

Attachment to Complaint

Introduction

Eye on Sacramento is a nonprofit local government watchdog organization which scrutinizes the actions and policies of the City of Sacramento and illuminates such actions and policies for the benefit of the community at large. All documentary evidence referred to in this attachment will be submitted separately in an "Evidentiary Submission" (ES).

Factual Background

On July 24, 2012, the Sacramento city council passed resolutions which placed on the November 6, 2012 general election ballot a local measure to increase the city's sales tax rate from 7.75% to 8.25% (see ES). The measure was designated Measure U. A week later (on July 31, 2012), the city council directed three of its members, Steve Cohn, Darrel Fong and Kevin McCarty, to author and submit a ballot argument supporting Measure U. At the same time, the city council directed Mayor Kevin Johnson to author and submit a ballot argument opposing Measure U (see ES).

By designating council members to write both the pro and con arguments on Measure U, the city council monopolized the ballot arguments on Measure U, shutting private citizens and organizations out of the process of submitting ballot arguments. The council's monopolization of Measure U ballot arguments was achieved through the operation of Calif. Elections Code Sec. 9287, which gives ballot arguments authored by council members acting at the direction of their city council top priority over all ballot arguments submitted by others for selection and printing in the sample ballots mailed to voters (see ES).

Prior to the council's selection of ballot argument authors on July 31st, several Sacramento residents, including Dennis Neufeld, Craig Powell, Greg Hatfield and Erik Smitt, were preparing their own ballot arguments against Measure U. When such residents heard media reports of the council's action designating Mayor Johnson as the author of the con argument on Measure U, such residents abandoned their efforts to submit a con argument on Measure U, knowing that, under state law, the mayor's argument would preempt any and all arguments submitted by private citizens (see ES).

Sacramento City Clerk Shirley Concolino designated 4:30 p.m. on August 8, 2012 as the deadline for the filing of ballot arguments on Measure U (see ES). According to a TV interview Ms. Concolino gave on August 9th, Ms. Concolino sent four e-mails to the mayor between July 31st and August 8th reminding him of the time and date of the deadline (see ES). The mayor, in dereliction of a duty assigned to him by the city council, failed to file his con argument on Measure U by the deadline established by the city clerk.

At approximately 5:05 p.m. on August 8th, R.E. Graswich, a former mayoral aide still acting on the mayor's behalf, telephoned Ms. Concolino and asked her for a brief extension of time to file the mayor's con argument. She refused (see ES).

On August 9th and again on August 10th, Dennis Neufeld and Craig Powell, President of Eye on Sacramento, asked the city clerk for a brief extension of the filing deadline for Measure U ballot arguments so that private citizens who had been sandbagged into not timely filing con arguments against Measure U by the city council's action and the mayor's failure to file could file con arguments against Measure U. She refused all such requests (see ES).

On August 16th, three board members of Eye on Sacramento, Craig Powell, Greg Hatfield and Erik Smitt, filed a verified petition for writ of mandate with the Sacramento Superior Court seeking a court order compelling the city clerk to briefly extend her deadline for filing of ballot arguments on Measure U so they could jointly submit a ballot argument opposing Measure U, thereby securing for Sacramento voters their basic democratic right to read and weigh both the pro and con arguments on an important ballot measure that would raise taxes on Sacramento residents and businesses (see ES).

The matter came before Judge Michael Kenny on August 20th. The court rejected the petitioners request for a writ, finding that the city clerk lacked the discretionary authority to extend the deadline for submission of ballot arguments.

After the petitioners filed their writ action, Eye on Sacramento received multiple reports of other ballot irregularities involving Measure U involving failures by city officials to discharge their duties to assure that ballot materials on Measure U complied with state law and local guidelines. None of these additional ballot regularities were received early enough to include them in the petitioners' writ action before Judge Kenny. Consequently, none of them were subjected to judicial review or scrutiny within the extraordinarily brief 10-day statute of limitations period established by the Elections Code for initiating and resolving challenges to the truthfulness of ballot materials (see ES).

Specific Allegations of Ballot Irregularities on Measure U

City Council Abused Its Power by Monopolizing Both Pro and Con Ballot Arguments

This election apparently marks the first time in memory where the Sacramento city council has taken control over both the "pro" and "con" arguments of a ballot measure, according to long-time city observers and city officials EOS has queried (see ES).

