IN THE
DISTRICT COURT OF APPEAL
OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION _____

LOCAL AGENCY FORMATION COMMISSION OF SAN MATEO COUNTY, THE BOARD OF SUPERVISORS OF SAN MATEO COUNTY, and COUNTY CLERK OF SAN MATEO COUNTY, Appellants, and EAST PALO ALTO CITIZENS' COMMITTEE ON INCORPORATION, an unincorporated association, Real Party in Interest and Appellant, v. JOSEPH HORWATH, JOSEPH T. SANDERS, L.A. BRECKENRIDGE, and ARN CENEDELLA, Respondents.	No._____ APPELLANTS' OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California, in and for the County of San Mateo
Honorable Melvin E. Cohn, Judge

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I

STATEMENT OF THE CASE

This is an appeal from a judgment granting a petition for writ of mandate. The case involves the incorporation of East Palo

Alto as a city. The principal issue is whether the citizens' petition instituting incorporation proceedings was signed by the proper number of registered voters. Resolution of that issue, and of most of the other issues raised below, depends on which of two statutes governs the procedures for incorporation of East Palo Alto. The San Mateo County Local Agency Formation Commission ("LAFCO") applied the provisions of the District Reorganization Act (hereinafter "DRA"; Government Code §56000, et seq.) The trial court found that certain provisions of the Municipal Organization and Reorganization Act (hereinafter "MORGA"; Government Code §35000, et seq.) take precedence over the DRA. LAFCO determined that the DRA requires petitions for incorporation to be signed by 5% of the registered voters in the area to be incorporated. The trial court applied MORGA's provisions requiring 25%.

The citizens' petition for incorporation was filed with, and accepted by, LAFCO in October, 1982. It contained signatures of more than 5% of the registered voters in the area proposed for incorporation. All necessary hearings on incorporation have been held and LAFCO has approved incorporation for East Palo Alto. The San Mateo County Board of Supervisors has ordered an incorporation election. The election is presently scheduled for June 7, 1983, with incorporation effective July 1, 1983, if approved by the voters.

On March 11, 1983, Joseph Horwath, a resident of Atherton, and three other individuals (hereinafter "Horwath") sued in San Mateo County Superior Court seeking a writ of mandate preventing the incorporation election. The suit named as Respondents LAFCO, the San Mateo County Board of Supervisors (the "Board") and the

San Mateo County Clerk (the "County Clerk"). The East Palo Alto Citizens' Committee on Incorporation ("EPACCI") was named as the Real Party in Interest, since it had submitted the citizens' petition for incorporation. On April 7, 1983, the Superior Court granted Horwath's petition and issued the writ (J.A., pp. 1164-1173).

The judgment of the Superior Court was that EPACCI's petition for incorporation was fatally defective because it contained the signatures of less than 25% of the voters in the area. In addition, the court found that although LAFCO waived MORGA's two-year waiting period, LAFCO failed to make written findings to support the waiver and, further, that LAFCO's decision on waiver was not supported by substantial evidence. The trial court concluded that EPACCI's petition was void based on the Court's resolution of these two issues. The Court did not reach any other issues raised below (J.A., p. 1168).

Notices of Appeal were filed on April 7, 1983, by EPACCI and on April 8, 1983, by LAFCO, the Board and the County Clerk (J.A., p. 1169, 1174-75). The filing of these notices has stayed the decision of the trial court, and the County Clerk is proceeding with preparation for the election on June 7, 1983. In this appeal, LAFCO, the Board, the County Clerk and EPACCI ask that the judgment of the trial court be reversed.

II

BACKGROUND

The proceedings for incorporation of East Palo Alto have been lengthy and thorough. However, only a brief statement of the most pertinent events, including earlier LAFCO proceedings on

incorporation, is necessary to an understanding of the legal issues.

In 1981, EPACCI petitioned LAFCO for incorporation of East Palo Alto as a new city. In response to the petition, LAFCO prepared an EIR, hired a fiscal consultant and held numerous hearings. These proceedings culminated in approval of incorporation, on the condition that three local districts be dissolved, so their tax bases could be transferred to the new city. The Board agreed and set an election for April, 1982. On the ballot were four separate measures: the incorporation of East Palo Alto and the dissolution of each of the three districts. Separate ballot measures were necessary because the boundaries of the incorporation area were different from the boundaries of the districts. Approval of incorporation was conditioned on approval of all four ballot measures (J.A., pp. 796-801).

The April, 1982, election results were inconclusive and contradictory. The voters voted strongly in favor of Measure A approving incorporation and in favor of Measures B and D dissolving two of the districts. Measure C, however, failed passage by a scant 41 votes (J.A., p. 803(A)).

Measure C involved dissolution of the Sanitary District. However, the Sanitary District boundaries, unlike the boundaries of the proposed city and the other two districts, include a small area within the city limits of Menlo Park. The voters living within that area of Menlo Park voted overwhelmingly against dissolution of the Sanitary District (J.A., pp. 803A, 989). Thus, the margin of defeat for Measure C was supplied totally by voters who do not even live in the area to be incorporated.

