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AGENDA REPORT Consent | Information

December 3, 2018

TO: San Diego Commissioners
FROM: Keene Simonds, Executive Officer
Holly Whatley, Commission Counsel
SUBJECT: **Commission Counsel Memorandums |
Special District Websites and Expanded Rules for Attorneys**

SUMMARY

The San Diego Local Agency Formation Commission (LAFCO) will receive two memorandums prepared by Commission Counsel. The first memorandum addresses the new statutory requirements enacted by the Legislature requiring all independent special districts to now maintain websites and include certain baseline information. Additional requirements are also established for healthcare districts. The second memorandum addresses changes enacted by the California Supreme Court to expand existing disclosure requirements for attorneys to now apply when appearing before certain quasi-legislative bodies – including LAFCOs. The memorandums are being presented to the Commission for information.

DISCUSSION

This item is for San Diego LAFCO to receive memorandums from Commission Counsel regarding recent changes that indirectly affect LAFCOs. This includes the requirement for all independent special districts to now maintain websites with added standards for healthcare districts as well as expand disclosure requirements for attorneys appearing before LAFCOs. The memorandums are attached and have been prepared at the request of the Executive Officer for information only.

ANALYSIS

See the attached memorandums.

San Diego LAFCO

December 3, 2018 Regular Meeting

Agenda Item No. 12 | Commission Memorandums: Special District Websites and New Rules for Attorneys Before LAFCO

ALTERNATIVES FOR ACTION

This item is being presented for information only.

RECOMMENDATION

It is recommended San Diego LAFCO receive the item provide direction to staff as needed.

PROCEDURES

This item has been placed on the San Diego LAFCO's agenda as part of the consent calendar. A successful motion to approve the consent calendar will include taking affirmative action on the staff recommendation unless otherwise specified by the Commission.

Respectfully,



Keene Simonds
Executive Officer

Attachments:

- 1) Commission Counsel Memorandum:
AB 2019 and SB 929: Requirements for Healthcare Districts and Independent Special District Websites
- 2) Commission Counsel Memorandum: Implications of the New Rules of Professional Conduct Governing the Practice of Law for the LAFCOs' Public Hearings

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Agenda Item No. 12
Attachment One

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MEMORANDUM

TO: Keene Simonds, Executive Officer FILE NO: 49021.0001
San Diego County LAFCO

FROM: David J. Ruderman, Assistant General DATE: October 12, 2018
Counsel

CC: Michael G. Colantuono, General Counsel
Holly O. Whatley, Assistant General Counsel

RE: AB 2019 and SB 929: Requirements for Health Care District and
Independent Special District Websites

As the 2017–2018 Legislative Session draws to a close, Governor Brown has signed two bills that impose requirements on health care districts and independent special districts. AB 2019 imposes increased transparency requirements on health care districts to ensure public access through the Internet. In addition, the bill sets an affordable housing mandate and bankruptcy procedures. SB 929 broadly requires independent special districts to establish and maintain websites to better connect the public with relevant information about the agency.

BACKGROUND

AB 2019. In September, 2017, Assembly Bill 1728 set specific requirements for Local Health Care Districts (HCD) to improve transparency.¹ Under AB 1728, HCDs were required to adopt an annual budget in a public meeting, maintain a website with contact information for the district, and adopt policies to guide the grant-making and assistance-giving process. The bill’s author explained that the bill was meant to “ensure greater transparency and accountability for healthcare districts” by providing easy access to basic information.² Assembly Bill 2019 continues what AB 1729 began, setting clearer guidelines and more substantial requirements for HCDs’ website, grant-making and housing efforts.

¹ Assem. Bill No. 1728 (2016-2017 Reg. Sess).

² Assem. Com. on Local Government, com. on Assem. Bill 1728 (2016-2017 Reg. Sess.).

SB 929. In 2017, the Little Hoover Commission released a report titled *Special Districts: Improving Oversight and Transparency*.³ One of the report's recommendations was to require all special districts to establish and maintain websites with key information. Before Senate Bill 929 was implemented, special districts were encouraged, but not required, to maintain a website. For example, the Brown Act requires special districts to publish meeting agendas online if the district has a website.⁴ SB 929 makes this legislative preference a mandate—requiring special districts maintain and use a websites for such purposes.

