



INITIATIVE, REFERENDUM & ELECTION LAW UPDATE

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MARIN COUNTY OFFICE

Chip Nielsen
Jim Parrinello
Marguerite Leoni
Steve Lucas
Jason Kaune
Chris Skinnell
Jennie Eddy
Darrin Lim
Sean Welch
Jennifer Lee
Elli Abdoli
Cate Castonguay*

2350 Kerner Blvd
Suite 250
San Rafael, CA 94901

Ph 415/389-6800
Fx 415/388-6874

SACRAMENTO OFFICE

Steve Merksamer
Bob Naylor
Jim Gross
Eric Miethke
Gene Erbin
Cathy Christian
Dick Martland
Dede Alpert*
Greg Turner
Alan Fernandes
Kristy Wiese*
Kurt Oneto

1415 L Street
Suite 1200
Sacramento, CA 95814

Ph 916/446-6752
Fx 916/446-6106

Web Site:
www.nmgovlaw.com

*not a member of the California Bar

NOVEMBER 2008 STATEWIDE INITIATIVES

California voters will be presented with 12 initiatives this November, covering everything from gay marriage to redistricting.

Proposition 1, High Speed Rail bonds, would authorize \$9.95B in bonds to partially fund a \$40B, 800-mile high speed train between San Francisco and Los Angeles. Supporters say rail travel is better for the environment and will reduce need for foreign oil; opponents say we have a budget crisis and more urgent needs for public money.

Proposition 2, Treatment of Farm Animals, would require that specified farm animals, including calves raised for veal, egg-laying hens, and pregnant pigs, be confined in a manner that allows them to fully extend their limbs or wings, lie down, stand up, and turn around; violators face misdemeanor penalties. Supporters say it will stop cruel treatment of farm animals, lower risk of animal disease and protect the environment; opponents say there are already laws against cruel treatment of animals and it will increase the price of eggs.

Proposition 3, Bonds for Children's Hospitals, would authorize \$980M in bonds to fund construction, remodeling, and equipping of children's hospitals. 80 percent of bond proceeds would go to hospitals that focus on children with certain illnesses, such as leukemia, cancer, and heart defects, and requires, among other things, that qualifying hospitals assist a high volume of children eligible for governmental programs. The other 20 percent of bond proceeds are designated for UC general acute care hospitals.

Proposition 4, Parental Notification About Abortion, would amend the California
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LOCAL BALLOT MEASURES - NOVEMBER PREVIEW

Citizens and City Governments Face Off Over Growth Measures

Land use continues to be an active topic in local elections, with a host of battles across the state—including several with competing measures—to be decided in November.

Berkeley (Alameda Co.): A citizen-sponsored initiative would require voter approval before designating city streets or lanes for transit-only or HOV/Bus-only use. The measure is a response to AC Transit's proposed Bus Rapid Transit project, which would construct bus-only lanes and light rail-like station structures along an 18-mile long stretch from Berkeley to San Leandro.

Beverly Hills (L.A. Co.): Measure H is a referendum seeking to overturn the city council's approvals for the revitalization of the Beverly Hilton Hotel, including a new Waldorf-Astoria and luxury.

Buellton (Santa Barbara Co.): An urban-growth boundary measure, Measure E, would require voter approval for expansion or development of sewer or water services outside existing city limits through an amendment to the city's General Plan that would remain effective through 2025. The council-sponsored alternative, Measure F, is identical, that it would expire in 2014.

Loma Linda (San Bernardino Co.): A council-sponsored measure would preserve 1,700 acres of city-owned land in the South Hills area as permanent open space.

Moraga (Contra Costa Co.): Two competing citizens' initiatives, Measures J and K, would both amend the town's General Plan to increase open space acreage within the town. However, Measure J would additionally provide funding for needed city projects upon granting of certain development rights
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Nielsen, Merksamer, Parrinello, Mueller & Naylor specializes in government and political law, initiative, referendum and election law, constitutional and regulatory law, voting rights and redistricting, and trial and appellate litigation in these areas.

VOTERS REJECT MANY SLOW GROWTH MEASURES IN 2008

Local election results in February and June 2008 suggest voters' attitudes may be changing with regard to slow/anti-growth measures. Not long ago, it seemed local voters would approve such measures easily, but that was not the case in a sampling of 2008 local elections.

Voters approved the slow/anti-growth side of only one of six local land use measures on the June 3, 2008 ballot. Voters in San Clemente approved Measure I, which set height limits for homes developed in Shorecliff. However, San Francisco's liberal-leaning voters approved Measure G, which endorsed the Lennar Corporation's efforts to develop an 800-acre parcel of land in Bayview-Hunter's Point. Those same voters defeated competing Measure F, which would have imposed an unprecedented low/moderate housing requirement and, by all accounts, would have been the death knell of the Lennar project. In Napa County, voters rejected Measure N which would have imposed growth controls in unincorporated parts of the county. Similarly Measure B in Thousand Oaks was rejected by the voters; it would have amended city ordinances to require that any development project having an impact on traffic must automatically be submitted to a public vote. And in Chula Vista voters rejected Measure E, which would have limited the height of new developments in certain areas and required voter approval of general plan changes allowing increased building heights in most areas of the city.

