Item 6

SAN MATEO LAFCo
LOCAL AGENCY FORMATION COMMISSION
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December 12, 2018

To: LAFCo Commissioners

From: Martha Poyatos, Executive Officer M. Poyatos

Subject: Updated Draft revisions to Extension of Service outside agency boundaries (Government Code Section 56133)

Summary

Government Code Section 56133 states that a city or district may provide new or extended services by contract or agreement outside its jurisdictional boundary only if it first requests and receives written approval from the commission. LAFCo may approve a sewer or water extension outside jurisdictional boundaries, but within its sphere of influence in anticipation of future annexation. In recent years, pursuant to Government Code Section 56133, the Commission has reviewed and approved various applications from various cities and districts (primarily the City of Redwood City) to extend water service outside jurisdictional boundaries. In the case of Redwood City, requests pertain to new construction in unincorporated Emerald Lake Hills and Oak Knoll neighborhoods. In recent months, the Commission has expressed concern that service extensions by the City have not included a plan for, or information regarding future annexation and that the implementation of LAFCo policy was not fully meeting the intent of Section 56133. As a result, the Commission directed staff to draft clarifying language to the policy to include a requirement for annexation agreements to meet the provisions of section 56133 (Attachment A). Staff has also prepared a draft revision to the policies to include city or district adopted annexation plans in addition to annexation agreements (Attachment B). Both documents are based on input from the Commission's Legislative and Policy Committee (Commissioners Draper, Cosgrove, Martin).

It is requested that the Commission take the following actions:

1) Receive the staff report and public comments on the clarifying draft "Policy and Procedure for Review of Requests for extension of service outside jurisdictional boundaries (Attachment A) and Draft Revised Service Extension Policies (Attachment B).
2) Provide direction to staff on any desired changes in the document

3) Direct staff to circulate the both draft policies to cities and special districts prior to Commission consideration of the Clarifying Policies at the January 16, 2019 meeting.

4) Direct staff to conduct outreach to cities and districts regarding the Draft Revised Service Extension (Attachment B) that would be considered by the Commission when cities and districts have had the opportunity to adopt annexation plans for areas in their spheres of influence.

Background:

Staff has reviewed the policies of other LAFCos and adopted language that applies to local conditions in San Mateo County. Staff notes that Section 56375 (a)(6) prohibits LAFCo from setting conditions that regulate land use. While LAFCo can establish requirements related to annexations such as annexation agreements as a condition of service extension, conditions regarding land use are the responsibility of the City or County. The draft language focuses on the annexation question and makes no provision or direction regarding land use. The following is a summary of local conditions concerning application of Section 56133.

An Example of the pattern of development and service delivery in unincorporated San Mateo County:

The majority of requests for outside sewer or water extension have typically involved infill development in unincorporated areas under the County's land use jurisdiction, but within a city's SOI. Affected parcels have not been contiguous to the City and therefore not eligible for immediate annexation.

Many unincorporated communities have developed at density levels that are similar to development in adjacent municipalities. As these unincorporated islands were developed, urban services not available in these neighborhoods, such as water and sewer service, were extended from surrounding cities and County districts. Two examples of demand for City sewer or water in unincorporated areas include Unincorporated Emerald Lake Hills requests for City of Redwood City water and Unincorporated Country Club Park requests for City of South San Francisco requests for City of South San Francisco sewer.

In the case of Emerald Lake Hills, the City of Redwood City is the designated water provider for most unincorporated areas in the City's sphere of influence. As properties are subdivided and new connections are requested, the City of Redwood City has complied with Government Code Section 56133 and applied to LAFCo before extending water service. LAFCo staff has been in communication with the City regarding including an annexation agreement as a condition of water extension and most recently the Commission conditionally approved water extension to 752 Hillcrest on such an agreement. The City has responded with the attached annexation declaration that would be signed by the property owner and recorded.

In the case of Country Club Park, an island within the City of South San Francisco, CalWater is the water provider within the City and the unincorporated areas. The majority of properties within this unincorporated area are served by septic systems, with thirteen properties served by City of South San Francisco sewer connection. A map showing which parcels currently have sewer service within the Country Club Park area is attached to this memo. The City has a general plan policy that prohibits individual annexations and instead stipulates that annexation

will only occur if the entire area is annexed. Most recently they have informed LAFCo that sewer can only be extended if annexation occurs which rules out sewer extensions to parcels with inadequate septic to serve existing residences or new development such as accessory dwelling units (In-law units).

Clarifying Policy Document

The attached policy revisions have been drafted for the Committee's consideration. One is a clarification of the existing policy to address current and anticipated applications for service extension, and the other is intended for adoption once cities have had the opportunity to establish annexation plans or policies for unincorporated areas in their respective spheres. The clarifying policy document is labeled as Attachment A. An introduction section has been added to the policy to give context and background to the Commission's policy. In this introduction, there is information about the pattern of development in the County, examples of the requests that the Commission receives for outside service extensions, and summarizes the changes made to the policy for the reader.

