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ATTORNEYS AT LAW

Municipal Elections

(aka, “the circus has left the tent, *but it will be back. . .*”)

League of California Cities - City Clerks New Law and Elections Seminar

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Presenters



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Jim is well versed in local election laws, running the gamut from initiative, referendum, vacancy and recall procedures, to political reform/campaign finance, to election recounts and contests. He devotes much of his time to helping clients comply with the California Voting Rights Act and the California Voter Participation Rights Act (Senate Bill 415) – laws that often require public agencies to change the timing and means by which they elect representatives (from “at-large” to “by-district” elections). He is also one of the firm’s go-to legal advisors for clients that are going through the “redistricting” process triggered by the U.S. Census every 10 years.

About Us



12

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250

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130+

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Best Best & Krieger serves as a trusted partner and strategist to public and private sector clients across the nation. With offices spanning from coast to coast, the firm's attorneys provide innovative legal solutions and cost-effective representation, working to protect and advance clients' interests at every turn. BB&K is recognized for decades of groundbreaking successes, loyal service, and a culture of inclusion and respect.

“Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. *Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time.*”

(Winston Churchill, before the House of Commons, November 11, 1947)

Agenda



1. Municipal Elections Generally
2. Some Lessons Learned from the Nov. 2024 General Municipal Election
3. Filling Vacancies for Elective Offices
4. Recall
5. Initiative/Ballot Measures
6. Referendum
7. Do's and Don'ts for Public Officials at Election Time

Municipal Elections Generally

Role of City Clerk and City Attorney

- City Clerk/Deputy City Clerk is the Elections Official (EO)
 - The “Ref” – Responsible for impartial administration of elections – Doesn’t take sides
 - With very rare exception, no discretionary calls – ministerial actions only
- City Attorney helps the “Ref” re: Elections Code (the “review booth in New York”)
 - With measures, prepares ballot title and summary (pre-petition) and impartial analysis (post-petition)
- How much advice can EO or City Attorney give to the public or to public officials?
 - Can provide basic guidance (e.g., provide forms, explain when and where to file documents)
 - Cannot provide substantive legal advice (“How do I do one of these initiatives?”)
 - No legal authority to “proof” a proponent’s “work” before filing (limited exception for reviewing form recall petitions prior to circulation)
 - City officials must be treated the same as others in their roles as candidates or proponents



Types of Municipal Elections

- The Four Most Common Types of Elections:
 - Elections for Officers, including filling vacancies (Mayor, City Council, City Clerk, City Treasurer)
 - Recall – Removing Officers from office before their elected term is up
 - Initiative/Ballot Measure – Putting local law on the books
 - Referendum – Keeping local law passed by the Council off the books
- Additional Rules Apply to Certain Elections (e.g., LAFCO, Charter Amendment)



Lessons Learned from the November, 2024 General Municipal Election

Lessons Learned from Nov. 2024 Election



- *SB County Fiasco* - Make sure, before any election, that your County ROV knows (i) whether you are a “by-district” or “at-large” city and (ii) if you are “by-district”, that they are using the correct district boundaries so votes/signatures are properly counted
- The “carpetbagger” problem – even if your City doesn’t have codified rules (most don’t), there are still State law rules on where a candidate’s legal “residence” is if they have two or more homes. This can be very fact-specific and it’s not your job to investigate. Complainants should refer their concerns directly to the DA or seek a *quo warranto* action through AG
- “Misinformation”/“mal-information” = “I just don’t like it, make them stop!!” – Typically the answer is “fight speech with speech”, not censorship
- If a campaign violation is not within your purview (e.g., political ad disclosures), do not directly forward complaints to FPPC – have the complainant file it (FPPC has online portal)

Filling Vacancies for Elective Offices

Filling Vacancies for Elective Offices

- Filling Mayoral, Council and Other Officer Vacancies (Govt. Code 34902, 36512)
 - “Vacancy” defined:
 - Includes death, resignation, disqualifying conviction, AWOL from regular meetings > 60 consecutive days (> 70 days if Council meets monthly or less frequently)



