
**FRESNO LOCAL AGENCY FORMATION COMMISSION (LAFCo)
EXECUTIVE OFFICER'S REPORT**

AGENDA ITEM No. 9-A

DATE: May 13, 2009

TO: Fresno Local Agency Formation Commission

FROM: Rick Ballantyne, Executive Officer
Kenneth Price, LAFCo Legal Counsel

SUBJECT: **Consider Request – Reconsideration of Commission Approval of “Belmont-Sunnyside No. 3 (Island Annexation) Reorganization.”** The Fresno LAFCo Executive Officer has received a written request from the Easterby Kings Canyon Home Owners Association for reconsideration of Resolution No. RO-08-14A approving the reorganization. The Homeowners Association requests that the resolution be amended to require, as a condition of approval, a vote of approval under California Constitution Article XIII (Prop. 218) **(LAFCo File No. RO-08-14)**.

Petitioner: Easterby Kings Canyon Home Owners Association, Terry Slaven, President

Background:

On February 4, 2009, the Commission heard the “Belmont-Sunnyside No. 3 (Island Annexation) Reorganization”—a reorganization proposed by the City of Fresno to annex 94 acres to the City of Fresno and detach the same area from the Fresno County Fire Protection District, the Kings River Conservation District, and County Service Area No. 7. The territory is generally located at the southwest corner of E. Belmont and N. Sunnyside Avenues (see location map).

The affected territory is an unincorporated island surrounded by the City of Fresno and is included within the City of Fresno’s “Island Annexation” Program. State law allows for annexations involving unincorporated islands or substantially surrounded unincorporated areas less than 150 acres in size to differ from other annexations in that the Commission shall approve such "island annexation" proposals and waive protest proceedings provided that the Commission can make certain factual findings specified in Government Code Section 56375.3.

At the conclusion of its public hearing, the Commission continued the proposal in order to allow City and County staff and the Easterby Kings Canyon Home Owners Association’s representative (Dr. Terry Slaven) to meet to discuss unresolved issues. This meeting occurred on February 13, 2009, and included discussions on such issues as keeping of horses within the affected territory, whether the City would install sidewalks within the affected territory, and the disposition of County-owned land that was previously occupied by a County-operated sewerage plant. Staff also inquired as to whether the neighborhood took issue with any of the stated “Island Annexation” criteria identified in Government Code Section 56375.3.

During its March 11, 2009 Commission hearing, the Commissioners determined that they could make the findings specified in Government Code Section 56375.3, approved the reorganization, and waived protest proceedings.

On March 24, 2009, the Easterby Kings Canyon Home Owners Association filed a formal request to have the Commission reconsider its resolution of approval (see attached letter).

Proposal:

The Easterby Kings Canyon Home Owners Association has requested that the Commission reconsider its resolution approving the "Belmont-Sunnyside No. 3 (Island Annexation) Reorganization." The Association believes that the annexation is a violation of property owners' rights established by Proposition 218, which established that local jurisdictions cannot impose additional property tax assessments or fees without voter approval. The assessment referenced by the Association is the City's "police and fire pension override," which adds an additional \$32.44 in property taxes per \$100,000 of assessed value for properties located within the City of Fresno. The fee referenced by the Home Owners Association is the City's "Community Sanitation" fee which totals \$6.23 per month and funds litter control; the City's annual "Operation Clean Up" curbside pickup; and once-a-month street sweeping.

In support of this reconsideration request, the Association states: "LAFCo should require the City to proceed to the Prop 218 process as a (condition) of the resolution granting annexation. The condition should require an affirmative vote by the property owners before annexation can be completed. The Howard Jarvis Taxpayers' Association has also gone on record supporting the Homeowners request (see attached letter from Statewide Legal Affairs Director Timothy Bittle).

The City of Fresno has notified the Commission that it is supportive of the request for reconsideration. It has further asked that the Commission consider continuing the request for reconsideration until its June 10, 2009, meeting (see attached letter dated May 6, 2009 from Fresno Assistant City Manager Bruce Rudd) so that it may research and consider the matter.

Discussion/Staff Analysis:

Government Code section 56895(a) states that "any person or affected agency may file a written request with the executive officer requesting amendments to or reconsideration of the resolution. The request shall state the specific modification to the resolution being requested and shall state what new or different facts that could not have been presented previously are claimed to warrant reconsideration."

Furthermore, Government Code Section 56895(f) states that "the Commission shall consider the request and receive any oral or written testimony. The consideration may be continued from time to time but not to exceed 35 days from the date specified in the notice. . . At the conclusion of its consideration, the Commission may approve or disapprove with or without amendment, wholly, partially, or conditionally, the request."

Staff believes that the request for reconsideration does meet the statutory requirements for reconsideration because it (i) states the specific modification to the resolution being requested and (ii) describes "new or different facts that could not have been presented previously."

