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Our File No. 45009.0001

April 29, 2015

VIA E-MAIL AND U.S. MAIL

William M. Wright, Esq.
The Wright Law Office
2828 Easy Street, Suite 3
Placerville, CA 95667

Re: **Legal Deficiencies in Draft Comprehensive Fiscal Analysis for Olympic Valley Incorporation Proposal (LAFCO No. 2013-02)**

Dear Mr. Wright:

I write on behalf of Incorporate OV Foundation (IOV) in response to Placer County LAFCO Executive Director Kris Berry's letter of April 28, 2015 to Dr. Fred Ilfeld regarding the draft Comprehensive Fiscal Analysis (CFA) for the proposed Olympic Valley incorporation prepared by the Rosenow Spevacek Group (RSG). We are concerned that Placer County LAFCO is preparing to prematurely release a legally and factually inadequate CFA in a rushed process that violates the Cortese-Knox-Hertzberg Act and IOV's common law right to a fair hearing. I urge you to consult with your client so that it will understand the need to allow sufficient time for this process in compliance with law.

As you know, a CFA is an analysis to be incorporated in the Executive Director's staff report on a proposed incorporation. Government Code section 56800 and the Governor's Office of Planning & Research's Guidelines govern its preparation, content, review, and distribution. The CFA must be legally sufficient, mathematically accurate, and rooted in reasonable (rather than "conservative") assumptions and estimates. As discussed below and in IOV's April 21, and April 23, 2015 memos to Ms. Berry, we have identified several legal and analytical flaws in the draft CFA that bear substantial revision before LAFCO proceeds further.

I. The CFA May Not Be Released for Public Review Until Revenue Neutrality Negotiations Are Completed

The CFA must analyze the proposed Town's fiscal viability, including the effect of any payments owed to the County under a revenue neutrality agreement pursuant to Government Code section 56815. Under that statute, incorporation proponents and the County are required to negotiate an agreement to mitigate any negative fiscal effect of incorporation on the County. LAFCO must include the resulting revenue neutrality agreement in the proposed terms and conditions of the incorporation. (Gov't Code, § 56815, subd. (e).)

The OPR Guidelines, promulgated pursuant to Government Code section 56815.2, provide further guidance for the CFA and revenue neutrality agreement negotiations. The Guidelines state the draft CFA should be used as a basis for revenue neutrality negotiations **before** public release of a draft CFA. (OPR Incorporation Guidelines, p. 43.) After the County and the proponents reach a revenue neutrality agreement, the fiscal analyst must use the agreed revenue neutrality payments to generate a CFA suitable for public review. LAFCO then releases the public hearing draft CFA in the Executive Director's staff report on the proposed incorporation for review and analysis by the public and the Commission. This timeline is described in the OPR Guidelines and depicted on a flowchart on page 42.

Ms. Berry's April 28, 2015 letter states Placer County LAFCO does not intend to follow the OPR Guidelines on this point. Releasing a flawed draft CFA before RSG revises it and before revenue neutrality negotiations conclude will prejudice the process and violate the Cortese-Knox-Hertzberg Act. We demand that Ms. Berry direct RSG to revise the draft CFA, then release that revised draft only to the County and the proponents until revenue neutrality negotiations conclude.

Ms. Berry's letter states that the data is time-sensitive and must be released now. She creates a false urgency and imposes a double standard. LACO has repeatedly allowed time extensions to the County and RSG and delayed its own actions yet insists that IOV respond to the CFA just 11 days after it received partial County data to support it. This comports with neither the common law fair hearing requirement nor common courtesy.

Releasing the draft CFA cannot guarantee that RSG will not have to later revise it to reflect FY 2014–2015 data. Government Code section 56800, subdivision (a) requires the CFA to use the data from the most recent fiscal year available preceding the issuance of the certificate of filing. LAFCO issues the certificate of filing under Government Code section 56651 only when the incorporation is ready for hearing, as a hearing must be set within 90 days of the certificate of filing's issuance. (Gov't Code, § 56658, subd. (h).) LAFCO cannot reasonably schedule a hearing until the environmental impact report and the CFA are ready for public review, after revenue neutrality negotiations are completed. None of these will happen by July 2015. LAFCO must, of course, review the EIR before acting on the incorporation under CEQA and the CFA is statutorily required to inform the hearing. IOV expects RSG will need to revise the public hearing draft CFA to use FY 2014–2015 data after LAFCO issues a certificate of filing setting the matter for a public hearing. Releasing the flawed draft CFA now, despite this reality, will not spare LAFCO from the need to update the CFA with FY 2014-2015 data. It will, however, violate IOV's rights and impair this process.

