



1-1-1963

## Recent Legislation

Santa Clara Law Review

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

### Recommended Citation

Santa Clara Law Review, *Recent Legislation*, 4 SANTA CLARA LAWYER 125 (1963).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol4/iss1/10>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# RECENT LEGISLATION

## NEW CONTROL OVER MUNICIPAL FORMATION AND ANNEXATION†

California's post World War II population growth has resulted in a spectacular increase in the number of cities and special districts which has alarmed political scientists and professional planners.<sup>1</sup> The problem lies not in the number of new cities and districts or their size, but with the nature of these service-rendering, taxing jurisdictions and their overlapping areas of government.<sup>2</sup> A basic objection is that each is created to serve a single municipal purpose. As a result, the taxpayer might well be subject to a dozen or more taxing authorities.<sup>3</sup> Some argue that under a more favorable system he would be responsible to but one taxing authority.

In his charge to the Governor's Commission on Metropolitan Area Problems<sup>4</sup> on March 26, 1959, Governor Edmund G. Brown asked that the Commission study and recommend solutions to the

---

† The author wishes to express his appreciation to Richard Carpenter, Executive Director and General Counsel, League of California Cities, Sherrill D. Luke, Secretary for Urban Affairs to Governor Edmund G. Brown, William S. Siegel, Assistant County Counsel, Santa Clara County, George W. Wakefield, Chief Assistant County Counsel, Los Angeles County, and Thomas H. Willoughby, Committee Consultant, Assembly Committee on Municipal and County Government, California Legislature for their assistance in the preparation of this article. However, the author takes full responsibility for everything in this article.

---

1

	1940	1960
Population (millions)	6.5	15.7
Cities	284	368
Special Districts	4,400	4,800*

\* Over 1,500 elementary school districts ceased to exist during this period. An increase in this figure by that amount would reflect a more accurate index of the growth of special districts.

<sup>2</sup> See CROUCH, MCHENRY, BOLLENS & SCOTT, CALIFORNIA GOVERNMENT AND POLITICS (2d ed. 1961); METROPOLITAN AREA PROBLEMS (Scott ed. 1958); REPORT OF THE GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS (1960); WOOD & HELLER, CALIFORNIA GOING, GOING . . . (1962); WOOD & HELLER, THE PHANTOM CITIES OF CALIFORNIA (1963); Scott & Corzine, Special Districts in the San Francisco Bay Area: Some Problems and Issues (October 1963).

<sup>3</sup> Scott & Corzine, Special Districts in the San Francisco Bay Area: Some Problems and Issues, p. 5 (October 1963).

<sup>4</sup> REPORT OF THE GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, p. 27 (1960). [Hereinafter cited as GOVERNOR'S COMMISSION.]

questions, "Do we have too many overlapping jurisdictions?" and "What is the danger point in proliferation of local government?" In its report the Commission stated:

Present law for annexation, incorporation, and the formation of special districts has not sufficiently provided for the orderly development of local government structure. The law has permitted annexations and incorporations which should not have occurred. It has made possible the blocking of other incorporation and annexation proposals which should have occurred.<sup>5</sup>

The Commission recommended that the state establish a "State Metropolitan Areas Commission." One of the proposed duties of the Commission was to: "exercise quasi-judicial powers in the review and approval of proposals for the incorporations of, or annexations to, cities, and for the creation of, [or] annexations to . . . special districts."<sup>6</sup>

The League of California Cities and the County Supervisors Association of California were represented on the Commission and generally concurred with its broad recommendations. But the League contended that the state agency should exercise authority only in annexations proposed in metropolitan areas.<sup>7</sup> The Supervisors Association insisted that the state agency have only advisory duties with respect to annexations and formations.<sup>8</sup> Both dissents were made a part of the official report submitted to the Governor in January 1960.

