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Marc Nolan, Deputy Attorney General  
Office of the Attorney General  
Executive Programs/Legal Opinions Unit  
300 S. Spring Street  
Los Angeles, California 90013

Re: Opinion Request 10-902 Regarding Duty To Annex Entire Island

Dear Mr. Nolan:

On behalf of the California Association of Local Agency Formation Commissions (“CALAFCO”), we write to express our thoughts on the two questions as to which Senator Negrete-McLeod’s March 19, 2010 request asks the Attorney General’s opinion:

- “A. Does [Government Code] Section 56375.3, pertaining to the annexation of substantially surrounded islands of incorporated territory require annexation of the ‘entire unincorporated island’ as set forth in subdivision (b)(1) and (2) of Section 56375.3?”
- B. May a local Agency Formation Commission split up county unincorporated islands which exceed 150 acres into smaller segments of 150 acres or less for annexations and thereby avoid landowner/voter protest proceedings pursuant to [Government Code] Section 56375.3(a)?”

We answer the first question in the affirmative, and the second in the negative, but note that the Legislature left to each Local Agency Formation Commission (“LAFCO”) to make a quasi-legislative determination, based upon its particular knowledge of the facts at issue, what constitutes “the entire island” in a given situation.

### *Analysis*

#### **1. The Entire Island Must Be Annexed.**

Government Code 56375.3 allows a LAFCO to sometimes shorten the process of approving an annexation, by obviating the need to conduct protest proceedings. To avail itself of the more streamlined process, the requirements of subsection (b)(1) must be met. By the terms

of subsection (b)(1), the LAFCO must find that the “island” that will be annexed “constitutes the entire island.” Absent clear legislation to this effect, given LAFCO’s broad authority to interpret state law, LAFCOs would not be required to have annexed the entire island.<sup>1</sup> But because of the plain wording of the statute, the answer to Senator’s first question is that entire “island” must be annexed.

## **2. Because The Statute Does Not Define Island, LAFCO Must Make That Determination**

The Legislature has not defined, and has repeatedly declined to define, the term “island.” The Cortese Knox Hertzberg Government Reorganization Act of 2000 (“CKH”) defines 77 terms – “island” is not among them.<sup>2</sup> This omission speaks to the Legislature’s intent to leave the term undefined, granting LAFCO’s discretion to construe the term according to particular facts before them. Government Code § 56375(l) grants LAFCOs power to:

To review the boundaries of the territory involved in any proposal with respect to the definiteness and certainty of those boundaries, the nonconformance of proposed boundaries with lines of assessment or ownership, and other similar matters affecting the proposed boundaries.

Subdivision (b)(3)(A) of § 56375.3 provides that an island can be “surrounded, or substantially surrounded, by the city to which annexation is proposed or by the city and a county boundary or the Pacific Ocean.” Stated differently, the word “island” is not a precise term. Depending on the facts at hand, there may be times when the word “peninsula” might be more accurately describe the area of land that is to be annexed because parts of an island need only be “substantially” surrounded by adjacent cities, the county line, or the ocean. The boundary of an island might even be formed in part by something other than a political boundary, such as prime agricultural land which is not subject to island annexation under subdivision (b)(5).<sup>3</sup> But the Legislature left to LAFCO to determine what constitutes an “island” and whether the island is “substantially surrounded.”

Legislative history substantiates LAFCO’s authority to allow streamlined annexation, even where the island connects to other large swaths of unincorporated land. In 2004, when SB 1266 was considered, it proposed language different than what was ultimately adopted. The proposed language stated:

(b) Subdivision (a) applies to territory that meets all of the following requirements: (1) It does not exceed 100 acres in area, that area constitutes the

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<sup>1</sup> See *Beck v. County of San Mateo* (1984) 154 Cal.App.3d 374 [LAFCO should not be required to order the annexation of the entire island].

<sup>2</sup> See Gov’t Code §§ 56010-56081.

<sup>3</sup> See *Scuri v. Board of Supervisors* (1982) 134 Cal.App.3d 400 [interpreting predecessor statute].

entire island, **and that island does not constitute a part of an unincorporated area** that is more than 100 acres in area. (Emphasis added)

It included the requirement that the island not be connected to other unincorporated territory (*i.e.* that it truly be an island, and not merely part of a peninsula or some other configuration). But the Legislature **deleted** the proposed language emphasized above, confirming that an “island” **can** be part of a larger incorporated area. Instead, the statute now provides:

(b) Subdivision (a) applies to territory that meets all of the following requirements: (1) It does not exceed 150 acres in area, and that area constitutes the entire island.

By deleting “and that island does not constitute part of an unincorporated area,” the Legislature confirmed that there may be times when a LAFCO might authorize an annexation of territory that is part of a larger unincorporated area (*i.e.*, that there may be times when the “island” is part of a peninsula or connected to other islands by cherry stems or other configurations). Had the Legislature intended to foreclose the possibility that islands might be connected to larger portions of the unincorporated county territory, it would have adopted the language originally proposed. Its decision to delete that phrase is determinative here.

