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OPINION	:	No. 83-205
of	:	JUNE 23, 1983
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THE HONORABLE RALPH B. JORDAN, COUNTY COUNSEL, KERN COUNTY, has requested an opinion on the following question:

Where a county-wide low rent housing measure was defeated by the county electorate as a whole, does the fact that the measure received a favorable vote within a particular unincorporated area of the county nevertheless authorize low rent housing for that area?

CONCLUSION

A favorable vote within a particular unincorporated area of a county on a county-wide low rent housing measure does not authorize low rent housing for that area where the measure was defeated by the county electorate as a whole.

ANALYSIS

The Housing Authorities Law, first enacted in 1938 (Stats. 1938, Ex.Sess., ch. 4), is found in section 34200 et seq., of the Health and Safety Code.[1] Section 34240 provides that there is "[i]n each county and city . . . the housing authority of the county or city." However, a housing authority is not activated, nor may it transact business in the county or city where it "exists," unless formal action is taken by the governing body of the city or county declaring a need for the authority to function. (§§ 34240-34244.)

A *county* housing authority which has been activated may operate and exercise its powers within the territorial boundaries of any city where the city has not activated its own housing authority if the consent of the city governing body has been obtained. (See §§ 34208-34209.) The powers of a housing authority include the power to develop, construct or acquire housing for persons of low income, that is, "low rent" housing projects. (See § 34310 et seq.) Although housing authorities function within cities and counties, they are considered "agencies of the state." As such, the courts have held that both the decision of a city or county to activate an authority, and the decision of an authority to acquire a housing project are "administrative" as opposed to "legislative" acts. As such, they have been held to be not subject to local referendum. (See *Housing Authority* v. *Superior Court* (1950) 35 Cal.2d 550.)

In response to this conclusion of the courts, the people adopted article XXXIV of the California Constitution at the November 1950 general election. (See *James* v. *Valtierra* (1971) 402 U.S. 137, 138-139, which case held article XXXIV to be constitutional.) That article provides in paragraph one thereof:

> "Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election."

Succeeding paragraphs define for purposes of the provision the terms "low rent housing project," "persons of low income," "state public body," which would include a housing authority, and "Federal Government."

Shortly after the adoption of article XXXIV this office issued an opinion as to the manner in which this constitutional provision should be implemented where a county

[1] All section references are to the Health and Safety Code unless otherwise indicated.

housing authority proposed "to establish low rent housing projects in unincorporated areas of the county but within or near unincorporated centers of population bearing place names." (18 Ops.Cal.Atty.Gen. 103 (1951).) Stated otherwise, we were required to interpret article XXXIV insofar as its election requirements apply not only to the electorate of a city or of a county, but of a "town." At such time, and now, there was and is no legal unit of government in California which is an unincorporated "town." Accordingly, the basic question resolved itself into whether the requisite election to establish housing projects in population centers with commonly accepted place names, but in unincorporated territory, required a vote of the electorate of the entire county, or only a vote of the voters residing in such unincorporated place (or "town").

We resolved this dilemma by resort to the apparent purpose of article XXXIV as gleaned from the voters' pamphlet for the November 1950 general election. This was to require that proposed housing projects be approved by "interested citizens," who we concluded were "members of the particular community in which the project is to be established, not . . . the citizens of another community in another part of the same county." (*Id.*, at pp. 106-107.) Noting that the constitutional provision used both the terms "city" and "town" we ultimately concluded that the election need not nor should not be county-wide, stating:

> "Primarily, however, we are persuaded by the apparent intent of Article XXXIV to require the submission of each such proposal to the electors of the particular community which is to receive the project. In our opinion, the word 'town' includes such identifiable communities as may reasonably be regarded as towns within the ordinary meaning of the term, regardless that such communities may not be incorporated cities.
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> "The legal conclusion does not decide the concrete case before us. That decision lies in the hands of the local authorities. The facts indicate that the Yolo County projects are to be located in or in the neighborhood of certain settled localities in Yolo County. Each of these localities has a place name. Two of those localities—Bryte and Broderick - lie adjacent to each other and are to constitute the site of a single project. Each of the localities in question is included in the list of unincorporated cities and towns contained in the official roster published by the Secretary of State (see 1951 Roster of Public Officials of California, pp. 188 et seq). Whether or not all or some of these localities properly constitute 'towns', and the area of any one town, are questions of fact to be determined by the board of supervisors as the body empowered to call and conduct the election (see *infra*.)" (*Id.*, at p. 107.)

