

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

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OPINION	:	No. 83-102
of	:	<u>JUNE 8, 1983</u>
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THE HONORABLE ERNEST L. KONNYU, MEMBER OF THE CALIFORNIA ASSEMBLY, requests the opinion of this office on the following question:

May a fire protection district with territory in two cities, neither of which contains 70 percent or more of the territory of the district within its boundaries with 70 percent or more of the registered voters of the district residing therein but the combined territory of the district in both cities does meet that criteria, be established as a subsidiary district of a joint powers agency formed by the cities for such purpose?

CONCLUSION

A fire protection district with territory in two cities, neither of which contains 70 percent or more of the territory of the district within its boundaries with 70 percent or more of the registered voters of the district residing therein but the combined territory of the district in both cities does meet that criteria, may not be established as a subsidiary district of a joint powers agency formed by the cities for such purpose.

## ANALYSIS

We are advised that a fire protection district is situated such that a portion of its territory lies within two nearby cities. The district territory contained within either city does not represent 70 percent or more of the total land area of the district containing 70 percent or more of the registered voters of the district, but the combined territory of the district within both cities does meet that criteria. We are asked whether the fire protection district may be established as a subsidiary district of a joint powers agency created for that purpose by the two cities. It is assumed that the requisite approvals will be provided by the local agency formation commission and the voters.

The District Reorganization Act of 1965 ("the Act") is codified as division 1, title 6 of the Government Code. (§ 56000.)<sup>1</sup> Section 56401 of the Act provides:

"A district of limited powers may be either merged with or established as a subsidiary district of a city in the manner provided in this chapter."

The chapter referred to is chapter 6 of the Act embracing sections 56400 through 56421. Section 56403 provides:

"An order establishing a district of limited powers as a subsidiary district may be adopted if upon the date of such order either of the conditions specified in subdivision (a) or (b) is satisfied:

"(a) The entire territory of such district shall be included within the boundaries of a city.

"(b) A portion or portions of the territory of such district are included within the boundaries of a city and such portion or portions shall both:

"(1) Represent 70 percent or more of the area of land within the district, as determined by reference to the statements and the maps or plats filed pursuant to Chapter 8 (commencing with Section 54900) of Division 2 of Title 5 of the current fiscal year.

"(2) Contain 70 percent or more of the number of registered voters who reside within the district as shown on the voters' registrar in the office of the county clerk or registrar of voters."

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<sup>1</sup> Section references are to the Government Code unless otherwise indicated.

Section 56040 of the Act defines "district of limited powers" to include a fire protection district. Section 56073 defines "subsidiary district" to mean "a district of limited powers in which the city council of a city shall be designated as, and empowered to act as, ex officio the board of directors of such district."

The procedure for the establishment of such a subsidiary district is initiated by a resolution of the board of supervisors of the county. (§ 56410.) A public hearing is held upon the proposal by the board of supervisors. (§ 56413.) After the hearing the board of supervisors may order the establishment of the subsidiary district subject to confirmation by the voters at elections conducted by the board. (§§ 56416 & 56417.) With voter approval the board of supervisors then adopts a conforming resolution which establishes the subsidiary district. (§ 56421.)

In summary the Act provides a procedure by which a fire protection district in which 70 percent of the territory of the district in which 70 percent of the registered voters of the district reside (the "70-70 criteria") lies within a city may be made a subsidiary district of that city for which the city council of the city acts ex officio as the governing board of the district.

The Joint Exercise of Powers Act is codified in Government Code section 6500 et seq. Section 6502 provides:

"If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting agencies may be located outside this state.

"It shall not be necessary that any power common to the contracting parties be exercisable by each such contracting party with respect to the geographical area in which such power is to be jointly exercised. For purposes of this section, two or more public agencies having the power to conduct agricultural, livestock, industrial, cultural, or other fairs or exhibitions shall be deemed to have common power with respect to any such fair or exhibition conducted by any one or more of such public agencies or by an entity created pursuant to a joint powers agreement entered into by such public agencies."

Section 6500 includes cities in its definition of "public agency." Section 6503.5 authorizes "the creation of an agency or entity which is separate from the parties to the agreement."

In applying the Joint Exercise of Powers Act care must be taken in defining the power which is to be exercised jointly. The result contemplated by the question is to change the status of an existing fire protection district from an independent government entity with its own board of directors to a district subsidiary to a joint powers entity created for the purpose by two cities, neither of which alone meets the 70-70 criteria of the Act, where the combined territories of the two cities does meet the 70-70 criteria of the Act. The Act places the power to establish subsidiary districts in the hands of the board of supervisors, not in the cities. Thus two questions evolve: (1) does the Joint Exercise of Powers Act authorize the cities to create a separate joint powers entity for such a purpose? (2) Does the Act authorize the board of supervisors to make the fire protection district subsidiary to the joint powers entity in such a case?

The Joint Exercise of Powers Act was construed in *The City of Oakland v. Williams* (1940) 15 Cal.2d 542, 549 as follows:

"The statute means nothing if it does not mean that cities may contract in effect to delegate to one of their number the exercise of a power or the performance of an act in behalf of all of them, and which each independently could have exercised or performed. A statute thus authorizing the joint exercise of powers separately possessed by municipalities cannot be said to enlarge upon the charter provisions of said municipalities. It grants no new powers but merely sets up a new procedure for the exercise of existing powers."

In 30 Ops.Cal.Atty.Gen. 73, 74 (1957) we pointed out that section 6502 "requires that each of the public agencies which are parties to an agreement must have the independent power to do the act for which they contract under the Joint Powers Act." (See also 56 Ops.Cal.Atty.Gen. 571, 581 (1973); 60 Ops.Cal.Atty.Gen. 148, 151 (1977) and 60 Ops.Cal.Atty.Gen. 206, 207 (1977).)

In the question presented, does either city have the power to act independently in the manner contemplated? The Act makes the 70-70 criteria a condition precedent to any action to make a fire protection district a subsidiary district of a city. The question assumes that neither city meets the 70-70 criteria. It follows that neither city has the power to act independently to have the fire protection district made a subsidiary district to itself. As we said in 56 Ops.Cal.Atty.Gen., *supra*, at 581, where a public agency "does not have the authority to do an act, it cannot do so indirectly by entering into an agreement under the Joint Exercise of Powers Act." Since the cities are not authorized to create the joint powers agency contemplated by the question, we do not reach the question whether the fire protection district may be made a subsidiary district of such an agency.

We conclude that a fire protection district with territory in two cities may not be established as a subsidiary district of a joint powers agency formed by the cities for such purpose.

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