Under the Legislative Authority header, language was added to clarify that the approval of a service extension is a discretionary action by the Commission and that this service extension shall include an agreement or some other document that promotes the likelihood of later annexation for the service area.

The list of agreements and contracts which are not subject to LAFCo approval was also updated to reflect changes to state law.

Statements regarding the processing of an application were added to help clarify and standardize procedures. This included detailing the factors that LAFCO will use to determine impacts of the proposal. Specific factors for developed parcels and vacant parcels have also been included in this update to assist applicants, staff, and the Commission in making this determination.

Emergency procedures, for when a service connection is required to mitigate an immediate or impending health and safety risk were also updated. The draft policy document allows for an administrative approval, with the approval of the Executive Officer and the LAFCo Chairperson., where there is an urgent health or safety concern documented by the County's Environmental Health Department.

These updates acknowledge obstacles to annexation (e.g. not being contiguous, county road standards and conditions that may not meet city standards, city zoning regulations that are more restrictive than county zoning and lack of adopted annexation plans by cities) and provide for service extension in a manner that promotes the likelihood of future annexation.

The requirement for an annexation agreement is supported by the attached Attorney General opinion which concludes that "A city may enforce an annexation agreement executed by the City and the landowner, as a condition of receiving city sewer services, to waive his or her right to protest the annexation of the property to the city when such becomes legally permissible, with the waiver binding upon the landowner, future landowners, long-term lessees of the property but not other persons residing on the property unless they have acknowledge of the agreement."

Annexation Plan Policy Document

In addition to the Clarifying Policy Document, a separate draft policy document has been prepared that includes requirements for an adopted annexation plan by city or district and a recorded agreement or document requiring future annexation. This policy document is labeled as Attachment B. These additional requirements would be new for both LAFCo, the applicant, and the cities so staff recommends time for outreach to all parties involved in extension of service and developing an annexation plan prior to the implementation of the requirements. This future revision policies requires sufficient time for staff to work with cities to implement a more comprehensive and beneficial plan of annexation of areas receiving or in need of city services.

Recommended Action:

1) Receive the staff report and public comments on the clarifying draft "Policy and Procedure for Review of Requests for extension of service outside jurisdictional boundaries (Attachment A) and Draft Revised Service Extension Policies (Attachment B).
2) Provide direction to staff on any desired changes in the document
3) Direct staff to circulate the both draft policies to cities and special districts prior to Commission consideration of the Clarifying Policies at the January 16, 2019 meeting.
4) Direct staff to conduct outreach to cities and districts regarding the Draft Revised Service Extension (Attachment B) that would be considered by the Commission when cities and districts have had the opportunity to adopt annexation plans for areas in their spheres of influence.

Attachments

A. Policy and Procedure for Review of Requests for Extension of Service Outside Jurisdictional Boundaries – Clarifying Policy
B. Draft Revised Service Extension Policies – Annexation
C. California Attorney General Opinion Regarding Annexation Agreements

Item 6
Attachment A

Clarifying Policy

SAN MATEO LOCAL AGENCY FORMATION COMMISSION

POLICY AND PROCEDURE FOR REVIEW OF REQUESTS

FOR EXTENSION OF SERVICE OUTSIDE JURISDICTIONAL BOUNDARIES

In 2001, San Mateo LAFCo adopted a policy for the extension of services outside of jurisdictional boundaries. This policy was intended to allow for local implementation of the Cortese-Knox-Hertzberg Act related to the provision of services outside to areas in San Mateo County. The majority of requests for extension of services have been for sewer or water extensions that typically involved infill development in unincorporated areas under the County's land use jurisdiction, but within a city's sphere of influence (SOI). Affected parcels have not been contiguous to the city and therefore not eligible for immediate annexation.

Since the initial policy, the economic recovery and increased demand for housing on the peninsula has increased the number of new developments requesting outside service extensions on vacant parcels as well as subdivisions within these unincorporated islands that are not contiguous to city boundaries. In response to these increased requests, LAFCo has clarified and updated the policy to reflect changes to the Cortese-Knox-Hertzberg Act, revised language that promotes the future annexation of the property, clarified the specific criteria for when services would be extended, and memorialized emergency extension procedures. These updates are reflected in this policy document.

1. Legislative Authority

Government Code Section 56133 provides that any city or district that plans to provide new or extended services by contract or agreement outside its jurisdictional boundaries must apply for and obtain written approval from the local agency formation commission in the affected county. Paragraph (b) of Section 56133 further states that LAFCo may approve extension of service outside an agency's boundaries and within its sphere of influence in anticipation of future annexation. As approval of such an extension is discretionary and must be done in anticipation of future annexation, San Mateo LAFCo will require that each application for extension be conditioned upon an executed and recorded deferred annexation agreement, a recorded covenant, or some other instrument that evidences or promotes likelihood of annexation of the property.

The Commission may also approve extension of service outside boundaries and outside its sphere of influence to respond to an existing or impending threat to the public health or safety if both of the following requirements are met:

a. The agency applying for the contract approval has provided the commission with documentation of a threat to health and safety, and
b. The commission has notified any alternate service provider, including any water or sewer system corporation, which has filed a map and a statement of its service capabilities with the commission.

