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Free Speech on Private Property: Location, Location, Location

By Michael R. Cobden

Fall has definitely arrived. Squirrels gather nuts, bees gather pollen, and college students gather signatures. It's another odd-numbered autumn, and politics is in the air. Signature gatherers are out in force, crowding grocery store entrances and Main Street sidewalks. They vary widely in professionalism, courtesy, and demeanor; leaving store managers wondering whether they can send aggressive gatherers packing without infringing constitutional rights. Most of the time, they can.

Free speech is all about location. "Give me liberty or give me death" must be tolerated in a public park, but not in your living room. Business sites are somewhere in between: private property, but open to the public. The First Amendment does not apply to rules set by store owners; it limits only government action (unless you own a "company town").

California's Constitution, however, is not only a limitation on government, but also a protection of individuals' rights, including free speech. In *Robins v. Pruneyard Shopping Center* our Supreme Court declared in 1979 that California's free speech protections apply to shopping malls because they invite the public to use space for more than shopping. There are physical elements that invite the public to use a mall like a traditional town square: cafes, theaters, open spaces, benches, promenades, gardens, picnic areas, and similar features transform such areas into public gathering places. However, just one or two of these features are unlikely to transform an ordinary shopping center into a "town square" in which signature-gathering and other expressive activity must be tolerated by property owners.

Under *Pruneyard* most privately-owned, stand-alone businesses can ask a signature gatherer to leave and pick and choose who may stay (provided they do not violate anti-discrimination laws). Indeed, even shopping centers with picnic benches and cafes probably do not meet the *Pruneyard* standard. Most retail chains have policies for handling unwanted solicitors, from panhandlers to signature gatherers and, absent criminal activity, these policies rarely call on managers to contact the police. When the police are called, they should keep two things in mind.

First, authority to arrest and remove a signature gatherer who peacefully refuses to leave after being asked to do so will need to come from local ordinance; the California Penal Code provides little authority to remove undesirable individuals from stores "open to the public." Second, even if there is defensible authority to arrest, there is always risk of litigation given the factually specific nature of the *Pruneyard* test. Many signature gatherers strongly believe they have a right to be there, even though they likely do not. The local government may well be able to win lawsuit they file, but doing so will likely be expensive. For this reason, many local governments do not enforce store policies regarding expressive activity, leaving store managers to seek injunctions in court. This is especially true in labor disputes, where state law is even more protective of union pickets.

Thus, if a local government does wish to assist store owners in such disputes, legal counsel should review detailed facts about the property involved and apply the *Pruneyard* test carefully. To non-lawyers, we must advise: don't try this at home without legal advice.

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For more information on this topic, contact Michael at 530/798-2416 or MCobden@CLLAW.US.

Initiative Analysis Must Be Impartial, Not Exhaustive

By Holly O. Whatley

The Los Angeles Court of Appeal's most recent venture into the turbulent waters of election law provides additional guidance regarding titles, summaries and impartial analyses for ballot measures and reaffirms the high bar courts set for challenges to these matters filed after the election. In *Owens v. County of Los Angeles*, plaintiffs filed a post-election challenge to the 2008 election on the County's renewal and small reduction of its utility user tax ordinance, which passed with over 62% approval. The County had placed the matter on the ballot as part of settlement of the *Oronoz* class action challenge to a tax first adopted in 1991 without the voter approval required by Prop. 62, which was thought to be a dead letter at the time, but was revived by the California Supreme Court in 1995. *Oronoz* is one of three recent cases allowing class action challenges to local government revenues.

The plaintiffs, one of whom had been a class representative in *Oronoz*, argued that the 2008 measure violated the voters' due process and free speech rights, Prop. 218 and the Election Code. The Court rejected each claim. First, the Court found no due process violation. Plaintiffs claimed the title, "Tax Continuation Measure," was so misleading as to violate due process (a high standard) because it implied the 1991 tax had been lawful. The Court noted that nowhere on the ballot did the County claim the 1991 tax was lawful. Moreover, the title was objectively correct because the tax has been collected continuously since its first adoption.

The Court next rejected the claim the impartial analysis "failed to inform the voters" that a "no" vote would eliminate a $65-million-a-year tax. However, the Court found that the impartial analysis "was not required to inform the voters of all of the arguments against the measure." That duty fell to opponents of the measure. Additionally, the Election Code's 500-word limit on impartial analyses limits the detail County Counsel could provide or a court could demand. In short, the test for sufficiency of the analysis is not whether it educates the voters on all the legal issues. Rather, to prevail, plaintiffs must show the analysis "profoundly misled the electorate."

The Court gave equally short shrift to Plaintiffs' claim the measure violated voters' free speech rights. Plaintiffs relied on *Stanson v. Mott*, which forbids public money to be used to advocate for or against a ballot measure. However, Plaintiffs provided no evidence the County had spent any public funds to campaign for the 2008 UUT measure. Merely publishing ballot materials with which the Plaintiffs disagreed does not amount to express advocacy or electioneering for the measure.

