



NIELSEN MERKSAMER

# Election Law Update

Initiative & Referendum, Voting Rights & Election Law

WINTER 2009

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## Nielsen Merksamer's Ballot Measure Clients Make a Clean Sweep in November 2008

Nielsen Merksamer's ballot measure clients went 7 for 7 in November, in three statewide and four local ballot measure races.

At the statewide level, Nielsen Merksamer represented the proponents of Proposition 2 (Treatment of Farm Animals) and Proposition 11 (Redistricting), and the opponents of Proposition 7 (Renewable Energy). Californians for Humane Farms succeeded in passing Proposition 2 with a comfortable 63.5% of the vote, while Hold Politicians Accountable – Yes on 11, narrowly won with 50.9% of the vote. Californians Against Another Costly Energy Scheme defeated Proposition 7 by a sizeable 29% margin.

At the local level, Nielsen Merksamer represented clients in San Francisco, Redwood City, Beverly Hills and Moraga, all of whom were also successful in November.

In San Francisco, the Committee to Stop the Blank Check handily defeated Proposition H, which would have allowed the Board of Supervisors to issue revenue bonds to take over PG&E's electric system and to take over other San Francisco utilities without a vote of the people.

Citizens Against Costly Initiatives defeated Measure W in Redwood City, which would  
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## Major Referendum Ruling: Court of Appeal Holds Documents Incorporated in Ordinance By Reference, Even If Not Present at Adoption, Are Part of Ordinance's "Full Text"

The Court of Appeal recently ruled that the San Francisco Board of Supervisors' Clerk properly rejected a referendum petition on "full text" grounds, because although it contained a copy of the ordinance itself, the petition omitted the text of several documents expressly incorporated by reference in that ordinance. *Defend Bayview Hunters Point Comm. v. City & County of San Francisco*, 167 Cal. App. 4th 846 (1st Dist 2008).

On its face the "full text requirement" of Elections Code § 9238 is simple: a referendum petition must contain the full text of the act referred. In practice, though, it is the subject of continuing controversy, particularly where acts include lengthy and complicated exhibits and attachments. Nielsen Merksamer has successfully litigated and regularly advises clients on the full text issue, including recent cases in Alameda and Contra Costa Counties.

The central issue on appeal in the *Defend Bayview* case stemmed from the fact the documents incorporated by reference were not actually attached to the ordinance when adopted by the Board, but were merely identified as being "on file with the Clerk of the Board." Proponents argued that,  
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## Local Ballot Measures November 2008 Recap

Our last newsletter previewed several local land use battles on the November ballot – the results are summarized below. Open space proponents had a mostly winning record, losing in two jurisdictions but prevailing in five. In addition, Berkeley voters rejected limitations on a transit-friendly project, while in Beverly Hills, as noted above, the Hilton Revitalization Project eked out a narrow win.

**Berkeley** (Alameda Co.) - Require Voter Approval of Transit- or HOV/Bus-Only Streets and Lanes - Measure KK: 76.70% NO, 23.30% YES.

\* **Beverly Hills** (L.A. Co.) - Referendum to Approve Beverly Hilton Hotel Revitalization Project - Measure H: 50.41% YES, 49.59% NO.

**Buellton** (Santa Barbara Co.) - Require Voter Approval for Amending General Plan to Expand Sewer or Water Services - Measure E: 68.47% YES, 31.53% NO; Measure F: 76.72% NO, 23.28% YES.

- Measures E and F had different expiration dates (2025 and 2014, respectively) but were otherwise identical.

**Loma Linda** (San Bernardino Co.) – Preserve City-Owned Land as Open Space – Measure T: 87.30% YES, 12.70% NO.

\* **Moraga** (Contra Costa Co.) - Amendment of General Plan to Increase Open Space – Measure J: 86.32% NO, 13.68% YES; Measure K: 55.96% NO, 44.04% YES.

- Measures K and J were two competing citizens' initiatives; Measure J offered additional city funding in return for development rights.

**Napa County** - Extend Requirement for Voter Approval for Re-Designating Open Space - Measure H: 61.97% YES, 38.03% NO.