2. **Agreements and Contracts Not Subject to Section 56133**

The following agreements/contracts between public agencies are not subject to LAFCo approval under Section 56133:

a. Agreements for services solely between public agencies where the public service to be provided is an alternative to, or substitute for, public services already being provided;
b. Agreements for the transfer of non-potable or non-treated water, or for the provision of surplus water to agricultural lands for projects which serve conservation purposes or directly support agricultural industries.
c. Agreements or contracts solely involving the provision of surplus water to agricultural lands and facilities, including, but not limited to, incidental residential structures, for projects that serve conservation purposes or that directly support agricultural industries. Approval from the Commission is required before any surplus water is provided to a project that will support or induce development.
d. An extended service that a city or district was providing on or before January 1, 2001.
e. A local publicly owned electric utility, as defined by Section 9604 of the Public Utilities Code, providing electric services that do not involve the acquisition, construction, or installation of electric distribution facilities by the local publicly owned electric utility, outside of the utility's jurisdictional boundary.
f. A fire protection contract, as defined in of Government Code Section 56134, subdivision (a).

These agreements and contract exemptions only apply to the commission of the county in which the extension of service is proposed.

LAFCo approval of extension of service outside jurisdictional boundaries is a discretionary action under the California Environmental Quality Act (CEQA).

3. Procedure for Processing Applications for Extension of Service Outside Jurisdictional Boundaries

In implementing Government Code Section 56133, the Commission shall process applications for extension of service outside agency boundaries in the following manner:

a. LAFCo staff shall encourage pre-application consultation and assist the applicant in investigating annexation prior to submitting a formal application for extension of services outside jurisdictional boundaries. It is the intent of the Commission that properties that are contiguous to city or district boundaries be annexed to the city or district in order to receive service. Consideration may be given to parcel configuration, relationship of the parcel to city streets and efficient jurisdictional boundaries. The agency proposing to extend service shall submit a resolution of application, a completed application form, applicable fees and the agency's form of agreement with the property owner for extension of service to the Executive Officer.

b. Once submitted, the Executive Officer shall deem the application acceptable for filing within 30 days of receipt, or if the application is incomplete, transmit a letter to the applicant stating the reasons the application is incomplete. Upon determination that an application is acceptable for filing, the application shall be placed on the Commission's agenda within 90 days.

c. LAFCo shall process the application in the manner it processes applications for organizational change to the extent that the application shall be referred for comment to affected county, city(ies), district(s).

d. The Executive Officer shall transmit the Commission's decision in writing to the affected city or district, the County of San Mateo Planning and Building Department, and the property owner.

4. Factors to Consider in reviewing <u>Applications</u>

Upon review and consideration of the application materials specified in b above, the Commission shall approve, approve conditionally or deny the application for extension of service outside jurisdictional boundaries. If the application is denied or approved with the conditions, the applicant may request reconsideration, citing the grounds for reconsideration. LAFCo will consider the following factors to determine the local and regional impacts of the proposed service outside of jurisdictional boundaries:

a. Whether annexation is a reasonable and preferable alternative to LAFCo allowing for the extension of services outside the agency's or district's jurisdictional boundaries;
b. The growth inducing impacts of any proposal;
c. Whether the proposed extension of service promotes logical and orderly development within the SOI. The creation of islands, strips, and corridors, the annexation of the properties that abut incorporated areas at the rear of the property only, or the annexation of properties where access is only available through unincorporated areas are disfavored;
d. The agreed upon timetable and stated expectation for annexation, where feasible and within LAFCo policy, to the agency providing the requested service. If logical and orderly development can be achieved via annexation in lieu of an outside extension of service, annexation should be favored;
e. The proposal's consistency with the policies and plans of all affected agencies;
f. The ability of the local agency to provide service to the proposed areas without detracting from current service levels;
g. Whether the proposal contributes to the premature conversion of agricultural land or other open space land;
h. Extent to which the proposal will assist the entity in achieving its fair share of regional housing needs;
i. Whether the proposal conflicts with or undermines adopted Municipal Service Review determinations and/or recommendations.
j. When a proposal is located within a sphere of influence of the following criteria shall apply as well:

i. For developed parcels within a sphere of influence

1. There is a documented existing or potential threat to public health or safety, or proposed new development is consistent with the City and County General Plans and other applicable regulations, and annexation to the city or district is not feasible at the time of application, and
2. The property owner and city or district have entered into a recordable agreement to future annexation and said agreement runs with the land and shall inure to future owners of the property.

ii. For undeveloped parcels within a sphere of influence

1. The proposed new development is consistent with the city and County General Plans and other applicable regulations, and
2. Annexation to the city or district is not feasible at the time of application, and
3. The property owner and city have entered into a recordable agreement to future annexation and said agreement runs with the land and shall inure to future owners of the property.

iii. For all properties located outside a sphere of influence

1. The extension of service mitigates existing or impending health and safety concern. Certification of the impending or existing public health threat is provided by the Director of Environmental Health, and
2. The property is currently developed, and
3. The service extension complies with the City and County General Plans and other applicable regulations, and
4. No future expansion of service will be permitted without approval from LAFCO.