In his 1963 inaugural address the Governor urged enactment of laws "to end the haphazard formation of new cities and service districts."<sup>9</sup> Subsequently he submitted to the Legislature two bills: Assembly Bill 1662 dealing with the formation of new cities and special districts, and Senate Bill 861 designed to control the annexation of territory to existing cities and districts.

In its original form Assembly Bill 1662 (hereinafter referred to as the "formation bill") called for the establishment of a nine-member commission composed of three state, three county and three city officials. This state commission would have exercised complete control over formations of cities and districts throughout the state. Senate Bill 861 (hereinafter referred to as the "annexation bill") created in each county a five-member commission consisting of two county officials, two city officials and one member of the general public.

---

<sup>5</sup> *Id.* at 17.

<sup>6</sup> *Id.* at 17, 20.

<sup>7</sup> *Id.* at 23.

<sup>8</sup> *Id.* at 25.

<sup>9</sup> Senate Journal, January 7, 1963, p. 50.

An immediate objection to the formation bill was that it would create a state commission which would be contrary to "home rule" principles. The charge was made by the County Supervisors Association at the Municipal and County Government Committee's first hearing of the bill. After the hearing, the author of the bill,<sup>10</sup> the Governor's office, and the League of California Cities agreed to a suggestion made by the Supervisors Association that the formation bill create a five-member commission corresponding to that provided in the annexation bill.<sup>11</sup>

The bills were considered by the Legislature at a time when the cities of the state were attempting to have legislation enacted that would facilitate annexation, rather than make it more difficult.<sup>12</sup> Counties were opposing any further weakening of their control; privately-owned utilities were resisting any legislation that would facilitate either annexations or incorporations; and farm groups were joining the utilities in their efforts.<sup>13</sup>

With the assistance of the League of California Cities and the County Supervisors Association,<sup>14</sup> both bills were enacted despite attempts to make the commission an advisory body only<sup>15</sup> and efforts to make the legislation permissive instead of mandatory.<sup>16</sup> The annexation bill provided that the law would become operative only if the formation bill was enacted. It also provided that if the formation commission was created, no annexation commission would be established. The formation commission would be the only commission and have all the powers enumerated in

---

<sup>10</sup> Assemblyman John T. Knox, Chairman Assembly Committee on Municipal and County Government, California Legislature.

<sup>11</sup> Cal. Stats. 1963, ch. 1808, § 1, p. 2707 (CAL. GOV. CODE § 54776); Cal. Stats. 1963, ch. 1810, § 1, p. 2713 (CAL. GOV. CODE § 54753). [Hereinafter only the Government Code sections enacted by these laws will be cited.]

<sup>12</sup> Assembly bills 2015, 2017, and 2018 were introduced by Assemblyman Knox and supported by the League of California Cities as measures intended to make annexations more easily accomplished. [None was enacted.]

<sup>13</sup> When a municipality having its own utility service annexes land previously served by the privately-owned utility company, the result is a loss of revenue to the privately-owned utility. Farmers generally believe themselves more secure when not subject to municipal control and they contend that the added municipal taxes deprives them of the opportunity to continue farming.

<sup>14</sup> It is interesting to speculate on whether the cities and the counties would have been as willing to cooperate with the Governor's program had it not been for their urgent need for the additional gas tax funds which would be made available if S.B. 344 was enacted. The Governor had indicated he would veto any bill that increased taxes. S.B. 344 increased taxes on gasoline. This bill was enacted into law as Cal. Stats. 1963, ch. 1852.

<sup>15</sup> Assembly Journal June 6, 1963, pp. 4641-42.

<sup>16</sup> Senate Journal May 13, 1963, pp. 2512-13.

both bills.<sup>17</sup> The formation bill carried similar language.<sup>18</sup> Enactment of both bills thus resulted in a single commission.

That there were two interlocking bills caused occasional ambiguity and confusion and will possibly lead to future litigation. This article will point out problem areas and attempt to foresee the results of court interpretations or future clarifying legislation.

