

EL DORADO LAFCO

LOCAL AGENCY FORMATION COMMISSION

AGENDA OF MAY 24, 2017

REGULAR MEETING

TO: Shiva Frentzen, Chair, and
Members of the El Dorado County Local Agency Formation
Commission

FROM: José C. Henríquez, Executive Officer

AGENDA ITEM #8: CONSIDERATION OF THE ISSUES SURROUNDING
MULTIPLE EXTENSIONS OF DEADLINES AFTER INITIAL
COMMISSION APPROVAL

RECOMMENDATION

Staff recommends that the Commission discuss and, where appropriate, provide direction to staff on the following issues that may arise when applicants request an extension to the one-year deadline to meet their conditions of approval:

- The California Environmental Quality Act;
- Changing financial circumstances that may imperil the fiscal status of the affected agencies;
- Changing logistical circumstances that the affected agencies may encounter; and/or
- Applicant-initiated project changes that may change the scope beyond what the Commission had considered when it initially approved the project.
- Staff also recommends that the Commission consider two staff recommendations involving a new possible condition of approval and a potential change in the Commission's billing practice for older projects.

REASON FOR RECOMMENDED ACTION

Per Government Code Section 57001, an applicant for a change of organization or reorganization has one year from Commission approval to comply with any Commission conditions of approval levied on the project. If LAFCO does not file a Certificate of Completion for an approved project within that year, the project is terminated unless the Commission approves an extension. Historically, most projects have not required an extension; those that have requested an extension typically have not needed more than

one extension. However, recently El Dorado LAFCO had three projects requiring more than three extensions. Last year, a project requiring four extensions was finally closed.

BACKGROUND

During the Commission's March 2017 meeting, the Commission granted extensions for two separate projects and directed staff to return the general matter so that the Commission can discuss these issues independent of a specific project.

How Did We Get Here?

Under the Cortese-Knox-Hertzberg Act (CKH), LAFCO's principal act, the Commission may deny, approve, or conditionally approve a project. Once approved, an applicant has one year to satisfy and comply with the Commission's conditions of approval; otherwise, the project is terminated. CKH empowers the Commission to grant extensions to this one-year deadline if needed. The extension may be for any length of time the Commission finds reasonable.

Typical conditions on LAFCO approvals include the extensions of all taxes, fees and bonded indebtedness service charges and assessments of the annexing entity; requiring the applicant to pay all fees (to LAFCO and other agencies) and indemnify LAFCO; and in annexations involving the provision of water, having a right-of-use letter from the annexing agency.

All three of the multi-year extension projects have been unable to meet the last condition, receiving a right-of-use letter from the annexing agency. Government Code §56668(l) requires the Commission to consider, the "Timely availability of water supplies adequate for projected needs" to the project site. Government Code §§56885.5 and 56886(j) further authorize the Commission to condition a petition on, "The fixing and establishment of priorities of use, or right of use, of water, or capacity rights in any public improvements or facilities or any other property, real or personal."

The El Dorado Irrigation District has two service areas, the El Dorado Hills area, which draws water from Folsom Lake, and the Western-Eastern region, which draws water from its Jenkinson Lake. EID can issue right-to-use letters from the Western-Eastern region. But EID must secure such a letter from the U.S. Bureau of Reclamation (BoR) for water to be drawn from Folsom Lake as the Bureau of Reclamation manages water coming out of Folsom Lake. The BoR process is notoriously long, and its staff have historically not considered annexations to be a high priority. Given the BoR's lengthy process, the Commission has been sympathetic to projects that require a right-of-use letter from EID via BoR when that is the only remaining condition an applicant must meet.

The three multi-year extension projects have all proceeded on the same path and, in addition to the lengthy BoR process, may have contributed in their own right to the delay. After LAFCO approved each of the three projects that have recently received extensions due to the delay caused by the BoR, each of the applicants waited at least a year after LAFCO approval to submit an annexation application to EID. EID could not submit its request to BoR until receiving a project application. And BoR will not start its right-of-use letter process until receiving an application from EID.