Results were similar in the February 2008 election, where voters approved four local ballot measures supporting proposed developments and rejected one slow growth measure. In Newport Beach, voters approved Measure B allowing for the construction of a new civic center on a site in Newport Center previously slated for a park. In the City of Coronado, voters approved Proposition B, which permitted development of a new lifeguard public safety service building on Coronado Beach, and defeated Proposition A, which would have given local voters veto power over City Council approvals of new lifeguard facilities, restrooms and bike paths on Coronado Beach. Finally, in the City of Santa Clara, voters resoundingly rejected two referenda measures, Measures A and B, that would have halted a mixed use infill project of single family homes and affordable senior housing units.

Time will tell whether these recent election results are the beginning of a trend, or an anomaly. One thing seems certain, however—voters are looking at complicated land use measures with a discerning eye, and the days of knee jerk reactions are over.

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(For more information, contact Jim Parrinello)

If you would prefer to receive this newsletter by e-mail, please let us know by contacting Chris Skinnell at cskinnell@nmgovlaw.com

VOTING RIGHTS UPDATE

CVRA Activity Heats Up. The California Voting Rights Act is making its presence felt in the Central Valley since the U.S. Supreme Court refused to hear an appeal challenging the law last year. Late in 2007, plaintiffs began the new round of litigation by suing the Tulare Local Healthcare District under the CVRA, challenging the District's at-large election system, because the District had only elected one Latino office-seeker (of four) in the past 15 years. The District's Board is currently comprised of an African-American, two Asian-Americans, and two Portuguese members.

Then, earlier this summer, the Bay Area-based Lawyers Committee for Civil Rights, sent letters to several dozen school districts in the Central Valley, demanding the districts abandon at-large elections. At least one such district—Madera Unified—has already been sued.

The plaintiffs in the two pending cases moved to enjoin the conduct of the November 2008 elections, with mixed success. The Tulare Healthcare District defeated the motion. The judge ruled that the motion was brought far too late (once ballots were already printed), and that plaintiffs had failed to show a likelihood of success on the merits. In the Madera school district case, though the motion was filed just as late as in Tulare, the defendants generally did not oppose injunctive relief; the district Board election will go forward, but the judge enjoined the District from certifying the election results.

Trial is currently set in the Tulare case for January 2009.

D.C. Court Upholds Section 5; Decision Appealed to Supremes. The leading development in voting rights case law since our last newsletter is the long-awaited three-judge court's opinion on the constitutionality of the renewed Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in *Northwest Austin Muni. Utility Dist. No. 1 v. Mukasey*, 2008 U.S. Dist. LEXIS 42682 (D.D.C. 2008). In that case, a utility district in Texas ("NAMUDNO") argued, that the 2006 renewal of the Act was unconstitutional, because when Congress renewed Section 5 in 2006 it failed to create a sufficient legislative record, failed to respond to evidence that the bailout option was illusory for most jurisdictions and failed to

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NOVEMBER 2008 STATEWIDES (cont.)

Constitution to prohibit abortion for unemancipated minors until 48 hours after a physician notifies the minor's parent, guardian or, if parental abuse has been reported, an alternative adult family member. Similar measures were defeated on the 2005 and 2006 ballots.

Proposition 5, Rehabilitation of Nonviolent Criminal Offenders, would require the state to expand and increase funding and oversight for treatment and rehabilitation programs for nonviolent drug offenders and parolees, reduce criminal consequences of such offenses by mandating 3-tiered probation with treatment and by providing for case dismissal and/or sealing of records after probation, limit court authority to jail offenders who violate probation or parole, and shorten parole for most drug offenses. Supporters say it will provide rehabilitation programs for nonviolent offenders and drug addicts and help them stay out of overcrowded jails and prisons; opponents say it lets people convicted of domestic violence and other crimes avoid jail time and shorten parole time for meth dealers and drug felons.

Proposition 6, Public Safety Spending and Criminal Penalties, would place additional penalties on crime. If it passes, youths 14 years or older convicted of a "gang-related" felony would be prosecuted as adults, penalties for violating gang injunctions would be increased, and bail would be eliminated for undocumented individuals charged with violent or gang-related felonies. And persons who receive public housing subsidies would be required to submit to and pass an annual criminal background check or have the entire family removed from their housing. Supporters say it would increase police on the streets and public safety, and provide better protection from gang members; opponents say it will waste billions on unproven programs.

Proposition 7, Renewable Energy, would require all electric utilities to generate 20% of their power from renewable resources by 2010, a standard currently applied only to private electrical corporations. This requirement would rise to 40% by 2020 & 50% by 2025. Supporters say using more renewable resources will help the environment; opponents, including most major environmental and renewable energy groups, say the measure will shut small renewable energy companies out of California's market, disrupt renewable energy work in progress and increase electricity bills without achieving stated goals.