Since incorporation was conditioned on approval of all four measures, incorporation itself was defeated by the failure of Measure C. This was a particularly unfair result since a clear majority of the voters in the incorporation area had voted in favor of Measure C (J.A., p. 989). The election results have created tension in the community because the issue of incorporation remains unresolved.

In May, 1982, the Board responded to the demonstrated majority sentiment for incorporation and to the tensions created by the unusual election results by petitioning LAFCO to reinstitute incorporation proceedings. LAFCO denied the Board's request without prejudice because its consultant would not have had time to complete a new fiscal review. When the new fiscal data was ready, EPACCI, instead of asking the Board to reinstitute proceedings, decided to petition LAFCO for incorporation and district reorganization itself. This gave EPACCI status as a proponent of reorganization under the applicable statutes. Therefore, EPACCI filed its petition, under provisions of the District Reorganization Act, seeking reorganization of certain districts and incorporation of East Palo Alto (J.A., pp. 1112-1115).

That petition was accepted, the new fiscal data were evaluated by LAFCO's consultant and lengthy and extensive hearings were held (J.A., p. 1112). LAFCO and the Board approved incorporation after these hearings in January, 1983, and scheduled an election for June 7, 1983 (J.A., p. 183). Incorporation is conditioned on the voters' approval of dissolution of two local districts (County Service Area No. 5 and the Ravenswood Recreation and Park District) in order to transfer their tax bases to the new city (J.A.,

p. 186). Due to an improvement in the community's position, the Sanitary District's tax base is not needed by the new city. Incorporation is not conditioned on its dissolution. Only one ballot measure is necessary for this election because the boundaries of the proposed city and the two districts are identical. No voters from outside the area to be incorporated will be involved in the election. In the June, 1983 election, voters in East Palo Alto will have an opportunity to make a clear decision on incorporation.

Incorporation of East Palo Alto was approved by LAFCO because it seemed the best method for breaking the cycle of frustration which has characterized past efforts to stimulate badly needed economic development. LAFCO found that the County had made good faith efforts to improve the community, but the County's efforts had not been successful (J.A., p. 1050). LAFCO considered annexing East Palo Alto either to Palo Alto or to Menlo Park, but found that annexation was not feasible (J.A., p. 1050). Because of the vagaries of complex state subvention formulas, East Palo Alto, if incorporated, would receive over a million dollars in new revenue, revenue that it does not now receive because it is unincorporated (J.A., p. 991). Thus, incorporation automatically brings to the community badly needed revenue to address its problems. In addition, LAFCO believed that incorporation was the best way to stimulate economic development and end the isolation of the community as an underdeveloped pocket surrounded by successful suburban development and suburban affluence (J.A., pp. 1053-1054).

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III

MORGA v. DRA

A. The DRA Applies To Certain Municipal Incorporations

The trial court's decision is based on the conclusion that LAFCO's proceedings were governed by MORGA and not by the DRA. The Board, LAFCO and EPACCI believe that LAFCO's proceedings were governed by the DRA, and these are the procedures LAFCO followed. However, the Superior Court held in its memorandum decision that "...the incorporation sections of MORGA must prevail as to procedure" (J.A., p. 1166). The Board, LAFCO and EPACCI believe that this holding is erroneous and that its error can be shown by reference to the statutes themselves.

First, the DRA clearly provides that incorporations may be conducted under its procedures. Section 56003.1 of the DRA provides:

> The incorporation of a new city, which is proposed as part of a plan of reorganization, may also be conducted in accordance with the procedures for reorganization set forth in this division [the DRA], unless the board of supervisors objects thereto. (emphasis added)

The DRA further provides that it is the sole and exclusive authority for proposals made under its auspices. Section 56001 provides:

> This division shall provide the sole and exclusive authority and procedure for the initiation, conduct and completion of changes of organization and reorganization.

"Change of organization" and "reorganization" include city incorporations (DRA §§56028, 56061).

Thus, the DRA indicates both that incorporations are

authorized under the DRA and that the DRA is the sole and exclusive authority for incorporations which are part of a plan of reorganization. There is nothing in the DRA which suggests that provisions of MORGA take precedence. The DRA permits incorporations "in accordance with the procedures...set forth in this division", and even provides that the DRA is the "sole and exclusive authority". Not only does the DRA provide that its procedures govern, but MORGA explicitly yields to the primacy of the DRA. MORGA §35002 provides:

> Except as provided in Division 1 (commencing with Sections 56000) of Title 6, this part shall provide the sole and exclusive authority and procedure for the initiation, conduct, and completion of city incorporations, municipal reorganizations, or changes of organization.

MORGA applies to municipal incorporations, except as provided in §56000. Section 56000 is the DRA. Therefore, MORGA yields to the DRA as governing certain municipal incorporations.

It is significant that when the legislature wants one statute to prevail over another, it says so. MORGA §35150 states that in case of conflict, MORGA prevails over the Knox-Nisbet Act. The DRA has a similar provision, DRA §56250. In contrast, there is no provision in MORGA saying that MORGA prevails over the DRA. Instead, MORGA yields to the DRA, MORGA §35002.