In that an unincorporated "town" was not (nor is it now) an electoral unit under the Elections Code, we concluded that the board of supervisors had implied authority to make it such a unit for purpose of article XXXIV.

Finally, carrying our reasoning one step further, we also defined the election area for any *single* housing project as follows:

> ". . . Article XXXIV requires that each such proposal must be submitted to the electors of the city, town or county *in which* the project is to be developed, constructed or acquired. *The election can be confined to the voters of an unincorporated town only if the project is to be located in that town*. Otherwise, not being either within an unincorporated town or an incorporated city, the proposed location is in the county alone, and the matter must be submitted to the electors of the entire county." (*Id.*, at p. 108, final emphasis added.)

Thus in 1951 we resolved the legal uncertainty contained in article XXXIV, confirming that an election, at least for a single low rent housing project, was to be held in one of the stated geographical units, that is, "the city, town or county, *as the case may be*, in which it is proposed to develop, construct or acquire the same."[2] (Emphasis added.)

Despite this concept of "community" voice in housing decisions as articulated by this office in 1951, the courts have not required a separate vote in each city, county or town when a *number* of housing projects are contemplated under a county-wide plan. Thus, in *Housing Authority* v. *Peden* (1963) 212 Cal.App.2d 276, a county-wide vote

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[2] The same concept of "community" decision as to low rent housing is found in the relatively recent California Supreme Court case, *California Housing Finance Agency* v. *Elliott* (1978) 17 Cal.3d 575, 591, as follows:

> "The parties agree that the purpose underlying adoption of article XXXIV, section 1, was to permit the people of a community to have a voice in decisions which affect the future development of their community and which could substantially increase their tax burden. (*James* v. *Valtierra*, *supra*, 402 U.S. 137, at p. 143 [28 L.Ed.2d 678, at pp. 683-684]; *Board of Supervisors* v. *Dolan*, *supra*, 45 Cal.App.3d 237, at p. 250; Ballot Pamp., arguments to voters, Gen. Election Nov. 7, 1950 pp. 12-13; 55 Ops.Cal.Atty.Gen. 13 (1972); 53 Ops.Cal.Atty.Gen. 120 (1970); 52 Ops.Cal.Atty.Gen. 247 (1969); *id*., at p. 133; 51 Ops.Cal.Atty.Gen. 245 (1968); 47 Ops.Cal.Atty.Gen. 17 (1966).) The people of California have reaffirmed their intention in this regard by their rejection at the November 5, 1974, general election of a ballot proposal for repeal of article XXXIV, section 1. We cannot ignore such a recent expression of the public will."

See also, *Conway* v. *County of San Mateo* (1981) 127 Cal.App. 3d 330, 334.

was taken on a measure as to whether "the Housing Authority of the County of Kings, California [should] develop, construct and acquire within the County of Kings . . . a low-rent housing project or projects of not to exceed two hundred and seventy five (275) dwelling units . . . ." Publicity on the measure served notice that the units would be distributed throughout the county at a number of locations, including 125 units in the *City* of Hanford. Hanford had, pursuant to section 34209, authorized the *county* housing authority to operate within its territorial boundaries. After the election on the measure passed county-wide, the City of Hanford contended that it was not bound thereby, and that a *separate* election was required for the city before units could be located therein. The city's position was essentially that it constituted a separate "community" for election purposes. The court rejected the city's contention, noting that the city had elected not to activate its own housing authority, but had elected to be part of the county authority's operation. With respect to the "community" concept, the court stated:

> "Thus, argues appellant, the intent of article XXXIV, section 1, is that only people who are to be directly affected by a housing project are entitled to vote on the measure. This argument does not lend itself to a logical analysis. If we exclude cities from a countywide election, as appellant argues we must, we find electors at the north end of a county having the right to vote on a housing project in the south end of the county. Yet excluded voters in towns and cities near the development would in all probability be affected to a greater degree than those in the northern part of the county. Likewise voters in a county area just outside a city might be more directly affected by the location of a housing project near the city limits than would voters on the opposite side of the city. It must be conceded that articulation of a measure such as article XXXIV is difficult, but not so difficult that the framers of the measure could not have expressed with clarity the intent appellant now perceives, had that been their intent.
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> "It appears to us that article XXXIV was framed in the alternative for the purpose of coping with situations similar to the one presented here. Kings County is primarily rural, in that there are only three incorporated cities in the entire county. Hanford, the largest city and the county seat, had a population of 10,133 according to the 1960 census. It is apparent that the Hanford City Council believed a countywide housing program would best serve the interests of both the city and the county. Furthermore, as respondent points out, the establishment of Lemoore Naval Air Base in the county area some few miles from the City of Hanford has had a great impact upon both the rural area surrounding the base and the City of Hanford. That the resulting housing problem could best be handled on a countywide plan seems reasonable.

