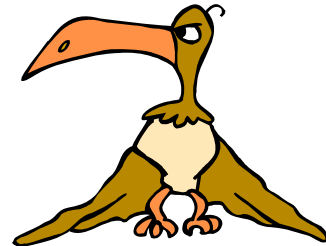




County Counsel Memorandum

Date: May 25, 2006
To: SBCAG Board
From: Shane Stark, County Counsel
Kevin Ready, Senior Deputy County Counsel
Subject: Use of Public Funds in the Ballot Process



This memorandum restates our advice on the legality of using public agency funds and public employee efforts during a ballot measure process and related political activities. SBCAG may use its general funds to produce and distribute an impartial presentation of relevant information to the electorate, provided the information cannot be viewed as an express advocacy of a position, pro or con, on the measure. We recommend that the proposed public information campaign proceed, with each activity and work product effort reviewed in advance by both management and counsel to insure propriety and legality. SBCAG may contract with outside firms to produce materials, including written and video, that comply with the impartial, non-advocatory and purely informational content required by law. The agency officials must review such material and are accountable for compliance with law.

A. Statutory clarification of the prohibition on spending public funds on campaign advocacy.

Controlling statutory law is found at Government Code § 54964, adopted in 2000.

a) An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.

The vote to approve the ordinance extending and increasing the sales tax and adopting the transportation expenditure plan is a “ballot measure” and the Santa Barbara County Association of Governments is a “local agency.” The key provision is § 54964(b)(3), defining “expenditure.”

“Expenditure” means a payment of local agency funds that is used for **communications that expressly advocate the approval or rejection of a clearly identified ballot measure**, or the election or defeat of a clearly identified candidate, by the voters.

"Expenditure" shall not include membership dues paid by the local agency to a professional association.....¹

Section 54964 expressly allows local agencies to educate the public about ballot measures:

c) This section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:

1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.

2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.

The Fair Political Practices Commission regulations on campaign expenditures (2 C.C.R. § 18225) similarly require reporting of funds and agency time expended on express advocacy of ballot measures:

§ 18225. Expenditure (a) An expenditure is any monetary or nonmonetary payment made for political purposes. A payment is made for political purposes if it is:

(1) For the purpose of influencing or attempting to influence the action of the voters for or against ... the qualification or passage of any measure;

(b) "Expenditure" includes any monetary or non-monetary payment made by any person, other than [candidates, committees, and PACs] that is used for communications which expressly advocate ... the qualification, passage or defeat of a clearly identified ballot measure.

The regulations define "clearly identified" and "expressly advocate" similarly to § 54964:

(1) "Clearly identified" has the following meaning:...

(C) A measure that has qualified to be placed on the ballot is clearly identified if the communication states a proposition number, official title or popular name associated with the measure. In addition, the measure is clearly identified if the communication refers to the subject matter of the measure and either states that the measure is before the people for a vote or, taken as a whole and in context, unambiguously refers to the measure.

¹ "Ballot measure" means an initiative, referendum, or recall measure certified to appear on a regular or special election ballot of the local agency, or other measure submitted to the voters by the governing body at a regular or special election of the local agency. "Local agency" has the same meaning as defined in Section 54951...SBCAG is a "local agency" under § 54951. ("... "local agency" means a county, city, whether general law or chartered, city and county, ... district, political subdivision, or any board, commission or agency thereof, or other local public agency.) A local agency is one that is enabled by statute to perform a local governmental function. See *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App. 4th 354. Section 54964 does not apply to some school elections. (See Subsections (b)(4); (d)).

(D) A measure that has not qualified to be placed on the ballot is clearly identified if the communication refers to the subject matter of the measure and to the qualification drive.

Because SBCAG has approved going forward with a ballot measure with a defined tax and expenditure plan, future communications that refer to Measure D are subject to § 18225, although the final ordinance that the voters will approve has yet to be adopted.

(2) A communication "expressly advocates" the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for" or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.

B. Recent case law interprets the statutory ban on "express advocacy" in light of the constitutional prohibition on spending public funds for campaign purposes.

The 2000 statute and FPPC regulation clarify the court-created constitutional prohibition on the use of public funds for political purposes. (The *Stanson v. Mott* doctrine, see Section C.) Recent case law discusses the legislative "express advocacy" test.

In *Schroeder v. City Council of Irvine* (2002) 97 Cal.App.4th 174, the court held that funds spent on a voter registration program were political expenditures, and unlawful under *Stanson*, only if the communications either expressly advocated, or taken as a whole unambiguously urged, passage or defeat of a ballot measure. The court adopted the "express advocacy" standard of FPPC Regulation 2 C.C.R. §18225(b)(2).

