

Case No. G045878

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FOURTH APPELLATE DISTRICT

DIVISION THREE

CITIZENS ASSOCIATION OF SUNSET
BEACH,

Plaintiff/Appellant,

v.

ORANGE COUNTY LOCAL AGENCY
FORMATION COMMISSION and
CITY OF HUNTINGTON BEACH,

Defendants/Respondents.

Superior Court Case No.
30-2010-00431832

On Appeal From the Superior Court of California
County of Orange

Judge: Hon. Frederick P. Horn

DEFENDANT / RESPONDENT ORANGE COUNTY LAFCO'S BRIEF

SCOTT C. SMITH, SBN 120736
DANIEL S. ROBERTS, SBN 205535
BEST BEST & KRIEGER LLP
5 Park Plaza, Suite 1500
Irvine, California 92614
Telephone: (949) 263-2600
Fax: (949) 260-0972

Attorneys for Defendant/Respondent
Orange County Local Agency
Formation Commission

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: G045878
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <u>Daniel S. Roberts, Bar No. 205535</u> BEST BEST & KRIEGER LLP 5 Park Plaza, Ste. 1500 Irvine, CA 92614 TELEPHONE NO.: (949) 263-2600 FAX NO. (Optional): (949) 260-0972 E-MAIL ADDRESS (Optional): Daniel.Roberts@bbklaw.com ATTORNEY FOR (Name): Respondent Orange County LAFCO	Superior Court Case Number: 30-2010-00431832
APPELLANT/PETITIONER: Citizens Association of Sunset Beach RESPONDENT/REAL PARTY IN INTEREST: Orange County Local Agency Formation Commission and City of Huntington Beach	FOR COURT USE ONLY
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Date: March 23, 2012

Daniel S. Roberts
(TYPE OR PRINT NAME)


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I. INTRODUCTION

Appellant Citizens Association of Sunset Beach ("CASB" or "Appellant") asserts in this case that without a pre-annexation election under the "Right to Vote on Taxes Act" under article XIII C of the California Constitution and Proposition 218, the City of Huntington Beach's taxes cannot be imposed on the residents of Sunset Beach (a previously-unincorporated area of Orange County) following Huntington Beach's annexation of Sunset Beach. As illustrated by the proportion of its Opening Brief devoted to the question of whether the City's local taxes are actually subject to article XIII C, as well as the fact that Appellant is now represented in this case by the Howard Jarvis Taxpayers Association, this case truly is about the applicability of those taxes.

By statute, the Orange County Local Agency Formation Commission ("OC LAFCO") had no role in imposing those taxes. The applicability of those taxes is a dispute between CASB (who resists the taxes) and the City (who presumably wants to collect the taxes). Consistent with its statutory directive, OC LAFCO took no position on the application of those taxes in approving the City's annexation application, and takes no position on that question in this lawsuit. Rather, OC LAFCO leaves that dispute to Appellant and the City to litigate. OC LAFCO's role was merely to consider the City's annexation application under the governing statutory scheme, the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 ("CKH Act"), Government Code §§ 56000, *et seq.*¹

¹ Unless otherwise noted, all statutory references herein are to the Government Code.

Nevertheless, CASB included OC LAFCO in this case and this appeal. Appellant's Opening Brief shows why. Residents of Sunset Beach formed Appellant CASB to represent their interests, "*including the interest in resisting the annexation of Sunset Beach by the City of Huntington Beach.*" (AOB² at p. 5 [emphasis added].) By including OC LAFCO in this suit about the validity of the local taxes, and seeking to have the Court compel OC LAFCO to condition its approval of the annexation on a successful tax election, CASB is really using the tax issue as another bite at the apple to further its goal of "resisting the annexation of Sunset Beach by the City." In essence, Appellant seeks to convert the "Right to Vote on Taxes Act" into the "Right to Vote on Annexations Act."

However, as explained below there is no right – either constitutional or statutory – to vote on an annexation of this type, with or without an imposition of taxes by the annexing city. If the conditions of the special statute that the Legislature provided for island annexations are satisfied, OC LAFCO *must* approve the annexation without protest or election. The constitutional tax protections under Proposition 218, whether they apply to the City's local taxes or not, do not affect the validity of the annexation. The trial court therefore properly entered judgment for OC LAFCO and should be affirmed.

² As used throughout this Brief, citations to "AOB" shall refer to Appellant's Opening Brief, "CT" to the Clerk's Transcript, and "AR" to the Administrative Record lodged with the Superior Court in connection with the hearing on the writ and which the City will lodge with this Court following its Respondent's Brief.

II. BACKGROUND

A. The Parties

Respondent OC LAFCO is the Local Agency Formation Commission for the County of Orange, organized and operating under the CKH Act. (CT, Vol. 2, at p. 447.) Respondent City of Huntington Beach is an incorporated City within Orange County who applied to OC LAFCO, pursuant to the terms of the CKH Act, to annex Sunset Beach, a small beachfront community surrounded by the City. (*Ibid.*; AOB at p. 4.) Appellant CASB is a nonprofit mutual benefit corporation formed by residents of Sunset Beach in July 2010 to represent their interests, “including their interest in resisting the annexation of Sunset Beach into the City of Huntington Beach.” (AOB at p. 5 [emphasis added].)

