



Local Ballot Measures: **The Line Between Information and Campaigning**

By Craig Steele¹ and Chelsea A. Straus², Richards Watson Gershon

Ballot measures can be high stakes occurrences. In special districts, voters may be asked to consider whether to approve tax measures, land use, or policy issues. Even normal special district functions like considering assessments might take the form of a ballot measure.

With so much at stake, public officials often want to participate in public discussions about a ballot measure. But the risks can be high. Laws that control election-related advocacy by local government agencies and officials are more restrictive than laws governing private campaigners.

Courts view the use of public resources to generate support or opposition in an election as “distortion” of the political process.³ There is a difference between public officials informing constituents about issues in an impartial, factual way, and using public funds to campaign for or against a ballot measure. The latter crosses a legal line that can have significant consequences for the agencies and public officials involved. The exact location of that line is not always clear, and some agencies have nestled up against it in recent years. As public agencies’ use of informational communications has

increased, so has the related scrutiny from regulators like the Fair Political Practices Commission (“FPPC”), and political opponents.

The line starts with two applicable statutes. Government Code Section 54964 prohibits officers, employees, or consultants of local agencies from spending or authorizing the expenditure of public funds to support or oppose a ballot measure or candidate. This statute does not prohibit an “accurate, fair, and impartial” presentation of relevant facts about a ballot measure. Government Code Section 8314 makes it illegal for local officials and staff to use public resources for campaign or personal purposes.

Apart from official ballot arguments and other materials authorized by the Elections Code, there is no law that permits special districts to spend funds to support or oppose a ballot measure or a candidate. However, the California Supreme Court has recognized that public agencies may spend funds for “informational purposes” to provide a fair and impartial presentation of relevant information regarding a ballot measure.⁴

The FPPC has regulations on impermissible election-related communications. FPPC Regulation 18420.1 prohibits the use of public funds on a communication that either “expressly advocates” for or against a candidate or ballot measure, or “unambiguously urges” a particular result in an election.⁵ FPPC Regulation 18901.1 contains similar provisions, but it applies to mass mailings financed by public funds.⁶

Some impermissible communications are obvious: words like “vote for” or “vote against” are “express advocacy.”⁷ Advertisements, signs, and buttons are campaign items that cannot be paid for with public funds. Public agencies can adopt a position for or against a ballot measure in an open and public meeting of the board.⁸ But it is difficult, sometimes, to distinguish communications that “unambiguously urge” an

election result from permitted “informational” activities.

The FPPC has penalized some public agencies recently for using public funds for election advocacy. Those penalties remind us that it can be difficult - but essential - to stay on the right side of the line between information and campaigning. Analyzing some recent FPPC enforcement cases can help special district communicators stay on the information side of this line and avoid prosecution and penalties. The FPPC has associated the following communication characteristics with impermissible arguments or advocacy:

(1) Out of Sync Schedule: The communication is published close to an election and *deviates* from the agency’s regular publication schedule. For example, the FPPC determined that a public agency’s special October/November 2016 issue of a bi-monthly newsletter before a November election with information on an upcoming ballot measure was not objective or nonpartisan.⁹

(2) Style: The communication is inconsistent with the public agency’s normal communications style. The FPPC found that a city’s magazine ads with narratives explaining the merits and need for a sales tax measure were inconsistent with the city’s prior ads in this magazine, which mostly contained concise language, pictures, and graphics to promote city programs and events.¹⁰ Similarly, digital ads with simple slogans about

a measure and no factual information crossed the line into advocacy.¹¹

(3) Special Appropriation: The communication is funded from a *special* appropriation related to the ballot measure, such as communications funded by a special \$1 million appropriation for a public education campaign approved outside the normal budget cycle and shortly after the public agency board voted to submit a tax measure to the voters.¹²

(4) Timing: The communication is published *after* a public agency votes to place a specific measure on the election ballot or close to the election date. One example is a public agency that placed a sales tax measure on the ballot and then started ballot measure outreach.¹³

Special districts can use forward-thinking strategies to demonstrate their intent to inform rather than advocate. Special districts should plan ahead to provide impartial election-related information as a part of normal agency communications by taking the following kinds of steps:

(1) Normal Budgeting: Special districts should incorporate a communications budget into their *normal* budgeting process. Informational communications related to issues that are, or may be, on the ballot should be funded from this normal communications budget, rather than from special appropriations that only come about because there is an election.¹⁴



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(2) Early education: Special districts should try to communicate *before* a related measure is placed on the ballot.¹⁵ Educating constituents about the issues early on related to a future ballot measure is less likely to be seen as campaigning for or against a measure. Once an election is underway, interested parties can access readily available public information, including agency studies or staff reports.

(3) Regular Publication Timing: Special districts should include communications within *regularly-timed* publications, such as a periodic newsletter. Communications should not be in special publications that are issued close to an election.¹⁶

(4) Standard communications: Special districts should use their *standard* methods and style of communicating information, including newsletters or presentations at public

meetings. Avoid non-standard communications that could be characterized as campaign “material” or “activity,” such as digital advertising, flashy logos and slogans, or door-to-door canvassing.¹⁷

Public agency expenditures on election-related communications will continue to be scrutinized. To help ensure that communications are not perceived as impermissible arguments or advocacy, special districts should plan ahead and consider the steps outlined above. A communication is likely permissible if it looks and sounds like a typical, consistent, moderate, and factual communication from a public entity and contains no express advocacy. However, if the communication looks or sounds more like a campaign, either through express advocacy or unusual timing, style or tone, the communication is probably not a permissible use of public resources. 🇺🇸

1 Shareholder, Richards, Watson & Gershon and General Counsel, Nipomo Community Services District.
 2 Associate, Richards, Watson & Gershon.
 3 *Stanson v. Mott* (1976) 17 Cal.3d 206, 217.
 4 *Id.* at 221.
 5 2 Cal. Code Regs. § 18420.1.
 6 2 Cal. Code Regs. § 18420.1.
 7 *See, e.g., Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 8.
 8 *League of Women Voters v. Countywide Criminal Justice Coordination Comm.* (1988) 203 Cal.App.3d 529, 555.
 9 *In the Matter of Mesa Water District*, FPPC Case No. 16/19813.
 10 *In the Matter of City of Fountain Valley*, FPPC Case No. 16/20109.

11 *In the Matter of County of Los Angeles*, FPPC Case Nos. 17/150 and 18/1258; *Settlement Agreement between the Howard Jarvis Taxpayers Association, John Suttie, and the County of Los Angeles* (June 2020).
 12 *Id.*
 13 *Id.*
 14 2 Cal. Code Regs. § 18420.1(d)(1); 2 Cal. Code Regs. § 18901.1(e)(1).
 15 *See* 2 Cal. Code Regs. § 18420.1(b)(2); 2 Cal. Code Regs. § 18901.1(c)(2).
 16 2 Cal. Code Regs. § 18420.1(d)(2); 2 Cal. Code Regs. § 18901.1(e)(2).
 17 2 Cal. Code Regs. § 18420.1(b)(1); 2 Cal. Code Regs. § 18901.1(c)(1).

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