Filling Vacancies for Elective Offices



- General Rule: Council has 60 days from vacancy to either:
 - Fill vacancy by appointment
 - Level of formality (application process, interviews, etc.) is up to local control, as long as it's complete in 60 days
 - For Council seat and other Officers, if vacancy occurs in first half of term and ≥ 130 days before next general municipal election, appointment is only good until mid-term – seat is then elected for 2-year “short term”
 - If vacancy occurs after that, appointment is good until the end of the scheduled term
 - For separately elected Mayor, appointment is good until end of scheduled term
 - Call special election at “next regularly established election date” not < 114 days later
 - Specially elected officer serves until end of schedule term in all cases
 - City Council may adopt ordinance requiring any of the following:
 - Immediately call special election to fill any vacancy
 - call special election if petition is received with certain # of signatures
 - that the appointed person holds office only until special election

Filing Vacancies for Elective Offices



- City Charter may (and often does) set a different deadline for Council to act (30 or 45 days)
- Special Election to fill vacancy follows same procedures for nomination, ballot designations, candidate statements, etc. as general election for Officers

Recall

Recall

- The Constitutional power of the electors to remove a local elective officer
 - With the exception of an officer appointed under EC 10229, voters cannot recall an officer if he or she:
 - has held office in current term for ≤ 90 days
 - defeated a recall election within the last 6 months
 - has 6 months or less left in current term
- Process is heavily regulated by statute (EC 11000 et. seq.) and Calif. Secretary of State
 - Prescribes forms of notices, petitions, etc.
- City Charter may set different rules (but check to see if preemptive state law governs)



Recall

- Notice of Intention (NOI) to Circulate Recall Petition starts process:
 - Must include name and title of the “target” (elected officer sought to be recalled)
 - Statement not > 200 words giving reasons for proposed recall (political statement);
 - Name, signature and residence address of each recall proponent;
 - Statement regarding opportunity of “target” officer to file an Answer to the Notice



Recall



- NOI Signature Requirements – Recent Amendments Increase Threshold
 - If $\geq 100,000$ reg. voters, minimum of 50 or 5x the nomin. signature requirement (typically 100)
 - If 1,000 - 100,000 reg. voters, minimum of 30 or 3x the nomin. signature requirement (typically 60)
 - If $< 1,000$ reg. voters, minimum of 30 signatures
- Relevant number of signatures depends upon applicable “voter pool”
 - If Office is “by-district”, only voters in the district may sign recall Notice or petition, or vote on recall
 - Must use district boundaries under which “target” officer was last elected
 - Particularly after redistricting - Make sure County is using correct boundaries – *OC/Santa Ana recall fiasco*
 - If Office is elected “at-large” or “from-district”, any voter in the City may sign recall Notice or petition and vote on recall

Recall



- Recall Proponents must:
 - Serve copy of Notice of Intention on the “target” officer (personally or certified mail)
 - File original Notice with EO w/in 7 days after serving “target” officer, along with proof of service
 - Publish Notice once or post in 3 public places if no newspaper
- Answer of “Target” Officer to the Notice of Intention - *Optional*
 - Not > 200 words giving political answer to the Notice (why the “target” officer shouldn’t be recalled)
 - Printed name, signature and residence/business address of “target” officer
 - Political statement is for voter information only – insufficient form or substance will not affect proceedings
- “Target” Officer must
 - File original Answer with EO w/in 7 days after proponents file Notice with EO
 - Serve copy of Answer on at least one proponent w/in same 7 days (personally or certified mail). No proof of service req’d

Recall



- Recall Petition – Form and Contents
 - Must follow California Sec’y of State form – sets formatting, contents, font size, etc.
 - If seeking to recall multiple officers, separate petition is required for each officer
- City Clerk/EO Review of Form Recall Petition
 - Proponents must file 2 blank copies of form petition with EO w/in 10 days after Answer is filed or Answer filing deadline expires, along with proof of publication/posting of Notice
 - EO must review petition format within 10 days of filing (in consultation with City Attorney)
 - If corrections needed, EO sends it back with letter outlining requirements and proponents have 10 days to correct
 - If petition sufficient, EO notifies proponents in writing and signature gathering deadline starts from this date
 - No signatures allowed on petition until EO determines sufficiency