ASSEMBLY BILL 2019—LOCAL HEALTH CARE DISTRICTS

Assembly Bill 2019 creates several requirements for HCDs.⁵

Affordable Housing. First, for any housing an HCD builds using the design-build process, the HCD must impose affordability restrictions for at least 20 percent of residential units that last at least 55 years.⁶ The thresholds AB 2019 imposes do not apply when the HCD is located within a jurisdiction that imposes a greater number of affordable units by local ordinance. It also does not apply to housing an HCD constructs for workforce housing, or to provide care to the elderly, disabled adults or individuals with dementia.⁷

Website Publication. Second, AB 2019 requires HCDs to maintain websites with substantially more information than previously mandated under AB 1728.⁸ AB 2019 mandates that HCD websites include:

1. The adopted budget;
2. A list of current board members;
3. Information on public meetings, including publication of meeting agendas at least 72 hours before they are held, as required by the Brown Act;
4. Municipal service reviews or special studies conducted by a LAFCO, if available;
5. Recipients of grant funding or assistance;

³ Little Hoover Commission, *Special Districts: Improving Oversight and Transparency*, Report No. 239, Aug. 2017.

⁴ Gov. Code, § 54954.2.

⁵ Stats. 2018, ch. 257, §§ 1-4.

⁶ *Id.* at § 2 (adding Health & Saf. Code, § 32132.96).

⁷ *Ibid.*

⁸ *Id.* at § 3 (amending Health & Saf. Code, § 32139).

6. Audits of the district's accounts and records;
7. Annual financial reports provided to the California Controller;
8. District policy for providing assistance and grant funding; and
9. Any other information the board deems relevant.⁹

Grant-Making Processes. Third, under AB 2019, HCDs must create several policies for providing assistance or grant funding if the district uses its funds in that way.¹⁰ Currently, HCDs must have policies to provide assistance or grant funding that ensure funding is spent consistent with the grant application and the district's mission.

AB 2019 requires HCDs that provide grants to develop several additional policies. HCDs must adopt specific strategies to ensure grants are spent as required under the grant application and HCD's mission, including a "grant contract terms and conditions, fiscal and programmatic monitoring by the district, and reporting to the district."¹¹ The bill also sets additional grant-related requirements for HCDs, including:

1. A plan for distributing grant funds for each fiscal year;
2. A process for providing, accepting and reviewing grant applications; and
3. A prohibition against individual meetings between grant applicants and staff, officers or board members outside of the established grant awards process.¹²

Finally, AB 2019 requires that HCDs have guidelines in place by January 1, 2020 to govern when to provide awards to underserved individuals and communities; how to evaluate financial need; when to provide grants to prior recipients; and when to sponsor charitable events, among other categories.¹³

Bankruptcy Notice. Finally, if an HCD files for bankruptcy, the HCD's board of directors must provide written notice to its LAFCO within 10 business days of filing for bankruptcy.¹⁴

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Id.* at § 4 (adding Health & Saf. Code, § 32140).

SENATE BILL 929

The authors of Senate Bill 929 describe it as a transparency bill intended to fix the problem that “consumers may be unaware of what their local special district does or even how to contact them.”¹⁵ The bill requires independent special districts to create websites, populate them with specific information, and continually update them beginning in 2020.¹⁶ While SB 929 does not apply to LAFCOs, CALAFCO supported this bill because it should make coordination between LAFCOs and independent special districts easier.¹⁷

Information Requirements. Under SB 929, all independent special districts must create a website with the district’s contact information. In addition, all districts must conform to any other legal requirements applicable to their districts’ website. These requirements vary based on the type of district, but will broadly include:

1. A catalog of enterprise systems, defined as “a software application or computer system that collects, stores, exchanges, and analyzes information that the agency uses,” and the data collected;
2. Financial transaction reports filed with the State Controller;
3. Annual compensation of elected officials, officers and employees (or a link to the Controller’s Government Compensation site); and
4. Meeting agendas at least 72 hours in advance of the meeting, in accordance with requirements of the Brown Act.¹⁸

Local Health Care Districts’ websites must also include the information described in Assembly Bill 2019.

Hardship Exemption. Special districts may exempt themselves from the website requirements if the district’s board of directors adopts a resolution with detailed findings on why a hardship prevents it from establishing or maintaining a website.¹⁹ SB 929 does not clearly state what constitutes a valid hardship, but it includes (a) inadequate access to broadband capabilities and (b) limited financial or staff resources. Notably, SB 929 provides that it is not a state-mandated program and therefore the

¹⁵ Sen. Rules Com., Off. Of Sen. Floor Analyses, Analysis of Sen. Bill No. 929 (2017-2018 Reg. Sess.).

