires disqualification of the interested city member of LAFCO but contains no similar disqualification with respect to county members. The request for our opinion mentions no particular provision or provisions of the state or federal constitutions which arguably might be violated. We presume that the question assumes that the arguably “discriminatory treatment” received by the city members vis-a-vis the county members under the section may violate one of the equal protection or analogous clauses of the state or federal constitutions. This possibility of unconstitutionality could be applicable to the city member himself or to the citizens of the interested city as a class.

Beginning with the city member of LAFCO, we point out that under the equal protection clause of the Fourteenth Amendment to the United States Constitution,<sup>2</sup> neither the city nor its officers are “persons” within that clause so as to permit them to invoke that clause against state legislation. As stated by the United States Supreme Court in *Williams v. Mayor* (1933) 289 U.S. 36, 40:

“A municipal corporation created by a state for the better ordering of government has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator [citations

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<sup>2</sup> “nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.” (Emphasis added.)

omitted].”

Also, as stated by the California Supreme Court in *Grigsby v. King* (1927) 202 Cal. 299, 307:

“ . . . we think it is clear that constitutional guarantee of personal rights are inapplicable to an impersonal, administrative agency exercising special and limited powers. Boards of Trustees have no existence, except by legislative enactments. They possess no natural rights; They exercise no functions except those specially granted to them. ‘A public office is a mere public agency created by the people for the purpose of administration of the necessary function of organized society . . . .’”

Still with reference to the city members of LAFCO, we move now to the state constitution and the functional equivalents of the equal protection clause. These are article I, section 7,<sup>3</sup> and article IV, section 16 of the California Constitution.<sup>4</sup>

Subdivision (a) of article I, section 7 of the California Constitution is a relatively new provision adopted by the people in 1974 which embodies the language of the Fourteenth Amendment of the United States Constitution with respect to “due process” and “equal protection.” Accordingly, what has been said above with respect to the Fourteenth Amendment should be equally applicable to this provision. Prior to the adoption of the new provision in 1974, former article 1, section 21,<sup>5</sup> and former article I, section 11 (now article IV, section 16) of the California Constitution were generally thought in California to be substantially the equivalent of the equal protection clause of

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<sup>3</sup> Article I, section 7 of the California Constitution provides:

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the legislature may be altered or revoked.”

<sup>4</sup> Article IV, section 16 provides:

“(a) All laws of a general nature have uniform operation.

“(b) A local or special statute is invalid in any case if a general statute can be made applicable.”

<sup>5</sup> Former article I, section 21 provided:

“No special privileges or immunities shall ever be granted which may not be altered, revoked or rejected by the Legislature; *nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.*” (Emphasis added)

See now article 1. section 7, subdivision (b) note 3, *supra*.

the Fourteenth Amendment to the United States Constitution.” (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal. 3d 480, 502, fn. 23.) Assuming the applicability of one or both of these provisions to public officers in their official status,<sup>6</sup> we note that they, like the equal protection clause of the United States Constitution, require for a violation thereof not only that individuals should be treated differently under the law, but that such individuals be similarly situated. (See, e.g., *County of LA. v. Southern Cal. Tel. Co.* (1948) 32 Cal. 2d 378, 388–389; *Educational & Recreational Services, Inc. v. Pasadena Unified Sch. Dist.* (1977) 65 Cal. App. 3d 775, 785.) Furthermore, like the equal protection clause of the United States Constitution, these provisions would require that if there is discrimination, that such discrimination be “invidious” (*Goesaert v. Cleary* (1948) 335 U.S. 464), since they evoke substantially the same standards (*Durham v. City of Los Angeles* (1979) 91 Cal. App. 3d 567, 575).

Applying the foregoing tests, we believe it is patent that the county supervisor members of LAFCO are not “similarly situated” with the interested city officer member of LAFCO with respect to a municipal annexation. County supervisors on LAFCO represent a different constituency than does the city member who represents the single interested city in the county. Accordingly, the supervisors’ concerns as to a single annexation proposal would, of necessity, be different from those of the single interested city member. This is evident when one considers that county officers, as representatives of a *subdivision of the state*, must take into consideration not only local interests, but also statewide interests when they consider whether to approve or disapprove a municipal annexation proposal. Accordingly, since the supervisor members of LAFCO do not stand in the same relationship to a municipal annexation as does the single interested city member, the failure of section 54184 also to provide for their disqualification does not violate any constitutional provision which mandates “equal protection” of the laws.

