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March 17, 2021

Agreement to Indemnify LAFCO Against Claims Arising from Annexation Decision Was Unenforceable as Lacking Consideration



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[v. City of](#)

The City

of Pismo Beach approved a 252-unit residential subdivision and the City and developer applied to the San Luis Obispo LAFCO to annex the property. The LAFCO application signed by the City and developer included an agreement to indemnify LAFCO against any claims arising out of its action on the application, including claims brought by the City and/or developer. The City and developer later filed a mandamus action challenging LAFCO's denial of their application. The suit was unsuccessful and LAFCO sought attorney's fees of more than \$400,000 under the indemnity agreement. The City and developer refused to pay, contending there was no consideration underlying the indemnity agreement because LAFCO was already legally required to accept and act upon the annexation application. The Court of Appeal agreed. It noted that all contracts must be supported by consideration in the form of either a benefit to the promisor or a detriment to the promisee, and a promise to do what the promisor is already legally bound to do is neither. LAFCO had a statutory duty under the Cortese-Knox-Hertzberg Act to accept all completed applications and to review and approve or disapprove them. LAFCO argued that, under its power to assess fees to cover processing costs, it was entitled to charge anticipated attorney fees as part of the application fee. The court rejected this claim, noting that the statute authorized fees to fund the cost of the administrative process, not costs of post-decision court proceedings. Moreover, the statute required that any such administrative fees be adopted in compliance with the Mitigation Fee Act. LAFCO had not complied with the procedural requirements of the Act with respect to assessment of attorney's fees and these procedures could not "be avoided by inserting a provision in an application form." The court likewise rejected LAFCO's claim that it had the power to require the indemnity agreement implied from other express powers

granted by statute. The court pointed out that Code of Civil Procedure section 1021 allows recovery of attorney's fees only as "specifically provided for by statute," not implied by the grant of other powers. Because LAFCO lacked such specific statutory power and the indemnity agreement lacked consideration, there was no legal basis for recovery of attorney's fees.