

LAFCO and the LAW

Avoiding Pitfalls and Potholes

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Scott Browne

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Legal Framework

- ✦ The Federal and California Constitutions
- ✦ Cortese-Knox Hertzberg Act (CKH)
- ✦ California Environmental Quality Act (CEQA)
- ✦ Brown Act
- ✦ Public Records Act
- ✦ Conflict of Interest Statutes
- ✦ Myriad of Other Laws

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The Constitutional Framework

- ✦ No federal constitutional right to be in or out of a local agency (*Hunter v. Pittsburgh* (1907) 207 U.S. 161)
- ✦ No State Constitutional Right (*Weber v. City Council* (1973) 9 Cal.3d 950)
- ✦ Reorganization Laws Upheld as long as there is a rational basis

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The Constitutional Framework

LAFCo Legal Risk Factors

- ✦ LAFCo action viewed as “quasi-legislative”
- ✦ Due process right to notice, opportunity to be heard and fair hearing seldom applied to quasi-legislative actions
- ✦ Primary Risk is Equal Protection Discriminatory Action Claim Against Protected Group (Comm Concerning Community Improv. v Modesto (2009) 583 F.3d 690)
- ✦ Special Voting Requirements in Some Counties

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The Cortese-Knox-Hertzberg Act

- ✦ CKH establishes the fundamental framework of how LAFCo's function
- ✦ Evolved out of a patchwork of statutes governing agency reorganization
- ✦ Provides a complex procedure for a local regional body to decide on local government reorganization, balancing state policies and local and citizen interests

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CKH Legal Risk Factors

- ✦ Some protection Built into CKH
 - §56106 (Time requirements directory not mandatory)
 - §56107 (liberal construction, actual prejudice must be shown)
- ✦ Failure to Comply with Statute
 - Failure to timely adopt Sphere Updates--§56425(g)
 - Failure to make adequate findings -- McBail Case
 - Failure to follow requirements for service plan--Patterson Case
 - But Courts give LAFCo considerable room to interpret law
- ✦ Failure to Follow Commission Policies--§56375(a)(1)

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CEQA

- ✦ **LAFCo Must Comply with CEQA in making its decisions**
- ✦ **As A Responsible Agency, Role is Limited**
 - Is Supplemental EIR Required?
 - Must Adopt Feasible Mitigation Measures
- ✦ **Acts as Lead Agency on Sphere Decisions**
 - Baseline is current physical conditions on the ground, not existing sphere
 - Must evaluate Indirect Facilitation of Growth

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CEQA Legal Risk Factors

- ✦ **CEQA challenge is the greatest legal risk a LAFCo will face**
- ✦ **As A Responsible Agency, Risk is Limited**
 - Can be sued even where lead agency is also being sued
 - Failure to require a supplemental EIR
 - Failure Adopt Feasible Mitigation Measures

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CEQA Legal Risk Factors Pg. 2

- ✦ **Lead Agency Risk is High**
 - Adoption of Negative Declaration or Exemption is easily challenged
 - Failure to follow Complex CEQA Statute and Guidelines Regulatory and huge body of CEQA law
- ✦ **CEQA lawsuits are complex, costly to defend and take years to resolve**
- ✦ **If Challenger prevails, entitled to attorney's fees**

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Brown Act\Risk Factors

- ✦ **No Collective Decision-Making Outside Meeting By Majority—Govt Code § 54952.2**
 - What is a majority required for action?
 - Includes Email and phone communications
- ✦ **Agenda Requirements—§54954-§ 54957.7**
 - Timing
 - Adequacy of Item Description
 - Closed Session Limitations
- ✦ **Challenger Must Give Agency Opportunity to Remedy Violation—Right to Fees if wins** 10

Public Records Act\Risk Factors

- ✦ **LAFCo must supply public records if asked—Govt Code §§6250 et.seq.**
- ✦ **Broad definition of what constitutes “public record”**
 - Exemptions for deliberative process and attorney client communications
- ✦ **Procedural Requirements—**
 - Timing to respond
 - Limited to copying costs
- ✦ **Law favors the Right of the Public to documents and successful claimant entitled to legal fees** 11

Conflict of Interest Statutes

- ✦ **Political Reform Act--GC 81000 et.seq.**
 - Statements of Economic Interest must be filed
 - Conflict exists if reasonably foreseeable that decision will have a material effect on economic interest
 - 300 Feet of Annexation
 - Special Limits for campaign donations for commissioner --\$250 in last 12 months
 - Action of the Commission can be voided if a conflict

Conflict of Interest Statutes—pg 2

- ✦ **G.C. 1090 Contracts with Commissioners**
 - Absolute prohibition—contract void
 - Criminal penalties for violation
- ✦ **Incompatible Offices**
 - Cannot serve as a “public official” simultaneously in two positions where one body has regulatory authority that affects the other
 - Dual role as LAFCo commissioner and agency directors is statutorily authorized
- ✦ **Common Law Conflict Prohibitions**

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Other Statutes

- ✦ **The unique role of LAFCo regulating a broad range of agencies requires it to consider issues that are governed by an equally broad range of statutes and regulations**
 - Water Law and Water Quality Regulation
 - Prop 218 and Municipal finance
 - CSD Law and other principal acts
 - Other laws

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