

MEMORANDUM OF LAW

DATE: June 13, 1996

TO: William W. Sannwald, City Librarian

FROM: City Attorney

SUBJECT: Use of Edwin A. Benjamin Memorial Fund Monies

In a memorandum dated May 16, 1996, at the request of the Board of Library Commissioners, you have asked whether Edward A. Benjamin Memorial Fund monies can be used for certain purposes. We have restated the questions as follows:

QUESTIONS PRESENTED

1. May the City use public funds (Benjamin Fund) to advocate for passage of a ballot measure, either by financing a citizen action committee's efforts or by spending funds directly to advocate passage of a ballot measure?

2. May the City use public funds (Benjamin Fund) for informational purposes to educate the public regarding a ballot measure?

3. Are there any restrictions in the City Ordinance which would prohibit the use of the Benjamin Fund for informational purposes, where the ballot measure, if successful, would provide funds for construction and enhancement of branch libraries?

4. May the Benjamin Fund be used to pay for the services of consultants who were hired by the City to poll City residents and conduct focus group meetings in order to determine the level of public support for a branch library ballot measure?

#### SHORT ANSWERS

1. No, public funds may not be used to advocate for a partisan position on any issue except under limited circumstances not present here.

2. Yes, public funds may be used for informational or educational purposes related to a ballot measure so long as both viewpoints on the issue are fairly represented.

3. No, the City Ordinance does not appear to prohibit the use of the Benjamin Fund for informational purposes regarding a ballot measure that would raise funds for the improvement of branch libraries.

4. This may or may not be an appropriate use of Benjamin Fund monies. If the purpose of the polling was to determine whether City residents would like the opportunity of voting on the issue of additional funding for branch libraries without attempting to advocate for or against the passage of such a measure, then it is probably an appropriate use. If, on the other hand, it was determined to be advocacy, then it is not an appropriate use. Ultimately this is a factual determination subject to review by the courts.

#### BACKGROUND

Edwin A. Benjamin died in 1963, and bequeathed \$500,000 to the City in a holographic will designating its use for library purposes. A trust fund was set up pursuant to a City Council ordinance in 1964 stating the specific purposes for which the trust fund could be used. (Ordinance No. 8973 (New Series).) This was amended in 1983 to remove a restriction on use of the fund. (Ordinance No. 15999 (New Series).)

Now, the City Council is proposing a ballot measure asking voters to approve a 1/4% sales tax increase for the next five years to be used for branch libraries. Related to this ballot measure, a citizen action committee, Citizens in Action for Local Libraries ("CALL"), has started a campaign to get the measure passed (2/3 vote required). The Board of

Library Commissioners has asked the City if they may utilize the Benjamin Trust Fund to promote passage of the ballot measure, by either giving the money to CALL to finance their efforts, or by spending funds directly to get the measure passed.

## ANALYSIS

### 1. USING PUBLIC FUNDS TO ADVOCATE FOR A BALLOT MEASURE

The City is strictly limited in how it may expend public funds. In general, "expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment. . . . Executive officials are not free to spend public funds for any 'public purpose' they may choose, but must utilize appropriated funds in accordance with the legislatively designated purpose." *Stanson v. Mott*, 17 Cal. 3d 206, 213 (1976); See also Cal. Pub. Res. Code Section 504 (Deering 1993) (providing explicit statutory authority for this general principle). However, campaign expenditures "cannot be sustained unless the power to do so is given . . . in clear and unmistakable language." *Stanson*, 17 Cal. 3d at 216 (emphasis in original). The Benjamin Fund is a public fund.F

The Benjamin Fund was donated to the City to be held in trust

for use by the Library Commission. As such, it is a public fund. Therefore, in order to use it to promote the passage of a ballot measure (a campaign expenditure), the Library Commission must have explicit legislative authorization. The following cases will help illustrate what is meant by "explicit legislative authorization."

In *Stanson*, the California Department of Parks and Recreation printed materials which promoted approval of an initiative bond measure appearing on the next ballot, as well as by sending out, at the department's expense, privately printed materials favoring its passage. In addition, the department spent state funds on speaking engagements and travel expenses to promote passage, and a three-person staff worked exclusively on promoting passage. *Id.* at 210-211. The Department argued that since it was authorized to assist the Parks and Recreation Commission in the "protection and development of the state park system," it was authorized to expend public funds to disseminate information concerning the public need for the bond issue under section 512 of the Public Resources Code.<sup>F</sup>

This code section is discussed later in this memorandum.

