

EL DORADO LAFCO

LOCAL AGENCY FORMATION COMMISSION

AGENDA OF DECEMBER 2, 2009

REGULAR MEETING

TO: Francesca Loftis, Chair, and
Members of the El Dorado County Local Agency Formation
Commission

FROM: José C. Henríquez, Executive Officer

AGENDA ITEM #4: DISCUSS AND CONSIDER LAFCO POLICY 1.9.2

RECOMMENDATION

Staff recommends that the Commission discuss and consider the adequacy of Section 1.9.2 of the Policies and Guidelines as it relates to tie votes.

REASON FOR RECOMMENDED ACTION

State Law is silent on the issue of tie votes on proposals or in situations where the Commission takes no action. Policy 1.9.2 appears to be this Commission's attempt to resolve those types of situations. Commissioner Sweeney is concerned that the policy may be in conflict with other statutes. This item was placed on the agenda at his request.

BACKGROUND

As it relates to annexations, detachments or reorganizations, Cortese-Knox-Hertzberg (CKH) contains only two procedures: The process that is used to get a petition ready for the Commission to deliberate and the reconsideration process to revisit the petition once a decision has been made. While most often used by an applicant whose project has been denied, anyone may ask the Commission to reconsider its decision provided that the request complies with Government Code §56895.

When rendering its decision on proposals, CKH indicates there are only three possible courses of actions: Unconditional approval, approval with conditions, or denial. Further, CKH is specific that motions to approve projects must gain a majority (quorum) to pass. This is true regardless of whether the Commission is deciding on the project for the first time or whether it is utilizing the reconsideration process.

However, CKH is silent on instances where a motion to approve (or deny) fails to gather a majority vote or on a motion garnering a tie. CKH also does not address the instance of a Commission not taking any action on an application.

Most governmental entities consider a tie vote as “no action,” and at least three court rulings support this view. On the other hand, ties resemble a denial in the sense that they do not allow the project to proceed. Because there is no process in CKH for “no action” and if there is no adopted local policy addressing those instances, then in cases of a tie there is the potential that a project goes into limbo (not approved or denied but no process to follow to return the item to the Commission).

This may be what the Commission had in mind when it adopted Policy 1.9.2, which reads (emphasis added):

1.9.2 **Voting:** Roll call shall be conducted in random order, with the Chair voting last. No act of the Commission shall be valid or binding unless four or more members concur. A tie vote, or any failure to act by at least four affirmative votes, shall constitute a denial.

Policy 1.9.2 seems intended to recognize the practical effect of a tie vote, which is that of a denial even if no action is officially taken. It may be that 1.9.2 was adopted to avoid the situation where an applicant might not be able to seek reconsideration if LAFCO treated the tie vote as truly constituting no action. By having this policy in place, it appears that the Commission wanted to direct applicants toward an administrative solution in cases of ties. To use a rough analogy, a tie vote is like a truck stuck in the mud and Policy 1.9.2 is the piece of plywood under the stuck tire that is supposed to get it moving again.

This is not the only LAFCO with such a policy in place. Most LAFCOs have language that is similar to Policy 1.9.2 or contains some variation, such as an automatic continuance to the next meeting, but that a second tie vote constitutes a denial. This language is from San Bernardino LAFCO’s Rule #13 in their Policy and Procedure Manual:

Four votes are necessary to approve a proposal or a motion. A proposal which receives a tie vote shall automatically be continued to the next Commission hearing. A subsequent tie vote at the next hearing of the proposal indicates automatic denial without prejudice.

Commissioner Sweeney is concerned that Policy 1.9.2 conflicts with other statutes requiring government agencies to specify its reasoning behind an action, regardless of whether it is an approval or denial. He indicated to staff his belief that LAFCO would have a difficult time defending the policy of an automatic denial because of a tie vote in court. He requests that the Commission consider amending Policy 1.9.2 to state that tie votes result in an automatic continuance until the Commission adopts a formal decision. Section 37 of the 9th Edition of Robert’s Rules of Order supports allowing for a motion upon which no action was taken to be “renewed” at a later meeting (emphasis added):

If a motion is made and disposed of without being adopted, and is later allowed to come before the assembly, after being made again by any member in essentially the same connection, the motion is said to be renewed.

...

Any motion that is still applicable can be renewed at any later session, except where a specific rule prevents its renewal; and such an impediment to renewal at a later session normally can exist only when the first motion goes over to that

session as not finally disposed of, in which case the question can then be reached through the first motion.

Staff has no opinion about amending Policy 1.9.2 to contain language reflecting Robert's Rules of Order except to recommend that any amending language should be clear that at some point the automatic continuances should stop. Although rare, one can imagine a scenario where a petition could be continued for several months because of absences and ties. In addition, perpetual continuances may run afoul of Government Code §56666(a), which states (emphasis added):

(a) The hearing shall be held by the commission upon the date and at the time and place specified. The hearing may be continued from time to time but not to exceed 70 days from the date specified in the original notice.

Since the hearing date is dependent on when the Certificate of Filing is issued and on the first meeting in which 21 days notice can be given, it seems that the Commission has very little leeway on how many continuances it can grant to an application. In that regard, adopting a rule similar to San Bernardino LAFCO's Rule #13 would strike a balance. However, it must be noted that language similar to Rule #13 precludes an applicant from using the reconsideration process. Denial without prejudice means that the applicant would have to wait a year before re-submitting a similar proposal.