

April 13, 2022

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*Via Email*

Chair Bob Tiffany and LAFCO Commissioners  
San Benito County Local Agency Formation Commission  
2301 Technology Parkway  
Hollister, CA 95023

*Re: LAFCO Meeting of April 14, 2022 – Agenda Item # 8  
LAFCO Approval Not Needed for Sunnyslope County Water District’s  
Provision of Wastewater Service to Lands of Lee Subdivision (291 Old Ranch  
Road)*

Dear Chair and LAFCO Commissioners:

I hope you all are well. I am assisting Mr. Bill Lee regarding his property located at 291 Old Ranch Road, located off of Fairview Road, in San Benito County (“Lee Property”). As Executive Officer Bill Nicholson set forth in his Staff report, Mr. Lee intends to develop a portion of the Lee Property with a residential subdivision.

## **I. SUMMARY**

I understand that this is a discussion item and therefore wish to add to the discussion of controlling facts and LAFCO law in respect to the Lee Property.

For the factual and legal reasons set forth below, I respectfully submit that because the Lee Property is *already included* within the wastewater service area of the Sunnyslope County Water District, and because Sunnyslope County Water District already holds the *legal authority* to serve all properties within its District with wastewater service, it is *neither appropriate nor legally accurate* for Executive Officer Bill Nicholson to submit to LAFCO that the Lee Property *cannot receive wastewater service* from the Sunnyslope County Water District without LAFCO permission. Further complicating this misinformation is the Executive Officer’s admonition that *only* Hollister and/or Sunnyslope may request that LAFCO permission, thereby ignoring those provisions of LAFCO law that allow for landowner petitions. By way of example, many LAFCOs throughout California allow landowner petitions in this exact situation, including Los Angeles County LAFCO, one of the state’s largest LAFCOs.

Further, just because San Benito County LAFCO has in the past “*confirmed*” Sunnyslope County Water District’s legal right to serve customers within its existing District boundaries to provide “comfort” to LAFCO and others does not make that LAFCO action legal or a power that San Benito County LAFCO can independently invoke under controlling LAFCO law. However,

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upon request by Mr. Lee or Sunnyslope, LAFCO can confirm that this situation is *exempt* from LAFCO jurisdiction.

Additionally, for the factual and legal reasons set forth below, I respectfully submit that the LAFCO Executive Officer's assertion that LAFCO gains jurisdiction because Sunnyslope County Water District's provision of wastewater service to the Lee Property is through an existing contract Sunnyslope holds with Hollister is likewise legally flawed. Government Code section 56133(e)(1) makes clear that LAFCO has no such jurisdiction in this situation. However, again, upon request by Mr. Lee or Sunnyslope, LAFCO can confirm that this situation is *exempt* from LAFCO jurisdiction.

All of these points are discussed below.

## II. DISCUSSION

### 1. Generally.

LAFCO is a creature of statute: its legal authority is limited to that which is provided by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, as amended. *See*, Gov. Code § 56000 *et seq.*<sup>1</sup> (“LAFCO Law”). *Ceres v. City of Modesto*, 274 Cal.App.2d 545, 550 (1969) [“LAFCO is a creature of the Legislature and has only those express (or necessarily implied) powers which are specifically granted to it by statute”]; *see also*, *Community Water Coalition v. Santa Cruz Local Area Formation Commission*, 200 Cal.App.4<sup>th</sup> 1317, 1323-24 (2011).

A case out of Pismo Beach in San Luis Obispo County (March 3, 2021) underscores that LAFCO Law is limited to the authority granted through statute. *See*, *San Luis Obispo County Local Agency Formation Commission v. City of Pismo Beach*, 61 Cal.App.5th 595 (2021) (“*Pismo Beach*”). In *Pismo Beach*, the San Luis Obispo County LAFCO denied an annexation request. The City of Pismo Beach sued, LAFCO won the lawsuit, and then LAFCO sought its attorney fees pursuant to an indemnity provision contained in the LAFCO annexation application. The Second District Court of Appeal sided with the City, finding that LAFCO had no express statutory power to require attorney fees. LAFCO argued that it had the legal authority under Section 56383(a) to charge fees to cover its costs. However, as the *Pismo Beach* court determined, section 56383 does not apply to post-administrative matters, such as the action that generated the attorney fees at issue: “The clear mandate of section 56383, subdivision(c) is that the executive officer must settle the costs charged under the section at the end of the administrative proceedings. The section does not provide for costs that may accrue thereafter.” *Id.*

In short, LAFCO simply does not possess broader, inherent, “reserve powers” (police powers) that cities and counties possess to regulate for the health, safety, and general welfare of their communities. Instead, LAFCO legally exists and operates *only* by those powers expressly “granted” to it by the California legislature, and by those local rules adopted by LAFCO that are *consistent* with those legislative grants of authority.