Issues and Complications Concerning Multi-Year Extensions

1 – Billing

Before discussing the substantive concerns that arise as a result of project extensions, issues have arisen in the past concerning billing applicants following project approval. Prior to 2015, LAFCO billed applicants three times: (1) at project initiation; (2) upon receipt of final application materials; and (3) shortly after final Commission approval of the project. Billing proceeded in this manner under the sometimes-mistaken assumption that the LAFCO process would end soon after Commission approval. In most circumstances when project applicants complied with all conditions within one year, LAFCO's costs after the final billing were typically minimal.

In 2015, the Commission agreed with staff's recommendation to change the billing process. Under the new practice and process, LAFCO now continuously bills applicants every six months so long as the Certificate of Completion has not been filed. As a result, new projects will not incur the types of unbilled costs being discussed in this section. At the same time the Commission agreed to the new billing process, it also agreed that any pending projects requiring an extension, or having received an extension, would not be subject to the new billing process. For all projects going forward, the Commission should be able to recover all of its costs from project initiation to Certificate of Completion.

To illustrate, the following projects all involved medium-to-high density residential projects, and all required annexation to EID for water service. These projects required, at most, one extension to the one-year deadline. The earned fees (unbilled project hours) costs were:

Name	Commission Cost
Dorkin (2006-07)	\$0
Bass Lake Estates (2008-01)	\$51.75
Summer Brook (2008-03)	\$82.17
Campobello (2010-01)	\$337.77

In contrast, the multi-year extension projects incurred significantly more costs after Commission approval. The multi-year extension projects generated the following earned fees (unbilled project hours) as of the end of March 2017:

Name	Commission Cost
Malcolm Dixon Estates (2013-01)	\$539.46
Porter (2013-02)	\$888.47
Diamante Estates (2014-01)	\$2,793.12
La Canada [2010-03 (closed)]	\$2,650.67

At the March 2017 Commission meeting, the new applicant representative for Porter and Malcolm Dixon Estates agreed to reimburse the Commission for its costs related to the extension. The Commission has provided a reimbursement agreement for the project applicants to sign and fully expects to recover all unbilled project hours for those two projects. However, the Commission has not (and likely will not) recover its costs (approximately \$5,400) from the other two projects (Diamante Estates and La Canada). La Canada completed all of its conditions and is no longer an open project with LAFCO.

2 – Applicant Pursues Land Use Changes Within the Project Area

While rare, there have been instances where the applicant has chosen to amend its tentative map during or soon after LAFCO approval. In those situations, the Commission and staff become concerned that the Commission approved an action for a project that differs from the actual project to be constructed.

While concerning, it is critically important to remember that the Commission is explicitly prohibited from regulating land use as land use decisions are determined by either El Dorado County or by one of the two cities. LAFCO is charged, under CKH, with considering the impacts of a LAFCO action, both on the provision of services and on the affected agencies at the time of consideration. Because LAFCO cannot make decisions on land use, any decision it makes on projects become a “snapshot” in time. This means that the project may not stay frozen indefinitely as the Commission approved it.

After researching this issue, conferring with other LAFCO colleagues, and having Commission counsel research the issue, staff has determined that a landowner may change the scope of the project after it has completed the LAFCO process.

In most instances where changes to the project have occurred following LAFCO approval, the applicant has changed the project several years following approval. In rare instances, the change occurred almost immediately. Marble Valley is the most recent example of that.