*Id.* at 215 (emphasis in original). However, the court disagreed, citing the holding in *Mines v. Del Valle*, 201 Cal. 273 (1927) (overruled on other grounds). *Id.* at 216.

In *Mines*, the seminal California case dealing with the expenditure of public funds in relation to a ballot measure, the city council called an election to submit a bond issue for municipal improvements; specifically, the expansion of electrical power plants. Thereafter, the Board of Public Service Commissioners, the governing board of a municipally owned public utility, expended more than \$12,000 of public funds to promote passage of the bond issue.<sup>F</sup>

Claims were submitted to the city council for printing cards, banners, automobile windshield stickers and banners, labels, circulars and postal cards, and for the construction of a float.

All these expenditures were incurred during the election campaign period for the purpose of influencing voters in favor of the bond issue. *Mines*, 201 Cal. at 275-277.

When a taxpayer challenged the propriety of such expenditures, the commissioners defended their actions on the basis of their broad authority under the Los Angeles city charter provision which granted explicit authority to extend electrical plants and works under its

charge. They argued that this explicit grant of authority necessarily carried with it an implied authority to do anything necessary to the execution of the express power. *Mines*, 201 Cal. at 281-282

The court held, however, that raising money to extend the electrical system is one thing and extending it is an entirely different and distinct power. Thus, the funds were improperly expended to influence approval of the bond issue. *Id.* at 283. The court reasoned that voters opposing the bond issue had rights to the expended public funds equal to those of voters supporting it; therefore, the use of public funds to further the bond issue was illegal unless the power was given to the governmental agency expending the funds in clear, unequivocal language. *Id.* at 287 (emphasis added). Moreover, such authority could not be implied from any express provisions of the charter, and nothing could invest defendants with authority denied by the charter. *Id.* at 287-288.

Thus, the California Supreme Court plainly states that explicit legislative authorization must be found in clear, unequivocal language in order for public funds to be used in favor of partisan efforts. Further, public funds may not be used to influence approval of a ballot measure in the absence of such explicit legislative authorization.F

However, even if the court found that such explicit legislative authority existed, such expenditures raise potentially serious constitutional questions. "A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions. . . . The selective use of public funds in election campaigns . . . raises the specter of just such an improper distortion of the democratic electoral process." *Stanson*, 17 Cal. 3d at 217. The California Supreme Court did not reach this "serious constitutional issue" in *Stanson* because the

legislative provisions relied upon did not authorize such expenditures in the "clear and unmistakable language" required by *Mines*. *Id.* at 219-220.

In this case,

there is no provision that accords the City such express legislative authorization. Therefore, the City may not use the Benjamin Fund to advocate a partisan position on the branch library ballot measure.

Finally, while partisan advocacy is prohibited, it is important to note that nothing precludes the Library Commission from taking a position on the ballot measure. "The government . . . may add its voice to the marketplace of ideas on controversial topics. However, it may not, in the guise of governmental speech, trammel the free speech rights of its citizens." *League of Women Voters v. Countywide Criminal Justice Coordination Comm.*, 203 Cal. App. 3d 529, 549 (1988). Thus, the Library Commission may publicly state its own position in support of the ballot measure. They simply may not advocate to voters to take a similar position.

## 2. USING PUBLIC FUNDS TO INFORM THE PUBLIC ABOUT A BALLOT MEASURE

### (a) Authority to use public funds

An administrative official possesses statutory authority to use public funds to disseminate "information" to the public on partisan issues, so long as a fair representation of both sides of the relevant facts is provided. *Stanson*, 17 Cal. 3d at 210. The *Stanson* court relies on section 512 of the Public Resources Code, which states in pertinent part:

For the purpose of disseminating information relating to its activities . . . duties or functions, the department may issue publications . . . and perform such acts and carry on such functions as in the opinion of the director will best tend to disseminate such information.

Cal. Pub. Res. Code Section 512 (Deering 1993).

Furthermore, under the provisions of the San Diego City Charter, the City has "the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter . . . ." *San Diego City Charter*, art. I, Section 2 (1931). The dissemination of information on partisan issues is not expressly restricted or limited by the provisions of the City Charter. Therefore, the City may use public funds to "educate" or "inform" the public regarding the upcoming ballot measure unless prohibited by the City Ordinance which governs the use of the funds they intend to use; i.e., the Benjamin Fund.