B. The Role of OC LAFCO

The Legislature formed in each county a local agency formation commission (or "LAFCO"), finding that "it is the policy of the state to encourage orderly growth and development which as essential to the social, fiscal, and economic wellbeing of the state," and recognizing "that the logical formation and determination of local agency boundaries is an important factor in promoting orderly development and in balancing that development with sometimes competing state interests of discouraging urban sprawl, preserving open space and prime agricultural lands, and effectively extending government services." (Gov. Code §§ 56001, 56325.) As noted above, OC LAFCO is the local agency formation commission for Orange County.

Among the powers and duties of a LAFCO is the review and approval of proposals for "changes of organization or reorganization." (Gov. Code § 56375(a)(1).) A "change of organization" includes an incorporation of a city or formation of a district, an annexation to or detachment from a city or district, a disincorporation of a city or dissolution of a district, a consolidation or merger of cities or districts, and establishment of subsidiary districts. (Gov. Code § 56021.)³ An "annexation" is "the annexation, inclusion, attachment, or addition of territory to a city or district." (Gov. Code § 56017.) Thus, one of the things LAFCOs do is review city annexation proposals.

The CKH Act prescribes how LAFCOs are to process proposals for changes of organization or reorganization such as annexations, including notice and hearing requirements and procedures to protest proposed changes of organization. In general, after a LAFCO receives a complete application for an annexation, the LAFCO will set the matter for hearing and give notice of that hearing. (*See* Gov. Code § 56658(i).) The LAFCO Executive Director then reviews the application and prepares a report to the Commission, which includes her recommendations, on the application. (Gov. Code § 56665). The LAFCO then holds the hearing on the application, at which it hears any oral or written protests, objections, or evidence as may be presented or filed and considers the report of the Executive Director. (Gov. Code § 56666.) Section 56668 of the CKH Act enumerates several non-exclusive factors to be considered in determining the application. After the conclusion of the hearing, the Commission must

³ A "reorganization" is two or more changes of organization initiated in a single proposal. (Gov. Code § 56073.)

adopt a resolution making a determination either to approve or to disapprove the proposed annexation. (*See* Gov. Code § 56880.) If the Commission determines to disapprove the proposal, the matter dies there and no further proceedings are taken. (*Ibid.*; Gov. Code § 56884.)

If the LAFCO determines to approve the proposed annexation, however, Part 4 of the CKH Act (commencing with Section 57000) provides for proceedings to protest the change of organization. (*See* Gov. Code § 57000.) The Executive Director sets the proposal for a protest hearing and gives notice thereof by mail, publication, and posting. (*See* Gov. Code § 57002.) At the protest hearing, the Commission shall hear and receive oral and written protests, objections, or evidence that are made, presented, or filed. (*See* Gov. Code § 57050). Landowners and registered voters within an area proposed to be annexed may protest. (*See* Gov. Code § 57051.)

The protest can then lead to an election. At the conclusion of the protest hearing, the Commission determines the value of the protests filed. (*See* Gov. Code § 57052.) If a majority of the registered voters within the affected territory (or a majority of the landowners, if the territory is uninhabited) protest the annexation, the LAFCO must terminate the proceedings, killing the proposed annexation. (*See* Gov. Code § 57075.) If less than 25 percent of the registered voters (or landowners) protest, then the Commission shall approve the annexation notwithstanding the protest. (*Ibid.*) If the value of protests is between 25 and 50 percent, however, then the Commission shall order the annexation subject to an election of the affected registered voters. (*Ibid.*)

Thus, the CKH Act generally provides LAFCOs broad quasi-legislative authority to consider changes of organization such as annexations, and provides objecting residents or landowners an opportunity to protest and defeat a proposed annexation LAFCO initially determines to approve. The Legislature has provided a special, *mandatory* process to address problems created by small "islands" of unincorporated territory surrounded or substantially surrounded by a city, however, that short-cut those general processes. Section 56375.3 of the CKH Act specifies what constitutes a "small island" to which its provisions apply, and then directs that for small-island annexations initiated between January 1, 2000 and January 1, 2014, the LAFCO *shall* give notice and conduct a hearing, but *waive protest proceedings* entirely and *approve the annexation*. (See Gov. Code § 56375.3(a)(1).) In essence, where the requirements of Section 56375.3 are satisfied, the Legislature has mandated that LAFCO must automatically approve the annexation, without any protest procedure or election.

That is just what happened here. Consistent with the Legislature's directive, upon finding that the conditions of Section 56375.3 were met, OC LAFCO approved the Sunset Beach annexation without protest proceedings. The issue of the City's taxes and whether their imposition requires an election remain separate.