5. Emergency Connections Procedures

a. If at the time of the Commission's meeting agenda is prepared, an application for extension of service to a developed parcel within or outside a city's sphere of influence necessary to mitigate an existing or impending health and safety risk is scheduled for action by the subject City Council or District Board, but is too late to be noticed and placed on the agenda of the next LAFCo meeting for formal action, and delay until the

subsequent Commission agenda would cause undue hardship, the Executive Officer, as part of their regular report to the Commission, shall provide a report describing the proposed extension and terms of the proposed agreement which is pending action by the city council or district board.

Pursuant to Section 56133, the Commission may consider delegation to the Executive Officer the authority to consider and approve the application following formal action by the legislative body of the city or district if the action taken does not vary from the report provided to the Commission and if the proposed extension meets all of the following conditions:

i. Service/infrastructure extension is exempt from the California Environmental Quality Act (CEQA), and
ii. Certification is provided by the Director of Environmental Health of an impending or existing public health threat, and
iii. The service extension complies with the City and County General Plans and other applicable regulations.

b. An administrative approval may be allowed for those projects that pose an urgent health or safety concern, without consideration by LAFCo if the project is brought to the Executive Officer's attention without adequate time to place the matter on the Commission's agenda. The administrative approval shall be made jointly by the LAFCo Chairperson (or Vice Chairperson if the Chair is not available) and the Executive Officer. Both must agree that an administrative approval is appropriate, based upon the criteria outlined below:

i. Service/infrastructure extension is exempt from the California Environmental Quality Act (CEQA), and
ii. Certification is provided by the Director of Environmental Health of an impending or existing public health threat, and
iii. The property is currently developed, and;

iv. There are physical restrictions on the property that prohibit a conventional service delivery method typically suited to the unincorporated area (i.e., septic tank, private well, etc.), and;

v. The service extension complies with the City and County General Plans and other applicable regulations, and;

vi. The property owner and city have begun the process to enter into a recordable agreement to future annexation and said agreement runs with the land and shall inure to future owners of the property. An exception to this requirement is the extension of sewer or water service by a city to territory located in the boundaries of the neighboring city because there is no alternative service provider and city boundaries would not be altered.

Adopted January 17, 2001

Revised November 21, 2001

Revised 2018

Item 6 Attachment B Annexation Policy

SAN MATEO LOCAL AGENCY FORMATION COMMISSION

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Since the initial policy, the economic recovery and increased demand for housing on the peninsula has increase the number of new developments requesting outside service extensions on vacant parcels as well as subdivisions within these unincorporated islands that are not contiguous to city boundaries. In response to these increased requests, LAFCo has clarified and updated the policy to reflect changes to the Cortese-Knox-Hertzberg Act, revised language that promotes the future annexation of the property, clarified the specific criteria for when services would be extended, and memorialized emergency extension procedures. These updates are reflected in this policy document.

1. Legislative Authority

Government Code Section 56133 provides that a city or district may provide new or extended services by contract or agreement outside its jurisdictional boundaries must apply for and obtain written approval from the local agency formation commission in the affected county.

Paragraph (b) of Section 56133 further states that LAFCo may approve extension of service outside an agency's boundaries and within its sphere of influence in anticipation of future annexation.

As approval of such an extension is discretionary and must be done with anticipation of future annexation, each application for extension must include the following information:

a. The means the city or district will use to implement this plan. This shall include a deferred annexation agreement, a recorded covenant, agreement to annexation, or some other

instrument that demonstrates the property owner's consent regarding future annexation of the property.

b. A plan the city or district has for annexation of the properties involved with the application. This plan shall include information about the timelines for planned annexation and what types of thresholds the city or district will employ to work with LAFCo and the affected community to implement annexation. (An example fo a threshold is having signed agreements or covenants with a 50% of the total number of property owners in the affected area).

The Commission may also approve extension of service outside boundaries and outside its sphere of influence to respond to an existing or impending threat to the public health or safety if both of the following requirements are met:

a. The agency applying for the contract approval has provided the commission with documentation from San Mateo County Environmental Health of a threat to health and safety, and

b. The Commission has notified any alternate service provider, including any water or sewer system corporation, which has filed a map and a statement of its service capabilities with the commission.

2. **Agreements and Contracts Not Subject to Section 56133**

The following agreements/contracts between public agencies are not subject to LAFCo approval under Section 56133:

a. Agreements for services solely between public agencies where the public service to be provided is an alternative to, or substitute for, public services already being provided;

b. Agreements for the transfer of non-potable or non-treated water, or for the provision of surplus water to agricultural lands for projects which serve conservation purposes or directly support agricultural industries.

c. Agreements or contracts solely involving the provision of surplus water to agricultural lands and facilities, including, but not limited to, incidental residential structures, for projects that serve conservation proposes or that directly support agricultural industries.

