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Ballot Labels: A Rose By Any Name?

By Holly O. Whatley

A recent decision by the Court of Appeal in San Jose provides a cautionary tale to those drafting ballot titles and labels — *i.e.*, the question printed on the ballot. On April 10, 2012, the Court determined the ballot title and question for San Jose's pension reform measure were not impartial, and rewrote them. The case is *McDonaugh v. Superior Court*.

At issue was a City Council-sponsored measure to amend the city's charter to establish a more limited retirement plan for future employees. The Council titled the measure "Pension Reform." The ballot question also used the term "reform" and stated that the measure's purpose was "to protect essential services, including neighborhood police patrols, fire stations, libraries, community centers, streets and parks."

A group of former and current city employees sought a writ to amend the title and question, arguing they were partial and violated the Elections Code. The trial court approved a stipulation between the parties to amend some of the challenged language, but denied the balance of the petition because petitioners failed to establish by clear and convincing proof that the challenged language was false, misleading or amounted to an argument for or against the measure, *i.e.*, were "partial."

In a rare case of timely appellate review of a case involving ballot materials, the Court of Appeal reversed. It noted that the standard for partiality is whether the measure's language encourages a "yes" or a "no" vote or "casts a favorable light on one side of the [issue] while disparaging the opposing view." The Court found the word "reform" connotes the removal of a defect. Use of that word "implicitly" characterized the existing pension system as defective or susceptible to abuse. Thus, the title and ballot question encouraged a "yes" vote. Accordingly, the Court replaced the term "reform" with "modification."

The Court also found that the introductory phrase regarding the protection of public services impermissibly promoted the measure by implying that if voters did not approve the pension reform, the public would lose basic public safety and fire protection. Notably, the Court did not find the introductory statement was false, but rather that it amounted to advocacy. It acknowledged that such compelling reasons to vote for the measure were more properly included in the arguments than in the ballot question. It ordered that phrase struck from the ballot question.

Finally, of additional note was the Court's willingness to intervene on an expedited basis given the short deadline to print ballot materials. Despite a stated deadline from the Registrar of Voters of April 6 to submit ballot materials to the printer, the Court of Appeal issued an April 5th order that the challenged materials not be printed until the Court issued a further order. The Court then took only five days from the appeal of the trial court's April 4th ruling to issue its opinion, allowing the real parties just one day to submit a brief.

Thus, while public lawyers have commonly recommended that ballot titles and labels comply with the standard for impartial analyses (*i.e.*, that they not be false, misleading or amount to an argument for or against), we now have a public appellate case making clear that this is the law. In reviewing ballot titles and questions, public lawyers should be mindful that even accurate statements in a ballot question and title are subject to challenge if the text taken as a whole constitutes advocacy. And if a challenge is filed, fasten your seatbelts for the necessarily fast-paced litigation that will follow!

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For more information on this topic, contact Holly at 213/542-5704 or HWhatley@CLLAW.US.

Planning Disadvantaged Communities

By David J. Ruderman

Since October of last year, when the Governor signed SB 244 (Wolk, D-Davis), California's cities have been required to count their DUCks—*i.e.*, disadvantaged unincorporated communities. Although the goals of SB 244 are laudable, cities and LAFCos have expressed concern about the impacts of SB 244. Efforts currently underway in the Legislature seek to clarify SB 244 to provide cities more flexibility to achieve its goals, but attempts at more comprehensive reform have stalled.

SB 244 requires cities to review and update the land use elements of their general plans to map and analyze the service needs of unincorporated communities within or adjacent to their spheres of influence. Although SB 244 is intended to help DUCs, it mandates land use element analysis of all nearby unincorporated communities, not just low-income areas. SB 244 also limits a city's ability to annex territory because it prohibits LAFCos from approving annexations of territory contiguous to a DUC unless an application to annex the DUC is also filed. Many cities argue this dual annexation requirement discourages all annexations, not just those of DUCs.

In March, Sen. Bill Emmerson (R-Riverside) introduced SB 1498 to repeal the dual annexation requirement. It also proposed allowing LAFCos to approve the extension of services beyond a city or district's sphere of influence to support existing or planned uses of public or private properties. However, despite the support of the League of California Cities, SB 1498 failed in committee.

As a compromise, Sen. Lois Wolk recently introduced language in the Local Government Omnibus Act of 2012, SB 1090, to address some local government concerns about SB 244. Although it makes no change to the dual annexation requirement, the amendment would make the following changes:

Under the proposed language, a city would no longer be required to update its land use element to map and analyze service needs for unincorporated island or fringe communities. Instead, a city would have discretion to update one or more other elements of its general plan based on data from, for instance, a LAFCo municipal services review.

It would fix the anomaly in SB 244 that mandated analysis of all island and fringe communities in the land use element, even if the communities were not low-income. SB 1090 would require cities to identify and plan for only island and fringe communities that are DUCs.

The Assembly Local Government Committee plans to hear this and other amendments to SB 1090 on June 27. Stayed tuned for further information on this bill as it proceeds through the Legislature.

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For more information on this topic, contact David at 530/798-2417 or DRuderman@CLLAW.US.

Off the Island!

By Scott E. Porter

Local Agency Formation Commissions (LAFCos) determine when cities may annex unincorporated territory, and may approve annexations after protest proceedings give landowners and voters opportunity to stop a proposal or require an election. Government Code §56375.3 streamlines the process for annexations of "islands" of unincorporated territory of 150 acres or less — in these cases no protests are permitted. "Island" is not defined.