Whenever a city council assigns the job of writing a ballot argument that is *directly opposite* of a position taken by a council majority, the risk and potential for dishonest manipulation and gamesmanship is simply too great to permit. A council majority in such circumstances could very easily assign the job of the "con" argument to

one of their own members who, by prearrangement, could submit a very weak ballot argument while blocking from the sample ballot other, more impactful, "con" arguments penned by private citizens. The assigned author could contrive, with a wink and a nod from the council majority, to "forget" to file his con ballot argument or *fail to file it by the stipulated deadline*. The council has an eye-popping and irreconcilable conflict-of-interest in handpicking the person who will write the ballot argument that opposes exactly what they want to see passed.

EOS is not claiming that the mayor's failure to file his ballot argument was a contrivance or was intentional. But the unpleasant truth is that the council's act of seizing monopoly control over both the pro and con arguments on Measure U is leading a substantial number of Sacramentans (based on the large number of posts on local media stories on the subject) to actively speculate that the mayor's failure to do his duty was either: (a) a contrivance of the mayor and council or (b) an intentional act by the mayor to sandbag opponents of Measure U into not filing a ballot argument of their own against it. Such speculation undermines the integrity of government and the legitimacy of democratic governance of local government (see ES).

An analysis of the mayor's rejected ballot argument (see ES) raises some red flags in this regard. His argument focuses on the need to "modernize" city government, which is widely acknowledged short hand for the top item on the mayor's agenda, enactment of his "strong" or executive mayor proposal (see ES). Is it legitimate for a council member writing a ballot argument (at the direction of his council) against a tax hike to use it an opportunity to promote his own separate political agenda? No.

More concerning is what the mayor's argument did not include. No where in his argument does the mayor include any criticism of controversial city spending that he supported, such as the spending of close to \$1 million of city funds on the unsuccessful sports arena deal that involved \$250 million of taxpayers subsidies and avoided a public vote on the arrangement. Nor does his argument mention a current city hall scandal involving a former aide to the mayor who ran up \$9,000 in personal charges on her city-issued credit card and is now the subject of a criminal investigation (see ES).

In short, the mayor's rejected ballot argument is *precisely* the sort of weak, watered down ballot argument that is an illegitimate, but wholly expected consequence of the city council's abuse of power in monopolizing both pro and con ballot arguments on Measure U.

City Councilmen Violated the Law by Substituting Five Shills to Author Pro Argument

When the city council appointed council members McCarty, D. Fong and Cohn to write the ballot argument supporting Measure U (both the primary and rebuttal arguments), the council's appointing resolution required that their arguments "shall be prepared in accordance with ... the Election Official's printing guidelines available from the City Clerk" (see ES).

The "Election Official" referred to in the council resolution is the city clerk and the "printing guidelines" it refers to are the "Guidelines for Preparation of Ballot Arguments" published by her office (see ES). On the very first page of those guidelines, standing apart from all other text on the page, is the following sentence which appears in striking bold print:

"Authors designated by the City Council may not be substituted for a new author."

Instead of authoring the pro argument on Measure U themselves, council members McCarty, Fong and Cohn instead substituted five new authors to "write" the pro ballot argument on Measure U in direct violation of both the city clerk's guidelines and the council resolution that granted them the authority to author the ballot arguments.

These three council members unlawfully selected five people to shill for them, including two city department heads who are subject to city council oversight and budgetary control: the police chief and the fire chief (see more on the chiefs' role below). Why did they use five shills instead of signing the ballot argument themselves? Because they knew that if they placed their own names and titles on the ballot argument - as they were specifically required to do by council resolution and city clerk guidelines - it would diminish the chances of the sales tax hike passing. City council members do not enjoy widespread public approval in Sacramento. The three council members knew that the public would not respond as favorably to three incumbent city politicians imploring the public to give them more money to spend.