Recall

- Number of City-wide or District-wide registered voters determines deadlines and required # of petition signatures
 - If < 1,000 voters – 40 days to gather and need 30% of voters
 - If 1,000-4,999 voters – 60 days to gather and need 25% of voters
 - **If 5,000-9,999 voters – 90 days to gather and need 25% of voters**
 - **If 10,000-49,999 voters – 120 days to gather and need 20% of voters**
 - If 50,000-99,999 voters – 160 days to gather and need 15% of voters
 - If > 100,000 voters – 160 days to gather and need 10% of voters
- Signatures may be withdrawn any time prior to filing Petition
- Proponents must file entire Petition with EO by legal deadline or VOID



Recall



- When submitted, EO makes “prima facie” examination of petition - signature “raw count”
 - If not enough “raw” signatures, EO takes no further action - Petition is not returned to the proponents – the effort is over
 - If enough “raw” signatures, EO accepts petition for filing and starts verification
- EO has 30 working days to verify signatures for “net count”
 - Verification typically done in conjunction with County ROV
 - Random sampling OK if > 500 signatures on Petition – *special extended timing rules apply (can be up to 90 days)*
- If EO determines petition is insufficient, remains on file and **confidential – not a public record**
 - Except, proponents have 21 days to review petition & challenge EO’s decision – *new timing and cost recovery rules may apply – talk with City Attorney*
- If petition determined sufficient, EO submits certificate of sufficiency to Council at next regular meeting

Recall



- Not > 14 days after receiving certificate at next regular meeting, Council must order recall election and set date. If it fails to, County must do so within 5 days
- Election must be held between 88 and 125 days after order, however, it may be consolidated with a regularly scheduled municipal election (City's primary or general) to be held within 180 days later
- Ballot must ask "Shall [officer's name] be recalled (removed) from the office of [title]?"
- "Target" Officer may file a candidate statement to oppose the recall
- Simple majority vote determines whether Officer is recalled
- ***Recent Amendment*** - If Officer is recalled, a **vacancy** is created in the Office, and shall be filled according to law (no more concurrent election for a replacement)

Initiative and Council-Called Ballot Measures

Initiative

- Constitutional power of the electors to propose and amend municipal legislative acts
 - “Initiative” is commenced by direct voter action - different than a Council-proposed ballot measure
 - Only “legislative acts” may be brought by initiative
 - usually ordinances, but sometimes resolutions (e.g.: General Plan Amendment)
 - Initiative cannot (i) regulate preempted matters, (ii) affect administrative/quasi-adjudicatory matters, (iii) impair essential govt. functions, (iv) direct Council to perform future act, etc.
 - Can be resubmitted to voters an unlimited number of times
 - “Single subject rule” – all components of initiative must have a “reasonable and common sense relationship” to each other



- Proponents commence process by filing Notice of Intent to Circulate Initiative Petition with EO
 - Must include full text of the proposed initiative measure;
 - May include statement of reasons not > 500 words;
 - Must be signed by not < 1 and not > 3 proponents;
 - Must also request City Attorney to prepare ballot title and impartial summary
 - Must include signed Elec. Code 9608 Affidavit re: No Misuse of Petition Signatures
- City Attorney prepares ballot title and summary of measure not > 500 words w/in 15 days after NOI filing. Ballot title and summary given to initiative proponents for printing in the petition
- Proponents publish Notice, ballot title and summary and/or post in 3 public places, depending upon whether City or County has newspaper of general circulation. Text of Measure need not be included
- Not > 10 days after publication/posting, proponents file affidavit of publication/posting with EO

- Proponents have **180 days** from receipt of ballot title and summary to gather signatures (not from the date affidavit is filed with EO or date of publication)
 - Top of each Petition signature page must include ballot title prepared by City Attorney
 - Each Petition “section” must include full text of measure, NOI with statement of reasons and ballot title and summary
 - Circulators need only be 18 yrs. old. No longer must be California registered voters or City residents. May be paid (but disclaimer required on Petition)
- Initiative Petition subject to other technical format rules (e.g., “Top Funders List”)
- **EO does not review** the petition’s form before signature circulation – different than Recall
- Any voter may withdraw signature from Petition prior to filing
- Proponents may withdraw measure anytime up to 88 days prior to scheduled election, even after measure has qualified and been placed on the ballot