### JURISDICTIONAL MATTERS

The formation law specifically excludes assessment-type districts from its jurisdiction,<sup>19</sup> while the annexation law fails to do so.<sup>20</sup> Does this indicate that assessment-type districts are within the commission's jurisdiction in matters of annexation? Probably not. The intent of both laws was to control districts other than assessment-type districts; assessment, improvement, or maintenance-type districts were not the target of the legislation. These districts are not governed by independent boards with independent taxing powers. Generally they are governed by city councils or boards of supervisors, thus avoiding the "overlapping"<sup>21</sup> structure common among more autonomous units.

It was generally agreed that even before amendment the definition of "special district" probably excluded this type district.<sup>22</sup>

---

<sup>17</sup> Cal. Stats. 1963, ch. 1810, § 2, p. 2711. "This act shall become operative only if Assembly Bill No. 1662 is enacted at the 1963 Regular Session of the Legislature and in such case at the same time as Assembly Bill No. 1662 takes effect. If this bill and Assembly Bill No. 1662 are both enacted at the 1963 Regular Session of the Legislature, no local agency annexation commission shall be formed pursuant to Chapter 6.5 (commencing with Section 54750) of Part 1, Division 2, Title 5 of the Government Code, but a local agency formation commission shall be formed in each county pursuant to Chapter 6.6 (commencing with Section 54775) of said part. The local agency formation commission shall have all the powers vested in the commission by said Chapter 6.6 and, in addition, shall, in each county, notwithstanding Government Code Section 54751, have all of the powers vested by said Chapter 6.5 in a local agency annexation commission and Chapter 6.5 shall apply in each county in the State."

<sup>18</sup> Cal. Stats. 1963, ch. 1808, § 2, p. 2716. "If this bill and Senate Bill No. 861 are both enacted at the 1963 Regular Session of the Legislature, a local agency formation commission shall be formed in each county pursuant to Chapter 6.6 (commencing with Section 54775) of Part 1, Division 2, Title 5 of the Government Code and no local agency annexation commission shall be formed in any county pursuant to Chapter 6.5 (commencing with Section 54750) of said part. In such case, the local agency formation commission shall have all of the powers vested in the commission by said Chapter 6.6 and, in addition, shall in each county, notwithstanding Government Code Section 54751, have all the powers vested by said Chapter 6.5 in a local agency annexation commission and said Chapter 6.5 shall apply in every county in the State."

<sup>19</sup> CAL. GOV. CODE § 54775 (b).

<sup>20</sup> CAL. GOV. CODE § 54750 (b).

<sup>21</sup> Governor's inaugural address, Senate Journal January 7, 1963, p. 50.

<sup>22</sup> The U.S. Bureau of the Census does not count as a "special district" one

The formation bill definition was modified to eliminate any doubt that this was so.<sup>23</sup> This change in definition was made at the request of the bonding counsels of the state. The same change probably would have been made in the annexation bill but for political considerations which made an attempt to amend inadvisable at that time.<sup>24</sup>

While this matter may be the subject of future difficulties, it is probable that the definition of "special districts" embodied in the more inclusive formation law would apply to both laws. Thus the assessment-type district would be exempt from jurisdiction of the commission, not only when in the process of being created but also when attempting to annex.

### MEMBERSHIP

The commission is to be composed of two members "representing the county," two members "representing the cities," and one member "representing the general public."<sup>25</sup> Both laws provide which county officials and city officials may be members. Neither law describes who may be the "general public" member.<sup>26</sup> It was the hope of the drafters of the legislation that the public member would have no direct connection with either city or county government.<sup>27</sup> However, it is arguable that the language would permit selection of a city or county official or employee. As a practical matter, it is doubtful that the city and county officials on the commission would select as a "general public" member anyone having a direct connection with city or county. Problems might arise if they were to choose an appointed, non-salaried library or park commissioner, or the like. It is probable, though, that this is just the interested, responsible kind of individual whom the Legislature intended would represent the "general public."