Lest there be any doubt that the five nominal authors of the "pro" argument were acting as shills for the three council members (as distinguished from acting independently in submitting the argument), consider the responses of one of the five to a question posed to him by EOS President Craig Powell. Powell asked him how he came to be a co-author of the "pro" argument on Measure U. He candidly admitted that he had received a phone call from councilman Kevin McCarty who asked him to sign it as a co-author. When he hesitated to accept the task, he received a phone call from councilman Darrel Fong urging him to sign it (see ES). He signed it.

Did the city clerk or the city attorney take any action to disqualify the "pro" ballot argument on Measure U for the very obvious reason that the argument violated both the city council's authorizing resolution and the city clerk's Guidelines for Preparation of Ballot Arguments which prohibited the delegation of the ballot argument to others? No. They took no action whatsoever.

Illegal Use of Police and Fire Chiefs as Ballot Argument "Shills"

When it comes to authors of ballot arguments, the police and fire chief are the "gold standard." They are held in much higher regard by the public than city councilmembers. They have worked their way up the ranks and placed their lives at risk to keep us safe. They frankly deserve better than to be cynically used as shills for

politicians who lack the courage to honestly (and lawfully) put their own names on a ballot argument.

Under Elections Code section 9282, to be eligible to submit a ballot argument placed on the ballot by the city council, someone must be either: an "individual voter who is eligible to vote on the measure," or a "bona fide association of citizens" (see ES).

According to reports we have received, the two chiefs do not reside in the city (which is not at all uncommon for city department heads), rendering them both ineligible to vote on Measure U. Any argument that the police department or the fire department is a "bona fide association of citizens" would be specious and rebutted by the obvious intent of the statute to allow voluntary associations of local citizens to submit ballot arguments, not the heads of city departments. Consequently, the police chief and the fire chief both appear to be ineligible under state law to author city ballot measures.

Did the city clerk or city attorney bother to inquire into the legal eligibility of the chiefs to author the "pro" argument on Measure U? No. They took no action on their own to confirm the chiefs' legal eligibility. They did, however, respond to a complaint from a member of the public claiming that the chiefs were legally ineligible to author the ballot argument. In response, the city clerk and city attorney took the position that the chiefs had written a ballot argument two years ago and that their positions put them at the head of "bona fide association[s] of citizens" (see ES).

False and Misleading Ballot Title Approved by City Attorney and City Clerk

Next, we have the ballot title for Measure U drafted by the city attorney and approved by the city council, the "Essential Services Protection Act." The problem with the ballot title is that it seriously misleads voters into believing that the higher sales taxes generated by Measure U will, in fact, be spent to protect "essential services," like police and fire services. But Measure U has been specifically designed by the city council to not specify how the proceeds of the tax hike will be used. Why? So that it qualifies under state law as a "general" tax increase which requires the approval of only a majority of voters, as compared to a tax hike which specifies how higher taxes must be used, which would require the approval of a two-thirds supermajority of voters (see ES).

While the ballot title of the measure clearly implies that the proceeds will be used to protect essential city services, the actual text of the measure approved by the council would allow a future council to spend the full \$26 million in higher taxes it brings in each year on annual subsidies for the construction and operation of a new sports arena for the Maloof brothers and does not require that any of the proceeds be spent on "essential services."

Not only did the city attorney not object to this obviously misleading ballot title, she was the one who wrote it and submitted it to the city council for approval.

False and Misleading Pro Argument Approved by City Attorney and City Clerk

Finally, the "pro" ballot argument on Measure U is full of false and misleading guarantees that "Measure U will restore...critical services," "ensure that all our fire engines are fully staffed," "will reduce response times," "will restor[e] gang prevention programs and after school programs," "keep community centers open," and "will restore community centers, senior centers, pools and libraries." Measure U would do no such thing. Measure U would simply take \$26 million more each year from Sacramento residents and businesses and dump that money into the city's general fund, and the city council would have plenary power to spend it (or waste it) any way it chooses (see ES).

EOS and others asked (non-city) election law attorneys to review the "pro" argument and each concluded that the argument submitted by the city council is populated with numerous false and misleading statements that would almost surely be struck if legally challenged. But did the city clerk or city attorney, whose job it is to review ballot arguments for compliance with the law, take any action to have any of these false and misleading statements removed? They did not.

Conclusion

We respectfully request that an investigation be initiated to examine the conduct of Sacramento city officials with respect to the above ballot irregularities on Measure U.

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