In addition, it is essential to recognize a practical matter of central importance. It is impossible for the incorporation of East Palo Alto to have proceeded under MORGA. MORGA only applies to proposals involving cities, and only cities. It does not apply to districts. In the case of East Palo Alto, it is essential both to dissolve certain districts and to incorporate a

new city. The DRA contains the authority for dissolving districts and only the DRA contains the authority for both dissolving districts and incorporating a new city in a single comprehensive proposal (§§56003.1, 56061, 56550). MORGA contains no provision for dissolving districts as part of a municipal incorporation.

In the case at bar, the new city of East Palo Alto depends upon the tax base of County Service Area No. 5[1] and the Ravenswood Recreation and Park District. Dissolution of those districts is a condition of incorporation. Their tax bases bring $704,000.00 per year to the new city (J.A., p. 1064). That tax base was found by LAFCO to be necessary to the fiscal viability of the new city.

Their dissolution is necessary and a condition of the plan of incorporation of East Palo Alto (J.A., p. 1058). Therefore, the incorporation of East Palo Alto is part of a plan for reorganization of districts and is entitled to proceed under the DRA. "Plan of reorganization" includes incorporation of cities and dissolution of districts (§56061).

Thus, both the DRA and MORGA contemplate a situation involving the incorporation of a new city and the reorganization of districts. Both MORGA and the DRA provide that, in such a case, the procedures of the DRA govern. The two statutes, by their own language, resolve any potential conflict between them. When a new city is being incorporated as part of a plan involving the reorganization of districts, the DRA applies.

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[1] A county service area is a "district" under the DRA. See DRA §56039(n).

The DRA sets forth a statutory scheme for processing municipal incorporations which are part of a plan of reorganization. DRA §56039(c) defines "district" to include a city which is being incorporated pursuant to DRA §56003.1. This makes provisions of the DRA which use the term "district" applicable to cities. DRA §56068 defines "reorganization" to include changes of organization of "each of two or more subject districts, including cities". A reorganization thus includes the incorporation of a city when combined with the dissolution of districts, as is the case here. (See also the definition of "change of organization", §56028; the definition of "plan of reorganization", §56061; and the definition of "subject district", DRA §56072. All include the incorporation of a new city.)

The definition sections of the DRA thus include municipal incorporation under certain circumstances. This carries out the provisions of MORGA §35002 and DRA §56003.1 which state that the DRA governs reorganization proceedings which include incorporation of a new city.

The trial court gave two reasons for its ruling. First, the court found that MORGA is the more recent act and its provisions should govern. There is no question that MORGA is more recent than the DRA. However, that does not mean that MORGA applies to proceedings beyond its own terms. MORGA makes no claim to apply to incorporations which involve reorganizations of districts. In fact, in MORGA refers to the DRA for such procedures, MORGA §35002.

The trial court's second finding is that the requirements of MORGA apply because the true purpose of these proceedings is

incorporation. The court states that this is "an incorporation with some reorganization incident thereto" (J.A., p. 1166). The court cites no authority to support its findings that the central purpose of a proceeding or the alleged motives of the petitioner should take precedence over plain statutory provisions. The DRA clearly authorizes incorporation that are part of a reorganization (§56003.1). In addition, this finding ignores an important practical necessity. Incorporation could not have proceeded under MORGA because the dissolution of districts was a fiscal necessity. MORGA contains no provisions for the dissolution of districts. The DRA was selected as the authorizing enactment because it was the only way to achieve the goal of incorporation.

Thus, the DRA governs incorporations which are part of a plan of reorganization. The incorporation of East Palo Alto is part of such a plan.

B. The DRA Contains A Signature Requirement For Reorganization Petitions

The trial court found that the DRA does not contain a signature requirement for municipal incorporations. The court said, "...none of the several sections in the DRA designating the number of signatures necessary refer to incorporation..." (J.A., p. 1165). The court did not discuss DRA §56191 which refers to the applicable requirements and provides that a petition for municipal incorporation under the DRA shall comply with the signature requirements for the dissolution of a district (§56173). Section 56191 is an omnibus clause applying the signature requirements for dissolutions to all proceedings that are not specifically provided for.

DRA §56191 provides signature requirements for formation of a new "district" as part of a petition for reorganization. In such a case, the applicable signature requirements are those found in the principal act designated in the petition for reorganization. If the designated principal act contains no signature requirements, then the DRA's signature requirements for a dissolution are to be applied. The requirements for dissolution are found in DRA §56173 and provide that such a petition shall contain signatures of 5% of the registered voters.[2]

"District", when used in this context, includes a city, DRA §56039(c). DRA §56191 thus applies to a reorganization which includes the formation of a new city, as is true in the case.

In this case, EPACCI designated the DRA as the principal act in its petition (J.A., p. 1112). Since there is no other provision of the DRA setting forth the signature requirements for an incorporation, the DRA applies the signature requirements for dissolution.

Thus, Section 56191 of the DRA designates the signature requirements which apply to a plan of reorganization which includes the incorporation of a new city. That section provides that the signature requirements for dissolutions shall govern.

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[2]DRA §56191 says "If a petition for reorganization shall include a proposal for the formation of a new district, said petition shall comply with the signature requirements, if any, of a petition for formation of such district, as set forth in the principal act designated in said petition for such formation, and if there are no such requirements, then the requirements of this division pertaining to dissolution."

