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A.B. 745:

DISCLOSURE OF CONTRIBUTIONS AND EXPENDITURES TO INFLUENCE PETITION AND PROTEST DRIVES ON LAFCO PROPOSALS

by

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1. Historical Background.

The post-Watergate era brought mandatory disclosure of financial contributions intended to influence the outcome of elections, such as elections on ballot measures, including incorporation and other proposals to the electorate. California led the pack with the adoption of Prop. 9, the Political Reform Act of 1974, which created the Fair Political Practices Commission (FPPC).

In 1976, the FPPC determined that a City incorporation effort did not become a "measure" to which campaign contribution disclosure applied unless and until the matter was placed on the ballot. *In re Fontana*, 2 FPPC Ops. 25, 75-162 (1976). Thus, public disclosure of the financial backers of an incorporation proposal is not required until fairly late in the game.

In the late 1990's Valley Vote succeeded in placing on the ballot a proposal to separate the San Fernando Valley from Los Angeles, raising and spending hundreds of thousands of dollars to prepare its petitions and to gather signatures. Los Angeles officials demanded that Valley Vote (and other secession efforts in the Harbor area of the City, Hollywood, and on the Westside) disclose their donors. Under the *Fontana* opinion, however, disclosure was not required until the measures reached the ballot.

2. The Commission on Local Governance for the 21st Century and A.B. 2838

While Valley secession was pending, the Commission on Local Governance for the 21st Century, a state blue ribbon panel formed to review what was then known as the Cortese-Knox Local Government Reorganization Act, was sitting and heard testimony from Valley Vote, Harbor Vote, and Los Angeles city officials. The Commission recommended to the Legislature that "proponents of reorganization actions be required to report campaign contributions in the same manner that local initiative proponents are required to report."

The Commission's recommendations were largely adopted by the Legislature as 2000's A.B. 2838 (Hertzberg, D-Van Nuys), which substantially revised the LAFCO law and renamed it the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (CKH Act), in recognition of then-Speaker Hertzberg's leadership in creating the Commission and shepherding its recommendations into law. A.B. 2838 was a heavily negotiated bill and its provision regarding disclosure of contributions was less forceful that the Commission's recommendation.

3. Current Law (Pre-A.B. 745)

A.B. 2838 adopted Government Code Section 56100.1 which, prior to the amendments of this year's A.B. 745 (Silva, R-Huntington Beach) that take effect on January 1, 2008, read as follows:

> A commission may require, through the adoption of written policies and procedures, the disclosure of contributions, as defined in Section 82015 [*i.e.*, the Political Reform Act], expenditures, as defined in Section 82025, and independent expenditures, as defined in Section 82031, made in support of or opposition to a proposal. Disclosure shall be made either to the commission's executive officer, in which case it shall be posted on the commission's website, if applicable, or to the board of supervisors of the county in which the commission is located, which may designate a county officer to receive the disclosure. Disclosure pursuant to a requirement under the authority provided in this section shall be in addition to any disclosure required by Title 9 (commencing with Section 81000) [*i.e.,* the Political Reform Act] or by local ordinance.

This statute is:

> optional in LAFCOs; and,
>
> applicable to petitions for a reorganization, but not to protests of a proposal at the conducting-authority stage.

According to the Assembly Floor Report on A.B. 745, only 19 of 56 LAFCOs responding to a survey have adopted policies to implement Government Code § 56100.1 and, of the ten most populous counties, only Fresno and San Diego LAFCOs have done so. San Diego's policy is attached to this paper.

In 2005, the Orange County LAFCO approved an application of the City of Anaheim to annex a large, populated, unincorporated island. The County Board of Supervisors supported the application. A well-organized opposition campaign was conducted and sufficient protests of registered voters in the annexation area were collected to kill the proposal. Because the measure had not reached the ballot, no disclosure of who funded this campaign was required. Following his election to the Assembly, former Orange County Supervisor Jim Silva introduced A.B. 745 at the request of the Board of Supervisors to ensure that disclosure would be required in the future. The bill was adopted and signed by the Governor with no opposition – not a single "nay" vote was cast in either house or any committee of the Legislature.

4. The Law as Amended by A.B. 745

A.B. 745 makes non-substantial amendments to Government Code § 56100.1, which was adopted as part of A.B. 2828, which implemented the recommendations of the Commission on Local Governance for the 21st Century. Thus, LAFCOs retain discretion to adopt disclosure requirements with respect to proposals for action by a LAFCO as to expenditures, contributions and – unlike the new statutes discussed below – independent expenditures (*i.e.,* expenditures to influence the outcome of a petition that are made independently of the proponents of the petition).[1] It also adopts two new provisions of the CKH Act, as follows:

> "56700.1. Expenditures for political purposes related to a proposal for a change of organization or reorganization that will be submitted to a commission pursuant to this part [*i.e.,* petitions for organization or reorganization of a local government], and, contributions in support of or in opposition to those proposals,

[1] "Independent expenditures" usually arise only with respect to candidate elections, and such expenditures must be independent of the candidate. It is not clear how an "independent expenditure" in the context of a measure differs from an expenditure by a committee or individual supporting or opposing the measure. Thus, the exclusion of "independent expenditure" from the newly adopted sections of the CKH Act may not have much significance.

> shall be disclosed and reported to the commission to the same extent and subject to the same requirements of the Political Reform Act … as provided for local initiative measures.
>
> 57009. Expenditures for political purposes related to proceedings for a change of organization or reorganization that will be conducted pursuant to this part [*i.e.,* conducting authority proceedings], and contributions in support of, or in opposition to, those proceedings shall be disclosed and reported to the commission to the same extent and subject to the same requirements of the Political Reform Act …, as provided for local initiative measures."