The Attorney General issued a recent opinion clarifying this rule. She concluded: "For purposes of Government Code section 56375.3, an 'island' is an area of unincorporated territory that is (1) completely surrounded, or substantially surrounded—that is, surrounded to a large degree, or in the main—either by the city to which annexation is proposed or by the city and a county boundary or the Pacific Ocean, or (2) completely surrounded by the city to which annexation is proposed and adjacent cities. An 'island' may not be a part of another island that is surrounded or substantially surrounded in this same manner."

LAFCo can determine in light of the record before it whether an area is an "island." The Attorney General expressly declined to impose a mathematical formula for what constitutes an island (as the Legislature had also refused to do), but cited a case identifying an "island" only 68% surrounded by incorporated territory.

The Attorney General took the analysis further. She also concluded that the statutory requirement that a city annex an "entire" island means that the LAFCo may not allow annexations that "split up an unincorporated island that exceeds 150 acres into smaller segments to utilize the streamlined 'island annexation' procedures."

Although opinions of the Attorney General are not legally binding precedent, courts typically grant the decisions great weight, especially opinions on public law questions that are rarely litigated. As a result of this opinion, LAFCos may be less willing to approve island annexations in reliance on the streamlined annexation procedures where it is not clear the island rule applies.

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Scott authored an amicus letter for the California Ass'n of LAFCos with respect to the request for this opinion. For more information on this topic, contact Scott at 213/542-5708 or SPorter@CLLAW.US.

All's Fair in Taxes and Assessments?

By Michael G. Colantuono

Municipal revenues are largely governed by California law — much of it a series of initiatives: Proposition 13 (1978), Proposition 62 (1986), Proposition 218 (1996) and Proposition 26 (2010). However, federal law occasionally requires attention. Most occasional of all are the cases applying the Equal Protection Clause of the 14th Amendment, adopted after the Civil War in 1868. That clause requires distinctions between taxpayers to be supported by a non-discriminatory rationale.

Cases applying Equal Protection to municipal revenues are few. In 1989, the U.S. Supreme Court found a West Virginia county violated the Equal Protection rights of an out-of-state owner of a coal mine: *Allegheny Pittsburg Coal Co. v. Commission of Webster County*. Although the county claimed a consistent practice of assessing property when it was sold, the evidence suggested this "welcome, stranger" assessment mechanism, which imposes higher property taxes on new buyers, was not consistently applied and that the county discriminated against the coal company as an out-of-towner.

This raised the question whether Proposition 13's use of the "welcome, stranger" assessment method also violated Equal Protection. In 1992, the Court decided otherwise in *Nordlinger v. Hahn* because Proposition 13's "welcome, stranger" assessment rule was consistently applied.

June 4, 2012 brought the Court's latest Equal Protection finance decision in *Armour v. Indianapolis*. The City installed sewers in neighborhoods on septic systems. Like California, Indiana law allows assessment financing of such improvements. Also like California, Indiana law allows property owners to pay the assessment up front or over time with interest. In 2003, the City assessed 180 properties in the Brisbane / Manning Sanitary Sewer Project $9,279 each and property owners who did not pay up front could pay $77 / mo. for 10 years, $39 / mo. for 20 years or $26 / mo. for 30 years. The next year, the City ended its practice of assessment financing of sewers, opting instead to use city funds to help low-income property owners. It cancelled outstanding assessments, including those imposed a year earlier in the Brisbane / Manning district. However, the City refunded nothing to 38 property owners who paid the $9,279 up front. They sued, arguing the City's policy was irrational and therefore violated Equal Protection.

Indiana trial and intermediate appellate courts ruled for the plaintiffs, but a divided Indiana Supreme Court reversed. The plaintiffs petitioned for review by the U.S. Supreme Court and the Court ruled for the City in a 6-3 decision written by Justice Breyer.

This seems profoundly unfair. Why punish those who do not take advantage of low-interest government loans and reward those who do? However, the question can be framed the other way — how is one harmed by a government grant to a neighbor?

The Court did not rely on subjective perceptions of fairness. Instead, it reminds us that Equal Protection review of economic and social policy is very deferential to the political branches, citing *Carolene Products,* a New Deal-era case taught in every law school. Distinctions not involving fundamental rights (like the rights to vote and travel) or suspect classifications (like race and religion) "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate public purpose." Moreover, "[l]egislatures have especially wide latitude in creating classifications and distinctions in tax statutes." California courts reached the same conclusion, most recently in a case upholding Proposition 65's income tax on millionaires to fund mental heath services.

In *Armour*, the Court found a rational basis in the city's desire to avoid the administrative burden of tracking a few small assessment payments for decades after abandoning the assessment program. The Court analogized forgiveness of the assessment to amnesty for traffic tickets or unpaid taxes. The strongest argument for the decision, however, may be concern that finding an Equal Protection violation would encourage litigants to convert every dispute under state law into a federal suit, distorting the relationship of state and federal law. Indiana law requires assessments to be "uniform" and the forgiveness program raised questions under that law.

Three Justices dissented, arguing that while few tax cases are so unfair as to violate Equal Protection, this case ought to join the West Virginia coal mine case as a very occasional reminder to legislators that some minimal degree of fairness is required in tax laws.

We draw two lessons from the case: First, distinctions made by local tax, assessment and fee ordinances must have some rationale and not turn on suspect classifications like race and religion. Second, courts generally apply this rule very deferentially. Thus, most tax policy questions are governed by state and local laws and by the political process rather than the federal courts.

Under California's demanding initiative requirements, however, judges impose more exacting review. Accordingly, it will be a rare public finance case in our state that involves a serious Equal Protection question.

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