"[2] We are impelled to the conclusion that article XXXIV, section 1, gives the city the alternative of proceeding separately or as a part of a countywide housing plan, ..." (212 Cal.App.2d at pp. 279-280.)

Accordingly, a "community" for purposes of article XXXIV need not be broken down by cities and towns within a county, but may include *the entire county*, both incorporated and unincorporated territory.

With this background on article XXXIV, we proceed to the facts with respect to this opinion request. At the November 4, 1980, general election Kern County Measure A was placed on the ballot. That measure read as follows:

"Shall the Housing Authority of the County of Kern develop, construct or acquire in the unincorporated areas of Kern County, and within its cities at a number of locations, with federal or state public body financial assistance, a low rent housing project or projects containing a number of dwelling units for people of low or moderate income, including elderly not in excess of 5% of the total number of dwelling units enumerated within Kern County by the 1980 census of the United States Department of Commerce, Bureau of the Census, with no more than 5% of the number of dwelling units enumerated within any city by the aforementioned 1980 census to be located within that city and no units to be located within any city without the express consent of its council."[3]

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[3] The "Argument In Favor of Measure A" in the voters pamphlet stated:

"Inflation and rapid population growth are squeezing many Kern County residents out of decent housing. Various agencies estimate that about 20% of the county's families are paying too great a portion of their incomes for housing and many families are doubled up in metropolitan Bakersfield's more than 5,500 overcrowded homes. Senior citizens and other people on fixed incomes are especially hard hit by this housing pinch. The county encourages as much rehabilitation of existing substandard housing as possible to ease the shortage of good affordable housing, but new homes must be built to fully end the crunch.

"*Measure A* would enable local governments to seek *presently available funds* through the county Housing Authority to build housing which our fixed income elderly and low and moderate income families can afford to rent. While helping to solve the county's housing problems, the measure could stimulate approximately $300 million worth of construction for the depressed housing industry.

"*Measure A* does not commit local governments to anything. No development could be built in any city without the approval of its city council. The measure also limits the number of homes to be built in any city to a small percentage (5%) of its existing housing stock—no city could acquire more than its fair number of dwellings.

This measure failed passage countywide. We are, however, advised that a tally of the votes in the incorporated areas of Kern County shows that the measure received a majority of the votes cast in 6 out of the 9 cities within the county. We have not been asked as to the effect of Measure A on the six cities where it received a majority vote. Our opinion is requested as to whether Measure A constitutes authority for the Kern County Housing Authority to develop, construct or acquire low rent housing in the Kern River Valley area where the measure also received a majority vote. We conclude that it does not constitute such authority.

We are advised that at the time Measure A was presented to the voters of the entire county no precise plan had been formulated as to the number of or locations of any low rent housing projects or units. In short, it is our understanding that Measure A was placed on the ballot to essentially give the Housing Authority "blanket authority" to build low rent housing anywhere in the county. (*Cf.* 59 Ops.Cal.Atty.Gen. 211 (1976).) Whether it would all be in incorporated areas, all in unincorporated areas, or a mixture of both had not been determined.

Whatever may be the correct conclusion as to the six cities where the measure received "approval," we conclude that the Kern River Valley area is to be completely distinguished for purposes of the vote on Measure A.

As will be recalled, in 18 Ops.Cal.Atty.Gen. 103, *supra*, we concluded that by virtue of the wording of article XXXIV an unincorporated "town" could be designated by the board of supervisors as the unit for an election on low rent housing despite the fact that such a "town" was not designated by any law as an electoral unit. (See section 25 of the Elections Code which provides that "'[l]ocal election is a municipal, county, or district election". Section 28 of the Elections Code essentially provided the same in 1951.) Accordingly, in 1951 we fell back upon "implied authority" of the board of supervisors to call such an election in a "town" because of the specific wording of article XXXIV. We also pointed out that in California there was no such geographical unit as an unincorporated "town," but noted that the California Roster possibly listed such "towns." We then stated:

> ". . . Whether or not all or some of these localities properly constitute 'towns', and the area of any one town, are questions of fact to be determined by the

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Passage of the measure would simply untie the hands of our local governments in solving Kern's housing problems.

