

CALAFCO U: Teaming with Lawyers

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The Presenter

- Conditions of Approval
- Risk Management
- CEQA
- Proposition 218

Agenda

GC 56886 provides broad conditioning authority:

- Any change of organization or reorganization may provide for, or be made subject to one or more of, the following terms and conditions. If a change of organization or reorganization is made subject to one or more of the following terms and conditions in the commission's resolution making determinations, the terms and conditions imposed shall prevail in the event of a conflict between a specific term and condition authorized pursuant to this section and any of the general provisions of Part 5 (commencing with [Section 57300](#)).

Conditions of Approval

GC 56886 lists these kinds of conditions:

- Pay money
- Impose a revenue measure
- Assign liabilities and debts
- Form improvement districts
- Issue debt
- Acquire property
- Allocate cash assets
- Allocate water and other capacity rights

Conditions of Approval

More GC 56886:

- Create and terminate offices
- Assign employees, contracts, civil service, rights, benefits, salaries
- Designate successor
- Configure new board
- Require another reorganization
- Effective date of reorganization
- Maintain service
- Allocate existing revenues

Conditions of Approval

- (v) Any other matters necessary or incidental to any of the terms and conditions specified in this section. If a change of organization, reorganization, or special reorganization provides for, or is made subject to one or more of, the terms and conditions specified in this section, those terms and conditions shall be deemed to be the exclusive terms and conditions for the change of organization, reorganization, or special reorganization, and shall control over any general provisions of Part 5 (commencing with Section 57300).

Conditions of Approval

- GC 57302: LAFCO conditions trump default provisions of CKH
- GC 56885.5: Can limit actions of district prior to its dissolution
- GC 56890: Can apply to all or part of city or district
- GC 56887: Can condition on Coastal Commission approval of a local coastal plan or amendment

Conditions of Approval

What can't you do?

- GC 56886.7: Require road maintenance or the improvement of a public facility the affected agency does not own
- GC 56886.1: Require public utilities to update customer accounts sooner than 90 days after NOC

Conditions of Approval

What else can't you do?

- GC 56122: Fail to protect rights of bondholders
- GC 56887.5: Condition affected city or county re debt in way that violates the constitutional debt limit

Conditions of Approval

GC 56886: You cannot directly regulate land use:

- “However, none of the following terms and conditions shall directly regulate land use, property development, or subdivision requirements: ... ”

Conditions of Approval

The power to deny an approval implies the power to grant the approval on conditions which eliminate the basis for denial. Thus, anything you can deny, you can conditionally approve.

- *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 868

Conditions of Approval

- LAFCO's power to deny is pretty broad, so its power to impose conditions is broad, too.
- GC 56107: LAFCO decisions reviewed very deferentially by courts and can be set only for fraud or prejudicial abuse of discretion.

Conditions of Approval

GC 56107(c):

- (c) ... Prejudicial abuse of discretion is established if the court finds that the determination or decision is not supported by substantial evidence in light of the whole record.

Conditions of Approval

- Thus, the essential question is this: is your action supported by substantial evidence in your record?
- “Substantial evidence” means any meaningful evidence, it does not mean the weight of the evidence in your record.

Conditions of Approval

Of course, the Constitution still applies:

- No invidious discrimination
- No action without a rational basis
- No violation of CKH
 - Procedural provisions
 - Substantive restrictions

Conditions of Approval

So, how far **should** you go?

- Is it legal?
- Is it practical?
 - How will you enforce it?
 - How long will it last?
 - What if circumstances change?
- Is it good public policy?
- Does it set a precedent you can live with?
- Is it consistent with your values and those of your Commission?

Conditions of Approval

- Include a good indemnity agreement in your application form
- Bind both the applicant agency and the developer
- Consider whether separate counsel are required for the applicant agency and LAFCO in the event of suit

Risk Management: Indemnity Agreements

- Because our decisions matter
- Because our decisions often come after other deadlines for challenge have run
- Because our CEQA compliance is often done by others who are not as careful as we are
- If we make a procedural error

Why LAFCOs get sued

- Always tender claims to your risk pool or insurer.
- While land use fights are rarely covered, it is far better to ask and get denied than to explain why you did not.
- SLO LAFCO got coverage because a civil rights claim was stated — even though that claim was not very persuasive.