Because of this, I respectfully submit that not only is LAFCO's written permission not

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<sup>1</sup> All section references are to the California Government Code unless otherwise noted.

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necessary in this situation, but also that LAFCO lacks the legal authority to require such LAFCO permission. *See, Ceres v. City of Modesto*, 274 Cal.App.2d 545, 550 (1969) [“LAFCO is a creature of the Legislature and has only those express (or necessarily implied) powers which are specifically granted to it by statute”].

To require LAFCO permission in response to an application by only Hollister or Sunnyslope would directly contravene the Cortese-Knox-Hertzberg Local Government Reorganization Act, including without limitation Government Code sections 56133(e)(1) and 56375 *et seq.*

## **2. Sunnyslope County Water District.**

LAFCO does not have the power to interfere with a relationship between a private property owner such as Mr. Lee and a District such as the Sunnyslope County Water District, where the sole purpose of that contract is to provide *an existing service* (here, sewer and water service) to a property within the District’s *existing* boundaries. As stated above, the Lee Property lays within the Sunnyslope County Water District, and Bill Lee has an agreement with the Sunnyslope County Water District to provide both sewer and water service.

Government Code section 56824.10 *et seq.* describes the narrow circumstances where LAFCO has the legal authority to regulate services within *an existing District’s existing service boundaries*: (1) when a district seeks to “provide a *new or different* function or class of services;” or (2) when a district wishes to divest its “power to provide particular functions or classes of services.” Gov. Code § 56824.12.

Neither of those situations are present here. Neither water service nor wastewater service is “new” to Sunnyslope County Water District, and Sunnyslope County Water District is not seeking to divest its “power to provide” water service or wastewater service. Gov. Code § 56824.12.

Sunnyslope County Water District has been supplying wastewater service since at least 1972. Further, the California statutory law controlling “County Water Districts” directly empowers such Districts to capture, treat, etc. any water, including wastewater, sewage, and stormwater. *See*, Cal. Water Code § 31047. The Executive Officer’s questioning of whether Sunnyslope County Water District can legally be in the wastewater service business ignores controlling law.

As such, LAFCO has no legal authority to “confirm” Sunnyslope County Water District’s jurisdiction over, and wastewater service to, the Lee Property.

In other words, when an existing district, like Sunnyslope County Water District, is merely providing an extension of its existing and legally allowed services (water and wastewater) within its existing legal boundaries (which existing boundaries include the Lee Property), then LAFCO has no jurisdiction. *Ceres v. City of Modesto*, *supra*, 274 Cal.App.2d at p. 550; *see also, South San Joaquin Irr. Dist. v. Superior Court*, 162 Cal.App.4<sup>th</sup> 146 (2008) [noting that the LAFCO law provides extensive procedures for extraterritorial service extensions, but not for service extension within a district’s existing service area]. Sunnyslope County Water District is not providing a new class or service, it is merely providing its existing service to a property within its existing boundaries. LAFCO permission is not *required*.

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Indeed, the Act itself supports the position that LAFCO lacks the authority to approve or disapprove the agreement between Mr. Lee and Sunnyslope County Water District. LAFCO Law expressly prohibits LAFCO from regulating land use and property development. *See, e.g.*, Gov. Code § 56375(a)(6). The ability to approve or condition new service connections within an existing service area falls squarely within this prohibition. While San Benito County may exercise these land use powers, San Benito LAFCO cannot. *See, Habitat & Watershed Caretakers v. City of Santa Cruz*, 213 Cal.App.4<sup>th</sup> 1277, 1303-04 (2013) [LAFCO cannot impose conditions restricting the level of service provided].

In addition to violating the express LAFCO law prohibition against regulating development, imposing a requirement for LAFCO permission in these circumstances defies logic and common sense. Such an interpretation would mean that every development project involving a service connection to Sunnyslope County Water District within their existing service area would nonetheless require LAFCO permission or confirmation. That is not what LAFCO law provides.

However, if requested by Mr. Lee or by the Sunnyslope County Water District, San Benito County LAFCO could confirm its agreement that it *lacks jurisdiction* in this situation. Only San Benito County LAFCO, not its Executive Officer, legal counsel, or other staff can take such an action. This option is discussed below.

### 3. City of Hollister.

Again, Sunnyslope County Water District (not the City of Hollister) is in agreement to provide water and sewer service to the Lee Property. Again, Sunnyslope County Water District has traditionally provided such water and sewer service to properties within its District boundaries, and the Lee Property is within Sunnyslope County Water District's existing boundaries.