Approval from the Commission is required before any surplus water is provided to a project that will support or induce development.

d. An extended service that a city or district was providing on or before January 1, 2001.

e. A local publicly owned electric utility, as defined by Section 9604 of the Public Utilities Code, providing electric services that do not involve the acquisition, construction, or installation of electric distribution facilities by the local publicly owned electric utility, outside of the utility's jurisdictional boundary.

f. A fire protection contract, as defined in of Government Code Section 56134, subdivision (a).

These agreements and contract exemptions only apply to the commission of the county in which the extension of service is proposed.

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3. <u>Procedure for Processing Applications for Extension of Service Outside Jurisdictional Boundaries</u>

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a. LAFCo staff shall encourage pre-application consultation and assist the applicant in investigating annexation prior to submitting a formal application for extension of services outside jurisdictional boundaries. It is the intent of the Commission that properties that are contiguous to city or district boundaries be annexed to the city or district in order to receive service. Consideration may be given to parcel configuration, relationship of the parcel to city streets and efficient and logical jurisdictional boundaries. The agency proposing to extend service and the property owners shall submit a resolution of application, a completed application form, applicable fees and the agency's form of agreement with the property owner for extension of service to the Executive Officer.

b. Once submitted, the Executive Officer shall deem the application acceptable for filing within 30 days of receipt, or if the application is incomplete, transmit a letter to the applicant stating the reasons the application is incomplete. Upon determination that an

application is acceptable for filing, the application shall be placed on the Commission's agenda within 90 days.

c. LAFCo shall process the application in the manner it processes applications for organizational change to the extent that the application shall be referred for comment to affected county, city(ies), district(s).

d. The Executive Officer shall transmit the Commission's decision in writing to the affected city or district, the County of San Mateo Planning and Building Department, and the property owner.

4. <u>Factors to Consider in Reviewing Applications</u>

Upon review and consideration of the application materials specified in b above, the Commission shall approve, approve conditionally or deny the application for extension of service outside jurisdictional boundaries. If the application is denied or approved with the conditions, the applicant may request reconsideration, citing the reasons for reconsideration. LAFCo will consider the following factors to determine the local and regional impacts of the proposed service outside of jurisdictional boundaries:

a. Whether annexation is a reasonable and preferable alternative to LAFCo allowing for the extension of services outside the agency's or district's jurisdictional boundaries;

b. The growth inducing impacts of any proposal;

c. Whether the proposed extension of service promotes logical and orderly development within the SOI. The creation of islands, strips, and corridors, the annexation of the properties that abut incorporated areas at the rear of the property only, or the annexation of properties where access is only available through unincorporated areas are disfavored;

d. The agreed upon timetable and stated expectation for annexation, where feasible and within LAFCo policy, to the agency providing the request service. If logical and orderly development can be achieved via annexation in lieu of an outside extension of service, annexation should be favored;

e. The proposal's consistency with the policies and plans of all affected agencies;

f. The ability of the local agency to provide service to the proposed areas without detracting from current service levels;

g. Whether the proposal contributes to the premature conversion of agricultural land or other open space land;

h. Extent to which the proposal will assist the entity in achieving its fair share of regional housing needs;

i. Whether the proposal conflicts with or undermines adopted Municipal Service Review determinations and/or recommendations;

j. Consistency with the city or district's adopted annexation plan.

k. When a proposal is located within a sphere of influence of the following criteria shall apply as well:

   i. <u>For developed parcels within a sphere of influence</u>

      1. There is a documented existing or potential threat to public health or safety, or proposed new development is consistent with the City and County General Plans and other applicable regulations, and annexation to the city or district is not feasible at the time of application, and
      2. The property owner and city or district have entered into a recordable agreement to future annexation and said agreement runs with the land and shall inure to future owners of the property.

   ii. <u>For undeveloped parcels within a sphere of influence</u>

      1. The proposed new development is consistent with the city and County General Plans and other applicable regulations, and
      2. Annexation to the city or district is not feasible at the time of application, and
      3. The property owner and city have entered into a recordable agreement to future annexation and said agreement runs with the land and shall inure to future owners of the property.

   iii. <u>For all properties located outside a sphere of influence</u>

      1. The extension of service mitigates existing or impending health and safety concern. Certification of the impending or existing public health threat is provided by the Director of Environmental Health, and

2. The property is currently developed, and
3. The service extension complies with the City and County General Plans and other applicable regulations, and
4. No future expansion of service will be permitted without approval from LAFCO.

5. <u>Emergency Connections Procedures</u>

a. If at the time of the Commission's meeting, an application for extension of service to a developed parcel within or outside a city's sphere of influence to mitigate an existing or impending health and safety risk is scheduled for action by the subject City Council or District Board too late to be noticed and placed on the agenda of the next LAFCo meeting for formal action, and delay until the subsequent Commission agenda would cause undue hardship, the Executive Officer shall provide a report to the Commission describing the proposed extension and terms of the proposed agreement which is pending action by the city council or district board.