Vargas v. City of Salinas (2005) 135 Cal.App.4th 36 follows *Schroeder v. Irvine* and uses an "express advocacy" standard to reject a challenge to city materials about a measure to repeal city action. It holds that in light of Government Code § 54964, a government-funded educational statement relative to a ballot measure is authorized unless it expressly advocates or unambiguously urges a result. The key points of the *Salinas* case are:

- The proper measure for judging whether government communications are promotional is the express advocacy standard under Government Code § 54964 and 2 C.C.R. § 18225. A communication meets that standard when it "contains express words of advocacy" or, when "taken as a whole, [it] unambiguously urges a particular result in an election."
- The city's communications passed the test because
 - The communications did not contain words of express advocacy or exhortation.
 - The challenged materials did not unambiguously urge a "no" vote on Measure O.
 - The city's communications presented a balanced picture of the consequences of the passage of the measure. The conclusions of city staff were supported by detailed economic analysis, presented for the most part in a straightforward fashion.
 - The city made the views of the repeal proponents available as well. It displayed the measure on the city clerk's counter. The proponents' views were reflected on the

city's Web site, in the minutes of city council meetings where proponents presented their positions. The proponents' plans were discussed and analyzed in the city's August 2002 report.²

- The constitution does not require an individual analysis of the “style, tenor, and timing” of a communication, as stated in *Stanson v. Mott*. The statutes provide a bright line “express advocacy” test.
- A public agency pursues a proper “informational” role when it simply gives a 'fair presentation of the facts' citing *Stanson v. Mott*, 17 Cal.3d at p. 221.

AFTERNOTE. On April 26, 2006 the California Supreme Court granted review of *Vargas v. City of Salinas* on the question of the standard for evaluating government communications about ballot measures. Although Government Code § 54964, FPPC Regulation § 18225, and *Schroeder v. City of Irvine* support the “express advocacy” test, *Vargas* cannot be cited as precedent at this time. Until the Supreme Court resolves the issue, we advise caution in composing and distributing public information on the ballot measure. Care should be taken to ensure that the style, tenor and timing of each item is informational, accurate and neutral in tone – a fair presentation of the facts.

C. The Constitutional prohibition on use of public funds for campaign purposes.³

Case law is unequivocal in its condemnation of the use of public funds or public time for “campaign” purposes.

[E]very court which has addressed the issue ... has found the use of public funds for partisan campaign purposes improper, either on the ground that such use was not explicitly authorized or on the broader ground that such expenditures are never appropriate [S]uch expenditures raise serious constitutional questions. A fundamental precept of this nation’s democratic electoral process is that the government may not “take sides” in election contests or bestow an unfair advantage on one of several competing factions.... *Stanson v. Mott* (1976) 17 C.3d 206, 217

The Supreme Court in *Stanson* identified some activities as clearly improper campaign activities, including the use of public funds to purchase bumper stickers, posters, advertisements, and campaign literature prepared by private proponents or opponents of a ballot measure. *Id.* at 221; *Choice-in-Education League v. L.A.U.S.D.* (1993) 17 Cal.App.4th 415, 428. What is prohibited as an improper expenditure of public funds is a “genuine effort to persuade the electorate such as ... disseminating literature, purchasing advertisements, or utilizing public employees for campaigning during normal working hours.” *League of Women Voters v. Countywide Crim. Justice Coord. Com.* (1988) 203 Cal.App.3d 529, 560.

² See *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 355 [defendant's Web page included references to studies supporting both parties' views, "thereby providing all interested visitors the means to independently view both sides of the controversy for themselves"].

³ Sections C and D are from County Counsel memo to Chief Probation Officer and Sheriff re Political Activities by County Employees and Officers, December 15, 1999. ([Eaglet's Guide to Public Law](#) pp.77-79.)

Courts condemn public agencies giving only one side of an issue. They do recognize the authority of an agency to spend funds, budgeted for information purposes, to provide the public with a “fair presentation” of relevant information relating to a bond issue on which the agency has worked. *Stanson v. Mott* 17 C.3d at 220-21; *Choice-in-Education League v. L.A.U.S.D.* 17 Cal.App.4th at 428. A “fair presentation” may include responses to citizen requests for information, giving the departments views when requested by an organization to speak at a meeting, and the holding of forums at which all sides may express their views. This includes discussion of the issues at regularly scheduled and televised board of supervisors meetings.

The courts acknowledge that frequently the line between unauthorized campaign expenditures and authorized information activities is not clear. There must be an individualized determination of the propriety or impropriety of an expenditure, which “depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case.” *Stanson v. Mott* 17 C.3d at 222; *Choice-in-Education League v. L.A.U.S.D.* 17 Cal.App.4th at 428.