**Pleasanton** (Alameda Co.) - Impose Development Restrictions on Hills - Measure PP: 59.52% YES, 40.48% NO; Measure QQ: 53.88% YES, 46.12% NO.

- Measures PP and QQ were a citizens' initiative and the city council's alternative measure. QQ contained a poison pill provision that was not triggered because PP garnered more YES votes. Both measures are thus effective, and their reconciliation will be determined by the City Council and/or the courts.

**Redondo Beach** (Los Angeles Co.) - Require Voter Approval for Increases in Development - Measure DD: 58.72% YES; 41.28% NO; Measure EE: 50.85% YES; 49.15% NO

- Measures DD and EE were a citizens' initiative and a more moderate city council alternative. Although both were approved, only DD will take effect because it earned more YES votes.

\* **Redwood City** (San Mateo Co.) – Require Voter Approval to Develop of Open Space - Measure V: 51.0% NO, 49.0% YES; Measure W: 62.6% NO; 37.4% YES.

- Measures W and V were a citizens' initiative and the more limited city council alternative.

\* Nielsen Merksamer served as campaign counsel. ■

## Voting Rights Update

The few months since our last newsletter have brought a number of important developments in the realm of voting rights and redistricting.

### Oral Argument in *Bartlett v. Strickland*

In our spring issue, we reported that the Supreme Court would hear this case challenging North Carolina's legislative redistricting plan (from 2002!). The case raises a critical question that has eluded decision by the Court for decades: Whether Section 2 of the Voting Rights Act compels a legislature to create a district around a minority group population center, even though there is no way to create a district with at least 50% minority population. With a few exceptions, the lower federal courts have generally favored a "bright-line" 50% rule, relying on language from the seminal 1986 Section 2 case, *Thornburg v. Gingles*.

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### Voting Rights Act Update (continued)

The Court heard oral argument on October 14. Observers at the argument report apparent reluctance among the Justices to abandon the 50% rule. The Justices expressed concern about the practicality of abandoning the bright-line approach for an open-ended inquiry. They also seemed to indicate that they saw no compelling reason for abandoning 20 years of lower court case law to choose a different, lower “bright line” (for example 45% or 48%), as advocated by the Solicitor General. Some of the Justices also expressed reluctance to adopt a new rule that would increase the number of cases in which the courts would be forced to intervene. A decision is expected early in the new year.

### Proposition 11 (Redistricting Reform) Passes

Winner in the “If at first you don’t succeed, try again and again and again and again . . . .” category: Proposition 11. Californians rejected initiatives to allow redistricting by commission, rather than in the Legislature, five times since 1980. The most recent, Proposition 77, was defeated only three years ago. Given this history, many observers had concluded that no redistricting reform measure could ever pass in the state. Yet reform groups decided to try again in 2008, and Proposition 11 narrowly passed, 50.9% to 40.1%. (Nielsen Merksamer represented the Yes on 11 campaign, see page 1 above.)

Proposition 11 puts redistricting of state Senate, Assembly, and Board of Equalization districts in the hands of a 14-member commission in 2011. (Congress will continue to be redistricted by the Legislature.) Registered California voters may apply to serve on the Commission (subject to stringent conflict of interest provisions). From the initial applicant pool, state auditors choose 60 applicants. Legislative leaders may strike 24 applicants from the pool. The auditors then pick eight commissioners by lottery, and the eight commissioners then choose six more commissioners. The Commission must consist of five Democrats, five Republicans, and four of neither party. For approval, district boundaries need votes from three Democratic commissioners, three Republican commissioners, and three commissioners from neither party.

### California Voting Rights Act Developments

We reported in our last issue that in September 2008, the Lawyers’ Committee for Civil Rights filed a CVRA suit against the Madera Unified School District, demanding an immediate move to trustee area elections. LCCR sought an injunction against the 2008 elections for the District’s board, to be conducted only two months later, in November. While MUSD has historically had a diverse board, and did not agree with the plaintiffs’ allegations, it opted not to contest the suit, or the injunction, and to voluntarily move to trustee area elections immediately. Yet LCCR is still demanding **nearly \$1.2 million** in attorneys fees and costs for this uncontested suit.

