

2023 New Laws, Part 1: LAFCO Protest Procedures

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Summary. Senate Bill 938 amends the law governing local agency formation commissions (LAFCOs), called the Cortese-Knox-Hertzberg Local Government Reorganization Act, in two ways. First, SB 938 helpfully consolidates into one chapter different protest thresholds for determining whether LAFCOs can approve an annexation or other change of organization. This should make it easier for agencies to determine how many protests from voters or landowners will be needed to stop a change of organization or require an election. Second, SB 938 gives LAFCOs a new avenue to dissolve districts that are unwilling or unable to resolve chronic service deficiencies, unlawful or reckless expenditures, or failures to adhere to the California Public Records Act and other legal requirements.

Notably, the new dissolution process within SB 938 balances an opportunity for special districts to address the concerns documented by the LAFCO with raising the protest threshold from 10 percent to 25 percent—making it harder for district residents to force an election in cases where the LAFCO adheres to the thorough and inclusive new process. This article focuses on this new SB 938 dissolution process, which goes into effect on January 1, 2023.

Background. Under existing law, LAFCOs have the authority to initiate these proceedings:

- consolidation of a district;
- dissolution of a district;
- merger;
- establishment of a subsidiary district;
- formation of a new district;
- reorganizations; and
- dissolutions of inactive districts.

Most boundary changes initiated by petition or local agency application require an election if 25 percent of the voters or 25 percent of landowners representing 25 percent of the assessed value of land in an affected territory submit written protests to LAFCO. However, for the LAFCO-initiated proceedings listed above, the protest threshold is just 10 percent, making it relatively easier for residents to stop a LAFCO-initiated dissolution than one that is initiated by the residents or one of the local agencies they elect.

The Little Hoover Commission, an independent California state oversight agency, issued a report in 2017 evaluating the performance of special districts and recommended the Legislature convene an advisory committee to review and simplify the protest process for dissolutions. The Little Hoover Commission noted that “complicated and inconsistent

processes potentially impact a LAFCO's ability to initiate a dissolution or consolidation of a district... Additionally, the LAFCO must pay for all costs for studies and elections if it initiates a consolidation proposal, whereas the district pays these costs if it proposes or requests the consolidation." The Legislative Analyst's Office also found LAFCOs may be dissuaded from pursuing dissolution because the protest thresholds are lower for LAFCO-initiated proceedings. The provisions of SB 938 were fundamentally developed through a multi-year working group process that was responsive to the Little Hoover Commission's recommendation.

Analysis. SB 938 empowers LAFCOs to hold derelict special districts accountable by making it easier for LAFCOs to dissolve them. SB 938 adds section 56375.1 to the Government Code, which applies the higher 25 percent protest threshold to LAFCO-initiated proceedings under these circumstances:

1. LAFCO adopts a municipal service review at a noticed public hearing that includes a finding, based on a preponderance of the evidence (i.e., the same legal standard that applies in most civil cases), that at least one of these conditions is met:
 1. The district has one or more documented chronic service provision deficiencies that substantially deviate from industry or trade association standards or other government regulations, and the district's board or management is not actively engaged in efforts to remediate the documented service deficiencies;
 2. The district spent public funds in an unlawful or reckless manner inconsistent with its principal act or other statute governing the district and has taken no action to prevent similar future spending;
 3. The district has shown willful neglect by failing to consistently adhere to the California Public Records Act and other public disclosure laws to which the agency is subject;
 4. The district has failed to meet the minimum number of times required in its principal act in the prior calendar year and has taken no action to remediate the failures to ensure future meetings are conducted timely;
 5. The district has consistently failed to perform timely audits in the prior three years, or failed to meet minimum financial review requirements allowed as an alternative to performing an audit over the prior five years; or
 6. The district's recent annual audits show chronic issues with the district's fiscal controls and the district has taken no action to remediate the issues.
2. LAFCO adopts a resolution of intent to initiate dissolution based on one or more of the required findings above at a noticed public hearing. The resolution must provide a remediation period of at least 12 months ("Remediation Period") during which the district should identify remediation steps and a date by which to provide a mid-point report at a regularly scheduled LAFCO meeting.

Local Governing Board Members Will Now Have Conflict of Interest in Campaign Donors Appearing Before Their Agencies

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Local elected officials – including city council members, special district board members and school district board members – will now have to “conflict out” of certain proceedings involving persons that made contributions to their respective political campaigns. Gov. Newsom signed SB 1439 into law, making a number of changes to the “Levine Act,” which is a part of the Political Reform Act. The Levine Act previously only applied to local governing boards composed of appointed officials, such as joint powers authorities or other regional agencies whose boards are appointed by their member agencies. Effective Jan. 1, 2023, SB 1439 extends the Levine Act’s coverage to elected governing boards.

The Levine Act will now impose two key duties on city council and district board members. First, it will prohibit accepting, soliciting or directing a campaign contribution of \$250 if the donor is involved in a proceeding involving a license, permit or other entitlement for use, including a contract award that is pending before the agency. Under SB 1439, this prohibition continues for 12 months following the proceeding. (It was previously three months.) Second, the Levine Act will now require city council and district board members to recuse from any proceeding involving a license, permit or other entitlement for use, including a contract award, if the member has received a campaign contribution from a person involved in the proceeding within the previous 12 months.

The Levine Act applies to both the parties directly involved in the proceeding, such as an applicant for an entitlement, as well as to other participants who actively support or oppose a particular decision in the proceeding. As with other provisions of the Political Reform Act, officials with a Levine Act conflict of interest cannot make, participate in making, or attempt to influence any such proceeding. The rule does not apply to labor contracts, personal employment contracts or contracts that are competitively bid.

In light of SB 1439, both elected and appointed officials of a local government agency must therefore do all of the following:

- *Disclose.* Before participating in any decision in a proceeding involving a license, permit or other entitlement for use (including certain contracts), an officer who received a contribution over \$250 in the preceding 12 months from a party or any participant in the proceeding must disclose that fact on the record.
- *Recuse.* If the officer knows or has reason to know that the party or participant who made the contribution has a financial interest in the decision, the officer must not make – or participate in making – the decision.
- *Or Return.* If the officer returns the contribution within 30 days from the time the officer knows or should have known about the contribution and relevant proceeding, the officer may participate in the decision.

- *Refuse.* While the proceeding is pending for 12 months after a final decision is rendered, an officer must not accept, solicit or direct a contribution of more than \$250 from the party or participant if the officer knows or has reason to know the party, participant or the party's or participant's agent has a financial interest in the decision.
- *Or Return.* If an officer accepts, solicits or directs a contribution of more than \$250 during the 12 months after the date a final decision is rendered in the proceeding, the officer may cure the violation by returning the contribution, or the portion of the contribution that exceeds \$250, within 14 days of accepting, soliciting or directing the contribution, whichever comes latest. This opportunity to cure is only available if the officer did not knowingly and willfully accept, solicit or direct the prohibited contribution and the officer or officer's controlled committee keeps a record of curing the violation.

SB 1439 presents a significant change for local elected officials because campaign donations previously did not give rise to a conflict of interest and the Levine Act did not apply to the agencies that officials were elected to represent. Thus, elected officials will need to be aware of these new "refuse and recuse" requirements.