- All sections of Petition must be filed together at one time
- Miss the deadline = ENTIRE PETITION VOID – START OVER!
- Number of required voter signatures depends on nature of the measure
 - “Regular” ordinance/legislative act – 10% of Citywide registered voters
 - Measure reducing, repealing or “affecting” local tax, assessment or property-related fee – 5% of Citywide voters who voted for a candidate at last Gubernatorial Election
 - City Charter Amendment – 15% of Citywide registered voters

Initiative

- EO makes “prima facie” examination of petition - signature “raw count”
 - If not enough “raw” signatures, EO takes no further action - Petition is not returned to the proponents – the effort is over
 - If enough “raw” signatures, EO accepts petition for filing and verification
- EO has 30 working days to verify signatures for “net count”
 - Verification typically done in conjunction with County ROV
 - Random sampling OK if > 500 signatures on Petition – *Special rules apply*
- If EO determines petition is insufficient, remains on file and confidential
 - Except, proponents have 21 days to review petition & challenge EO’s decision - *new timing and cost recovery rules may apply*
- If petition determined sufficient, EO submits certificate of sufficiency to City Council at next regular meeting
- EO may not reject Petition based on belief that measure is unconstitutional or illegal



Initiative

- Council's options if Initiative Petition is determined sufficient:
 - Adopt the measure, w/o alteration, at regular meeting or not > 10 days after (no introduction req'd)
 - Submit measure to voters at City's "next regular election" not < 88 days after order
 - Usually the next general election, but could be a primary if City holds one
 - Call earlier special measure election between 88-103 days after order
 - Order staff to prepare "impact report" of the measure to the Council
 - Impact report must be returned to Council w/in 30 days
 - Only delays the process. After impact report received, Council has three options above
- Some measures (likely) cannot be outright adopted by City Council
 - e.g., local tax and term limits measures



Council-Called Ballot Measure (EC 9222)



- City Council orders measure placed on ballot and calls the election:
 - Ordinance is titled “. . . of the People of the City” rather than “. . . of the City Council”;
 - Ordinance not effective until approved by voters (rather than 30 days after Council action)
 - Order may require supermajority/unanimous Council vote in some cases (e.g.: local general taxes)
 - Election may be limited to certain dates (e.g., charter amendment, term limits)
- No need for Notice of Intent, Petition, etc. – Council action bypasses this procedure
- Why would Council do this instead of just adopting the ordinance?
 - Voter support for controversial ordinance (“The People of spoken!”)
 - “Advisory” measures are OK
 - Voter approval is nonetheless legally required (e.g.: tax increase, charter amendment, term limits)

Election Procedures for All Ballot Measures



After an election is called for either an initiative measure or Council-called measure:

- City Attorney prepares impartial analysis not > 500 words
 - Identifies legal effects of important aspects of the measure
 - No advocacy, but can raise unresolved legal/Constitutional questions posed by the measure
 - Must identify whether measure was placed on the ballot by initiative petition or Council action
- Voters may submit ballot arguments/rebuttals for or against the measure
 - Interested parties (including Councilmembers) may submit direct arguments not > 300 words
 - Each direct argument author, or designee, may submit rebuttal if allowed by Council rules (typical) not > 250 words
 - Late filed direct arguments and rebuttals must be rejected
 - Each argument/rebuttal must include names of authors and may be signed by up to 5 authors

Election Procedures for All Ballot Measures

- In most cases, simple majority voter approval passes the measure, but sometimes a supermajority is required (e.g.: 2/3 for special taxes)
- If two conflicting/competing measures both receive required voter approval, measure with the highest affirmative vote count is passed. The other is void
- “Advisory Measure” is non-binding if passed
- Unless the measure otherwise allows for it, a binding measure approved by voters or an initiative adopted by Council without an election can only be repealed or amended by voters in a future election