C. LAFCO's Decision to Approve Huntington Beach's Application to Annex Sunset Beach

Both Appellant and the City have gone in depth into the factual and procedural background of this lawsuit in their respective Briefs to this

Court. OC LAFCO here will focus only on those facts relevant to its role in this litigation, none of which are disputed by any of the parties. Sunset Beach was formerly an unincorporated beachfront community within Orange County. (*See* AOB at p. 4.) It is approximately 134 acres in size and is surrounded to the south, east, and north by the City of Huntington Beach. (*Ibid.*) Of course as a beachfront community, it is boarded on the west by the Pacific Ocean.

In August 2010, the City of Huntington Beach, by resolution, applied to annex Sunset Beach pursuant to the island-annexation provisions of the CKH Act. (*See* AR, Vol. 4, Tab 29, pp. 766-767.) OC LAFCO thereafter processed the City's application pursuant to the relevant portions of the CKH Act. In December 2010, after notice and a hearing and upon finding that all conditions of Section 56375.3 (b) were satisfied, OC LAFCO waived protest proceedings under the CKH Act entirely and approved the City's annexation application pursuant to Section 56375.3(a)(1). (*See* AOB at p. 6; CT, Vol. 1, at pp. 180-186.) OC LAFCO did not condition the annexation on any tax election, nor did it make any pronouncement on what taxes would apply after the annexation took effect. (*See* CT, Vol. 1, at pp. 180-186.) Rather, OC LAFCO took no position on the taxes at all, just as it does before this Court. (*Ibid.*)

D. Trial Court Proceedings

CASB then filed this lawsuit in the Superior Court. Initially, Appellant sought a writ of mandate against OC LAFCO

compelling LAFCO to set aside Resolution IA 10-05 [the resolution approving the annexation], and to either reject the City's island annexation application because it does not meet the island annexation criteria, *or to condition its approval of the City's application on the City first obtaining a favorable vote by the residents of Sunset Beach under Proposition 218 regarding imposition of the City's special taxes.*

(CT, Vol. 1, at pp. 32-33 [emphasis added].)

After the City and OC LAFCO demurred to the original Petition on the grounds, *inter alia*, that the Court could not mandate that OC LAFCO exercise its quasi-legislative authority to adopt a particular condition on its approval of the annexation application, CASB amended its Petition and expressly disclaimed any desire to force OC LAFCO to impose the Proposition 218 election as a condition on its approval of the annexation. In opposition to the demurrers, Appellant argued

In order to avoid any implication that CASB is asking the court to violate the doctrine of separation of powers, CASB has amended its Petition/Complaint to seek relief that clearly does not compel either the OC LAFCO or the City to take any particular legislative action in this matter.

(CT, Vol. 2, at p. 463.)

The City and OC LAFCO then each answered the First Amended Petition. After the trial court entered a preliminary injunction to "maintain the status quo pending the outcome of this litigation" (CT, Vol. 2, at p. 444), the parties briefed the writ on the merits. (*See* CT, Vol. 2, p. 520 – Vol. 3, p. 632.) The trial court heard oral argument and took the matter

under submission. (*See* CT, Vol. 3, at p. 633). Days later, the Court issued its written ruling, denying the writ. (*See* Aug. 18, 2011 Min. Order, attached to Appellant's Request to Augment Record.)⁴ The preliminary injunction having been dissolved (*see* CT, Vol. 3, at pp. 368-369), OC LAFCO then completed the annexation by recording the Notice of Completion. (*See* MJN⁵ at Ex. "K.") The Superior Court entered formal Judgment on September 20, 2011. (*See* CT, Vol. 3, at pp. 672-673.) This appeal followed. (*See* CT, Vol. 3, at pp. 683-684.)

III. QUESTIONS PRESENTED IN THIS APPEAL

Appellant CASB frames its appeal as presenting two questions: (1) whether article XIII C of the California Constitution applies to the City's local taxes before they can be levied on Sunset Beach residents, and (2) if (and presumably only if) it does, should the Superior Court have required OC LAFCO to condition its approval of the annexation on a successful tax election. The first of these questions has nothing at all to do with OC LAFCO – OC LAFCO neither levied any tax and, due to its limited authority to dispose of small island annexations, nor did it require the City to do so. OC LAFCO leaves the question of whether the City may collect the taxes at issue to the City and to Appellant to argue. Based on the way Appellant has framed the issues on appeal, if this Court affirms the Superior Court's ruling that article XIII C does not apply to the taxes at issue here, then the second issue is moot.

⁴ This Court granted Appellant's Motion to Augment Record by order entered February 15, 2012. The Minute Order is therefore now part of the record on appeal.

⁵ "MJN" refers to the Motion for Judicial Notice filed by Respondent City of Huntington Beach concurrently with its Respondent's Brief.