Those requirements are found in DRA §56173 and provide that a petition shall be signed by not less than 5% of the registered voters. Therefore, EPACCI's petition complied with DRA §56191 and §56173.

In order to interpret §56191, reference must be made to the DRA's definition sections. It is in those sections that the DRA applies its provisions to municipal incorporations. The signature requirements in DRA §56191 apply to "formation of a new district". As noted above, "district" is defined to include a city. Therefore, DRA §56191 applies to formation of a new city.

As can be seen by reading the Superior Court's memorandum decision, the Court did not analyze the definition section of the DRA. The Court does not even refer to these provisions despite the extensive discussions about them in the briefs and in oral argument before the Court. In addition, the conclusion that the signature requirements of MORGA take precedence must overcome serious analytical problems. Such an analysis has to explain away both the explicit provisions of the DRA and also assume a complete omission in the legislative scheme. This conclusion assumes that having established the DRA as the "sole and exclusive authority" and having authorized incorporations under the DRA, the legislature failed to provide any signature requirement for incorporations under the DRA.

IV

TWO-YEAR WAIVER

The second element of the decision below is based on the court's finding that MORGA §35264 applies. It requires a two-year waiting period before reinstituting incorporation proceedings

unless LAFCO finds that waiting would be "detrimental to the public interest". In this case, the earlier proceedings were terminated by the election in 1982. The DRA has a one-year waiting period for certain proceedings, but has no waiting period for incorporation proceedings which are terminated by election (§56272). EPACCI does not agree that MORGA §35264 applies, but in order to be cautious, LAFCO complied with MORGA §35264 and waived the two-year waiting period, as permitted. LAFCO found that waiting two years would be detrimental to the public interest (J.A., p. 1138).

However, the court below found that there was not substantial evidence to support the finding that a two-year delay would be "detrimental to the public interest (whatever that means)" (J.A., p. 1167). The court below also ruled that LAFCO was required to make written findings on the detriment to the public interest (J.A., pp. 1167-1168). Since LAFCO made only oral findings and not written findings, LAFCO did not meet the standard established by the trial court.

A brief review of the record indicates that there was substantial evidence to support LAFCO's decision to waive the two-year waiting period. The record in the trial court, and on appeal, contains several categories of evidence which support LAFCO's decision to waive the waiting period. First, LAFCO took testimony at a public hearing on the issue of the waiver. The testimony of two people is particularly relevant. Duane Bay pointed out that during a two-year waiting period, decisions on land use and economic development would be made by the County. These decisions may be difficult to undo, should an incorporated

city wish to make other decisions (J.A., pp. 1136-1137). Thomas R. Adams, attorney for EPACCI, testified that decisions on economic development needed to be made immediately and that it was important to put the matter of East Palo Alto's future to rest (J.A., pp. 1134-1135).

In addition, LAFCO is presumed to have studied its earlier studies, reviews and reports, as noted in City of Santa Cruz v. LAFCO, 76 Cal.App. 3d 381, 142 Cal.Rptr. 873 (1978). The court there said,

> LAFCO, as a quasi-legislative administrative agency, must in reason be presumed to have considered its earlier studies, reviews and reports, made at the expense of time and money in response to the Act's mandate, as well as such evidence as was initially produced at the hearings. The validity of such studies, reviews and reports did not depend upon their being "presented" anew to the commissioners at the hearings. As we have pointed out, a quasi-legislative hearing "allowed by legislative grace is not circumscribed by the restrictions applicable to judicial or quasi judicial adversary proceedings." (See Franchise Tax Board v. Superior Court, supra, 36 Cal. 2d 538, 549, 225 P.2d 905, 911.) (76 Cal.App. 3d at 392, 142 Cal.Rptr. at 880)

LAFCO must thus be presumed to have studied its 1981 reports on incorporation.

The record of LAFCO's 1981 proceedings contains the information that "in East Palo Alto if the area were either annexed or incorporated...between $800,000 and $1.5 million of new revenue would become available, primarily from new state and federal sources. None of these revenue sources are available as long as the area remains unincorporated", (J.A., pp. 1141-1144). LAFCO thus had information showing that a delay in incorporation was costing a potential new city between $800,000 and $1.5 million.

In addition, LAFCO had just made findings on the reasons

for incorporating East Palo Alto. Several of those findings speak to the detrimental effect of any further delay in incorporation. LAFCO found that maintaining the status quo (no incorporation; services provided by the County) was detrimental in several respects. LAFCO found that the status quo was detrimental in the areas of economic development, the isolation of East Palo Alto, the protection of housing stock, reduction of the crime rate and deterioration of water distribution and sewer lines (J.A., pp. 782-795). The County had not been successful in providing necessary services or in promoting economic development (J.A., p. 783). No one considered the status quo to be viable. The only realistic alternative was incorporation (J.A., p. 784). LAFCO had all of these findings before it when it decided that the two-year period should be waived. Since the status quo was detrimental to the public interest, delay in considering and implementing a change was detrimental to the public interest. Thus, abundant evidence in the record and in the declarations supports that conclusion.