Pursuant to Section 56133, the Commission may consider delegation to the Executive Officer the authority to consider and approve the application following formal action by the legislative body of the city or district if the action taken does not vary from the report provided to the Commission and if the proposed extension meets all of the following conditions:

i. Service/infrastructure extension is exempt from the California Environmental Quality Act (CEQA), and
ii. Certification is provided by the Director of Environmental Health of an impending or existing public health threat, and
iii. The service extension complies with the City and County General Plans and other applicable regulations.

b. An administrative approval may be allowed for those projects that pose an urgent health or safety concern, without consideration by LAFCo if the project is brought to the Executive Officer's attention without adequate time to place the matter on the

Commission's agenda. The administrative approval shall be made jointly by the LAFCo Chairperson (or Vice Chairperson if the Chair is not available) and the Executive Officer. Both must agree that an administrative approval is appropriate, based upon the criteria outlined below:

i. Service/infrastructure extension is exempt from the California Environmental Quality Act (CEQA), and

ii. Certification is provided by the Director of Environmental Health of an impending or existing public health threat, and

iii. The property is currently developed, and

iv. There are physical restrictions on the property that prohibit a conventional service delivery method typically suited to the unincorporated area (i.e., septic tank, private well, etc.), and

v. The service extension complies with the City and County General Plans and other applicable regulations, and

vi. The property owner and city have begun the process to enter into a recordable agreement to future annexation and said agreement runs with the land and shall inure to future owners of the property. An exception to this requirement is the extension of sewer or water service by a city to territory located in the boundaries of the neighboring city because there is no alternative service provider and city boundaries would not be altered.

Adopted January 17, 2001

Revised November 21, 2001

Revised 2018

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 93-407
of	:	October 13, 1993
DANIEL E. LUNGREN Attorney General	:	
CLAYTON P. ROCHE Deputy Attorney General	:	

THE HONORABLE BERNIE RICHTER, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following question:

May a city enforce an annexation agreement executed by the city and a landowner of unincorporated property which requires the landowner, as a condition of receiving city sewer services, to waive his or her right to protest the annexation of the property to the city when such becomes legally permissible, with the waiver binding upon the landowner, future owners, long-term lessees, and other persons residing on the property?

CONCLUSION

A city may enforce an annexation agreement executed by the city and a landowner of unincorporated property which requires the landowner, as a condition of receiving city sewer services, to waive his or her right to protest the annexation of the property to the city when such becomes legally permissible, with the waiver binding upon the landowner, future owners and long-term lessees of the property, but not other persons residing on the property unless they have actual knowledge of the agreement.

ANALYSIS

We are informed that a California city has numerous islands of unincorporated territory within its urban area. In supplying sewer services to these unincorporated areas, it has imposed certain conditions upon landowners in exchange for furnishing the services. As to property adjacent to the city, the landowner must file a petition to have the property annexed to the city. The owner of land which is not contiguous, and hence not immediately annexable, must execute and record a "sewer service and annexation agreement" which in part:

> "1. Contains a waiver by the owner of the premises of any right of protest to the annexation of the premises to the incorporated territory of the city provided for under the annexation laws of the state of California,
>
> "2. . . . . .
>
> "3. Provides that the agreement and any waiver, covenants and conditions set forth therein run with the land on which the premises are located; . . . ."

The question presented for resolution is whether the city may enforce these waiver terms against (1) the landowner who has executed the waiver, (2) future owners of the property, (3) long-term lessees of the property, and (4) other persons residing on the property. We conclude generally that the waiver terms may be enforced by the city.

Preliminarily we note that there is no duty on the part of a city to provide sewer services to properties located outside of its boundaries. In fact, a city is not always required to provide sewer services within its boundaries. (*Richards v. City of Tustin* (1964) 225 Cal.App.2d 97.)

As for the annexation of territory to a city, the governing statutory scheme is the Cortese-Knox Local Government Reorganization Act of 1985 (Gov. Code, §§ 56000-57550; "Act").[1] The Act allows landowners and registered voters in "inhabited territory" (12 or more registered voters) to file written protests against a proposed annexation. (§ 57051.) Depending upon the number of protests received, the annexation proceedings may be terminated, an election held, or completed without an election. (§§ 57075, 57078.) Does the application of these state laws prevent a city from requiring a waiver of annexation protest rights as a condition of furnishing sewer services?

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[1] All references hereafter to the Government Code are by section number only.

In *Ferrini v. City of San Luis Obispo* (1983) 150 Cal.App.3d 239, 246-247, the court stated:

> "The annexation of territory by a city has long been held to be both a legislative matter and one of statewide concern. [Citations.] Consequently, matters relating to the annexation of territory to a municipality are not municipal affairs. [Citations.]
>
> "Therefore, the municipal charter may not contain provisions pertaining to annexation which are contrary to the general laws of statewide application. `The annexation of territory to a city is governed by the general laws of the state and is not a municipal affair [citation], and where a city council proceeds under legislative requirements relating to annexation, such requirements constitute the measure of power to be exercised. [Citations.] . . . .
>
> "The intention of the state Legislature to occupy the field in annexation procedures is evidenced by its declaration that MORGA shall provide the exclusive method for changes of organization (§ 35002) which include annexations (§ 35027). `[W]here the statute contains express provisions indicating that the Legislature intends its regulations to be exclusive within a certain field, local government may not legislate in that field. . . ."[2]

Under *Ferrini*, then, it could be argued that a city may not by ordinance, contract, or otherwise, require annexation protest waivers from landowners or voters.