OC LAFCO files this separate Brief, however, in the event that this Court reverses the Superior Court's ruling on the applicability of article XIII C to the City's taxes at issue here. As discussed in detail below, Appellant has failed to show, both at the trial court and now on appeal, any ground to mandate that OC LAFCO do anything other than what it did – approve the annexation, even if article XIII C applies to the City's taxes. Accordingly, the Judgment in favor of OC LAFCO should be affirmed.

IV. STANDARD OF REVIEW

OC LAFCO concurs with Respondent City of Huntington Beach's statement of the applicable standard of review as set forth in its Brief.

V. ARGUMENT

A. Summary of Argument

The trial court properly found that the applicable statutory law left OC LAFCO no alternative but to approve the annexation at issue here. Even if article XIII C did apply to the taxes CASB challenges here, there is no conflict between that provision and the statutory island-annexation provisions of Section 56375.3 because nothing in that statute requires the imposition of any tax. Because there is no conflict between article XIII C and Section 56375.3, there is no need to "harmonize" the two provisions as Appellant proposes. Moreover, CASB's proposed "harmonization" not only seeks relief that Appellant expressly amended its Petition/Complaint below to *abandon* (so as to avoid running afoul of separation of powers concerns), but would actually conflict directly with the Legislature's mandate that such an island annexation be approved and *not* be subject to an election. There

simply is no right for CASB's members (or anyone else) to vote on this annexation. OC LAFCO properly approved the annexation without conditioning it on an election, whether or not article XIII C applies to the taxes at issue. Finally, the "mischief" CASB speculates could occur under the trial court's judgment is fanciful, and could not actually occur as a matter of law. The Judgment in favor of OC LAFCO was correct and should be affirmed.

B. State Law Required LAFCO to Approve the Annexation

The Superior Court found, correctly, that OC LAFCO was required to approve the annexation of Sunset Beach because all of the conditions enumerated in Section 56375.3 were met. (*See* Aug. 18, 2011 Min. Order attached to Appellant's Motion to Augment Record). Appellant CASB does not dispute on appeal (nor did they at the trial court) that the conditions for application of the island-annexation procedure under Section 56375.3 are met here. (*See* AOB at p.21.) Rather, it argues that notwithstanding the fact that those conditions were met, the trial court nevertheless erred because "nowhere in the island annexation statute did the Legislature prohibit the holding of a Proposition 218 election on taxes." (*Ibid.*) Appellant is wrong in that contention.

Section 56375.3 prohibits an election where the requirements of that section are satisfied. It provides that LAFCO "*shall . . . (1) approve, after notice and hearing, the change of organization or reorganization of a city and waive protest proceedings pursuant to Part 4 (commencing with*

Section 57000) entirely," if the conditions of that section are met. (Gov. Code § 56375.3(a) [emphasis added].)

An election is one of the "protest proceedings pursuant to Part 4 (commencing with Section 57000)." In general, Section 57075 provides for LAFCO to make a change in organization "subject to confirmation by the registered voters residing within the affected territory" if certain other protest thresholds are met. (*See* Gov. Code § 57075(a)(2).) In the specific case of an island annexation, however, the Legislature has directed LAFCOs to waive such procedures "in their entirety" and to approve the annexation. (Gov. Code § 56375.3(a)(1).⁶)

⁶ That the Legislature *does not want* island annexations to be subject to elections is further illustrated by how it has directed LAFCOs to process such annexations initiated after January 1, 2014. The Legislature's mandate that LAFCOs approve island annexations and waive the protest proceedings in their entirety expires on January 1, 2014. (*See* Gov. Code § 56375.3(a)(1)(A).) Thereafter, *some* protest proceedings will apply to island annexations, as specified in Section 57080. (*See* Gov. Code § 56375.3(a)(2).) An election is not one of those protest proceedings that will apply then, however. Section 57080 specifically provides that in island annexations initiated on or after January 1, 2014, the provisions of Section 57075 (providing for an election) "shall not apply." Rather, there shall be a protest hearing and landowners and registered voters within the affected territory may make oral or written protests to the annexation. (Gov. Code §§ 57050-57051). The LAFCO then shall determine the value of the written protests. (Gov. Code § 57052.) If written protests have been filed and not withdrawn by 50 percent or more of the registered voters in the affected territory, the LAFCO shall terminate the annexation proceeding. (Gov. Code § 57080(b)(1). If not, however, the LAFCO shall "[o]rder the territory annexed *without an election*." (Gov. Code § 57080(b)(2) [emphasis added].) Thus the Legislature has made clear, even once the statutory provision waiving all protest proceedings for island annexations sunsets on January 1, 2014, island annexations *still* will not be subject to an election.