Proposition 8, Ban on Gay Marriage, would eliminate the right of same-sex couples to marry in California by amending the State Constitution to state: "Only marriage between a man and a woman is valid or recognized in California."

Proposition 9, Victims' Rights, would require victims to be notified and given an opportunity for input during phases of the criminal justice process, including bail, pleas, sentencing and parole; establish victim safety as a consideration in determining bail or release on parole; increase the number of people permitted to attend and testify on behalf of victims at parole hearings; reduce the

number of parole hearings to which prisoners are entitled and similar provisions. Supporters say it would give victims similar rights to criminals and prevent the early release from prison of dangerous criminals to ease overcrowding problems; opponents say the rights of victims are already protected and the measure would take money away from more important programs.

Proposition 10, Bonds for Alternative Energy, authorizes \$5B in bonds, a majority of which will be allocated to cash payments to purchasers of certain high fuel economy and alternative fuel vehicles. The remaining proceeds are designated as incentives for research, development and production of renewable energy technologies, alternative fuel vehicle technology and related programs. Supporters say it will help people afford cars that are cheaper to run and better for the environment and reduce need for foreign oil; opponents say we already have programs to encourage clean power and it will take money away from more urgent budget priorities.

Proposition 11, Redistricting, would amend the State Constitution to create a 14-member commission responsible for drawing new district lines for State Senate, Assembly, and Board of Equalization districts. Under the initiative, the State Auditor would randomly select commission members from a voter applicant pool, with five members from each of the two largest political parties, and four members unaffiliated with either political party. Supporters say it will stop politicians from drawing districts that make it easier for them to get re-elected, and will make elections more competitive and officeholders more accountable; opponents say districts should be drawn by elected officials, not appointees.

Proposition 12, Bonds for Veterans' Home Loans, would authorize \$900M in bonds for financing a program to assist veterans in purchasing farms, homes, and mobile homes. Supporters say giving veterans low interest loans to buy homes is a way to show appreciation for their service and sacrifice; opponents say the measure should give priority to veterans who served in combat or in combat zones.

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NOVEMBER '08 LOCAL MEASURES (cont.)

Napa County: A citizen-sponsored initiative would extend the effect of Measure J, a 1990 initiative that requires voter approval for certain changes to the policies and land use map of the county's General Plan, to 2058. The new initiative would also require voter approval for certain changes to the designation of lands under the General Plan and a 1999 Board of Supervisors policy relating to groundwater permits.

Pleasanton (Alameda Co.): After a companion referendum was invalidated (see Spring Newsletter), the initiative sponsored by the citizens' group Save Pleasanton's Hills that seeks to reinforce an existing voter-mandate 29,000-unit housing cap and amend the city's General Plan to block development on steep hillside areas in the city is going to the voters in November. An alternative measure by the council would instead require the development of an ordinance *(continued on page 4)*

NOVEMBER '08 LOCAL MEASURES (cont.)

to impose more moderate development restrictions.

Redondo Beach (Los Angeles Co.): The citizen-sponsored Building a Better Redondo initiative, Measure DD, would require voter approval for conversions of public land to private use, certain changes to residential or mixed-use developments, and changes that would “significantly increase” traffic, density or intensity of use in a neighborhood. Measure EE, promoted as the city council’s more clear and concise alternative, would instead require voter approval for re-zoning or increasing density in residential neighborhoods, re-zoning parks and open space, and allowing building heights above a certain level within the Coastal Zone.

Redwood City (San Mateo Co.): Measure W would amend the city charter to require 2/3 voter approval of development on open space within the city’s boundaries. Although spurred by a proposed development on the Cargill salt flats, the measure would affect many other privately-held parcels in the city. Measure V, the city council’s countermeasure, would instead permit development on the Cargill land with approval by a simple majority of voters.

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(For more info, contact Jennifer Lee or Sean Welch)

VOTING RIGHTS UPDATE (cont.)

update the “coverage” formula to ensure Section 5 was directed at the jurisdictions most in need. In other words, the 2006 renewal failed to meet the standard of the federalism cases—that it be “congruen[t] and proportional[]” to the purpose of remedying unconstitutional—i.e., purposeful—discrimination by the States. The district court rejected these claims.

NAMUDNO has appealed to the Supreme Court, as permitted by statute. The Court may not refuse the case, as it can for most, though it need not hold oral argument or issue a lengthy opinion. Notably, Justice Stevens, in a recent dissent joined by Justice Souter regarding the proper interpretation of Section 5, has already expressed some skepticism about the continuing propriety of Section 5 constraints: “[I]t may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were.” *Riley v. Kennedy*, 553 U.S. ___, 128 S. Ct. 1970, 1987 (2008) (Stevens, J., dissenting (joined by Souter, J.)). This statement is particularly noteworthy, coming as it did from two justices who would generally be regarded as most sympathetic to the renewal’s defenders.

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(For more info, contact Chris Skinnell or Marguerite Leoni)

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NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR
2350 KERNER BOULEVARD, SUITE 250
SAN RAFAEL, CALIFORNIA 94901
(415) 389-6800 / (415) 388-6874 (FAX)