In addition, the record below shows that the three LAFCO Commissioners who voted to waive the two-year period did so because delaying a decision on incorporation made it difficult for the County to respond to the needs of East Palo Alto, because each year of delay costs the new city between $800,000.00 and $1,000,000.00 in revenue, and because a majority of voters in the 1982 election voted in favor of incorporation (J.A., pp. 1145-1151).

Horwath cited no contradictory evidence to the trial court. Nevertheless, the trial court found that there was no substantial

evidence to support the waiver. EPACCI and the County believe that the court's decision was erroneous in light of the evidence discussed above.

In addition, LAFCO's decision on waiver was quasi-legislative and written findings were not required. LAFCO was entitled to make an oral finding couched in conclusory language, as it did. That LAFCO's decisions are quasi-legislative has been settled in a long line of cases. The court in Bookout v. LAFCO, 49 Cal.App. 3d 383, 122 Cal.Rptr 668 (1975), held, "It is settled by a long unbroken line of case authority that the matter of forming and adding new territory to municipal corporations, like cities and town...are legislative matters which the Legislature has delegated to local municipalities to be performed in accordance with the appropriate legislative acts [numerous citations omitted]", 49 Cal.App. 3d at 386-387, 122 Cal.Rptr. at 670. The court also stated that "the nature of the power exercised is legislative and political rather than judicial", 49 Cal.App. 3d at 387, 122 Cal.Rptr. at 670; Simi Valley Recreation and Park District v. LAFCO, 51 Cal.App. 3d 648, 124 Cal.Rptr. 635 (1975).

Similarly in Timberidge Enterprises v. City of Santa Rosa, 86 Cal.App. 3d 873, 150 Cal.Rptr. 606 (1978), the court noted, "And, of course, being a creature of the Legislature, exercising legislative functions (see City of Santa Cruz v. LAFCO, 76 Cal.App. 3d 381, 142 Cal.Rptr. 873) it [LAFCO] has only such powers as are bestowed upon it by the Act [Knox-Nisbet]", 86 Cal.App. 3d at 883, 150 Cal.Rptr. at 612.

The most thorough and compelling discussion of the nature of LAFCO's actions is found in City of Santa Cruz, supra. In a

unanimous decision, that court stated,

> An administrative agency such as LAFCO is nonetheless quasi-legislative in nature, though it holds public hearings and considers "testimony presented by an affected local agency or county or any interested person who wishes to appear." "[T]he fact that in the subject proceedings the [agency] was not enacting ordinances embodying rules and regulations does not make its actions any less quasi-legislative. [¶] Nor does the presence of certain elements usually characteristic of the judicial process mean that [its] action was quasi-judicial...[¶]...The Legislature and administrators exercising quasi-legislative powers commonly resort to the hearing procedure to uncover, at least in part, the facts necessary to arrive at a sound and fair legislative decision...Hence the presence of certain characteristics common to the judicial process does not change the basically quasi-legislative nature of the subject proceedings." (Wilson v. Hidden Valley Mun. Water Dist., supra, 256 Cal.App. 2d 271, 279, 63 Cal.Rptr. 889, 893.)
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> "Mere ascertainment of facts as a basis for legislation does not render the process judicial or anything less than quasi-legislative." (City Council v. Superior Court, 179 Cal.App. 2d 389, 393 3, Cal.Rptr. 796, 799.) "Where the proceedings are quasi-legislative in character, a hearing of a judicial type is not required; a hearing allowed by legislative grace is not circumscribed by the restrictions applicable to judicial or quasi judicial adversary proceedings." (Franchise Tax Board v. Superior Court, 36 Cal. 2d 538, 549, 225 P.2d 905, 911; Brook v. Superior Court, 109 Cal.App. 2d 594, 606, 241 P.2d 283.) "To restrict [a quasi-legislative] agency to evidence produced at the time and place specified in the public notice would generate undesirable inflexibility" (California Optometric Assn. v. Lackner, 60 Cal.App. 3d 500, 508, 131 Cal.Rptr. 744, 750). It is commonly accepted practice, not at all incompatible with the concept of a public hearing, for quasi-legislative agencies to receive staff recommendations before the hearing. The complexity of matters before legislative bodies simply does not permit them to act only on input received at the hearing (Los Angeles County Civil Service Com. v. Superior Court, 73 Cal.App. 3d 998, 1004, 141 Cal.Rptr. 126, 130. (76 Cal.App. 3d at 388, 142 Cal.Rptr. at 873)

The court continued,

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> An administrative order, legislative in character, is subject to the same tests as to validity as an act of the Legislature." (Knudsen Creamery Co. v. Brock, 37 Cal. 2d 485, 494, 234 P.2d 26, 31; Board of Supervisors v. California Highway Commission, 57 Cal.App. 3d 952, 960, 129 Cal.Rptr. 504.)
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> Written findings of fact are customarily required in judicial proceedings, or those of a quasi-judicial administrative agency, for in such contexts the rights of persons are involved. However, no statute or authority known to us requires such findings in quasi-legislative determinations. As said in Wilson v. Hidden Valley Mun. Water Dist., supra, 256 Cal.App. 2d 271, 280, 63 Cal.Rptr. 889, 894, "the one determines individual rights, while the other involves the exercise of a discretion governed by considerations of the public welfare." Written findings of fact are alien to legislative procedures, for no person has a right to the adoption of legislation. And no one has any right, constitutional or otherwise, to be included, or excluded, from a proposed annexation. (citations omitted)