Appellant may attempt to distinguish this requirement not to order an election by arguing that it does not seek an election on the *annexation*, but instead an election on the *taxes*. There is no such functional distinction, however. By seeking to force (by writ of mandate) OC LAFCO to condition the annexation on a successful tax election, CASB attempts to set up a situation in which the annexation will stand or fall with the election (consistent with Appellant's goal of defeating the annexation). This is the exact result the Legislature sought to avoid by exempting small-island annexations from the protest proceedings pursuant to Part 4 (commencing with Section 57000) of the CKH Act. If the electorate votes "no," then the condition fails, and with it the annexation. The tax election would have become a *de facto* election on the annexation. By conditioning approval of the annexation on approval of taxes in an election, if the taxes are then not approved in the election, LAFCO would have *denied* an application that the law *required it to grant*. (See Gov. Code § 56375.3 [the commission "shall" approve, after notice and hearing, the annexation application if the conditions of that section are met]; § 56375(a)(4) ["A commission shall not disapprove an annexation to a city, initiated by resolution, of contiguous territory that the commission finds is any of the following [¶] (C) An annexation or reorganization of unincorporated islands meeting the requirements of Section 56375.3"].)

The legality of the annexation is a separate issue from the legality of the taxes. The annexation can be (and here is) proper regardless of whether article XIII C applies to the City's taxes. OC LAFCO has no role in assessing the City's taxes. Under Section 56375.3, OC LAFCO's role is to determine if all of the conditions under that section are met. If they are, the

Legislature has mandated that OC LAFCO "shall" approve the annexation. Section 56367.3 does not authorize OC LAFCO to deny an annexation application that meets all of that section's requirements simply because the application does not also include a tax election. Nor does the CKH Act permit OC LAFCO to order an election on the annexation.⁷ OC LAFCO did what it was required to do under the undisputed facts it was presented and approved the annexation. The trial court properly entered judgment for OC LAFCO, and that judgment should be affirmed.

C. **There is No Conflict Between the Island Annexation Provisions and Article XIII C, Even Assuming Article XIII C Applies to the Taxes at Issue**

Perhaps recognizing that the desired tax election would in fact be a *de facto* election on the annexation itself, Appellant's Opening Brief next invokes the supremacy of the state Constitution over statutes to argue that

⁷ CASB also states, without analysis, that "among the conditions that a LAFCO may impose on an annexation applicant is 'approval by the voters of general or special taxes.'" (AOB at p. 3.) Appellant cites for this proposition Section 56886(s). To the extent CASB infers that OC LAFCO could have imposed an election condition on the annexation at issue here pursuant to Section 56886(s), Appellant is wrong. Section 56886 is a general provision applying to "any change of organization or reorganization." (Gov. Code § 56886.) At best, Section 56886(s) would allow a LAFCO to impose an election condition in the general case. As noted above, however, Section 56375.3 applies to the specific situation here – a small-island annexation – and *prohibits* all protest procedures under Part 4, including an election. When two statutes conflict in such a way, the specific statute (here Section 56375.3) controls the general one (Section 56886). (See *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal. 4th 571, 577 [quoting *Rose v. State of California* (1942) 19 Cal.2d 713]; Civ. Code § 3534; Code Civ. Procedure § 1859.) OC LAFCO could not have used the general provision of Section 56886(s) to impose a condition that conflicts with the specific requirements of Section 56375.3.

"if the island annexation statute conflicted with Proposition 218, the former would have to yield." (AOB at p. 21). That statement is of course correct as an abstract principle. It has no application in this case, however, because Appellant's premise – "if the island annexation statute conflicted with Proposition 218" – is incorrect, even if this Court determines that Proposition 218 applies to the City of Huntington Beach's local taxes.

In making this argument, CASB erroneously conflates two separate statutory provisions – the island-annexation provisions in Section 56375.3 and the tax provisions in Section 57330. There is no conflict between Proposition 218 and the island-annexation provisions in Section 56375.3 because Section 56375.3 *does not impose any taxes*. With the exception of an inapplicable provision dealing with the ability of cities and counties to come to a separate property-tax transfer agreement under Revenue and Taxation Code § 99, nothing in Section 56375.3 says anything about any taxes. As CASB itself acknowledges in its Opening Brief by quoting the Attorney General's Opinion (82 Ops. Cal. Atty. Gen. 180, 186 (1999)) "'annexed parcels not previously subject to the [annexing agency's] taxes . . . become subject to them *by virtue of the general provisions of section 57330.*" (AOB at p. 20 [emphasis added].)

Therefore, if there is any conflict with Proposition 218 (an issue OC LAFCO leaves to Appellant and the City to argue), it is with Section 57330, *not* the island-annexation provisions of Section 56375.3. If anything must yield to the constitutional supremacy of Proposition 218, it is Section 57330, not the island-annexation provisions. The island-annexation

provisions of Section 56375.3 are firm even assuming, *arguendo*, article XIII C applies to the City's taxes.

D. CASB's Proposed "Harmonization" is Not Only Unnecessary, But Raises a Claim Appellant Abandoned Below by Amendment and in Any Event Would Violate the Law

Starting from the incorrect premise of a conflict between article XIII C and the island-annexation provisions in Section 56375.3, CASB urges this Court to "*cure* the conflict by harmonizing the [annexation] statute with the constitution." (See AOB at p. 21.) Appellant's proposed "harmonization" is to mandate that OC LAFCO condition its approval of the annexation on an election. (*Id.* at pp. 22-23.) Appellant expressly abandoned such a claim below, however, in light of clear separation-of-powers concerns. Not only that, the "harmonized" interpretation CASB offers is contrary to the express provisions of the CHK Act. For all of these reasons, Appellant's arguments on this point fails.