2. Failing to Provide IOV with All County Data, Spreadsheets and Calculations Underlying the Draft CFA Violates Common Law Fair Hearing Requirements as well as the Public Records Act

As you know, LAFCO proceedings are quasi-legislative and thus subject to judicial review in traditional mandate under Code of Civil Procedure section 1085. (See *San Miguel Consolidated Fire Protection Dist. v. Davis* (1994) 25 Cal.App.4th 134, 152 ["LAFCO is a 'quasi-legislative administrative agency' whose proceedings are 'quasi-legislative in nature.'] [citations omitted].) Judicial review of quasi-legislative actions considers "whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support; when review is sought by means of administrative mandate the inquiry is directed to whether substantial evidence supports the decision." (*McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1786.)

In considering the proposed incorporation, LAFCO must consider the CFA to analyze whether the Town will receive sufficient revenues to fund public services and a reasonable (again, not "conservative") reserve during the first three fiscal years post-incorporation and whether any adverse financial impact on the County will be appropriately mitigated. (Gov't Code, §§ 56720, 56815.) LAFCO cannot base its analysis of these issues on the CFA alone, without releasing the underlying data, spreadsheets

and working papers to the proponents for review and analysis. Failing to release its working papers and underlying data would mean that Ms. Berry would make her recommendation and LAFCO could make its decision based on secret data available to the County — but not to the proponents — making fair and meaningful revenue neutrality negotiations impossible.

Moreover, Ms. Berry's approach violates the common law fair hearing requirement, which applies whenever the law requires a hearing. (See *Western Oil & Gas Association v. Air Resources Board* (1984) 37 Cal.3d 502, 528–529 [agency may not base decisions on secret data, using the public hearing as a façade].) An essential element of a fair hearing is participants' ability to review and comment on the evidence on which the agency relies. (*California Association of Nursing Homes etc., Inc. v. Williams* (1970) 4 Cal.App.3d 800, 811.) Here, by contrast, LAFCO proposes to proceed with a flawed report based on data exclusively available to it, the County and to RSG, without releasing that data to the proponents for use in the revenue neutrality negotiations or to the public. This violates basic fair hearing requirements. We must insist our client's rights to a fair hearing be respected and seek your assistance to attain that end.

IOV has also made public records requests for these materials — and renews those requests now. We expect LAFCO's timely and faithful compliance with that statute, as well.

3. CFA's Treatment of TOT is Inconsistent and Unsupported by Law

The draft CFA's treatment of transient occupancy tax (TOT) is inconsistent and unsupported by law. First, Measure F imposes a general tax. Accordingly, as a matter of law its proceeds may be used for any general governmental purpose of the taxing agency. (Cal. Const., art. XIII C, § 1, subd. (a).) The draft CFA unlawfully assumed Measure F's proceeds must be used for infrastructure; it must be revised.

Second, the CFA muddles two distinct concepts: sources of funding for Town services and revenue neutrality obligations. It is inappropriate to say TOT revenues will be encumbered by the revenue neutrality obligation. The Town can satisfy any funding obligation that arises from a revenue neutrality agreement from any source of its choosing. The revenue neutrality obligation is a requirement to mitigate the adverse fiscal effect of incorporation on the County, not to transfer a specific revenue source to the County.