Specifically, Dr. Slaven's letter requests that the "resolution be amended to require that the property owners be afforded their rights under Cal. Const. Art. XIII when they will be subject [sic] any new or additional fees or taxes as provided for by Prop. 218.

Secondly, although the Commission considered statements by Dr. Slaven and other representatives of the Home Owners Association, as well as City officials, that there would be tax and fee increases as a result of the annexation, it appears that neither was aware, or could have been aware (because they did not receive notice from the Howard Jarvis Taxpayer's Association), that a Proposition 218 vote may be legally required as a condition for approval.

The Commission did not have notice of such an assertion until it received the March 23, 2009, letter from Mr. Biddle, Legal Affairs Director of the Howard Jarvis Taxpayers Association.

The island annexation provision in LAFCo law requires that the Commission approve an island annexation application if it makes certain factual findings. However, the Commission may impose a variety of conditions on the island application proposals, including a condition that a Proposition 218 vote occur prior to recordation.

If a court determines that the imposition of a Proposition 218 vote was required because voters did not have a protest right, it is conceivable that the court could possibly (i) invalidate the application; or (ii) allow the annexation to be recorded but not permit the City to impose any new taxes, fees, or assessments on the property without a Proposition 218 vote. If the territory is annexed, but landowners refuse to agree to increased taxes and assessments, it is unclear as to what services the City could provide the territory. As the City points out, it would "raise significant implications for the City's ability to provide essential services to its residents." Without such information, it may have been difficult for the Commission to make the finding, required under Government Code section 56375.3, as to whether or not the territory would benefit from the annexation.



Recommended Action:

Grant reconsideration.

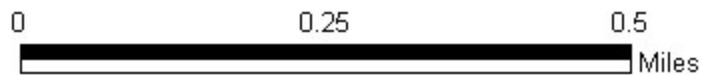
EXHIBIT "A"



Legend

-  City Limits
-  Affected Territory

City of Fresno "Belmont-Sunnyside
No. 3 Reorganization" (Island Annexation)
LAFCo File No. RO-08-14





March 24, 2009

EASTERBY KINGS CANYON HOME OWNERS ASSOCIATION

Mr. Rick Ballantyne, Executive Officer
Fresno Local Agency Formation Commission
2115 Kern Street, Suite 310
Fresno, CA 93721



Re: Request to Reconsider Belmont-Sunnyside No. 3 Reorganization (File No. RO-08-14)

Dear Mr. Ballantyne:

Pursuant to Cal. Gov. Cd. § 56895 I am requesting the reconsideration of the resolution authorizing the City of Fresno to proceed with the island annexation referenced above.

I request that the resolution be amended to require the property owners be afforded their rights under Cal. Constitution Art. XIII when they will be subject any new or additional fees or taxes as provided for by Prop 218.

Because there will be new and additional fees and taxes - not allowing us to vote violates our rights under Art. XIII (Prop 218.)

See the application by the City of Fresno:

8. Costs and Other Changes Affecting Residents or Landowners:

General bonded indebtedness of affected agencies:

City of Fresno has adopted a tax override. When annexed, this property would be subject to any existing property tax override. Residents will have to use and pay for City of Fresno solid waste services within 5 years*

***See City of Fresno v. Superior Court (1984) 56 Cal. App. 3d 1137**

Further, a new and additional fee for Community Sanitation will be charged to each property that is not charged now.

I understand under Gov. Cd. § 56107 that a LAFCO resolution can not be invalidated when it “. . . does not adversely and substantially affect the rights of any person . . . “ However, clearly here the property owners rights are being adversely and substantially affected!

I request this reconsideration on the fact that there was never any analysis or discussion by the City or LAFCO as to this conflict between the loss of our voting rights under Cal. Gov Cd. § 56375.3 and those provided under Article XIII of the California Constitution. We now have been made aware of those rights after the LAFCO hearing process.

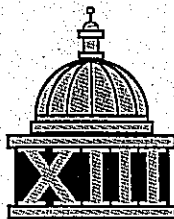
Since LAFCO is prohibited from allowing us to have our protest hearing or vote under Gov. Cd. § 56375.3 it should require the city to proceed to the Prop 218 process as a conduction of the resolution granting annexation.

The condition should require an affirmative vote by the property owners before annexation can be completed.
Further, because of the nature for this reconsideration we ask you to wave the \$500 application fee.

Sincerely,

Terry Slaven, President
Easterby Kings Canyon Homeowners Association.

HOWARD JARVIS, Founder (1903-1986)
JON COUPAL, President
TREVOR GRIMM, General Counsel
TIMOTHY BITTLE, Director of Legal Affairs



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HOWARD JARVIS TAXPAYERS ASSOCIATION

March 23, 2009

Victor Lopez
Fresno Local Agency Formation Commission
2115 Kern Street, Suite 310
Fresno, CA 93721

Re: Request to Reconsider Belmont-Sunnyside No. 3 Reorganization (File No. RO-08-14)

Dear Chairman Lopez,

Howard Jarvis Taxpayers Association supports the request asking Fresno LAFCo to reconsider its approval of the Belmont-Sunnyside No. 3 Reorganization (File No. RO-08-14).