1. CASB Affirmatively Abandoned The Claim that the Court Should Mandate OC LAFCO Condition the Annexation on a Tax Election

Not only is the "harmonization" CASB proposes between article XIII C and Section 56375.3 unnecessary because there is no conflict between the two, but in making this argument CASB actually seeks to revive a claim that it expressly abandoned at the trial court in amending its Petition/Complaint. As noted above, CASB initially sought a writ of mandate to compel OC LAFCO to condition its approval of the annexation on a favorable Proposition 218 election. (See CT, Vol. 1, at pp.32-33

[prayer for relief in original Petition/Complaint].) The City, joined by OC LAFCO, demurred to such a claim on the ground that the court could not mandate OC LAFCO impose such a condition because determination of which conditions to impose lies within the legislative authority of a LAFCO, and therefore cannot be compelled by a court. (CT, Vol. 2, at pp. 309-312; Vol. 2, at pp. 439-440.)

In response, Appellant amended its Petition/Complaint to *abandon* such a claim in order to defeat Respondents' Demurrers. (CT, Vol. 2, at p. 463 ["In order to avoid any implication that CASB is asking the court to violate the doctrine of separation of powers, CASB has amended its Petition/Complaint to seek relief that clearly does not compel either the OC LAFCO or the City to take any particular legislative action in this matter."]; *see also Carrasco v. Craft* (1985) 164 Cal. App. 3d 796, 808 [". . . where a plaintiff amends his declaration or complaint so as to change the cause of action, or add a new one, it constitutes an abandonment of the original issues . . ."].) CASB cannot now assign error to the trial court for not granting relief on a claim that it abandoned below.⁸

⁸ Even if Appellant could revive that issue here, such a claim still fails under the separation of powers doctrine. When OC LAFCO considered whether to approve the annexation of Sunset Beach into the City of Huntington Beach, it acted in its quasi-legislative capacity. (*See City of Santa Cruz v. Local Agency Formation Comm'n of Santa Cruz County* (1978) 76 Cal.App.3d 381, 387-388.) What conditions to place on such approval (within the bounds the Legislature placed on its delegation of authority to LAFCOs) are therefore also legislative. "The commanding of specific legislative action is beyond the power of the courts for it would violate the principle of division of powers of the three governmental departments." (*City Council of Santa Barbara v. Superior Court of Santa*

2. CASB's Proposed "Harmonization" Conflicts with the Express Provisions of the CKH Act

Finally, Appellant's proposed "harmonization" is not possible because it directly conflicts with the Legislature's directives within the CKH Act. As discussed above, the Legislature clearly stated that where the requirements of Section 56735.3 are met, a LAFCO *shall* waive protest proceedings entirely and *shall* approve the annexation. Because an election is one of those protest proceedings that it had to waive, OC LAFCO was not free to condition its approval of the annexation on an election.

Appellant's argument to the contrary is unavailing. CASB argues that OC LAFCO had the power to condition the annexation on an election because it had the power under Section 56375 to approve annexations "with or without amendment ... or conditionally." (AOB at p. 22 [quoting Gov. Code § 56375; ellipses supplied by Appellant].) Appellant goes on to point out that OC LAFCO did impose other conditions, such as the execution of a Memorandum of Understanding, use of best efforts to maintain the identity of Sunset Beach, creation of a Sunset Beach subcommittee on the City Council, etc. (*Ibid.*) Therefore, CASB concludes, OC LAFCO could use that same power to condition the annexation on a Proposition 218 election. (*Ibid.*)

In making this argument based on the general language in subdivision (a)(1) of Section 56375 (which contains the "with or without amendment . . . or conditionally" language CASB quotes in its Brief), however, Appellant ignores the specific language in subdivision (a)(4) of

Barbara County (1960) 179 Cal.App.2d 389, 394-395.)

that same section. There, the Legislature explicitly stated that "A commission shall not disapprove an annexation to a city, initiated by resolution, of contiguous territory that the commission finds is any one of the following: [¶] (C) An annexation or reorganization of unincorporated islands meeting the requirements of Section 56375.3." (Gov. Code § 56375(a)(4).)