[NOTE: See Section B *supra*, for express advocacy test. Section 54964 applies to communications – it authorizes the production and distribution of educational materials with agency funds. The general prohibition on use of public money on political activity, prohibited under the doctrine of *Stanson v. Mott*, remains in effect.] ...

D. Rules of Conduct and Guidelines for Employees.

The basic public employee conduct rules under the applicable laws are clear:

1. A public agency employee **on his or her own time**, may support or oppose a ballot measure. This includes endorsing a measure, signing advertisements, giving money, talking to friends, walking precincts, etc.
2. A public agency officer or employee, **on the job**, may not engage in any political activity. This extends to any attempt to encourage persons to vote in a particular way and any work designed or intended to secure an election result. ...
3. Public agency management may not, directly or indirectly, encourage employees to support or work for passage of a measure, even if the actual support or work would occur on the employees’ own time and would be protected activity if done voluntarily by the employees. The expression by management that support or work on behalf of a measure would be beneficial to the department and “encouragement” could easily be construed as coercion.
4. Public agency equipment, facilities and supplies should not be used in support of campaign activities.

SPECIFIC GUIDELINES

1. Employees may, on their own time, with their own computers, typeset and pay for an advertisement as individuals. Agency computers - hardware, software, or printers, should not be used.

2. Employees may not, even on their own time, solicit contributions from other employees for the purpose of collectively paying for an advertisement, unless the solicitation is also made to the general public. This applies to advertisements that are produced by the employees themselves, and to advertisements produced by a private person or organization.

Government Code § 3205 prohibits local government employees from soliciting contributions from other employees of the agency unless “the solicitation is part of a solicitation made to a significant segment of the public which may include officers or employees of that local agency.” This means that **contributions may not be solicited only from agency employees, whether or not the soliciting is done on agency time.**

3. Employees may give money to or lend their names in support of advertisements promoted by private entities --including committees). Contributions and endorsements must be voluntary and solely involve individual private funds or time.

4. Employees may, on their own time, with their own telephones and feet, walk precincts and call persons seeking support of measures. They may identify themselves as agency employees; however, they should be careful to indicate that their activities are individual and voluntary, on their own time, and not done at public expense or on behalf of the public agency.

5. The public agency officials and their employees may participate in public forums discussing ballot measures. As individuals, during non-working hours they may take an individual position on measures, advocate positions and engage in fund raising activities. When campaign activities overlap with working hours, then vacation time should be taken for any working time missed because of the activities. Careful records should be kept to document that work hours were not used for the campaign activities. Elected officials who are in a sense always on duty may participate in campaign activities during work hours. Whether political activities take place during work hours or not, they should not interfere with the performance of work duties.

6. The agency may also send representatives to open forums held by others, and state the agency’s position on the measure. If the forum contains participation by representatives of all viewpoints, [agency] participation need not be limited to fair presentation of information. In such cases, advocacy is permissible.

7. County, city and agency facilities, supplies and equipment should not be used in organizing or coordinating voluntary individual activities

8. The agency officers should refrain from using County transportation to or from campaign activities unless such transportation is regularly provided to them for off-duty use either as part of their compensation or in order to perform the functions of their office. (*League of Women Voters, supra*, 203 Cal.App.3d at p. 560.)

9. Uniformed employees may not participate in any kind of political activities while in uniform. (Gov. Code, § 3206.)

10. Elected officials may not sign his or her name or have his or her name or likeness featured in any mailing which is sent out to more than 200 persons and which is paid for with public money. 2 Cal. Code Reg. 18901. This prohibition applies even to mailings that are indisputably balanced and educational.

11. Employees should be informed that each individual employee is responsible for compliance with laws regulating campaign activities including reporting requirements. The Political Reform Act requires campaign disclosure by “committees.” In general, a person or organization that receives or expends more than \$1,000 in a calendar year for campaign purposes is a committee and must file a statement of organization and disclosure statements. See Gov. Code §§ 82013, 84101, 84107.

12. Carefully limit management statements about campaigns. Please be sensitive that giving information about campaign activities might be taken as official coercion. Some persons might construe any management statements about campaigns as official influence. Employees should be informed in clear terms that participation is a voluntary individual choice, that non-participation will not be held against them, and that political activities cannot take place on agency time or equipment.

13. Refrain from using e-mail, agency mailboxes, or computers for campaign activities. (bulletin boards used for general purposes and not restricted to work announcements are permissible).

14. Refrain from detailed substantive discussions of campaign efforts during staff meetings. Limit communications during regular work hours to announcements of who may be contacted for further information concerning off-the-job activities.

