FILED

APR 7 1983

MARVIN CHURCH, County Clerk

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SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF SAN MATEO

PRESENT: Hon. MELVIN E. COHN, Judge of the Superior Court

NO. 272816 JOSEPH HORWATH, etc., v. LOCAL AGENCY FORMATION

Hearing on Writ of Mandate

Paul McCloskey, Patricia Brody, Attorneys for the Petitioners

Thomas Adams and Ann Broadwell, Attorneys for the Real Parties in Interest

Lem Summey, Deputy District Attorney for the County of San Mateo

Submitted April 5, 1983, 19

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D E C I S I O N

This matter comes before the court on a petition for writ of mandate. It involves a petition for the incorporation of East Palo Alto as a municipality.

Previously, a petition for incorporation of East Palo Alto was filed in 1981. Thereafter, a petition for writ of mandate was filed attempting to halt the election. Said petition for writ of mandate was denied by this court and in the subsequent election held on April 13, 1982, the electorate, by a narrow margin rejected the incorporation. Shortly thereafter, a new petition for the incorporation of East Palo Alto (the one that is the subject of this law suit) was filed. After a hearing held on May 17, 1982 by the Local Formation Agency Commission (LAFCO), said commission waived the two year waiting period requirement of sec. 35264 (govt. code) and on Feb. 24, 1983 voted to put

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(continued on page two)

xxJUDGE OF THE SUPERIOR COURTx

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the incorporation on the ballot on June 7, 1983. The instant petition for writ of mandate followed.

There are two different acts in the government code that refer to incorporation: The older act passed in 1965 is known as the District Reorganization Act (D.R.A.). The later act, passed in 1977, is the Municipal Organization Act (MORGA).

Many points have been raised by the petitioners. The court feels that two of them are significant and are determinative as to this writ.

In the eyes of the court, the most significant issue raised by the petitioners is that the petition had to be signed by 25% of the voters of the proposed municipal corporation. Respondents have earnestly urged that the petition needed only a 5% sign up. (Only 563 of a total of 8693 voters or 6½% signed the petition).

The confusion arises from the less than clear provisions of the two acts cited above. D.R.A. is an act directed to the reorganization of special districts by annexation or detachment, consolidation, dissolution or merger. However, sec. 56141 (govt code) allows an incorporation as a part of a reorganization under the terms of the D.R.A. Respondents herein have elected to proceed under the D.R.A. and argue that a petition under the D.R.A. needs only a 5% sign up. The problem with that argument is that none of the several sections in the D.R.A. designating the number of signatures necessary refer to incorporation and each of them refers to a separate function of a reorganization, i.e., 56170, 56172, 56173 and 56175 each allows a 5% sign up but 56170 is specifically directed

at annexation or detachment, 56172 at consolidation, 56173 at dissolution and 56175 at merger. None of them mention incorporation. The only section directly aimed at incorporation is 35130 which requires a 25% sign up. Moreover, section 35130 was passed twelve years later than the sections in the 56000 series and under the normal rules of constuction would govern if there is an ambiguity. Respondents have made an ingenious argument whereby by straining the construction of several code sections in the 56000 series they reach a conclusion that section 56173, which is plainly limited to dissolution on its face, is really the section that allows a 5% sign up for incorporation. It is, at best, a boot strap argument which this court feels must fail in the light of the plain English of sec. 35130 requiring a 25% sign up. In the courts view, even though the proceedings under D.R.A. allow an incorporation, the incorporation sections of MORGA must prevail as to procedure. The court does feel that the Legislature should address the problem outlined above and clarify the procedure.

This court also has some doubt that the D.R.A. really is applicable to the present incorporation. The D.R.A. clearly allows incorporation as a part of a reorganization. It seems just as clear that the present application is for an incorporation with some reorganization incident thereto. Since almost every incorporation would involve some reorganization of districts, the legislature could also easily clarily that somewhat nebulous problem.

The second major issue that the court addresses is whether LAFCO properly waived the two year waiting period set forth in

sec. 35264. That section allows such waiver by the commission (LAFCO) "if it finds such provisions are detrimental to public interest" (whatever that means).

In this case, LAFCO paid the requirement lip service by making such a finding in the words of the code section. In the court's view, it was insufficient. The only finding made was a legal conclusion, with no substantial evidence that either the minutes or the partial transcript of the hearing revealed, upon which to rest the conclusion. The finding itself is devoid of any facts. It seems to this court, where the incorporation was very closely contested in the first election, that the public is entitled to know upon what facts the findings rested. They ought not to have to guess what the commissioners heard or considered in arriving at the finding. The attempt of the commissioners in their belatedly filed declarations, to state that they considered evidence submitted in the 1981 proceedings (which failed) hardly seems to fill the need for substantial evidence upon which to base findings. In the court's view, it is not too much to ask that the commissioners state the basis of their decision at the time at which it is made.

Respondents cite the City of Santa Cruz v LAFCO, 76 CA3 381 (1978) as authority that no written findings are necessary. However, a reading of that case indicates that Justice Elkington held, that where LAFCO exercises a quasi legislative function (whatever that means), it needs to hold no hearing nor make any findings. By its own terms on page 387, that case is limited to the issues of sphere of influence and annexation. Moreoever, no code section required LAFCO to make findings in those situations. In

this matter, we have a specific code section requiring a finding. (Sec. 35264, govt code).

Because the court finds that the above two issues void the present petition for incorporation, it does not deem it necessary to address the other points raised by petitioner.

The court therefore takes the following action:

1. The request for judicial notice is granted.
2. The demurrer is overruled.
3. The motion to strike is denied.
4. Let the peremptory writ of mandate issue as prayed.

Dated: April 7, 1983

Melvin E. Cohn

MELVIN E. COHN
Judge of the Superior Court