The general ability to impose conditions under subdivision (a)(1) cannot be interpreted to allow a LAFCO to adopt a condition that conflicts with the specific and express prohibition on denying an annexation in subdivision (a)(4) of that same section. Said another way, if OC LAFCO could condition the annexation on an election under its general powers in subdivision (a)(1), that would render the prohibition in subdivision (a)(4) on denying annexations that meet the requirements of the island-annexation statute (§ 56375.3) meaningless because the LAFCO would be denying the annexation if the electorate votes "no." Such an interpretation is to be avoided. (*See City of San Jose v. Superior Court* (1993) 5 Cal. 4th 47, 55 [rejecting interpretation of one subdivision of a statute that would, if adopted, render another subdivision of that statute meaningless].) The general power to impose conditions on approval of an annexation does not include the power to impose as a condition something the Legislature expressly prohibited. Thus, while OC LAFCO could impose other conditions, such as those noted by CASB in its Brief, that are not directly prohibited under the CKH Act, it *could not* impose a condition, like an election, that the CKH Act prohibits under the circumstances of this case.

Because there is no conflict between the tax provisions in article XIII C and the island-annexation provisions in Section 56375.3, there is no need to "harmonize" the two, as CASB proposes. Moreover, Appellant's proposed "harmonization" is a theory CASB itself abandoned and affirmatively disclaimed in amending its Petition below in order to avoid running afoul of the separation of powers doctrine. Finally, the proposed "harmonization" is not possible because it would directly conflict with the applicable statutory provision. OC LAFCO did in this case exactly what the CKH Act mandated that it *shall* do – it waived protest proceedings (including an election) and approved the annexation. There are no grounds to mandate that OC LAFCO do anything different. The Judgment for OC LAFCO should be affirmed.

E. There is no Right to Vote on Annexation

That Appellant is really using the article XIII C tax issue as a lever to derail the annexation can perhaps be best illustrated by its argument that there is a "right to vote on annexation." In attempting to preempt the argument that a vote on taxes is a *de facto* vote on the annexation, CASB slides from arguing that the taxes cannot be imposed on its members absent a Proposition 218 election all the way to claiming a right to vote on the annexation itself. It argues that

Our Supreme Court has held that once the general right to vote on annexation was created by the Legislature, it joined the ranks of the right to vote in other contexts and would be treated as a fundamental right by the courts that cannot be denied to one class of citizens simply

for the sake of convenience or because they might vote the "wrong" way.

(AOB at p. 23 [citing *Citizens Against Forced Annexation v. Local Agency Formation Comm'n.* (1982) 32 Cal.3d 816, 822; *Curtis v. Board of Supervisors* (1972) 7 Cal.3d 942, 952-53.]).

CASB is flatly wrong that there is any right to vote on whether they are annexed into the City of Huntington Beach. First, there is certainly no *constitutional* right to vote on an annexation. "The right to vote does not include the right to compel the state to provide any electoral mechanism whatever for changes in municipal organization. Such line-drawing is a function that the Legislature may reserve to itself." (*Board of Supervisors of Sacramento County v. Local Agency Formation Comm'n* (1992) 3 Cal.4th 903, 914 [citing *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 502-503, 505].) Thus, any "right" to vote on an annexation must come from the Legislature.

As discussed above, however, the Legislature has expressly declared that under the circumstances of this case – i.e. where the requirements of Section 56375.3 are satisfied – there is no right to vote or otherwise to protest the annexation. LAFCOs *shall* waive protest proceedings entirely, including elections, and approve the annexation if the conditions of that statute are met.

Citizens Against Forced Annexation, supra, and *Curtis v. Board of Supervisors, supra*, are of no use to CASB here. In *Citizens Against Forced Annexation*, the statutes at issue granted the right to vote to

residents of the territory to be annexed, but not to the residents of the city that would be absorbing the annexed territory. (See 32 Cal.3d at p. 818.) In other words, the question there was *who* could vote on the annexation; there was no question on *whether* there would be a vote because the Legislature had seen fit to authorize a vote in the circumstances of that case. In *Curtis*, too, the Legislature had provided a right to vote on incorporation. The question there was whether allowing landowners to deny to citizens that right by protesting the incorporation prior to it even being put to a vote was permissible under constitutional equal protection guarantees. (See 7 Cal.3d at p. 954.) Neither case stands for the proposition that there is any right to vote on an annexation where the Legislature has not provided for such an election. Both cases are inapposite here. The Legislature has not granted the right to vote on an annexation of a small island into the city surrounding it, and in fact has directly stated that there shall be no such election. (See Gov. Code § 56375.3(a)(1).) CASB's assertion that it has a right to vote on the annexation of Sunset Beach into the City of Huntington Beach is erroneous.

F. The "Mischief" Appellant Claims May Arise if the Judgment is Affirmed is Fanciful

CASB's final argument is that the Superior Court's Judgment "will produce much mischief" and "open a gaping hole in Proposition 218." (See AOB at pp. 28-29.) Appellant illustrates this doomsday scenario by positing that if this Court affirms the Judgment in this case, a City could form a tax district within its boundaries, the residents of which would vote to approve a tax, then impose that tax on other residents of the City – who would not approve of such a tax if given a vote – by annexing those

objecting residents into the new tax district by using the island-annexation provisions of the CKH Act. (*Ibid.*)

Appellant's scenario is fanciful and could not occur under the law. The island-annexation provisions under Section 56375.3 could not be used to implement such a scheme because they apply only in vary narrow circumstances. First and foremost, Section 56375.3 applies only to changes of organization or reorganizations of a *city*. (*See* Gov. Code § 56375.3(a)(1).) Second, it applies only to *unincorporated* territory that is "surrounded" in various ways specified in the statute. (*See* Gov. Code § 56375.3(a)(1)(C); (b)(1)-(3).) Moreover, it does not apply to "tax districts" like special assessment districts of Mello-Roos districts because the CKH Act does not apply to those types of districts. (*See* Gov. Code § 56036(a).)