The first section is included in the chapter of the CKH Act governing petitions to a LAFCO for organization or reorganization of a local government. As to such petitions, it has the following consequences:

"Expenditures for political purposes" and "contributions in support of or in opposition" to these proposals must be disclosed to LAFCO under the rules of the Political Reform Act for local initiative measures. This is a mandatory duty of those who make such expenditures – *i.e.*, those who spend $1,000 or more to influence the outcome of a proposal that has reached the signature-gathering stage. LAFCO has no discretion to allow expenditures to go unreported and it must accept the disclosure itself – it cannot arrange for the County Registrar to accept these filings, as Government Code § 56100.1 would permit (although see more on this issue in point 5 below). Thus, once the proponents or opponents of a petition for LAFCO action spend $1,000 with respect to that proposal, they must report their contributions of $100 or more and all of their expenditures. In theory, organizers of an independent expenditure campaign which neither supports nor opposes a proposal are exempt from this disclosure. However, it is very likely that expenditures will be viewed as being in support or opposition; so disclosure from all who spend more than $1,000 with respect to a proposal is likely required.

The second new section of the CKH Act is placed in the chapter of the statute governing conducting authority proceedings and it has these same consequences: Once a person or group spends $1,000 or more to influence the outcome of a conducting authority proceeding, that person or group must disclose contributions and expenditures to LAFCO.

Although the statute references the Political Reform Act, it does not amend that Act. Accordingly, the Fair Political Practices Commission has no jurisdiction to enforce the requirements for disclosure until a LAFCO matter is placed on the ballot and becomes a "measure" within the meaning of the Political Reform Act. Enforcement will be up to the LAFCO and, absent cooperation of the persons obligated to make disclosure, enforcement will require a lawsuit. Although the legislation is not clear on this point, it is likely the courts will

allow third parties to sue to enforce disclosure – as newspapers and opposing political forces may wish to do.

5. Practice Tips for Implementing the Law

Adopt a local policy. In theory, a LAFCO could enforce this statute just as it is written. However, this will lead to difficulties, as the analogy of a petition for or a protest of a LAFCO action to an initiative measure to be acted upon by the voters is imperfect. For example, the FFPC rules tie disclosure to election dates – requiring disclosures before and after the election and require expedited disclosure of large, last-minute contributions. What is the "election date" for a LAFCO proposal? Presumably the originally scheduled hearing date, but it will be helpful if a local policy spells this out. Moreover, what happens if the hearing date is postponed? Presumably, continuing disclosure should be required, but it will be helpful if the local policy addresses this, too.

Adopt a local policy before a controversy erupts. It will be much easier to achieve consensus among your Commissioners and to adopt rational policy if it is done in the abstract with respect to future proposals and not in the heat of a political battle on a particular proposal.

Consider whether to require more disclosure that does the FPPC. While this statute is mandatory and requires at least as much disclosure for expenditures and contributions regarding a LAFCO petition or conducting authority proceeding as is required for a ballot proposal, a LAFCO may require additional disclosure. For example, it may make sense to coordinate disclosure under a local LAFCO policy with the disclosure required by the election finance ordinance of a local government affected by the proposal even if that local ordinance requires more disclosure than does the FPPC.

Disclosure is to LAFCO, but you can ask for help. Although the statute is clear that disclosure must be to LAFCO, it does not prohibit LAFCO from asking for help from County staff. Given that County elections officers are proficient with FPPC rules regarding election disclosure, and typically have substantial office hours to serve the public, it may be helpful to designate the County elections official as a deputy Executive Officer of LAFCO for this purpose.

Consider electronic disclosure. Disclosure under an optional LAFCO policy regarding proposals (*i.e.,* under Government Code § 56100.1) must be posted to a LAFCO's website (if one exists) unless the local policy requires disclosure be made to a County officer. This requirement does not apply to mandatory disclosure under new Government Code §§ 56700.1 and 57009. However, there will likely be substantial public interest in this information and posting it to the Web may be helpful in disseminating the information without substantial wear and tear on LAFCO staff. However, consider whether complete disclosure of contributors'

information (including home addresses, for example) is a good idea in this age of cyber-stalkers. Privacy and transparency in government are competing goals and each community should consider how best to balance them.

You may wish to hew as closely to the FPPC rules or local campaign finance ordinances as practicable. It is not a good idea to reinvent the wheel here or to take on the burden of updating the wheel when legal developments require change in campaign finance disclosure requirements. This subject involves complex constitutional questions and the law is dynamic. It is probably best for both those in government and those in politics if this area of political finance disclosure is as similar to other campaign disclosure rules as possible. There will be a need to define terms and otherwise fit disclosure regarding LAFCO proposals into rules written with elections in mind and there is a need to consider conformity with local campaign finance ordinances. However, in general, consistency with background law is a worthy objective in this context.

CALAFCO may want to develop a model policy. This will be helpful to LAFCOs, especially those with fewer resources. If a model is developed, the San Diego and Fresno LAFCO rules for disclosure may be a good place to start. Input from the FPPC and the California Association of Clerks and Chief Election Officials (CACEO) will be valuable, too. The San Diego policy is attached to this paper.

Seek legal advice. Your policy should be reviewed by a lawyer before you adopt it. Someone will eventually sue to challenge or enforce these rules and it is best to do it right the first time than to risk losing a lawsuit and having to do it again.