City of Santa Cruz has been cited and relied upon for this proposition in several subsequent cases, Timberidge, supra, Santa Ana, supra, Stauffer Chem. Co. v. Cal. Air Resources Board, 128 Cal.App. 3d 789 at 794, 180 Cal.Rptr. 550 at 553 (1982), and Carlton Santee v. Padre Dam Municipal Water District, 120 Cal.App. 3d 14 at 19, 174 Cal.Rptr. 413 at 415 (1981).

The Superior Court cites no authority for its decision that written findings are required to support quasi-legislative action. There is no statutory requirement for written findings. The usual judicial authority for such a proposition is the seminal decision in Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal.Rptr. 836 (1974). However, the Topanga decision does not apply to quasi-legislative proceedings. Ensign Bickford Realty Corp. v. City Council, 68 Cal.App. 3d 467, 472, 137 Cal.Rptr. 304, 307 (1977); McKinney v. Oxnard Union High School District, 31 Cal. 3d 79, 88, 181 Cal.Rptr. 549, 553 (1982).

Thus, the traditional rule applies that findings may be stated in ultimate facts, Martin v. Alcoholic Beverage Control Bd., 52 Cal. 2d 238, 248, 340 P.2d 1, 7 (1959); Palm Springs Turf Club v. California Horse Racing Bd., 155 Cal.App. 2d, 242, 245, 317 P.2d 713, 715 (1957). The Agency is entitled to the presumption that it has acted in accordance with law (Evidence Code §664), and its findings may even be implied Sacramento Municipal Utility District v. P.G.& E., 72 Cal.App. 2d 638, 647, 165 P.2d 741, 746 (1946); Albonico v. Madera Irrigation Dist., 53 Cal. 2d 735, 741, 3 Cal.Rptr. 343, 376 (1960).

These principles were discussed by the California Supreme Court in Southern Calif. Jockey Club v. Calif. Horse Racing Bd., 36 Cal. 2d 167, 223 P.2d 1 (1950). In that case, the Horse Racing Board was obligated to base its licensing decisions on the "public interest". The court found that the board was a quasi-legislative agency and should be accorded wide latitude in making determinations regarding the "public interest". The court said:

> This is especially true where most of the evidence consists of opinion, and the issues involved -- public interest and purposes of the act are general and incapable of exact definition..."A moments reflection upon the very nature of the determination that the board was required to make shows that such determination must be produced, not upon provable concrete facts, but upon opinion evidence exclusively." In such a case, wide discretion is necessarily vested in the factfinder. Southern Calif. Jockey Club v. Calif. Horse Racing Board, 36 Cal.2d 167, 177, 223 P.2d 1, 7-8 (1950).

See also, Palm Springs Turf Club v. Calif. Horse Racing Bd., 155 Cal.App. 2d 242, 317 P.2d 713, 715-716 (1957).

Thus, Topanga type written findings are not required in this quasi-legislative determination. LAFCO has entitled to rely

on opinion evidence and on the lengthy record before it. In such a setting, there is ample support for LAFCO's finding in ultimate facts and it should not have been overturned on review by the trial court.

V

REQUEST FOR PROSPECTIVE APPLICATION

In the event that this court determines that MORGA's 25% signature requirement applies to an incorporation which is part of a plan of reorganization under the DRA, EPACCI and the Respondents ask that the ruling be made prospective only. They ask that the 25% requirement not be applied to EPACCI's petition filed in October, 1982, but that it be applied only to petitions filed in the future.

The courts have authority to make their rulings prospective and have done so based on considerations of equity and public policy. The factors to be considered were set out by the United States Supreme Court and have been adopted by the California Supreme Court. In Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), the Court set forth three factors to be considered when deciding whether to make a decision prospective. The Court said,

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra, 392 U.S. at 496, 88 S.Ct. at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, 393 U.S. at 572, 89 S.Ct. at 835. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the

> rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, 381 U.S. at 629, 85 S.Ct. at 1738. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice and hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, 395 U.S. at 706, 89 S.Ct. at 1900.

Chevron, supra, 404 U.S. at 106-107, 92 S.Ct. at 355, quoted in Ralston Purina v. County of Los Angeles, 56 Cal.App. 3d 547 at 559, 128 Cal.Rptr at 564 (1976).

The California Supreme Court and courts of appeal have followed this reasoning. In Westbrook v. Mihaly, 2 Cal. 3d 765, 87 Cal.Rptr. 830 (1970), the California Supreme Court said, "'the decision whether to apply an overruling decision retroactively or prospectively only turns on considerations of fairness and public policy'....This is the rule we have adopted in California" (citations omitted), 2 Cal. 3d at 800, 87 Cal.Rptr. at 864. See also Daly v. General Motors, 20 Cal. 3d 725 at 743, 144 Cal.Rptr. 380 at 391 (1978); Neel v. Magana, 6 Cal. 3d 176 at 192, 98 Cal.Rptr. 837 at 848 (1971); Connor v. Great Western Savings, 69 Cal. 3d 850 at 868, 73 Cal.Rptr. 369 at 379 (1968), In Re Marriage of Brown, 15 Cal. 3d 838 at 850, 126 Cal.Rptr. 633 at 640 (1976); People v. Hitch, 12 Cal. 3d 641, 117 Cal.Rptr. 9 (1974).