While LAFCo cannot disapprove a qualified island annexation, it seems able to *condition* its approval under Gov. Code § 56375, which empowers LAFCo to “review and approve ... with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization.”

That LAFCo may exercise its authority under section 56375 to condition its approval is further supported by the fact that the statute requiring approval of qualified island annexations, Gov. Code § 56375.3, expressly provides that its authorization is “[i]n addition to those powers enumerated in Section 56375,” not in lieu of them.

The constitutional rights of property owners in the territory to be annexed may be violated if the Fresno LAFCo does not condition its approval of the proposed annexation to require some sort of election regarding city fees and taxes the City of Fresno plans to collect from these parcels after the annexation.

The Attorney General has twice opined that the election to approve annexation can also serve as the election to approve taxes and fees imposed by the annexing agency. See 82 Ops.Cal.Atty.Gen. 180 (1999) and 89 Ops.Cal.Atty.Gen. 173 (2006). In both opinions, the AG acknowledged that Proposition 218 gives the owners of property to be annexed the right to vote before a new tax or fee may be imposed on them, but found that the annexation election provides all the due process required by 218’s voter approval requirement.

The implication seems to be that if *no* election is held for annexation, then Proposition 218’s voter approval requirement is *not* satisfied.

Fresno LAFCo
March 23, 2009
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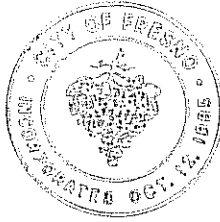
While we have not surveyed all of the fees and taxes that are collected by the City but not the County, we have members who own property within the territory to be annexed, who believe that their right to vote on new fees and taxes will be violated unless an election is held.

Please give their right to vote on new fees and taxes serious consideration when acting on the request for reconsideration of the Belmont-Sunnyside No. 3 Reorganization. Thank you.

Sincerely,



Timothy A. Bittle
Director of Legal Affairs



Andrew T. Souza
City Manager

May 6, 2009

Mr. Rick Ballantyne, Executive Officer
Fresno Local Agency Formation Commission
2115 Kern Street, Suite 310
Fresno, CA 93721

Dear Mr. Ballantyne:

SUBJECT: Support for Reconsideration and Request for Continuance on Belmont-Sunnyside #3

This is in response to the March 25, 2009, request by the Easterby Kings Canyon Home Owners Association (Easterby HOA) for a hearing to reconsider the Commission's approval of the Belmont-Sunnyside #3 Island Annexation. Both the Easterby HOA and the Howard Jarvis Taxpayers Association (HJTA) are requesting the Commission to grant a rehearing to add a condition to the annexation that the City be required to conduct a Proposition 218 hearing upon annexation of the subject territory. The Easterby HOA and HJTA take the position that a Prop. 218 hearing is necessary for the City to be able to collect fees and taxes from the newly annexed properties. These issues raise significant implications for the City's ability to provide essential services to its residents.

The City is in support of the rehearing and believes it meets the requirements pursuant to Government Code section 56895 for new and different facts. Neither LAFCo nor the City were aware prior to the March 25, 2009, letter of any claim related to this island annexation that would potentially threaten the City's ability to collect necessary revenue to provide basic public health, safety and welfare services to the new City residents.

If Easterby HOA and HJTA claims were to prevail there is an argument (without discussing its merits) that Prop. 218 would effectively nullify the island annexation program. Additionally, if their claims were to prevail there is an argument that there would not be a "benefit" under section 56735.3(b)(6) if the City is unable to fund services to the newly incorporated territory. The Commission has authority to condition island annexations. The Commission did not consider whether it was appropriate to condition the annexation on compliance with Proposition 218. Finally, the City, without this information did not consider and opine to the Commission whether, based on the Proposition 218 claim, the City would like to seek a separate tax sharing agreement with the County under section 56735.3(b)(3)(D).

Based upon the above, the City is in support of the reconsideration. Finally, if the Commission should grant the reconsideration, the City would like additional time to thoroughly research and consider these issues to inform the City's position on the reconsideration. As such, the City respectfully requests a continuance of a hearing on the reconsideration pursuant to subsection (f) of Government Code section 56895 for thirty-five (35) days. We appreciate you forwarding this request to the Commission.

Please contact Planning and Development Interim Director Keith Bergthold if you have any further questions or concerns at (559) 621-8049.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Rudd". The signature is fluid and cursive, written in a professional style.

Bruce A. Rudd
Assistant City Manager

CC: Keith Bergthold, Interim Director, Planning and Development Department
Kathryn Phelan, Senior Deputy City Attorney