To the extent that the LAFCO Executive Officer nonetheless believes that LAFCO has jurisdiction, because Sunnyslope County Water District separately contracts with the City of Hollister to provide sewage treatment, LAFCO Law makes clear that the Executive Officer is incorrect.

While Government Code section 56133(a) does generally provide 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]" several caveats to that general rule are present here.

*First*, the Lee Property is not *outside* the jurisdictional service boundary of Sunnyslope County Water District.

*Second*, for purposes of argument only, even if one were to proffer an argument that Sunnyslope County Water District's contract with Hollister somehow places service to the Lee Property *outside* Sunnyslope County Water District's jurisdictional boundaries, then Government Code section 56133(e) would nonetheless mandate that LAFCO involvement *is prohibited*:

(e) This section [requiring LAFCO approval] **does not apply** to any of the following:

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(1) Two or more public agencies where the public service to be provided is *an alternative to, or substitute for*, public services already being provided by an existing public service provider and where the level of service to be provided is consistent with the level of service contemplated by the existing service provider.

Gov. Code § 56133(e)(1).

The additional wastewater treatment capacity that Sunnyslope County Water District contracts for with the City of Hollister is clearly “an alternative to, or substitute for” the wastewater services already being provided by Sunnyslope County Water District, and the wastewater treatment service so provided by the City of Hollister “is consistent with the level of service contemplated by” Sunnyslope County Water District. Gov. Code § 56133(e)(1).

The facts of this situation clearly fit squarely within the exception set forth in Government Code section 56133(e)(1). LAFCO has no jurisdiction; LAFCO permission is *not* needed and cannot be legally required, no matter how “comfortable” that may make San Benito County LAFCO or others.

However, if requested by Mr. Lee or by the Sunnyslope County Water District, San Benito County LAFCO could confirm its agreement that it lacks jurisdiction in this situation and that Government Code § 56133(e)(1) applies. Only San Benito County LAFCO, not its Executive Officer, legal counsel, or other staff can take such an action. This option is discussed below.

### III. POSSIBLE FUTURE LAFCO ACTIONS

To the extent that a majority of the San Benito County LAFCO Commissioners would like to take action and support the points raised in this letter, they can affirm their support by motion - at the appropriate future LAFCO meeting – such as the following examples:

**Motion # 1.** That LAFCO does not have the legal authority to interfere with an agreement between Mr. Lee and the Sunnyslope County Water District, where the sole purpose of that contract is to provide *an existing service* (water and wastewater) to a property within the District’s *existing* boundaries; that neither water service nor wastewater service is “new” to Sunnyslope County Water District, and that Sunnyslope County Water District is not seeking to divest its power to provide particular functions or classes of services.

And

**Motion # 2.** That to the extent the Sunnyslope County Water District’s provision of sewer service to the Lee Property involves the City of Hollister, that involvement was agreed to years ago by Hollister and the Sunnyslope County Water District and is likewise not subject to LAFCO review and approval; Government Code section 56133(e)(1) makes clear that LAFCO has no such jurisdiction in this situation.

These items could be scheduled for future LAFCO action, and again to the extent that a majority of the LAFCO Commissioners would like to take action and support these motions, the water and wastewater issues regarding the Lee Property would be decided.

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Bill Lee would indemnify LAFCO against any legal challenge if those motions were adopted by the Commission.

#### IV. CONCLUSION

Thank you for this opportunity to weigh in on these topics. Again, our points are based on facts and controlling law. Bill Lee has a will serve letter from the Sunnyslope County Water District to provide both sewer and water service. Therefore, LAFCO has no jurisdiction. Further, to the extent the Sunnyslope County Water District's provision of sewer service to the Lee Property involves the City of Hollister, that involvement was agreed to years ago by the City and the Sunnyslope County Water District and is likewise not subject to LAFCO review and approval; Government Code section 56133(e)(1) makes clear that LAFCO has no such jurisdiction.

Lastly, with the request of Bill Lee or Sunnyslope County Water District, to the extent that a majority of the San Benito County LAFCO Commissioners would like to take action and support the points raised in this letter, they can affirm that support by motion - at the appropriate future LAFCO meeting – along the lines discussed above. Again, Bill Lee would indemnify LAFCO against any legal challenge if those motions were adopted by the Commission.

□ □ □ □ □

Thank you again for this opportunity to provide input on this issue. I look forward to your meeting of April 14, 2022.

Respectfully submitted,



Michael Patrick Durkee, Esq.

Cc: Executive Officer Bill Nicholson  
Sunnyslope County Water District  
Bill Lee