Furthermore, whatever “discrimination” is presented by section 54784 can hardly be said to be “invidious.” When the interested city member disqualifies himself on an annexation proposal, the city’s alternate member takes over pursuant to the terms of section 54784 itself. Thus, the city is not left without representation. Finally, LAFCO itself may, pursuant to the provisions of 54784.1, completely negate the disqualification provisions by adopting a rule to permit the city member to remain and vote upon the annexation proposal. (63 Ops. Cal. Atty. Gen. 748 (1980), *supra*.)

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<sup>6</sup> One case can be found where the court held that the provisions of former Article IV, section 25, subsection 33 of the California Constitution, now embodied in article IV, section 16 of the California Constitution, prohibited the approval of a charter provision in the San Francisco Charter which could impose liabilities upon the district attorney neither recognized by general law nor the common law. (See *Galli v. Brown* (1952) 110 Cal. App. 2d 764.)

As to the citizens of the interested city, we believe the foregoing analyses are also applicable. The citizens of the interested city, as do their representatives, stand in a completely different relationship to an annexation proposal than do the citizens *other* cities in the county or the citizens of unincorporated territory. Also, the citizens of the interested city cannot be said to be “invidiously” discriminated against by section 54784 since they are never without representation on LAFCO. Their alternate member replaces their primary representative when the latter is disqualified from participation.

Accordingly, on question one, we conclude that section 54784 is not “unconstitutional.”

## 2. The One-Man One-Vote Concept as Applied to Section 54784

The second question presented; is whether the failure of section 54784 to provide for the disqualification of county members of LAFCO as well as city members with respect to annexation proposals violates the one-man, one-vote requirements of the equal protection clause. This requirement was brought to the legal forefront in 1964 with the reapportionment cases, *Wesberry v. Sanders* (1964) 376 U.S. 1, (congressional reapportionment) and *Reynolds v. Sims* (1964) 377 U.S. 533 (state legislative reapportionment). These cases hold that one man’s vote in a legislative election must be equal in weight to another man’s vote. In *Avery v. Midland County* (1968) 390 US. 474 the United States Supreme Court extended this rule to the apportionment of local legislative bodies where the elected representatives exercise “general governmental powers over the entire geographic area served by the body.” (*Id.*, at p. 485.) However, in *Sailors v. Board of Education* (1967) 387 U.S. 105, the court refused to apply the doctrine to a local *appointive* county school board, which itself was selected from delegates from elective school boards. The court ultimately concluded that [s]ince the choice of members of the county school board did not involve an election, and since none was refused for these non-legislative offices, the principle of ‘one-man, one-vote’ has no relevancy.” (*Id.*, at p. 111.) Additionally, even as to local *elective* governing boards, the United States Supreme Court has not applied the principle to a body which, “although vested with some typical governmental powers, has relatively limited authority.” (*Sayler Land Co. v. Tulare Water District* (1973) 410 U.S. 719, 728.)

The only way that one might argue that the composition of LAFCO, or its functioning, could violate the one-man, one-vote principle is to argue that appointive bodies which are selected by *elective* bodies must be selected by bodies which themselves are equally apportioned throughout the area. Accordingly in our case, the argument would be that the county supervisors and the city-selection committee must meet such test, at least where these appointive bodies exercise general governmental powers. (See, e.g., *Bianchi v. Griffing* (2d Cir. 1968) 393 F.2d 457.) *Sailors v. Board of Education* (*supra*),

387 U.S. 105, arguably did not decide that question, because the board of education considered therein was an *administrative* body not exercising legislative or general governmental powers.

However, with respect to the attempt of some to find a legislative-administrative dichotomy as to appointive boards, the California Supreme Court, after reviewing the United States Supreme Court decisions, held in *People ex rel Younger v. County of El Dorado* (1971) 5 Cal. 3d 480, 505 with respect to the Tahoe Regional Planning agency:

“We think that any administrative legislative distinction in appointive offices should also be rejected. Surely, it is just as difficult to fit the governmental activities performed by appointed officers into near categories, as it is to classify the functions of elected officials. This conclusion is fortified by the fact that the court in *Hadley* cites *Sailors* with approval, stating: We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not offend the Constitution, the fact that each official does not “represent” the same number of people does not deny those people equal protection of the laws. (397 U.S. at p. 58 [25 L. Ed. 2d at p. 52].) We think the true meaning of *Sailors* and *Hadley* is that the legislative or administrative nature of the activities performed by an officer is irrelevant; if the officer is elected, one person, one vote applied. If he is appointed, the principle does not apply.”

Accordingly, we need not venture into the questions whether LAFCO exercises general governmental powers, or merely limited ones; whether it exercises legislative or administrative powers; or whether its members are appointed by elected officials representing equal voting strength. Since LAFCO is an appointive body, the one-man, one-vote principle is not applicable.

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