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New Legislation Requires LAFCos to Plan for Disadvantaged Unincorporated Communities, Creating Unfunded Mandate (SB 244)

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On October 7, 2011, Governor Brown signed SB 244 (Wolk, D-Davis), which makes two principal changes to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000. SB 244 requires LAFCos to: (1) deny any application by a city to annex a territory that is contiguous to a "disadvantaged unincorporated community" unless a second application is submitted to annex the disadvantaged community as well; and (2) evaluate disadvantaged unincorporated communities in a municipal services review (MSR) upon the next update of a sphere of influence after June 30, 2012. The intent of the statute is to encourage investment in disadvantaged unincorporated communities that often lack basic infrastructure by mandating cities and LAFCos include them in land use planning. It represents an unfunded mandate from state government that presents a planning and financial challenge for LAFCos and cities in the coming year.

Changes to LAFCO Procedures. SB 244 defines "disadvantaged unincorporated community" as any area with 12 or more registered voters in which the median household income is 80 percent or less of the statewide median. It prohibits a LAFCo from approving annexation to a city of territory greater than 10 acres (or any smaller area defined by local LAFCo policy) contiguous to a disadvantaged unincorporated community unless an application to annex the disadvantaged unincorporated community has also been filed. Although SB 244 does not require LAFCos to approve the annexation of the disadvantaged unincorporated community as a condition for approval of the contiguous annexation, it will empower LAFCos to link the two decisions (which San Bernardino County LAFCo already does as a matter of local policy for unincorporated islands without respect to income levels). This will likely add to the cost of annexations and could discourage applications for annexation.

SB 244 also requires LAFCos to consider disadvantaged unincorporated communities when developing spheres of influence. Upon the next update of a sphere of influence on or after July 1, 2012, SB 244 requires LAFCos to include in an MSR (which must be updated before spheres may be updated):

1. The location and characteristics of any disadvantaged unincorporated communities within or contiguous to the sphere; and

2. The present and probable need for public facilities and services of any disadvantaged unincorporated communities within the existing sphere of influence of a city or special district that provides public facilities or services related to sewers, municipal and industrial water, or structural fire protection.

In determining spheres of influence, SB 244 authorizes LAFCos to recommend the reorganization and consolidation of governmental agencies to improve the efficiency and affordability of infrastructure and service delivery. SB 244 also contains requirements for updating a sphere of influence for a special district and gives LAFCos authority to approve annexations to a city or special district of areas served by mutual water companies and to request information from mutual water companies. However, as mutual water companies are private entities that own their water systems, such systems cannot be transferred to a public water provider without the consent of the mutual water company or payment for the value of the asset transferred, either by voluntary sale or an eminent domain action.

Changes for Cities and Counties. SB 244 also changes current law by requiring cities and counties to review and update the land use elements of their general plans on or before the next adoption of a housing element. An updated general plan must: (1) identify, describe and map "island," "fringe" and "legacy unincorporated communities" with the city's sphere of influence or, as to the county, within the county; (2) analyze water, wastewater, drainage, and structural fire protection needs or deficiencies in these communities; and (3) analyze benefit assessment districts or other financing alternatives that could make extension of services to identified communities financially feasible. "Island" communities have the usual definition of that term. "Fringe" communities are simply those within a city's sphere of influence. "Legacy" communities are those which have been inhabited for 50 or more years.

Interestingly, even though SB 244 is intended to help disadvantaged communities, it mandates land use element analysis of all unincorporated island or fringe communities and legacy communities, not just low-income communities. SB 244 also requires cities and counties to perform this review and update upon the deadline for each subsequent periodic revision to the housing element (*i.e.*, not every amendment to the housing element, just those that are required by the Planning and Zoning Law) and, if necessary, update the land use element to its general plan accordingly.

Fiscal Impact. Generally, when the Legislature mandates a new program or a higher level of service on local government, it must provide funds to reimburse the local government for the cost of implementing the program or increased level of service. SB 244, however, does not reimburse LAFCos, cities, counties, or special districts for the increased cost arising from its mandate. Instead, SB 244 states "[n]o reimbursement is required" because a local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act."

Local agencies, however, may not have authority to levy fees to cover these increased planning costs. Under Proposition 26 (passed by voters in November 2010), there is some question about whether local agencies may recover advanced planning costs of the type SB 244 mandates from applicants for land use approvals to be granted under those plans. While the third exception to Proposition 26's new definition of taxes (California Constitution, art. XIII C,

§ 1(e)(3)) does allow fees for regulatory purposes, the precise scope of the costs that may be recovered from such fees is uncertain. SB 244 does include a provision that authorizes cities, counties, and special districts to borrow under the Clean Water State Revolving Fund Loan Program for wastewater treatment facilities or services. However, given the fiscal state of local government throughout California, it is unlikely that borrowing money will be an attractive way to cover the costs SB 244 mandates. Moreover, even if the Proposition 26 issue can be overcome, fees on developers to recover advance planning costs require there be development to bear those costs. In current economic conditions that may be unlikely and, even when the economy recovers, there may not be substantial development in low-income unincorporated communities to allow local governments to recover these costs.

It can be expected that one agency or another – perhaps a city or a LAFCo with large planning costs under SB 244 – may bring a test claim before the Commission on State Mandates. This is the conclusion of the state Department of Finance, which expressed concern that a claim of state mandate arising from SB 244's requirements could result in "substantial state General Fund impact." In the meantime, many local agencies can be expected to seek to recover these costs from planning permit fees or from a fee imposed on building and land use approvals to fund advanced planning costs. All agencies should, of course, track these costs to facilitate mandate reimbursement should that be forthcoming in the future.

In sum, LAFCos will need to review the disadvantaged unincorporated areas that lie within a city's sphere of influence during upcoming MSRs to provide the data needed to comply with the planning requirements for these communities' public facilities and services. In addition, LAFCos should revise their local rules to include the requirements imposed by SB 244 to ensure they fulfill their obligations under this legislation. Finally, LAFCos may wish to consider whether to reduce the 10-acre standard for annexations which trigger the duty in cities to propose annexation of contiguous disadvantaged communities.