---

that is controlled by a city or county governing body, ex officio, or which otherwise does not possess substantial autonomy.

<sup>23</sup> Letter From Thomas H. Willoughby to SANTA CLARA LAWYER, October 14, 1963.

<sup>24</sup> The firm of O'Melveny & Myers, representing the state's bonding counsels, suggested the amendment of the formation bill. In a letter to Sherrill D. Luke, the Governor's Secretary for Urban Affairs, the firm of Orrick, Dahlquist, Herrington & Sutcliffe suggested a similar change in the annexation bill. This letter, dated June 11, 1963 was written after the bill had passed the Assembly (June 7, 1963).

<sup>25</sup> CAL. GOV. CODE § 54776; CAL. GOV. CODE § 54753.

<sup>26</sup> CAL. GOV. CODE § 54775.1; CAL. GOV. CODE § 54750.1. Both limit city officers to mean the mayor or a member of a city council or legislative body of the city and county officers to include: (a) a member of the board of supervisors; (b) the county clerk; (c) the county auditor or county controller; (d) the county assessor; (e) the county surveyor or county engineer; or (f) the county registrar of voters.

<sup>27</sup> Letter from Thomas H. Willoughby *op. cit. supra* at 24.

The legislation expressly permits city and county officials to serve while holding their other offices.<sup>28</sup> This overcomes the common law prohibition against incompatible offices, but still does not allow officials to serve who are prohibited by city or county charter from so doing.

Nothing expressly prohibits the selection of two representatives from the same city. But the intent that this should not be done is clear. Since such representation would have to meet with the approval of the other cities in the county, there is little likelihood that the situation will ever occur.

Another matter concerning membership of the commission that might need clarification is the subject of the alternate member. The annexation law provides for the appointment of an alternate "city member" who is to serve when the commission is considering a proposal for the annexation of territory to a city of which one of the regular "city members" is an official. He is to replace the "city member" who is disqualified from participating in the proceedings concerning the proposal.<sup>29</sup>

This disqualification of an interested party was considered essential to avoid possible conflicts of interest. No corresponding provision exists in the formation law, however. The question then arises as to whether a "city member" should disqualify himself from participating in proceedings involving incorporation of a city near his own city, in territory that his city has unofficially delineated as a future area which it intends to annex. Surely a conflict of interest will exist in this situation as clearly as it will in the case of annexation.

One could conclude that, since the disqualification requirement was not extended to a formation matter, none should be assumed; the conflict would be in sharpest focus in annexation, and only in that situation should a disqualification and substitution be made. The opposing argument is that one who would be unfairly motivated in the former situation would be similarly motivated in the latter.

It is clear that the alternate member must replace the "city member" when a proper annexation matter arises. Whether a similar disqualification occurs in an incorporation is doubtful. If in "leaning over backwards" the commission requires an alternate to serve during an incorporation proceeding of the type described,

---

<sup>28</sup> CAL. GOV. CODE § 54776.3; CAL. GOV. CODE § 54753.05.

<sup>29</sup> CAL. GOV. CODE § 54759.

will its acts be subject to challenge? What if the alternate merely replaces an absent member when neither of the two above situations exists? Might not such a substitution be said to subvert legislative intent when it results in the temporary majority of three "city members"?

Despite possible conflicts of interest not provided for in the annexation law, it would appear that the prudent course would require that the alternate act only as specifically directed. The usual presumption of good-faith will apply to the actions of the commission. One might even wonder why an alternate was provided for in any event.

### WHOM DOES THE COMMISSION REPRESENT?

Although the language of the law refers to commission members as "representing" the city, county, or general public, the phrase was intended only to refer to the selection process. The intent may have been to create a commission of balanced interests and viewpoints. But it is likely that political considerations dictated the composition of the commission. No doubt exists that the objective of the commission is to provide for orderly growth. If a self-serving attitude were to be adopted by the city and county members, the single "public" representative would have effective control. It is anticipated that the commissions will act as representatives of the entire community.