Referendum

Referendum

- The power of the electors to approve or reject local “legislative acts”
- Only “legislative” acts (and not “administrative” or “executive” acts) may be challenged by referendum
- Exception – Legislative acts not subject to referendum:
 - urgency ordinances
 - ordinances calling or “relating to” elections (be careful with this one!)
 - Ordinances providing for tax levies or appropriations for usual current expenses of City (but initiative may used to repeal, reduce or “affect” a tax, assessment or fee – Proposition 218)
- Can only be submitted once, generally within 30 calendar days after adoption of the challenged act (but may be a few days longer – see below)
- No “single subject rule” – referendum may challenge all or just a part of an act



Referendum



- No Notice of Intent, publication, etc. like with Initiative
- Because of the short deadline, proponents go straight to the Petition process
- Each “section” of the Petition must contain the identifying number/title of the act, and either:
 - The full text of the challenged act, or challenged portion of the act; or
 - At proponent’s option, an impartial summary of the act approved by the City Attorney not > 5,000 words:
 - Proponent must submit proposed summary to EO within 3 working days of act’s passage
 - City Attorney has 10 working days to review and amend summary – *failure to act within 10 days is deemed approval*
 - Summary must include City website link to the full text of challenged act
 - *Stays the 30-day effective date/referendum petition deadline until City Attorney approves summary or approval deadline passes (can be a big incentive to approve a summary quickly!)*

Referendum



- Petition must be filed with EO within 30 calendar days after act's adoption or, if summary requested, City Attorney approval/deemed approval of summary
- Miss the deadline, petition is VOID AND ACT BECOMES EFFECTIVE.
- Petition must be signed by at least 10% of City's registered voters to be valid (25% if < 1,000 registered voters)
- EO performs "raw count" prior to accepting for filing, determines if Petition complies with procedural rules and has req'd number of "net" signatures. Random sampling allowed if > 500 signatures. Same process as Initiative

Referendum

- If Petition is insufficient, it must be rejected. But proponents can review petition and challenge EO's findings within 21 days
- If Petition is sufficient, challenged act is immediately suspended and certificate of sufficiency presented to Council at next regular meeting
 - Council may then:
 - Entirely repeal the act, or portion thereof, that was challenged
 - Place the act as a ballot measure on a regular or special election not < 88 days after Council orders the election
- Election conducted in same way as initiatives/ballot measures (City Attorney impartial analysis, ballot arguments and rebuttals)
- Ordinance not effective unless upheld by majority voter approval
- If repealed by Council w/out an election or disapproved by the voters, act cannot be reenacted for one year from repeal.
 - Includes substantially similar acts (no "tweak and pass" maneuver)

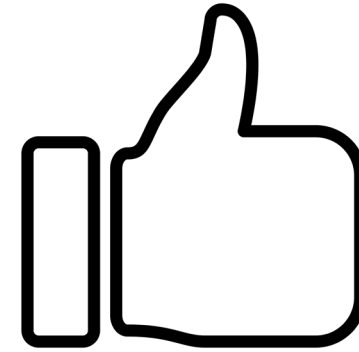


Do's and Don'ts for Public Officials at Election Time

Use of Public Resources Re: Elections

Permissible Activities

- Activities related to the preparation of a ballot measure (pre-measure polling and investigation, legal drafting, placement on agenda to call election)
- Identifying programs/services to be cut if a measure passes and posting reports and minutes on website if this is City's standard practice
- Including informational, non-partisan articles in regularly-published newsletter
- City Official (using no public time or resources) may author ballot argument for or against measure
- Council may, prior to or when calling a measure, state on record City's position at a public meeting (if alternative viewpoints may also be expressed)
- Factually inform the public, media and others that City Council supports or opposes the measure, but must do so in informational manner and not in a way that urges others to vote yes or no on the measure
- An informational departmental view about a measure presented by city employee upon request by a public or private organization, at a meeting of the organization
- City officials, employees, and staff may, on their own time, advocate a position regarding a candidate or a ballot measure if made clear that they are acting in a personal capacity and not at the City's expense
- voter registration programs



Use of Public Resources Re: Elections

Impermissible Activities

(Govt. Code §§8314 & 54964; *Vargas v. Salinas* (2009))