Other project changes have occurred following LAFCO approval, but prior to receipt of the Certificate of Completion. This occurrence is rare but not unprecedented and may happen with the Diamante Estates project. The Commission approved Diamante Estates in 2014. The Diamante Estates owner submitted an application to El Dorado County Planning for a new project on the same property, retitled as The Vineyards. The County is currently processing that project, so it has not changed yet. Nevertheless, it is possible for The Vineyards to receive County approval while Diamante is still in the LAFCO process. While the difference in scope between Diamante and The Vineyards projects is – relatively speaking - small (approximately 20 homes), this scenario poses a policy quandary as a new County-approved project would differ from the Commission-approved project.

However, regardless of whether the County approves a changed project prior to LAFCO project completion, the only question before the Commission is whether a *time extension* should be granted – not whether the Commission agrees with the land use changes to the project. The Commission, via its project approval, already

considered and decided that the new service boundaries would encompass the project.

3 – CEQA

A couple of Commissioners have expressed concern that the environmental review may become outdated from the time of certification of the environmental document until LAFCO project completion. Under the California Environmental Quality Act (“CEQA”) (Public Resources Code §§ 21000 *et seq.*), a project’s environmental review may be by an Environmental Impact Report (“EIR”), negative declaration or mitigated negative declaration, or be exempt from environmental review. CEQA provides that a subsequent or supplemental EIR shall not be required by a lead or responsible agency unless one or more of three events occur under Public Resources Code Section 21166:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

This same concept is embodied and expanded upon in CEQA Guideline Section 15162. Both sections 21166 and 15162 provide that the test for determining whether the environmental review is still applicable is not necessarily time but substantial changes in circumstance and/or information. If a long time passes from when an EIR is certified and there are a lot of changes (either in the project or circumstances, such as more traffic or new developments), then updating pieces of the CEQA analysis may be needed. So, the analysis hinges upon changed circumstances rather than just the passage of time.

Possible solution

The Commission could require that an evaluation of whether substantial changes have occurred in the project or circumstances be part of an extension request. If the Commission is interested in this, staff recommends that the Commission hire an environmental consultant to conduct this analysis and have the project applicant pay for the consultant. However, please note that additional considerations will have to be made as to how LAFCO interacts with the lead agency if it pursues this option.

4 – Changed Building Codes and/or Service Impacts

Depending on the length of time from when an applicant submits a project to LAFCO and completion of the project, the building codes (including the fire code) and other potential service impacts may change. The project applicant also takes this risk when dealing with the local land use authority as it will receive building permits and must comply with applicable building codes and/or increased fees that may have changed since project initiation. This concern is not unique to LAFCO. But LAFCO does not have any control over building codes, fees set by other agencies, or other

service impacts. While a project applicant may wish to work with the local land use authority to enter into a development agreement or otherwise vest development rights, those issues are separate and apart from LAFCO's considerations.

Thus, staff does not recommend making any change to existing practice or procedure regarding this issue.

5 – Outdated Financial Analyses and Assumptions

This is similar to the issue above. Fiscal decisions are frozen in time once they are reached and may be stale upon project completion. Certain assumptions made in Year 0 may no longer be applicable in Year 3 when the project is finally through LAFCO. This may be either positive for the affected agencies or negative, depending on their financial position. However, whether another agency will be positively or negatively affected under these circumstances is out of LAFCO's control. It is the responsibility of each agency's staff to reasonably project a project's anticipated financial impact.

Recommendations

1. New Condition of Approval. Staff recommends adopting a new condition of approval that may remedy most long-term extensions. As noted earlier, the projects that have required long-term extensions have one trait in common: For an indeterminate reason, they did not file timely annexation approvals with EID. If applicants are required to submit an EID annexation application within a few months after LAFCO approval, then the BoR process should get started earlier, reducing the amount of time needed to comply with the condition of approval. However, project applicants will likely still need more than one year to comply with the right-to-use condition if a BoR letter is needed.
2. Cost Reimbursement. A second recommendation to alleviate the cost to the agency is to require that, on a going forward basis, the Commission contact project applicants to inform them that on a going forward basis, after the next three hours of Commission staff time, the Commission will begin billing the applicants for all costs incurred.