Thus, a city could not form the type of "tax district" CASB proffers with the hope of later annexing the rest of the territory within the city into that "tax district" via the island-annexation procedures of Section 56375.3. The CKH Act does not even apply. The annexing entity would not be a "city," it would be the "tax district." Moreover, the territory would not be unincorporated, because it is already part of the city. The "tax district" also could not "enlarge[] the boundaries of that initial district by adding new territory, 150 acres at a time" because those 150-acre pieces would not be surrounded. In fact, the very requirement that the island to be annexed be surrounded defeats Appellant's theory of the "tax district" gobbling up chunks of the rest of the city "150 acres at a time." The "mischief" CASB tenders is fanciful – it could not arise under the statute at issue, and is

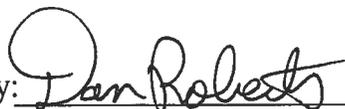
certainly no reason to reverse the trial court's correct ruling that LAFCO properly approved the annexation of Sunset Beach.

VI. CONCLUSION

OC LAFCO properly approved the annexation of Sunset Beach into the City of Huntington Beach, whether or not article XIII C applies to the City's local taxes. All of the requirements of Section 56375.3 were undisputedly met here; thus OC LAFCO had no alternative but to approve the annexation. There is no conflict between Section 56375.3 article XIII C because that section has nothing to do with any taxes. If article XIII C applies to the City's taxes such that there is a conflict with applying them to residents of Sunset Beach, such a conflict is with Section 57330, which is the provision providing for taxes in annexed territories, not Section 56375.3 governing the approval of the annexation itself. Thus, even assuming *arguendo*, that the taxes are invalid absent an election under Proposition 218, the annexation nevertheless was proper. Since the only role OC LAFCO played was to approve the annexation (not the taxes), and that action was proper (and in fact *required* under the applicable law), the judgment for OC LAFCO in this case was correct and should be affirmed.

Dated: March 23, 2012

Respectfully submitted,
BEST BEST & KRIEGER LLP

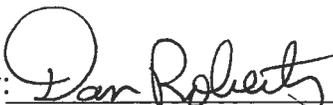
By: 
SCOTT C. SMITH
DANIEL S. ROBERTS
Attorneys for Defendant/Respondent
Orange County Local Agency
Formation Commission

**CERTIFICATION OF WORD COUNT
(California Rules of Court, Rule 8.204(c))**

I, Daniel S. Roberts, counsel for Respondent Orange County Local Agency Formation Commission, certify that the total word count of this brief, including footnotes, but excluding this certificate and the Tables of Contents and Authorities, is 6,596. I am relying on the word count of the Microsoft Word program on which this Brief was prepared in making this certification.

Dated: March 23, 2012

BEST BEST & KRIEGER LLP

By:  _____

SCOTT C. SMITH
DANIEL S. ROBERTS
Attorneys for Defendant/Respondent
Orange County Local Agency
Formation Commission

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE, SUITE 400
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

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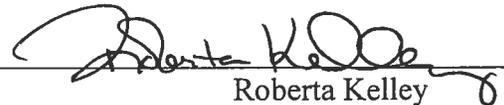
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Attorneys for Plaintiff/Appellant
CITIZEN'S ASSOCIATION
OF SUNSET BEACH

Attorneys for Respondent/Defendant
CITY OF HUNTINGTON BEACH

Stern, Van Vleck & McCarron, LLP
John C. McCarron
925 L Street, Suite 850
Sacramento, CA 95814
Telephone: (916) 442-1298

Michael G. Colantuono
Holly O. Whatley
Michael R. Cobden
Colantuono & Levin, PC
11364 Pleasant Valley Road
Penn Valley, CA 95946-9000
Telephone: (530) 432-7357
Facsimile: (530) 432-7356

Plaintiff's Co-Counsel

Howard Jarvis Taxpayers Association
Timothy A. Bittle
921 11th Street, Ste. 1201
Sacramento, CA 95814
Telephone: (916) 444-9950
Facsimile: (916) 444-9823

Jennifer McGrath, City Attorney
City of Huntington Beach
P. O. Box 190
Huntington Beach, CA 92648-0190

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California Court of Appeal
Fourth Appellate District
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Supreme Court
360 McAllister Street
San Francisco, CA 94102

Superior Court of Orange County
700 Civic Center Drive West
Santa Ana, CA 92701

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE, SUITE 400
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502