In *Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, however, the Court of Appeal upheld an agreement by a developer to have his property annexed to a city when legally permissible in exchange for connecting the property to the city's sewer system. The court rejected the argument that the agreement would violate the annexation statutes, stating as follows:

> "The annexation process involves a legislative function of municipal government, in that a city engaging in it exercises a legislative power

[2] "MORGA," the Municipal Organization Act of 1977, was replaced by the Act; the latter has a similar provision: "this division provides the sole and exclusive authority for the initiation, conduct, and completion of changes of organization and reorganization for cities and districts" (§ 56100).

> expressly delegated to it by the state [citation] in pertinent statutes. . . . Its establishment and operation of a municipal sewer system is a `governmental function' [citation] which it may perform under constitutional and statutory authority alike, . . . [citations]. The cited sources of a city's authority to discharge the annexation or sewage functions do not expressly vest it with the authority to contract for either purpose, but they have this effect by necessary implication: `[A] city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality and to powers implied by necessity. [Citation.]' (*Carruth v. City of Madera* (1965) 233 Cal.App.2d 688, 695 [annexation contract]. See *McBean v. City of Fresno* (1896) 112 Cal. 159, 161-163, 170 [sewage disposal contract].)" (*Id.*, at pp. 733-734; fn. omitted.)

In *Carruth v. City of Madera* (1965) 233 Cal.App.2d 688, 695, relied upon in *Morrison*, the court sanctioned an annexation agreement which involved the provision of sewer services by a city to a proposed subdivision.

While an annexation agreement executed by a landowner in exchange for sewer services would thus not conflict with the provisions of the Act, does this mean that a right to protest an annexation proposal may always be waived by a landowner? Section 3513 of the Civil Code provides:

"Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

The general operation of Civil Code section 3513 was summarized in *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 41, as follows:

> "Unless otherwise provided by law, any person may waive the advantage of a law intended for his benefit. (Civ. Code, § 3513.) Waiver is the voluntary relinquishment of a known right. [Citation.] To constitute a waiver, it is essential that there be an existing right, benefit, or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished. The doctrine of waiver is generally applicable to all the rights and privileges to which a person is legally entitled, including those conferred by statute unless otherwise prohibited by specific statutory provisions. [Citations.] . . . ."

On the other hand, as the court noted in *Covino v. Governing Board* (1977) 76 Cal.App.3d 314, 322, in holding that a teacher could not waive his status as a probationary teacher in order to be employed as a temporary, full-time teacher:

> "Appellant's claim that despite the provisions of the code he should be permitted to waive his right to the probationary status may not be accepted for two major reasons. One, while as a general rule anyone may waive the advantage of law intended solely for his benefit, a law established for a public reason cannot be waived or circumvented by a private act or agreement (Civ. Code, § 3513; [citations].) Teachers are public employees and their tenure rights elaborately regulated by the Education Code reflect the public policy of the state. As stated in *De Haviland v. Warner Bros. Pictures* (1944) 67 Cal.App.2d 225, 235: `Legislation which is enacted with the object or promoting the welfare of large classes of workers whose personal services constitute their means of livelihood and which is calculated to confer direct or indirect benefits upon the people as a whole must be presumed to have been enacted for a public reason and as an expression of public policy in the field to which the legislation relates.' . . . ."

Consequently, a statutory right may be relinquished if there is knowledge of the right, the waiver is intentional, and the right is intended solely for that individual's benefit and is not intended for a public purpose.

A landowner signing the protest waiver in question would clearly have "knowledge" of the right, but would the right be intended solely for his or her benefit? We believe that it would. In *Northridge Park Water District v. McDonell* (1958) 159 Cal.App.2d 556, the question was whether a water district could adjourn a hearing required by law based upon the landowners' waivers of the statutory requirements. The court concluded:

> ". . . No such adjournment was ordered, probably because each petition contained an express consent that the lands be included in Improvement District Number 1 and express waiver of the code requirement of adjournment. Section 32472 of the Water Code provides that if, during adjournment, protests are filed to inclusion, under the prescribed conditions, by a majority in number of the holders of title to the land proposed to be included, representing a majority in acreage of said land, the board shall dismiss the petition; otherwise the land shall be included subject to the conditions. It is apparent that the adjournment provision is to enable petitioners for inclusion to object to the proposed

> conditions and for no other purpose. This statutory provision being for their benefit, they may waive it, as they did. . . ." (*Id*., at p. 562.)