### A STATE AGENCY?

Whether the commission is an agency of the state or of the particular county in which it serves is an interesting question not conclusively resolved by the language of the law.<sup>30</sup> Since the commission is staffed and financially supported by the county, it may be argued that it is a county agency.<sup>31</sup> But the commission was created by the state, is not subject to control by the board of supervisors, and cannot be disbanded by them. Precedent indicates that the commission will be a county responsibility but a state agency, since the legislative acts that created it are similar to acts that created other agencies declared to be state, rather than local, agencies. Whenever an agency is found to be of "state-wide" concern, it is invariably determined that the body is a state

---

<sup>30</sup> *But cf.* CAL. GOV. CODE § 54776 and CAL. GOV. CODE § 54752.

<sup>31</sup> CAL. GOV. CODE § 54788, 90, 91; CAL. GOV. CODE § 54769-71.

agency.<sup>82</sup> Considerable evidence exists that the problems to be dealt with by the commission are of statewide concern.<sup>83</sup>

Although no mention is made of the commission's capacity to sue and be sued, the powers may be implied. As an agency of the state the commission would seem to have the privilege of calling upon the Attorney General for legal opinions. The laws appear to give the commission access to the services of the county counsel and to allow for the employment of independent counsel.<sup>84</sup> As a practical matter it is generally expected that the commission will be served by the county counsel.

The legislation provides that expenses shall be paid by the county, yet it is clear that the commission is not responsible to the board of supervisors. A contest could arise between the commission and the board of supervisors, if the board were to refuse to approve a commission expenditure. The question of county liability would probably turn on a determination of whether the expenditure was "usual and necessary" as required by the laws.

#### QUORUM

While no mention of quorum is made in either law, ordinary rules would appear to apply.<sup>85</sup> Thus a quorum of three of the five members will have to be present for the transaction of business.<sup>86</sup> It has been suggested that no action be taken without the affirmative vote of at least three members. The commission probably could include such a provision in its by-laws.<sup>87</sup>

#### POWER OF ENFORCEMENT

No means of enforcing commission decisions is provided. As a practical matter the omission would appear to be of little importance. An annexation of territory without commission approval would not be a legal annexation.<sup>88</sup> Therefore, the pseudo-annexed area would not be subject to taxation, since no enforceable liens could be placed on the property. For similar reasons incorporation would not be possible without commission approval.

---

<sup>82</sup> Cf. *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950); *Dineen v. City & County of San Francisco*, 38 Cal. App. 2d 486, 101 P.2d 736 (1940).

<sup>83</sup> See Governor's Commission *op. cit. supra* at 3.

<sup>84</sup> CAL. GOV. CODE § 54788, 90, 91; CAL. GOV. CODE § 54769-71.

<sup>85</sup> CAL. CODE CIV. PROC. § 15.

<sup>86</sup> 28 OPS. CAL. ATT'Y GEN. 259; 28 OPS. CAL. ATT'Y GEN. 344.

<sup>87</sup> Cf. CAL. BUS. & PROF. CODE § 18622.

<sup>88</sup> CAL. GOV. CODE § 54787; CAL. GOV. CODE § 54766.

## NOTICE BY NEWSPAPER ADVERTISEMENT

Public notice by newspaper advertisement is required where new districts or cities are being created,<sup>39</sup> but is not required in an annexation proceeding.<sup>40</sup> It is probable that political considerations alone precluded amending the annexation to require such notice. The amendment to the formation bill requiring newspaper notice was passed on June 12, 1963.<sup>41</sup> Since the annexation bill had cleared the assembly on June 7, 1963, any attempt to ammend it was likely to jeopardize its success. Public notice by newspaper, while not required in annexations, would appear to be desirable in all proceedings before the commission.