¹⁶ Stats. 2018, ch. 408, §§ 2, 3 (adding Gov. Code, §§ 6270.6, 53087.8).

¹⁷ Pamela Miller, CALAFCO, letter to Senator Mike McGuire re Sen. Bill 929 (2017-18 Reg. Sess.) May 17, 2018.

¹⁸ Stats. 2018, ch. 408, § 3 (adding Gov. Code, §53087.8).

¹⁹ *Ibid.*

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district is not entitled to state funds for creating or maintaining the website.²⁰ The resolution is valid for one year, at which point the district must either adopt a new hardship resolution or meet AB 929's website requirements.²¹

HOW THIS AFFECTS YOUR COMMISSION

Assembly Bill 2019 and Senate Bill 929 both impose requirements on special districts to improve transparency and public access via the Internet to basic information about the special districts' activities. The bills will facilitate communication between LAFCOs and the independent special districts within their territory by providing access to contact and other required information. And for HCDs, the legislation will ensure LAFCOs receive timely notice of bankruptcy filings.

If you would like more information regarding the issues discussed in this memo, please contact David Ruderman at (530) 798-2417 or DRuderman@chwlaw.us, or Michael Colantuono at (530) 432-7359 or MColantuono@chwlaw.us, or Holly Whatley at (213) 542-5704 or HWhatley@chwlaw.us.

²⁰ *Id.* at § 5.

²¹ *Ibid.*

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Agenda Item No. 12
Attachment Two

Michael G. Colantuono
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MEMORANDUM

TO: Keene Simonds, Executive Officer FILE NO: 49021.0001
FROM: Michael G. Colantuono, General Counsel DATE: October 9, 2018
CC: Holly O. Whatley, Assistant General Counsel
RE: Implications of the New Rules of Professional Conduct Governing the
Practice of Law for the LAFCO's Public Hearings

The California Supreme Court has approved a comprehensive reorganization of the state's Rules of Professional Conduct governing the practice of law in California. The rules take effect November 1, 2018. Most pertinent to San Diego LAFCO, the amended rules define "tribunal" to include any administrative body acting in a quasi-judicial capacity. This will include some actions of the Commission, including CEQA findings. The effect of this definition is to require attorneys — but not others — to be candid in presentations to "tribunals" and to avoid gifts and ex parte (i.e., outside the hearing and the presence of other interested parties) contacts with decision-makers except as permitted by a policy adopted by the tribunal.

LAFCO may take no action in response to these rules, other than make note of them. Alternatively, the Commission might adopt a policy on ex parte contacts to reestablish a level playing field between lawyers and others. Such a policy might ban ex parte contacts, allow them if disclosed by the policy-maker or private party, or allow them if the policy maker discloses them only if he or she relies on information obtained in an ex parte contact (this last option is our advice even apart from the new Rules of Professional Conduct). If you, or management staff, wish to consider such a policy further, please let me know and we can assist in drafting or reviewing it.

SUBSTANCE OF THE AMENDMENTS

There are a number of substantive changes to the Rules of Professional Conduct. The most important addition for local government is the adoption of a new definition of "tribunal." A tribunal is:

(i) A court, an arbitrator, an administrative law judge, or **an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved**; or (ii) a special master or other person* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.¹

(Terms followed by asterisks in the Rules are defined elsewhere in the Rules.) This new definition includes local government bodies, such as the Commission, acting in a quasi-judicial capacity. Local government can either act as a quasi-judicial or legislative body. LAFCO acts in a legislative capacity when it creates rules that apply to all future cases.² Quasi-judicial action applies legislation to specific facts. LAFCOs commonly act in a quasi-judicial capacity when they make CEQA determinations. LAFCO also acts as a quasi-judicial body when it makes certain employment determinations, including disciplinary actions. LAFCOs predominantly act in a legislative capacity, including when making findings.

The Rules' new definition of "tribunal" has two noteworthy consequences. **Rule 3.3 (Duty of Candor)** requires that attorneys not to make false statements to a tribunal. **Rule 3.5 (Contact with Judges, Officials, Employees and Jurors)** prohibits ex parte communications between lawyers and judges, officials or staff members of a quasi-judicial administrative forum, except as permitted under the forum's rules of procedure. This includes any contacts that "directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal."³

Rules 3.3 and 3.5 mean that attorneys and non-attorneys operate under different restrictions. Lawyers may appear in front of local government bodies to represent a client's interests. They may also appear as private citizens, concerned about local issues like a land use development in their neighborhood. In either case, the amended rules set different requirements for attorney and non-attorney participation in local government. The rules may be a trap for the unwary as the distinction between legislation and adjudication in the local government context is not always obvious and many attorneys

¹ Amended Rule 1.0.1, subd. (m) of the Rules of Professional Conduct.

