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September 10, 2004

Santa Cruz County Regional Transportation Commission
1523 Pacific Avenue
Santa Cruz, CA 95060

Re: The Use of Public Funds to Provide Information to the Public

Dear Members of the Commission:

On September 2, 2004, you directed this office to respond to three concerns raised by a representative of Campaign for Sensible Transportation (CFST), regarding the proposed Public Informational Program for the Transportation Sales Tax Measure. During your consideration of the Program, CFST asserted that as a result of State law, the Commission: (1) is prohibited from using public funds to direct otherwise lawful information to "registered voters"; (2) is prohibited from communicating otherwise lawful information within 29 days before the election; and (3) is required to include a comprehensive evaluation of the potential consequences of the measure in all materials prepared as part of the Program (see attached Press Release dated September 2, 2004 from the Campaign for Sensible Transportation.) CFST cited no legal authority for its claims.

It is the opinion of this office that an impartial presentation of facts about a prospective ballot measure may be communicated to the public, and that this communication may be directed to registered voters, within 29 days before the election, and need not provide a comprehensive evaluation of the potential consequences of the measure.

GENERAL LAW

It is generally unlawful for local government officers or employees to use public resources or personnel to engage in "political activity". (See *Stanson v. Mott* (1970) 17

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Cal.3d 206; *Mines v. Del Valle* (1927) 201 Cal. 273; *People v. Battin* (1978) 77 Cal.App.3d 635; *see also* Penal Code §424 (embezzlement or misappropriation of public funds.)

California Government Code § 54964 specifically prohibits a local agency from making an expenditure of public funds to advocate support or opposition of a ballot measure or a candidate appearing on the local ballot. Subdivision (a) of § 54964 states as follows:

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 term "expenditure" is defined by Section 54964 to mean a "payment of local agency funds that is used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure" (Government Code § 54964 (b) (3).) Underlying this prohibition is the precept that "the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." (*Stanson, supra*, 17 Cal.3d at 217.)

Notwithstanding this prohibition against *campaign activities*, subdivision (c) of Section 54964 expressly permits publicly funded *informational activities*:

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. (Emphasis added.)

Public agencies may use a reasonable expenditure of public resources to provide to voters the "relevant facts" about a ballot measure. (*Stanson, supra*, 17 Cal.3d at 220-21; Government Code § 54964(c).)

The *Stanson* court cited the reasoning from a New Jersey Supreme Court decision in explaining why public funds could be used for balanced presentation of facts. In *Citizens to Protect Public Funds v. Board of Education (1953)* 13 N.J. 172, 98 A.2d 673, the court was reviewing the legality of a school board's expenditure of public funds for the publication of an 18-page booklet concerning a school building program which was the subject of an upcoming bond election. While most of the booklet contained factual information, three of the booklet's pages contained the simple exhortation "Vote Yes," "Vote Yes" while an additional page warned of the dreadful consequences resulting from a no vote. Focusing on these four pages, the New Jersey court ruled that:

the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and this imperiled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature. (citation omitted) (*Stanson, supra*, 17 Cal.3d at 220; emphasis added.)

A recent case, *Schroeder v. City Council of Irvine* (2002) 97 Cal.App.4th 174, provides additional guidance in determining whether a particular communication constitutes "election campaigning" or an "impartial presentation of facts". In *Schroeder*, the Irvine City Council instituted a publicly funded voter registration and participation effort in connection with a Countywide vote on the reuse of a closed military airbase. Although the Council had taken a public position in favor of the ballot measure, the materials it provided to the public did not advocate any vote on the measure. A taxpayer challenged the City financed effort as illegal "partisan campaigning".

In evaluating whether the City's expenditures were made for "political purposes" and therefore unlawful under *Stanson*, the *Schroeder* Court applied regulations adopted by the Fair Political Practices Commission (FPPC). These regulations (Cal. Code Reg., tit.2, § 18225) provide that an expenditure that is used for a communication which expressly advocates the... "passage or defeat of a clearly identified ballot measure", or that "taken as a whole, unambiguously urges a particular result in an election" would be for political purposes and subject to the Political Reform Act (Government Code §§ 81000 et seq.)

Because these publicly funded efforts urged residents to vote and not how to vote, the Court held that the City had not violated *Stanson*.

We conclude the funds spent on the Vote 2000 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 Measure F. (*Schroeder v. City Council of Irvine, supra*, 97 Cal.App.4th at 187-188.

ANALYSIS

A. Directing Informational Materials to Registered Voters.

CFST asserts that to comply with State law the Commission may not target registered voters with its communications, and states, "This would be an obvious attempt to directly affect the outcome of the ballot measure".

Under *Stanson*, public funds may be expended to communicate a fair presentation of facts about a pending ballot measure. Assuming that the communication is proper, directing that information to registered voters would be lawful. As noted above, subsection (c)(2) of Government Code § 54964 authorizes a local agency to present relevant facts to "voters" to aid them in reaching an informed judgment regarding a ballot measure.