## DOES "MODIFY" MEAN "ENLARGE"?

The legislation states that the commission may approve, disapprove, modify or condition the proposed formation or annexation.<sup>42</sup> Assuming that the power to "modify" includes the power to enlarge an area proposed for annexation or creation, the commission may be accused of depriving the affected property owners of due process if it does so without giving them appropriate notice. Notice to the newly included parties would preclude a charge of abuse of discretion. The failure to do so might not result in a determination of abuse, though, since the affected individuals would retain their previous protest and election rights.<sup>43</sup>

It is generally believed that the intent of the legislation was to enable the commission to enlarge a proposed annexation or incorporation area by a reasonable degree. Where the commission approves a proposal conditioned on the inclusion of added territory, it might be argued that the proposal as submitted was disapproved, and its proponents should be required to wait one year before initiating new proceedings. A solution to the problem would be for the commission to readvertise and reopen the public hearing. The requirement that a determination must be made within thirty days following the conclusion of the hearing<sup>44</sup> could reasonably be construed to refer to the conclusion of the last public hearing.

---

<sup>39</sup> CAL. GOV. CODE § 54784.

<sup>40</sup> CAL. GOV. CODE § 54763.

<sup>41</sup> Senate Journal June 12, 1963, p. 3892.

<sup>42</sup> CAL. GOV. CODE § 54780; CAL. GOV. CODE § 54760.

<sup>43</sup> CAL. GOV. CODE § 54787; CAL. GOV. CODE § 54766.

<sup>44</sup> *Ibid.*

## MAY CITY REDUCE AREA AFTER COMMISSION APPROVAL?

The legislation makes no reference to a city's present right to reduce the area of proposed annexation at the time of its own public hearing.<sup>45</sup> When a city, subsequent to commission approval of the annexation, determines that the area shall be reduced from that approved by the commission, does this amount to a subversion of legislative intent? The maximum reduction of 5% would not affect the broad goal of the commission. The new law clearly states that once the commission approves an annexation, proceedings should continue "as otherwise provided by the governing law."<sup>46</sup> If the commission determines that cities are making reductions with which it disagrees, it need only attach a condition to its approval that no reduction be made in the area approved for annexation.

## EFFECTIVE DATE

Some ambiguity exists in the language regarding the effective date of the legislation.<sup>47</sup> The commission was to exercise its powers as soon after September 20, 1963, as ". . . the first members . . . are selected . . ." Annexation and formation proceedings initiated prior to the time of selection of the "first members" would not be affected. The question arises whether the intent was to make the legislation effective as soon as two members were selected, or only when the first complete membership was selected. Since the latter interpretation would enable a county to forestall, temporarily, legislation by not making its appointments, the better reasoning might be that the legislature intended that the law apply immediately upon selection of the second member. The commission would be powerless to act at that time, but the prohibition against annexations and formations would guarantee cooperation between the cities and county to complete the enrollment of commission members.

## CONCLUSION

New legislation often gives rise to litigation or future clarifying legislation. The annexation and formation laws are no exception.

---

<sup>45</sup> CAL. GOV. CODE § 35121.5.

<sup>46</sup> CAL. GOV. CODE § 54787; CAL. GOV. CODE § 54766.

<sup>47</sup> Cal. Stats. 1963, ch. 1810, § 3: "This act shall not apply to proceedings to annex territory to a local agency if the annexation petition has been circulated or filed, or if a governing body has initiated proceedings to annex on its own motion, prior to the time when the first members of the commission created by this act are selected in the county or counties in which lies the annexing local agency and the territory to be annexed." Cal. Stats. 1963, ch. 1808, § 3 contains similar language.

The effect of this legislation will be closely observed by all Californians interested in orderly growth and responsive government. Any legal problems created will be a small price to pay in return for the good that might result.

*William E. Glennon*