These principles have frequently been applied in elections cases. Thus, in Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817 (1969), the Court found that several Louisiana elections had been conducted in violation of Section 5 of the 1965 Voting Rights Act. Nevertheless, the Court decided not to set aside the elections, saying, "These §5 coverage questions involve

complex issues of first impression -- issues subject to rational disagreement", 393 U.S. at 572, 89 S.Ct. at 835.

In a recent case, the California Supreme Court found a referendum petition invalid, but refused to apply its ruling to the case before the Court. In Assembly v. Deukmejian, 30 Cal. 3d 638, 180 Cal.Rptr. 297 (1982), the court found that a statewide referendum petition violated §3516(c) of the Elections Code, which requires signers of petitions to list their residence address. The Court nevertheless decided not to apply its ruling to petitions already circulated in that case, 30 Cal. 3d at 652, 180 Cal.Rptr. at 305.

Applying those principles to the case at bar gives this court authority to make its decision prospective. The first factor is whether the decision has established "a new principle of law...by deciding an issue of first impression whose resolution was not clearly foreshadowed", Ralston, supra, quoting Chevron, supra. There is no case law applying the signature requirements of MORGA to a reorganization under the DRA. In addition, the statutes themselves were found by the trial court to be unclear, stating, "The court does feel that the Legislature should address the problem outlined above and clarify the procedure" (J.A., p. 1166). There is no case law which would foreshadow such a decision.

A similar situation occurred in England v. Louisiana, 375 U.S. 411, 84 S.Ct. 461 (1964). There, the Court clarified an earlier opinion on the doctrine of abstention, but did not apply its decision to the parties before the Court. The Court stated that the parties had acted upon a mistaken view of the case law

and, "we cannot say, in the face of the support given the view by respectable authorities, including the Court below, that appellants were unreasonable in holding it or acting upon it", 375 U.S. at 422, 84 S.Ct. at 468. The Court made its decision prospective.

The second issue is whether a retroactive application will serve the purpose of the new ruling. The purpose of MORGA's 25% requirement is to ensure that there is public support for the incorporation proposal before LAFCO is required to investigate the proposal and do research (J.A., pp. 239, 241). In the case at bar, public support has already been shown by the April, 1982, election at which more than 50% of the voters voted for incorporation. Additionally, LAFCO has already done all of the necessary research and held all of the necessary hearings. Thus, the purpose of the statute has already been served in this case.

The third factor is the inequity of retroactive application. In this case, all of the people in East Palo Alto who signed the 1982 petition and participated in the extensive hearings to support incorporation have relied on the 5% requirement of the DRA. LAFCO itself relied upon the provision and accepted the petition as complete. LAFCO has now spent $78,590.00 in studies and hearings on the proposed incorporation (J.A., p. 1152). LAFCO and EPACCI have each hired fiscal consultants to analyze and reanalyze the data. Delay in an incorporation decision costs the potential new city of East Palo Alto from $800,000.00 to $1,000,000.00 per year (J.A., p. 1551). Thus, the local agencies and the proponents of incorporation have invested time and money in reliance upon the sufficiency of the petition.

In addition, the claim that the two-year waiver was not

proper could have been raised soon after it was granted in May, 1982. Had it been raised earlier, LAFCO would have had an opportunity to reconsider the issue without disrupting an election. Similarly, EPACCI's petition was filed with LAFCO in October of 1982. Had the claim of its insufficiency been raised in a timely way, EPACCI could have had opportunities to correct the matter. EPACCI could have either sought the additional signatures or requested that the Board of Supervisors initiate the proceedings (DRA §56195). However, these issues were only raised in a petition for reconsideration on February 23, 1983, after the administrative proceedings were completed. Application of the rule to this case will reward the opponents of incorporation for failing to raise issues in a timely way and it will cause a costly and time-consuming repetition of hearings that have already occurred twice.

Both MORGA and the DRA are to be liberally construed to effectuate their purposes, MORGA §35006, DRA §56006. EPACCI and the Respondents, therefore, ask this Court to make prospective any decision applying MORGA's 25% requirement or its waiver requirement to the DRA. Retroactive application would not serve the purpose of the decision and would be inequitable under all of the facts and circumstances of this case. EPACCI, LAFCO, the Board and the County Clerk therefore ask that a decision upholding the trial court be made prospective only.

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VI

REQUEST TO TAKE JUDICIAL NOTICE OF INCORPORATIONS IN OTHER CITIES

At Horwath's request, the court below took judicial notice of the number of signatures on six incorporation petitions filed in other counties. The request violates Evidence Code §452 in that it does not provide "reasonably indisputable accuracy", provide enough information to permit the court to take judicial notice of one petition (Avenal, Kings County) and all appellants objected to the request. They ask that the decision to take judicial notice be reversed.