- Purchasing items such as bumper stickers, posters, advertising floats, or television and radio ‘spots’ promoting or opposing a candidate or measure
- Disseminate campaign literature regarding a candidate or measure
- Use City e-mail or other channels to support or oppose a candidate or measure
- Produce and distribute materials that advocate a yes or no vote on a measure
- Contribute to campaigns supporting or opposing a candidate or measure
- Expend funds for printing, office supplies or staff time to generate promotional materials for or against a candidate or measure
- Use city staff or employees to campaign for or against a candidate or measure during working hours
- With City publicly-funded messaging – Does it “expressly advocate” or “unambiguously urge an election result”, or is it “neutral in style, tenor or timing”?



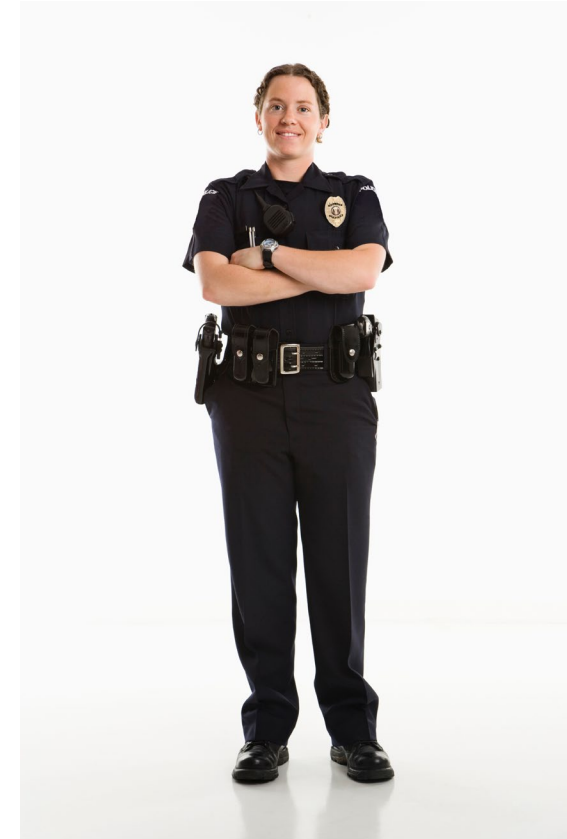
Use of Private Funds and Time In Elections

- Generally, no limits – First Amendment speech
- City Officials may freely advocate on their own “time and dime”
 - Official must be mindful of “private” vs. “public” time
- Private funds may include personal money/resources or valid privately-contributed and spent campaign funds
 - Committees can be specifically formed to support/oppose candidates, recalls or measures
 - Follow FPPC rules to establish committees and report campaign funds contributed/spent



Appearance in Uniform and/or Vehicles/Equipment

- Govt. Code § 3206 – “No officer or employee of a local agency shall participate in political activities of any kind while in uniform.”
 - Includes appearing in campaign literature
 - What is “in uniform”?
 - Is the clothing/equipment required for the job?
 - Does the City pay for the clothing/equipment?
 - Is the clothing/equipment associated with a specific City position?
 - This rule applies even when uniformed officer/employee is off-duty
- No authorizing an officer, employee or candidate to appear in, on, next to, or otherwise appear to operate agency vehicles or equipment for political activities



Making Promises to and Soliciting Contributions from other Officers/Employees

- Govt. Code §3204 – No promises of gifts, money, promotion, job, or other form of compensation in return for a contribution or vote
- Govt. Code §3205 - a public officer/employee shall not, directly or indirectly, solicit political contributions from another officer/employee
 - Refined by recent 9th Cir. *Progressive Democrats* ruling – ruled parts of §3205 unconstitutional
 - Public employees may directly solicit support from fellow public employees outside of City hours and property for a candidate. However, they may still not do so on City premises, or at City time or expense
 - A public employee *who is also the candidate* remains prohibited from doing so, unless he or she solicits contributions from “a significant segment of the public which may include officers or employees of that local agency.” (no specific targeting of officers/employees)
 - Violation is a criminal misdemeanor





Questions?

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