² *Patterson v. Central Coast Regional Com.* (1976) 58 Cal.App.3d 833, 840.

³ Amended Rule 3.5, subd. (a) of the Rules of Professional Conduct.

who may wish to participate in LAFCO policy-making may have little knowledge of this law.

IMPACT ON THE LAFCO

While LAFCO should understand the implications of Rule 3.3, there is little action that it can take to level the playing field between attorneys and non-attorneys as to the duty of candor and, from a public policy perspective, there may be no need to do so. Candor is expected of all who address the Commission. LAFCO can remind participants that certain hearings are quasi-judicial in nature, and therefore that the duty of candor applies. It can request that participants always engage with the forum in an open and honest way. Attorneys, however, will be subject to discipline by the State Bar under Rule 3.3 that does not apply to non-attorneys. To avoid “weaponizing” these new rules (i.e., encouraging non-lawyers to complain of a lawyer’s lack of candor in LAFCO hearings merely because the lawyer takes a different view than the complainant), it may be best to avoid publicizing this new rule.

Rule 3.5, however, allows cities to adopt ex parte and gift rules that apply equally to attorneys and non-attorneys. LAFCO has several options. First, LAFCO can choose to not adopt any rule. Due Process already limits ex parte communications in all quasi-judicial actions. We recommend policy-makers disclose ex parte contacts that provide information on which decision-makers rely at the hearing so all parties to a hearing can know what evidence is to be relied upon and have opportunity to comment on it.⁴ Beyond this, however, LAFCO might choose not to regulate ex parte communications. Gifts and campaign contributions to individual policy makers are governed by the Political Reform Act and other law and LAFCO might choose to rely on that background law, too. However, if LAFCO decides not to adopt a rule, then attorneys alone will be prohibited from engaging in ex parte communications and there will be an undeveloped playing field in civic affairs.

If LAFCO chooses to adopt a policy, it will likely be wise to reference, and defer to, the Political Reform Act and other state laws governing gifts. As to ex parte contacts, LAFCO has a range of options. It can adopt a blanket ban on ex parte contacts. A wholesale ban may be difficult to implement when there are regular, frequent and informal contacts with elected officials (as when you run into constituents at

⁴ *Flagstad v. City of San Mateo* (1957) 145 Cal.App.2d 138.

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community events or in the grocery store). In other communities, some have expressed concern that ex parte communication bans limit valuable sources of information, restrict access to elected officials and make public meetings unbearably long (because residents cannot speak to commissioners at any other time about quasi-judicial matters).⁵

Finally, LAFCO can adopt a rule that limits attorney and non-attorney ex parte contacts. LAFCO may, for example, adopt the California Administrative Procedure Act, which prohibit any contacts unless there is notice and an opportunity for all parties to participate in the communication.⁶ That is likely overkill for a small town. LAFCO can also approve a rule that allows all ex parte communications, restricted only by due process requirements. This would negate the uneven application of Rule 3.5, and applies as if LAFCO had adopted no rule at all. A middle option would be to allow ex parte contacts but require they always be disclosed by the resident or by the policy maker.

It can be difficult, however, to discuss a policy on ex parte contacts without creating the implication LAFCO is trying to keep some of its policy makers discussions with constituents secret.⁷

If you would like more information on issues discussed in this memo, or assistance in creating an ex parte communication policy, please contact Michael Colantuono at (530) 432-7359 or MColantuono@chwlaw.us, or Holly Whatley at (213) 542-5704, or HWhatley@chwlaw.us.

⁵ Christensen and Weikel, *How a Ban on Ex Parte Communications by the Coastal Commission Could Change the Balance of Power*, Los Angeles Times (May 14, 2016).

⁶ Gov. Code §§ 11430.10-11430.80. The Administrative Procedure Act does not apply to local government bodies unless expressly adopted.

⁷ For example, Los Angeles Mayor Eric Garcetti faced criticism for not barring ex parte meetings between developers and city planning commissioners. Reyes, *Garcetti Bans Private Meetings Between Developers and Planning Commissioners*, Los Angeles Times (March 9, 2017).