Third, LAFCO has no power to withhold the Measure F tax proceeds from the Town. A county has no power to impose a bed tax in incorporated territory. (See Gov't Code, § 7280, subd. (a) ["**The tax, when levied by the legislative body of a county, applies only to the unincorporated areas of the county.**"] [emphasis added].) The term "levy" is crucial — it means each collection of the tax, not just its enactment. Once a revenue neutrality agreement is reached, LAFCO must include its provisions in the terms and conditions of its approval of incorporation. (Gov't Code, § 56815, subd. (e) [terms and conditions intended to mitigate fiscal impact on county, i.e. revenue neutrality agreement's payments, shall be included in proposed terms and conditions of incorporation].) LAFCO lacks the power to alter the agreement. LAFCO's general conditioning power under Government Code section 56868 is controlled by these more specific authorities and therefore does not entitle LAFCO to assign what must be a city bed tax to a county.

Fourth, the draft CFA's statement that NLTRA may have encumbered the Measure F proceeds beyond the expiration of its contract on June 30, 2016 is illogical. NLTRA's contract, and thus its right to receive Measure F funds, expires on June 30, 2016. It cannot legally encumber those funds beyond that date. This statement must be corrected.

4. Draft CFA Inappropriately Assumes the Outcome of Revenue Neutrality Negotiations to Brand the Town Non-Viable

The CFA assumes the outcome of the revenue neutrality negotiations that have not commenced, let alone finished. This is impermissible. Under Government Code section 56815, the incorporation proponents and the County must agree to mitigate any negative fiscal effect on the County from the incorporation. When an agreement is concluded, LAFCO must include the revenue neutrality agreement in the proposed terms and conditions of the incorporation. (Gov't Code, § 56815, subd. (e).) RSG's draft CFA assumes that the result of the negotiations will be the loss of most of the Town's TOT revenue and that payment will be made on a straight-line basis over eight years — this is not the experience of most cities which incorporated after adoption of the revenue neutrality statute. RSG then relies on these unjustified and unauthorized assumptions to support its conclusion the Town is not fiscally viable. This is flawed, lacking in neutrality and objectivity, and founded on a misapprehension of applicable law. Before negotiations conclude, there is no reasoned basis to estimate these

payments. Accordingly, RSG must revise its draft CFA to remove its assumed revenue neutrality payment amounts and any conclusions that stem from them and then release that draft via LAFCO to the County and the proponents for use in their negotiations. When a revenue neutrality agreement is reached, RSG can prepare a public hearing draft CFA reflecting it. The process LAFCO now pursues violates the statute, the OPR Guidelines and fundamental fairness.

5. A 30% Reserve is Unreasonable and Violates the OPR Guidelines

Government Code section 56720 requires LAFCO to find that the proposed Town will receive sufficient revenues to fund a reasonable reserve during the first three fiscal years after incorporation. The draft CFA assumes a 30% reserve. This is unreasonably high. The OPR Guidelines recommend a minimum 10% reserve by the end of the third fiscal year after incorporation. The 30% figure might be good public policy, but it is not the fair, neutral evaluation of fiscal viability the law requires of a CFA and it is unreasonable for a new Town. It — and RSG's stated preference for "conservative" rather than reasonable analysis — amount to bias, putting a thumb on the scale to disfavor incorporation. These aspects of the CFA, too, must change.

6. Comparable Cities Must be Comparable

The draft CFA cites six cities in Placer County as comparable cities for all purposes under the CFA — revenue and expenses analysis and proposed Town staffing. The Town is sufficiently unique that no one city is a good comparable for all these purposes.

Moreover, Government Code section 56800, subdivision (a)(1) requires comparison cities to be similar in population and geographic size to the proposed Town, not simply nearby. The average population of the comparable cities cited in the draft CFA is 8,300 persons, while the population of the proposed Town is 943. The draft CFA must be revised to use comparable cities that have similar geographic sizes and populations. For purposes of estimating Town staff and its service costs (but not necessarily revenues and every cost — like snow removal), the CFA should look other cities that contract for most services, particularly police and fire protection. For purposes of the requisite staffing and service costs, we suggest such cities as Bradbury, Hidden Hills and La Habra Heights — all small, contract-only cities served by county sheriff and fire — precisely the kind of Town the petition for incorporation proposes.