Similarly, in *Allen v. Hance* (1911) 161 Cal. 189, the court held that a landowner could waive his right to contest the validity of a street improvement proceeding. Pursuant to Civil Code section 3513, therefore, we conclude that a landowner may waive his or her right to protest a future annexation of the property by a city furnishing sewer services to the property.

As for any future owners of the property and long-term lessees, section 1589 of the Civil Code provides:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Here, the subsequent purchasers and long-term lessees would clearly "accept" the benefits of the original agreement, i.e., the sewer services, but would they know or ought to know of the agreement? We believe that the answer may be found in the recording laws (Civ. Code, §§ 1169-1220), which would give them constructive knowledge of the prior landowner's waiver. The recording of a conveyance of real property provides constructive notice of its contents to subsequent purchasers, among others. Civil Code section 1213 provides:

> "Every conveyance of real property or an estate for years therein acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees . . . ."

A "conveyance" of real property is defined in Civil Code section 1215 as follows:

> "The term `conveyance' as used in Sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills."

In *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1020, the court explained:

> "The principle is well settled that once an instrument that affects real property is recorded, all persons who later acquire any interest in the

> property are conclusively presumed to have constructive notice of the contents of the recorded document. (Civ. Code, §§ 1213-1215, 2934, 2952; *Dexter v. Pierson* (1931) 214 Cal. 247 . . . ."

The recording laws apply equally to long-term lessees as they do to subsequent purchasers. (See Civ. Code, §§ 1214-1215; *Commercial Bank v. Pritchard* (1899) 126 Cal. 600, 603; *Garber v. Gianella* (1893) 98 Cal. 527, 529; *Dean v. Brower* (1931) 119 Cal.App. 412, 415.)

In an analogous case, *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal.App.2d 666, the court applied section 1589 of the Civil Code to "successors" of a contract under which a water company agreed to supply water to a development. While "privity of contract" was found to be lacking, the court held that the successors were subject to the burdens of the original contract under "privity by estoppel." The court concluded:

> "A fitting criterion of privity is supplied by a concept appearing elsewhere in this case. The concept is that expressed in Civil Code section 1589, *supra*. Applied to the facts, it would be expressed as follows: Voluntary and knowing acceptance of contract benefits among the successive subdividers created a chain of privity without regard to express assignments or formal assumptions of contract burdens. At the time of the December 1956 water service agreement the ostensible contracting party (Rosemont Development Co., the limited partnership) had already left the scene. Immediate beneficiary of Price's nondisclosure was Wunderlich, the new operator of the Rosemont development. The evidence is not clear whether Wunderlich was the active developer in December 1956 or whether he had already turned the operation over to Price and to his son-in-law, Reynolds. Either before December or within a few months thereafter, the Price & Reynolds partnership became the active developer. For several years following, the partnership used the water service agreement as an important instrumentality in the continued expansion of the Rosemont development. When the two partners incorporated, the corporation continued to receive the benefits of the Citizens Suburban water supply in the developed units of the subdivision. Price, a pervading figure in all these entrepreneurships, was perfectly aware of the methods he had used to lure Citizens Suburban into its commitments. Knowing acceptance of the contract benefits by each of the successive developers creates privity which estops the present developers from asserting that they are not `successors' of the original contracting party." (*Id.* at p. 681.)

In *Haas v. Palace Hotel Co. of S.F.* (1950) 101 Cal.App.2d 108, 117, the court stated: "While a person may accept the benefits of a contract made for his benefit, such acceptance implies an acceptance of the burdens necessarily connected with the contract."

Accordingly, we conclude that subsequent purchasers and long-term lessees of the property would be subject to the burdens of the original agreement, that is, waiver of the right to protest any annexation proposal. Pursuant to section 1589 of the Civil Code, a privity of contract by estoppel would arise.[3]

Unlike subsequent owners and long-term lessees, "renters" (persons with leases of less than a year, usually month to month tenants) would not have constructive notice of the original owner's agreement under the terms of Civil Code sections 1214 and 1589. Accordingly, if renters are to be found subject to a landowner's waiver, actual knowledge of the agreement would be required. If they do have such knowledge,[4] they would, by the acceptance of the benefits of the sewer services and privity of contract by estoppel, be subject to the original waiver. (*Citizens Suburban Co. v. Rosemont Dev. Co., supra,* 244 Cal.App.2d 666; *Haas v. Palace Hotel Co. of S.F.*, *supra,* 101 Cal.App.2d 108.)

In answer to the question presented, therefore, we conclude that a city may enforce an annexation agreement executed by the city and a landowner of unincorporated property which requires the landowner to waive his or her right to protest annexation of the property to the city when such becomes legally permissible, with the waiver binding upon the landowner, future landowners and long-term lessees of the property, but not other persons residing on the property unless they have actual knowledge of the agreement.

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[3] Due to our analysis of Civil Code section 1589 and the conclusion that we reach, we need not determine the effect of the "run with the land" requirement of the particular waiver agreement in question.

[4] For example, the terms of the waiver could be placed in the rental agreements.