

ASSOCIATION OF BAY AREA GOVERNMENTS

Representing City and County Governments of the San Francisco Bay Area



ABAG

To: Judy Kelly
Fr: Kenneth Moy
Dt: January 11, 2011
Re: SFBRA: ABAG Staff Support for Ballot Measure

M E M O

Summary: Decided cases and the opinions of the Office of the Attorney General provide some guidance on activities that ABAG can undertake to support the San Francisco Bay Restoration Authority's efforts to place a funding measure on the ballot. This memorandum identifies those activities for which the guidance is clear. All other activities should be cleared with this office.

Background and Analysis: ABAG and the Conservancy have agreed to provide the SFBRA with staff support. At this time, the SFBRA is developing a regional measure to implement a regional revenue mechanism to fund wetlands restoration projects. With support from the staff of ABAG and the Conservancy, SFBRA anticipates placing such a measure on the ballot in November 2012.

ABAG as a local government entity is prohibited from expending public resources to advocate a particular vote on a measure or candidate before the electorate. This prohibition stems from the holdings made in the seminal case of *Stanson v. Mott*¹ which deemed that such expenditures violate the "fundamental precept of this nation's democratic electoral process . . . that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." In the intervening decades, the holding in *Stanton* has evolved through decided cases and the opinions rendered by the Office of the Attorney General of the State of California.

You have asked for guidance on what activities can legally be undertaken to support the SFBRA. In reaching the conclusions set forth in this memorandum, I have relied primarily on a case decided in 1988 and an Attorney General's opinion issued in 2005.²

One must apply two step analysis³ to determine whether a proposed activity is prohibited:

- Are 'public resources' being expended?

¹ (1976) 17 Cal.3d 206 [130 Cal.Rptr. 697, 551 P.2d 1]

² *League of Women Voters Of California et al. v. Countywide Criminal Justice Coordination Committee, et al.* (1988, Second Appellate District, Division One) 203 Cal. App. 3d 529; 250 Cal. Rptr. 161; 1988 Cal. App. LEXIS 722 and 88 Ops. Cal. Atty. Gen. 46, 2005 Cal. AG LEXIS 7, respectively.

³ This memorandum does not address a frequent threshold issue raised under *Stanton*: whether the public entity has the authority to undertake the activity under review. I have reviewed ABAG's joint powers agreement and bylaws and have concluded that it has the authority to undertake all the activities sanctioned under this memorandum.



- Do the activities constitute ‘advocacy’ or ‘campaigning’?

If the answer to both questions is ‘yes’, the activity is prohibited. For the purposes of this memorandum, ABAG should consider any effort made by a staff member or any effort using ABAG resources (office space, equipment or supplies) as an ‘expenditure of public resources’. Thus, the critical question is whether the proposed activity constitutes ‘advocacy’ or ‘campaigning’.

This memorandum describes activities which are clearly sanctioned and clearly prohibited as guidance to staff. Activities that do not fall within these categories should be brought to my attention for further analysis.

A. Sanctioned Activities

1. Develop and Draft a Proposed Ballot Measure, including:
 - a. research public perception of the need for the proposed measure;
 - b. research and identify possible uses (restoration projects, public access, co-benefits projects, etc.); and
 - c. research and identify possible funding mechanisms (sales tax, parcel tax or assessment).
2. Formulate Strategies for Placing a Measure on the Ballot, including:
 - a. strategy for specifying uses of funds by type of project, geography, co-benefits or allocation principles;
 - b. feasibility of specific characteristics of the funding mechanism including, amounts to be raised, payers, duration, and type;
 - c. surveys and polling of public support for the ballot measure, including types of projects and specific funding mechanisms.⁴; and
 - d. strategy to qualify the measure, including costs of placing the measure on the ballot.
3. ‘Neutral’ or ‘Educational’ Activities after Ballot Measure Qualifies, including:
 - a. Governing Board adoption of a resolution of support disseminated in the same manner as all other actions of the Governing Board; and
 - b. General dissemination of information regarding SFBRA, San Francisco Bay, benefits of wetlands restoration, proposed projects and the like but only if such information does not include any language that by content or tone advocates for (or against) passage of the ballot measure.

⁴ These types of surveys and polls should be kept separate and distinct from surveys and polls designed to support a campaign, including development of ‘messages’ or ‘themes’. For example, the first polling conducted by FM3 focused solely on the public’s reaction to possible ballot measures. This survey, without more, cannot be used to develop a campaign in support of the measure.

B. Prohibited Activities

1. Research or data gathering for the purpose of developing, or which can be used only to develop, campaign materials, including polls and surveys of the public response(s) to facets of a campaign.
2. Recruiting or organizing people or entities to campaign, or to support a campaign, for the ballot measure.
3. Raising funds for a campaign.
4. Creation of 'traditional' campaign materials such as buttons, bumper stickers and door hangers regarding the ballot measure.
5. Dissemination of 'information' about SFBRA, San Francisco Bay, benefits of wetlands restoration, proposed projects and the like which includes language that can be interpreted to advocate, directly or by implication, for a particular position or vote on the ballot measure.

With respect to activities prohibited under item 5, the Political Reform Act states: "A communication 'expressly advocates' the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as 'vote for,' 'elect,' 'support,' 'cast your ballot,' 'vote against,' 'defeat,' 'reject,' 'sign petitions for' or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election."⁵ The use of such words in any communication that references the ballot measure is prohibited.

More subtle language can also be prohibited. For example: after describing or referencing the ballot measure, one should not use the statement "Your support is needed to restore critical habitat." However, one can state "Funds raised by the ballot measure will be used to restore critical habitat." The former advocates, the latter informs. In close cases, please consult with counsel.

cc: Governing Board
Ezra Rapport

⁵ Govt. Code Section 18225(b)(2).