Risk Management: Insurance

- Sometimes people sue because they're mad or did not feel respected or heard
- How you conduct yourself matters
- Remember GC 56325.1:
 - While serving on the commission, all commission members shall exercise their independent judgment on behalf of the interests of residents, property owners, and the public as a whole in furthering the purposes of this division. Any member appointed on behalf of local governments shall represent the interests of the public as a whole and not solely the interests of the appointing authority. This section does not require the abstention of any member on any matter, nor does it create a right of action in any person.

Risk Management

- Any decision might be the subject of litigation, so it is a good idea to do thorough reports and make good findings supported by record evidence as a routine practice.
- Still, the riskier projects tend to identify themselves.
- Talk to your counsel early and often about those.
- Make a good record.

Preparation for Litigation

- What Claims are Most Common?
 - CEQA
 - Cortese Knox Hertzberg
 - Civil Rights Claims
 - Public Records Act
 - Brown Act
 - Political Reform Act and Other Conflict Laws

Preparation for Litigation

- Most common claims seek a writ of mandate
- Such cases are reviewed on your administrative record
- The standard of review is more deferential under CKH and CEQA than on civil rights claims or the PRA or Brown Act

Preparation for Litigation

What goes in the administrative record?

- Everything the Commission saw
- Everything participants in the hearing submitted
- Background information referenced in materials the Commission saw or the participants submitted
- Materials submitted on reconsideration

Preparation for Litigation

CEQA in a Nutshell

- Initial Study
- Non-Project & Exempt Projects
- Negative Declarations
- EIRs

CEQA

- CEQA is about process and information
- Be careful about notice requirements
- Don't hide the ball
- Don't limit yourself to CEQA conditions of approval, but don't overlook them either

CEQA

- LAFCO is typically a responsible agency
- If you don't comment on the lead agency's document, you have to live with what it produces
- But you can impose conditions of approval beyond the lead agency's CEQA mitigation
- Indemnity agreement can require applicant to defend CEQA challenge – if there is an applicant!

CEQA

- Prepare justification for fee (13D, 6(b))
- Give notice of majority protest hearing by mail (13D, 6(a)(1))
- Conduct majority protest hearing (13D, 6(a)(2))
- If no majority protest, impose fee (13D, 6(a)(2))
- If not for water, sewer or trash; conduct registered voter or property owner election (13D, 6(c))
- Can set fees w/ CPI adjustments for up to 5 years (GC 53756)

Prop. 218 in a Nutshell

- No procedural requirements
- Must qualify for one of 7 stated exceptions and 2 implied exceptions or be voter-approved as a tax
- Implied:
 - it must fund government
 - it must be “imposed”

Prop. 26 in a Nutshell

The 7 exemptions:

- Benefits / burdens
- Services / product
- Regulation
- Use of public property
- Fines and penalties
- Land use fees
- Prop. 218 fees and assessments

Prop. 26 in a Nutshell

- Use a rate-making consultant
- Have the cost-of-service analysis (COSA) reviewed by an attorney
- Allow for the possibility Board will reject recommendation
- Make a good record
- Don't adopt fees not supported by the record
- Consider validation

Tips on Rate-making

- *Jacks v. Santa Barbara*, S225589 (argued 4/4/17) —
Is charter-city franchise fee on SCE a tax under Prop. 218? Is the legal character of a measure depending on its legal or its economic incidence?
- *City of Ventura v. United Water Conservation District* (to be argued soon) —
Is groundwater fee required by statute to have 3:1 ratio of ag to M&I charges constitutional?
- *Citizens for Fair REU Rates v. Redding*, S224779 (fully briefed 7/21/15) – does Prop. 26 grandfather PILOT from electric utility?

Pending Finance Cases

- *CBIA v. SWRCB*, S226753 (fully briefed 12/20/15) — *Sinclair Paint* challenge to SWRCB fees for water quality programs; DCA found it sufficient that fee did not exceed cost of 8 related regulatory programs; each program need not be self-funded

More Pending Finance Cases

- *Cal. Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604 — AB 32 auction fees not taxes because voluntarily paid for something of value; *Sinclair Paint* does not apply.
- *Manteca USD v. Reclamation District 17* (2017) 10 Cal.App.5th 730 — Prop. 218 overcomes inter-govt. tax immunity for purposes of assessments

Recent Cases Pending Review

- Questions?