For purposes of TOT reliance and snow removal, we suggest such communities as Mammoth Lake, Big Bear Lake, and Truckee. The CFA relies for purposes of staffing analyses on cities in Nevada and Placer counties which provide policing, fire service or both. Such cities are not meaningfully comparable to the proposed Town's staffing needs given the high cost of public safety services and their great need for legal and other administrative support.

7. The Draft CFA is Neither Objective nor Reasonable

Government Code section 56800 requires the CFA to provide reasonable analysis of the proposed Town's fiscal viability. Inherent in reasonable analysis is a neutral, balanced consideration of available evidence. We think a neutral observer would find the current draft CFA to be suffused with bias against — or at least profound unfamiliarity with — small governments.

For example, the draft CFA states that Olympic Valley would be unusually reliant on a single revenue source and that no cities within the last 25 years have incorporated with a similar reliance on a single revenue source, without support for that statement and without identifying whether there are other towns and cities similarly reliant on a single revenue source. Data available from the State Controller and posted to the californiacityfinance.com website demonstrate many cities have similarly undiversified revenue portfolios — TOT and franchise fees in particular are large revenues to some cities. Revenue diversity is desirable, of course, but it is not determinative of viability. The draft CFA also states that it presents a "conservative forecast" of operating revenues and expenses, and relies on a "conservative" analysis of growth projections. This too violates Government Code section 56800's requirement for a reasonable, i.e. neutral, analysis of revenue and expenditures. RSG must revise the draft CFA to avoid putting a thumb on the scale to favor or disfavor the proposed Town.

The draft CFA also states the Town Council may deny proposed development projects, depriving the Town of needed potential revenues. It should also observe the Town Council may approve more development than currently proposed, increasing available revenues. A neutral, balanced analysis would note both possibilities, and assume a reasonable development rate for the community. The CFA should avoid undue speculation but, when it must make estimates, those estimates should be neutral,

fair and balanced and not reflect the rhetoric of the leading opponent of incorporation. Accordingly, the draft CFA must be revised.

Additionally, referring to the bankruptcy of Mammoth Lakes is gratuitous, irrelevant, and suggests a lack of neutrality in the analysis. Mammoth Lakes' bankruptcy stemmed from a lawsuit, which is a risk every public agency faces, but bears no mention in the draft CFA which must analyze reasonably foreseeable risks, not outsized, theoretical but unlikely risks. Mammoth Lake's court loss and bankruptcy are notable precisely because of their rarity. This reference must be deleted.

Conclusion

Although this letter refers to some of IOV's concerns with the CFA, it is not exhaustive. We refer LAFCO and RSG to IOV's April 21 and April 23, 2015 and a forthcoming memo which include more detail. This last will include HdL Coren & Cone's (HdL) analysis of the CFA's property tax assumptions. As you know, HdL is the State's leading property tax analyst. Given the very short, 11-day period LAFCO currently permits for IOV's comments on a CFA that has taken many more months to prepare than predicted — due to significant delays LAFCO allowed itself, the County and RSG — it has been necessary to provide IOV's comments seriatim. We trust LAFCO and its consultant will respond fully and fairly to those comments and will not rush to maintain a now-unrealistic hearing schedule at the expense of a full and fair analysis.

We request that LAFCO direct RSG to revise the draft CFA, correcting these legal and analytical flaws and those identified in Incorporate OV Foundation's memos noted above. We also demand that LAFCO provide IOV the data, spreadsheets and working papers underlying the draft CFA.

Once revised, LAFCO must release the revised draft CFA, and all underlying data and working papers, to Placer County and IOV for their use in the revenue neutrality negotiations. LAFCO can appropriately release the public hearing draft of the CFA only after these negotiations are complete.

Finally, we must insist that Ms. Berry relax her unrealistic May 1st deadline and that LAFCO commit to compliance with the procedures stated in the OPR guidelines.

Please reply before LAFCO's May 1st deadline so IOV can consider other means to ensure its rights, should such means be necessary.

Sincerely,

Michael G. Colantuono
General Counsel
Incorporate OV Foundation

MGC:mts

cc: Dr. Fred Ilfeld, Chair
Members of the Incorporate OV Foundation Board
Kris Berry, Placer LAFCO Executive Officer