Horwath relies on Evidence Code §452(h) which requires that the facts be "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy". Peter Detweiler is the source of Horwath's information (J.A., p. 24). Mr. Detweiler said that only five cities had been incorporated subsequent to Proposition 13, whereas Horwath's attorney located documents regarding a sixth such incorporation (J.A., p. 275). Additionally, Mr. Detweiler said that in each instance the petition was signed by at least 25% of the registered voters, whereas the documents show that the Cathedral City petition was only signed by slightly more than 5% of such voters (J.A., p. 285).

Mr. Detweiler's information is not of reasonably indisputable accuracy as required by Evidence Code §452(h). His statements leave a great deal of uncertainty about how many incorporations there have been, how many were initiated and how many voters signed the petitions. It is entirely unclear, even now, whether Horwath claims that fifteen cities or sixteen cities have been

incorporated since Proposition 13. There is little reason to believe that the information is complete or, as to Avenal, wholly accurate. All appellants object to the court taking judicial notice as requested. However, the material presented in the request is of such marginal relevance that it should be disregarded even if it is judicially noticed.

Horwath provides information about six incorporations. In one case (Grand Terrace; J.A., p. 613) it is clear from the petition that the petitioners were proceeding under MORGA, which explains why they collected so many signatures. In three cases, there is no information about what statute the petitioners thought they were proceeding under (Kensington, Big Bear Lake, Hesperia, Avenal; J.A., pp. 566, 626, 686). In the fifth case, the petition shows that the proceedings were under the DRA, and the petition met the DRA's 5% requirement (Cathedral Hill; J.A., p. 682).

Horwath has not demonstrated that any person involved in any of the six proceedings believed that MORGA's 25% requirement applies to an incorporation under the DRA, much less what LAFCO's practice might be, if any. Even if someone had held such a belief, that information is of small value as an aid to interpreting the clear language of MORGA and the DRA. It is not customary to survey either lay people or attorneys to determine the numbers of people who favor one statutory interpretation or another. It is more appropriate to rely on customary legal tools. The statutes here are clear, and their interpretation by citizens who circulate incorporation petitions is not determinative.

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VII

CONCLUSION

In 1981, LAFCO determined that incorporation of a new city of East Palo Alto would provide the government structure which could best address the serious problems facing East Palo Alto. The Board scheduled an election on that issue for April, 1982. Despite a majority vote in East Palo Alto in favor of incorporation, the structure of the ballot permitted incorporation to be defeated by residents of Menlo Park. The benefits of incorporation and the will of a majority of the residents were frustrated.

The issue, however, was of such importance that LAFCO waived the two-year waiting period for filing another petition. Such a petition was filed in October, 1982. In 1983, LAFCO again found that incorporation was the best way to address the needs of the community.

The ruling of the court below, if upheld, will again deny the majority of citizens the opportunity to effect their will on this critical issue and further delay the important benefits of incorporation.

The Board, LAFCO and EPACCI believe the correct proceedings have been followed and that the DRA requires a petition signed by 5% of the voters. In addition, they believe that the two-year waiver was properly granted.

In the event the court disagrees, LAFCO, the Board and EPACCI believe this new reading of the law raised so late in this incorporation proceeding should only apply prospectively. It is critically important for the community to resolve this vital issue by the expression of a binding and effective majority vote.

We respectfully request that this court reverse the order of the Superior Court and deny the writ of mandate.

Dated: _____

James P. Fox, District Attorney
By L. M. Summey, Assistant

Dated: _____

Thomas R. Adams
Adams, Broadwell & Russell

Ann Broadwell
Adams, Broadwell & Russell

Attorneys for Appellants

PROOF OF SERVICE

(C.C.P. §1013a, §2015.5)

I declare that I am employed in the County of San Mateo, California. I am over the age of eighteen (18) years and not a party to the within entitled cause; my business address is Hall of Justice and Records, 401 Marshall Street, Redwood City, CA 94063.

On April 20, 1983, I served the attached APPELLANTS' OPENING BRIEF on the parties involved in said cause by personal service as follows:

California Supreme Court
Room 4250 State Building
San Francisco, CA 94102 (Seven copies)

Paul N. McCloskey, Jr.
Brobeck, Phleger & Harrison
Two Palo Alto Square
Palo Alto, CA 94304

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of April, 1983, at San Mateo, California.

Lemuel Summey

PROOF OF SERVICE

(C.C.P. §1013a, §2015.5)

I declare that I am employed in the County of San Mateo, California. I am over the age of eighteen (18) years and not a party to the within entitled cause; my business address is 400 South El Camino Real, Suite 370, San Mateo, California 94402.

On April 20, 1983, I served the attached APPELLANTS' OPENING BRIEF on the parties involved in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Mateo, California, addressed as follows:

The Honorable Melvin Cohn
Judge of the Superior Court
County of San Mateo
Hall of Justice and Records
401 Marshall Street
Redwood City, CA 94063

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of April, 1983, at San Mateo, California.

Ann Marie Rozzi

Ann Marie Rozzi