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Orrick: FPPC Puts Focus on California Public Agency Bond Issue Mailers

Public agencies considering bond campaigns in California should take note of a recent stipulation involving information that agencies sometimes share with voters before bond referendums.

The California Fair Political Practices Commission (FPPC) zeroed in on material a school district sent voters before a bond referendum in Poway, just north of San Diego.

The FPPC alleged, and the District stipulated, that the mailer “unambiguously urged” the passage of the measure in violation of the Fair Political Practices Act and state law, and fined the District over \$13,000.

The Case

- In October 2019, about six months before a primary election, the Poway Unified School District sent residents a mailer indicating it was “considering” placing a bond measure on the ballot to repair and improve schools.
- The mailer indicated how the district would use bond proceeds if voters approved the measure.
- A complaint alleged the mailer used public funds to support the measure’s passage.
- The Commission’s [decision](#) amounts to an implicit announcement that mailers public agencies send voters before bond referendums may run afoul of state law.

The Context

Public agencies often face competing interests when it comes to sharing information about possible bond issues.

On one hand, agencies want to provide factual information to help voters assess bond proposals. On the other hand, a 1976 California Supreme Court [decision](#) says agencies should not use public money to try to influence a question voters will decide.

Unfortunately, public agencies have had to draw the line between impermissible partisan expenditures and informational ones without clear guidance from the courts.

The California Supreme Court decision acknowledged that past cases supported a public agency’s ability to make a fair presentation of facts relevant to an election matter. Even so, a number of publicly financed mailers that purported to contain only relevant factual information have nevertheless been found to constitute improper campaign literature – even when they did not explicitly exhort voters to “vote yes.”

The courts have said that each case determining the propriety of an expenditure under this rubric must carefully consider the style, tenor and timing of the publication at issue.

In Poway’s case, the FPPC found that the district provided detailed information about how funds

would be used and accounted for and reflected the pressing need for improvements.

The FPPC stipulated that the mailer didn't use inflammatory or overly argumentative language and instead focused on presenting facts and a clear plan for addressing facilities issues. However, according to the FPPC, the mailer made an "argument" for the measure by detailing deficiencies in facilities and linking the proposed improvements to student success and safety.

The Implications

Public agencies considering bond campaigns in future years should take note of the FPPC's increased interest, and consult their attorneys prior to distributing the mailer.

The FPPC's order with Poway does not have precedential value in California courts.

However, authorities do have the ability to impose civil fines on offending entities. In some cases, they have the power to fine public officials, too.

Want to know more? Contact one of the authors (John Palmer, Eugene Clark-Herrera, Don Field and Lauren Herrera).

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