Meanwhile, a number of other school districts that received CVRA demand letters from the LCCR have voluntarily chosen to move to elections by-trustee areas as well. ■

### New Anti-SLAPP Cases Decided By California Courts

California’s anti-SLAPP statute, Code of Civil Procedure §§ 425.16–425.18, is designed to prevent frivolous litigation that would have a chilling effect on First Amendment rights. Given the First Amendment implications of the initiative and referendum powers, it is therefore not surprising that California courts are often called upon to construe the anti-SLAPP statute in that context. Three such cases have been decided since the last publication of this Newsletter.

In a unanimous ruling, the California Supreme Court in *Club Members for an Honest Election v. Sierra Club*, 2008 Cal. LEXIS 13720 (Cal. 2008), held that an action must be brought “solely” in the public interest to benefit from the exception to the anti-SLAPP legislation contained in CCP § 425.17. Thus, insofar as an action as a whole seeks any unique advantage or benefit for the plaintiff different from the interest of the public generally, the exception does not apply.

In *Widders v. Furchtenicht*, 167 Cal. App. 4th 769  
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**Anti-SLAPP Cases (cont.)**

(2008), the plaintiff City Attorney filed an action for declaratory relief asking the court to declare that two proposed initiatives filed by the defendant were unconstitutional, and that he was not required to prepare a Title and Summary for either. The trial court dismissed the action as untimely, but noted that, had it been timely, the defendant's anti-SLAPP motion would have failed because the City Attorney was not required to prepare Titles and Summaries for the proposed initiatives which did not constitute legislation.

The Court of Appeal reversed, holding that the action was timely but should have been dismissed. Relying on *Marblehead v. City of San Clemente*, 226 Cal. App. 3d 1504 (1991), the Court of Appeal held that the two proposed initiatives were an improper exercise of the initiative power because they did not contain any specific laws to be enacted. Thus, the City Attorney was not required to prepare a Title and Summary for either.

*Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Ass'n of Gov'ts*, 167 Cal. App. 4th 1229 (2008), involved a claim that defendant unlawfully spent public funds to advocate for the passage of a ballot measure that would impose a one-half percent sales tax to pay for projects in its transportation plan. Defendant filed a special motion to strike. The Court of Appeal reaffirmed that governmental agencies have First Amendment rights and are entitled to the protection of the anti-SLAPP statutes. The Court further held that defendant's activities did not constitute an illegal expenditure of public funds because defendant is authorized by statute to formulate and sponsor such measures, and its expenditures occurred before the County Board of Supervisors voted to place the tax measure on the ballot. ■

**Nielsen Merksamer's Clean Sweep (cont.)**

have required two-thirds voter approval to develop open space within the city's boundaries.

In Beverly Hills, Citizens to Preserve Beverly Hills successfully passed a referred ordinance— Measure H — authorizing the redevelopment of the Beverly Hilton Hotel site and the addition of a Waldorf-Astoria Hotel and condominiums on the same site.

Finally, as noted above, Moraga Citizens for Open Space, Sports Fields and Recreation successfully defeated Measure K, which would have severely restricted property rights within the City's boundaries.

Nielsen Merksamer congratulates all of its ballot measure clients. ■

**New Full Text Ruling (cont.)**

because the documents were not present or attached to the ordinance upon passage, they could not be part of the ordinance's "text" and thus those documents need not be included in the petition. The court disagreed.

The court reviewed the case law holding that "exhibits incorporated into ordinances are part of the 'text' of the ordinance for referendum petition purposes." It then recognized that incorporation by reference, even without physical attachment, is a "perfectly legal and appropriate" way to draft and adopt an ordinance, noting that "not a single published [initiative or referendum] opinion has attributed any importance to whether a document incorporated in an ordinance is or is not physically attached to it when it is passed."

Turning its attention to the content of the excluded exhibits, the court focused on the exhibits' role in supplying vital information about the effect of the ordinance (i.e., the new boundaries of the redevelopment area, the use of limitations on eminent domain and the community's role in the planning process). Signers, the court held, were deprived of their ability to understand the petition before signing it, and the Clerk of the Board properly rejected the petition.

Another case from Pleasanton, addressing similar issues, is before the Court of Appeal in San Francisco. ■

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