As the statute now stands, to utilize the streamlined annexation process authorized by subdivision (b) of § 56375.5, LAFCO must provide for the annexation of “the entire island,” but is free to determine what constitutes that island under the “substantially surrounded” rule. When a LAFCO considers a change in organization such as an annexation, it must consider the factors listed in Government Code § 56668, including subdivision (c), which requires, in part, that LAFCO consider “the effect of the proposed action and of alternative actions, on adjacent areas, on mutual social and economic interests.”<sup>4</sup> By adding the “whole island” requirement, the Legislature removed LAFCO’s ability to split an island without first completing the protest proceeding process. The “whole island” requirement does not prohibit LAFCOs from splitting such islands pursuant to the notice and hearing process applicable to non-island annexations.

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<sup>4</sup> There are other situations where LAFCOs must determine what constitutes an area of interest. *See* Gov’t Code § 56425(e)(4) [When a LAFCO determines an appropriate sphere of influence, it must consider “the existence of any social or economic communities of interest in the area if the commission determines that they are relevant to the agency.”]

### **3. LAFCO's discretion is legislative and reviewed by the courts only for action that is arbitrary capricious or entirely lacking in evidentiary support**

Because the Legislature has declined to define the term "island," each LAFCO has quasi-legislative discretion to make that determination in each case. Courts routinely "defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision."<sup>5</sup> Such deference is even stronger for LAFCOs. "[LAFCO's] actions are presumed to comply with [CKH] because LAFCO was formed to implement [CKH]."<sup>6</sup>

California courts have uniformly held LAFCO's annexation decisions to quasi-legislative and subject to deferential judicial review.<sup>7</sup> "LAFCO is merely a creature of the Legislature, exercising a legislative function."<sup>8</sup> That LAFCOs may hold a hearing and make findings does not change the basic principle that its decisions are quasi-legislative. The decision to redraw boundaries of political subdivisions is categorically legislative no matter the procedure followed.<sup>9</sup> Because determination of what constitutes an island is legislative, a court will uphold the action unless the action is arbitrary, capricious, or lacking in evidentiary support.<sup>10</sup>

### **4. Government Code 56375.4 Already Limits the Power to Piecemeal Annexations**

Senator Negrete-McLeod's second question suggests concern that LAFCOs might attempt to circumvent the 150-acre limitation by piecemealing the annexation of islands accomplish the annexation of areas larger than 150 acres. But such concerns are misplaced, because Government Code § 56375.4(a) already prohibits use of the island annexation process for an area that "became surrounded or substantially surrounded by the city to which annexation is proposed" after January 1, 2000. Furthermore, § 56375.3 already requires the "entire island" to be annexed and § 56375.4(b) prohibits, until January 1, 2014 any proposal "involving the same or substantially the same territory as a proposal initiated pursuant to paragraph (1) of subdivision (a) of Section 56375.3 after January 1, 2000, [from being] initiated for two years after the date of adoption by the commission of a resolution terminating proceedings."

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<sup>5</sup> *Divers' Envtl. Conservation Org. v. State Water Res. Control Bd.* (2005) 145 Cal.App.4<sup>th</sup> 246, 252.

<sup>6</sup> *City of Agoura Hills v. LAFCO of Los Angeles County* (1988) 198 Cal.App.3d 480, 490.

<sup>7</sup> *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4<sup>th</sup> 489, 495 ("A LAFCO annexation determination is quasi-legislative").

<sup>8</sup> *Bookout v. LAFCO of Tulare County* (1975) 49 Cal.App.3d 383, 388.

<sup>9</sup> *City of Santa Cruz v. LAFCO of Santa Cruz* (1978) 76 Cal.App.3d 381, 388 ["Nor does the presence of certain elements usually characteristic of the judicial process mean that [its] action was quasi-judicial."]

<sup>10</sup> *Calif. Hotel & Motel Assn. v. Industrial Helpers Assn.*, 25 Cal.3d 200, 212 (1975).

## 5. Conclusion.

We conclude that the answer to Senator Negrete-McLeod's first question is "Yes, the entire island must be annexed, but LAFCO has discretion to determine what constitutes the island." The answer to the second question is that LAFCOs may not split unincorporated islands, because state law already requires the LAFCO to annex the "entire island," and any annexations must also comply with the requirements of Government Code 56375.4.

Should you have any questions or comments, feel free to contact either of the undersigned. Scott Porter can be reached at (213) 542-5708 or [sporter@cllaw.us](mailto:sporter@cllaw.us); Michael Colantuono can be reached at (530) 432-7359 or [mcolantuono@cllaw.us](mailto:mcolantuono@cllaw.us).

Very truly yours,

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c: William Chiat, Executive Director, CALAFCO  
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