"A vote for *Measure A* is a vote to return State and Federal tax dollars to our community, is a vote to help the depressed construction industry, and most of all, is a vote for fair-priced, decent housing for all of our county's citizens. Vote *YES* on *Measure A*."

board of supervisors as the body empowered to call and conduct the election." (18 Ops.Cal.Atty.Gen. 103, 107.)

Our own examination of the 1981-82 California Roster Prepared By March Fong Eu - Secretary of State discloses that the State Division of Highways has designated some 79 "Unincorporated Areas of California" as lying within Kern County alone (some of which may be located in incorporated areas). A more basic and detailed document, that is "City and Unincorporated Place Names In California" (1981 Ed.), prepared by the California Department of Transportation, sets forth 76 such "places" in Kern County which lie totally in the *unincorporated* territory of the county. These "places" range in population from several where no population was stated (e.g., "Fruitvale") to 23,382 for Oildale. Of these 76 places, the document disclosed that 22 had a population of 1,000 or more. Interestingly the Kern River Valley area was not set forth therein at all. Thus (since we are told it is commonly thought of as an individual community) it apparently contains a number of such "places."

The foregoing statistics for Kern County demonstrate the difficulty in urging that Measure A was "approved" by the voters of the Kern River Valley area. Unlike a city which has definite existence and boundaries and *is* an electoral unit in and of itself, "towns" for purposes of article XXXIV have no such definite existence nor boundaries, nor are they an electoral unit. If Measure A may be said to have "passed" in the Kern River Valley area," how many other areas may it be said to have "passed"? Using the Department of Transportation statistics, with a minimum population of 1,000 as a guide, one could urge that it passed in 22 "areas."

However, our 1951 opinion demonstrates that this question cannot be answered in the context of the 1980 election held in Kern County. That opinion concluded that a board of supervisors has discretion to delineate the areas which are to be considered "towns" for purposes of article XXXIV and then has "implied authority" to call an article XXXIV election therein. Such conclusions presuppose that a delineation of an area or areas as "towns" be done *before* an election is called. However, no such delineation was made with respect to Measure A as to the Kern River Valley area or any other area in Kern County. Accordingly, it can in no way be said that an article XXXIV election was called therein or that the voters therein had any notification that they were an independent electoral unit for the vote on Measure A. For that reason alone we would conclude that the voters within the Kern River Valley area may not be said to have "approved" a low rent housing project within the contemplation of article XXXIV.

Furthermore, under the reasoning of *Housing Authority* v. *Peden*, *supra*, 212 Cal.App.2d 276, it would seem that the voters in a particular area such as the Kern River Valley area were voting not for housing in *that* area, but for housing countywide in the

context of a countywide plan, even though yet to be devised. As stated in *Peden*, "That the resulting housing problem could be best handled on a countywide plan seems reasonable." (*Id.*, at p. 280.) Accordingly, at least where no "town" has been designated for purposes of the election, the voters in any particular unincorporated area would be voting for housing anywhere in the county. Their vote should, accordingly, not be "fractionalized."

Finally, where an election is held countywide, and there has been no delineation made as to the areas which are to be considered "towns" for purposes of the election, we believe that to state that all "areas" may later urge that an *unsuccessful* election was nonetheless successful in their area would be *reductio ad absurdum*. As noted, if a "town" were to be classified in Kern County as a place containing 1,000 or more persons, 22 areas could make such argument, fractionalizing a single unsuccessful election into 22 successful elections in the unincorporated area. Such a result was clearly not contemplated either by the drafters of Measure A or by the voters when they voted on Measure A in 1980.

For the foregoing reasons, we conclude that Measure A at the November 1980 general election does not constitute authority for the Kern County Housing Authority to develop, construct or acquire low rent housing in the Kern River Valley area. Another election would be necessary, and the county board of supervisors would have to designate the area as a "town" for purposes of article XXXIV. (18 Ops.Cal.Atty.Gen. 103, 105, 109, *supra*.)

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