Finally, the Court rejected Plaintiffs' argument that listing the types of services the tax revenue would fund transformed the measure into a special tax requiring two-thirds voter approval. In so ruling, the Court relied on the measure's language that stated that the funds would go towards "essential services, **including** sheriff's deputies, parks, libraries, street repairs, **and other general fund services**." Because cities frequently use similar language in ballot labels, summaries, and impartial analyses, this latter holding is particularly welcome. However, a decision of the San Jose Court of Appeal involving Mayor Reed's pension reform measure ordered changes to a ballot label (the question on the ballot) that listed services which would benefit from predicted savings from the pension reform measure, so it is still wise to consult legal counsel when drafting ballot labels.

The case is a helpful decision regarding ballot materials generally and fiscal ballot measures in particular.

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For more information on election law topics, contact Holly at 213/542-5704 or HWhatley@CLLAW.US.

C&L Welcomes Len Aslanian

Len joins our litigation and municipal advisory groups. His work covers a broad spectrum of public law issues, including land use, rate-making, charter cities, litigation involving public revenues, and Americans with Disabilities Act compliance.

Prior to joining C&L, Len served as a Reserve Deputy City Attorney in the Criminal Branch of the Los Angeles City Attorney's office. He staffed arraignment and trial courtrooms at the San Fernando Courthouse, trying 7 misdemeanor cases and arguing numerous bail reviews and motions to suppress. He also researched land use and CEQA issues for the City Attorney's Executive Office.

Len has degrees from UCLA and NYU. Welcome, Len!

Court of Appeal Provides Rate-Making Guidance

By Michael G. Colantuono

On October 15, 2013, the San Jose Court of Appeal affirmed Colantuono & Levin's victory for the Pajaro Valley Water Management Agency in a challenge under Prop. 218. The case attacked the Agency's groundwater augmentation charges, claiming violation of every requirement of Proposition 218. This scattergun attack produced a very helpful opinion which is the first published appellate guidance on many issues under Proposition 218's provisions regarding water, sewer, trash and other property related fees. The case is *Griffith v. Pajaro Valley Water Management Agency*, 2013 WL 5622250 (6th DCA No. H038087).

The court took just four court days after oral argument to publish its decision. Among the more significant aspects of the decision are:

First, a groundwater augmentation charge is a fee for "water service." The Court relied on the definition of "water" in the Proposition 218 Omnibus Implementation Act of 1997, narrowly construing this court's earlier decision in *Howard Jarvis Taxpayers Assn. v. City of Salinas*, which refused to apply the Act's definitions to a storm water charge dispute. Along with the Supreme Court's 2010 decision in *Greene v. Marin Flood Control & Water Conservation District*, this case firmly establishes that the Act is good authority for construing Prop. 218. The significance of the meaning of "water" is that Prop. 218 requires a majority protest proceeding for all property related fees, but also requires an election on fees for services other than water, sewer and trash services. As successful majority protests are rare, this is very significant for all who rely on groundwater as it means augmentation changes remain politically viable.

Second, the Court confirmed that notice of a majority protest hearing need not be given to tenants even though the Agency had billed some tenants. Again, citing the Act, the Court found Prop. 218's requirement that this notice be given to "record owners" means only property owners listed on the assessment roll. Of course, the Act allows notice to be given to customers via billing inserts and otherwise and only requires notice to property owners if the rate-making agency intends to collect it via the property tax roll or to lien properties for delinquent fees. Thus, the case confirms local government discretion to choose whether to notify customers, property owners or both.

Third, the decision provides helpful guidance for the calculation of a property related fee and how its proceeds may be spent. Payment of debt on facilities used to provide service and on facilities no longer in service is permissible, as is payment of general administrative and overhead costs, and use of fee proceeds to plan for future services. The Court accepted the Agency's evidence that all groundwater users benefit from its services, not just those in the coastal area where supplemental water supplies are piped. The Court affirmed the Agency's reliance on the American Water Works Association's **M-1 Manual** to work from the cost of service toward a rate even though an assessment analysis must work from special benefit rather than from cost.

Fourth, this is the first published authority on Prop. 218's requirement that fees be proportionate to the cost of serving each parcel. The Court affirmed the common practice of grouping customers into classes with comparable service costs and setting rates class by class rather than parcel by parcel, finding the Agency's "method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service." The Court ruled that neither Proposition 218, nor the recent *Palmdale* water rate case required otherwise, and cited a recent California Supreme Court ruling under Proposition 13 that allows class-by-class rate-making.

The Court found the fact that all groundwater users benefit from and pay for the Agency's service does not mean the service is of general benefit such that the service cannot be funded by property related fees.

The plaintiffs have told the press they will seek rehearing in the Court of Appeal and review in the California Supreme Court. However, if the case becomes final (as seems likely), it provides very useful authority on these fundamental issues in rate-making under Prop. 218.

Groundwater rates are being litigated in Ventura, Los Angles, and San Jose, with these cases on appeal to the District Courts of Appeal. Perhaps next to be decided will be *Great Oaks Water Co. v. Santa Clara Valley Water District*. Those cases promise to provide further guidance on rate-making issues, not only for groundwater agencies, but all local government rate-makers. Stay tuned!

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For more information on this topic, contact Michael at 530/432-7357 or MColantuono@CLLAW.US.

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