This statutory authority is consistent with the acknowledgement that local governments have implicit power to make reasonable expenditures "for the purpose of giving voters relevant facts to aid them in reaching an informed judgment" on ballot measures ((*Stanson, supra*, 17 Cal.3d at 220, citing *Citizens to Protect Public Funds*, 98 A.2d at p.676; emphasis added.)

B. Communications Within 29 Days of the Election.

CFST claims that the Commission should prohibit the conveyance of materials to the voters within 29 days of the election, and suggests that any such communication would be unlawful "advocacy".

There is no legal authority imposing a prohibition on otherwise legal, publicly funded informational activities within 29 days of an election. While there is language within *Stanson* which suggests that the "timing" of publicly funded communications may be

considered in determining whether a particular message is a lawful presentation of facts, it has not been applied to convert an otherwise lawful informational activity into prohibited political advocacy (see *Choice-In-Education League v. Los Angeles Unified School* (1993) 17 Cal. App. 4th 415, 430.)

C. Scope of Information Communicated.

CFST claims that the Commission must include a comprehensive evaluation of the potential consequences of the measure ("That the material include information on all consequences, good and bad, of the measure") as a part of whatever informational material it produces.

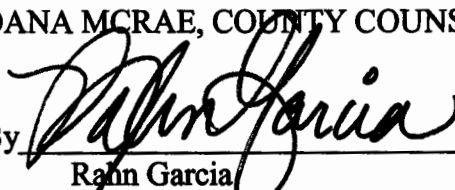
The standard established by the Supreme Court in *Stanson* is that informational materials "provide the public with a 'fair presentation' of relevant information" (*Stanson, supra*, 17 Cal.3d at 220-221.) Under *Schroeder*, a publicly funded communication that is an "impartial presentation of facts" that neither expressly advocates, nor taken as a whole, unambiguously urges passage of Measure J would comply with the legal requirements enumerated by *Stanson*. The standard urged by CFST was referred to by the *Stanson* court, but was not adopted (*Stanson, supra*, 17 Cal.3d at 220, citing *Citizens to Protect Public Funds*, 98 A.2d at p.676-677.)

It is the opinion of this office that if the public information program carried out by the Commission provides a "fair presentation of the facts", it need not also contain a detailing of all of the measures consequences. Furthermore, if the program consists of information objectively describing the Expenditure Plan and its programs, as opposed to evaluating what consequences would result from its passage or rejection by the voters, there would also be no legal requirement to include an evaluation of the measure's potential consequences.

Very truly yours,

DANA MCRAE, COUNTY COUNSEL

By



Rain Garcia
Chief Assistant County Counsel

Enclosure

The Campaign for Sensible Transportation — No on J

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September 2, 2004

FOR IMMEDIATE RELEASE

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“No on Measure J” Questions “Public Information” Program

Opponents of Measure J, the Highway 1 widening sales tax ballot measure, are raising serious legal and ethical issues with regard to a Regional Transportation Commission (RTC) plan to spend \$58,500 in taxpayer money on mailers and handouts aimed at “educating the public” about Measure J. If passed, Measure J would raise the County sales tax by one-half cent for the next 30 years, primarily to widen Highway One from Santa Cruz to “Aptos”.

Opponents claim that California law establishes specific guidelines with regard to the expenditure of public funds by a public agency distributing information relative to ballot measures. Such material must:

- Make a fair and objective presentation of the facts,
- Disclose all consequences, good and bad, of the proposal, and
- Avoid any express advocacy (e.g. yes or no) in the style, tenor, and timing of the material.

Failure to follow these guidelines, by distributing material designed primarily for the purpose of influencing voters to support Measure J, rather than to provide objective information, may constitute improper campaign expenditures, Measure J opponents maintain.

It is also not clear why the eleven pages of information provided in the County Clerk’s voter pamphlet (containing the full text of the ballot measure, including the Ordinance and the Expenditure Plan, an impartial analysis by the County Counsel, a fiscal impact statement by the County Auditor-Controller, and the arguments and rebuttals by proponents and opponents of the measure) is not sufficient to inform the public about the measure.

In order to insure that the RTC follows the law, “No on Measure J” is demanding:

- Public review at a meeting of the Commission of all materials to be mailed or disseminated to the public,
- That the material include information on all consequences, good and bad, of the measure,
- The materials should not be targeted to registered voters. This would be an obvious attempt to directly affect the outcome of the ballot measure.

- Materials should not be mailed to voters less than 29 days before the election. This is when voters will receive their ballot pamphlet, and are most susceptible to "advocacy."

Bruce Van Allen, a member of the Campaign for Sensible Transportation (CFST) says "These are public funds, which means all the residents of this county paid into them, including the people opposed to widening the highway. If the Commission does not follow our recommendations for fairness, it opens itself up for legal action by people that don't want to see their money spent advocating for a tax measure that they do not support." "A campaign advocating the approval of Measure J should be done by members of the public, and not by a public agency, such as the RTC, using public funds", adds co-member Peter Scott.

For more information contact Bruce Van Allen at 429-1688 or Peter Scott at 423-0796.

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