(b) Limitations on the use of the Benjamin Fund

San Diego City Ordinance No. 8973 (New Series) was adopted in 1964 to carry out the intent of Mr. Benjamin's bequest, creating a special fund known as the "Edwin A. Benjamin Memorial Fund." Section 2 of the ordinance states:

The purpose of said Fund shall be to improve library resources and service over and above the level which can be provided by normal library budget allotments, said improvement to be effected by the purchase of books and other library materials, the construction or improvement of library buildings, the temporary employment of necessary or additional personnel in order to make increases of books and other materials available for use through cataloguing, indexing, or duplicating, or any combination of the above.

This language makes clear that the City Council intended the designated funds to be used for general library purposes. There is no indication in the language of Section 2 that Council intended to prohibit the use of the Fund for educating the public about a ballot measure which, if successful, would result in improvements to branch libraries; similarly, there appears to be no other provision of the ordinance which prohibits such expenditures by the City.

To determine appropriate uses for the Fund, we may also look to the legislative intent. The legislative intent of Ordinance No. 8973 (New Series) can be ascertained from the ordinance language itself; specifically, the intent of the City Council was to "carry out the beneficent intent of Mr. Benjamin's bequest and to preserve for the public the greatest benefit available from said bequest . . . ." San Diego City Ordinance No. 8973 (New Series) (February 27, 1964). Mr. Benjamin's testamentary intent was to improve library services.F

See holographic will of Mr. Edwin Benjamin dated August 8, 1956.

The ballot measure

is intended to fund branch libraries. Thus, using the Fund to disseminate information to the public about the ballot measure meets both the

legislative intent and Mr. Benjamin's testamentary intent.

Thus, in the absence of an express prohibition, and in light of the legislative intent, it seems appropriate to use the Benjamin Fund to "inform" the public about the branch library ballot measure. The only caution is that the activity must not cross the line between proper "information" and improper "advocacy". Unfortunately, differentiating between what is "information" and what is "advocacy" may sometimes be difficult. *Stanson*, 17 Cal. 3d at 221.

(c) The difference between "information" and "advocacy"

In making this determination, there is no hard and fast rule. "The determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; . . ." *Id.* at 222.

In some instances, the distinction is rather clear; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising "floats," or television and radio "spots" unquestionably constitutes improper campaign activity, as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure.

*Id.* at 221 (citing *Mines v. Del Valle*).

However, "in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual information, . . . have nevertheless been found to constitute improper campaign literature." *Id.* at 222.

For example, in *Citizens to Protect Pub. Funds v. Bd. of Educ.*, 13 N.J. 172 (1953) (heavily relied upon by the *Stanson* court), the New Jersey Supreme Court considered the legality of a school board's expenditure of public funds for the publication of an 18-page booklet concerning a school



building program which was the subject of an upcoming bond election. Most of the booklet contained factual information as to the need for the proposed school facilities and the cost of the proposed project, but three of the booklet's pages contained the simple exhortation "Vote Yes," "Vote Yes," and an additional page warned of the dire consequences that would result "if You Don't Vote Yes." The court held that,

The board made use of public funds to advocate one side only of the controversial questions without affording the dissenters the opportunity . . . to present their side, and thus imperilled the propriety of the entire expenditure. . . . The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature.

Id. at 180-181.

However, the New Jersey Supreme Court also emphatically affirmed the school board's implicit power to make "reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal." Id. at 179. Therefore, while full disclosure of relevant facts is encouraged, if there is any

attempt to influence the actions of the voters, it is considered improper partisan advocacy.

On the other hand, even where an advertisement refrained from exhorting voters to "Vote Yes," the courts have sometimes found an improper use of public funds. For example, in *Stanson*, the court makes note of a situation where the trustees of the Madera Union High School District placed a full page advertisement in a general circulation newspaper one day before a school bond election. The ad did not explicitly urge voters to "Vote Yes" on the bond issue, but stated in large letters that "a classroom emergency exists now at Madera Union High School" and listed a number of reasons why additional funds were needed by the school district. The county counsel requested the Attorney General's opinion as to whether public funds could be used to pay for the advertisement. The Attorney General concluded that although the ad did not explicitly urge a "Yes" vote and did disclose relevant factual information, the use of public funds to pay for the advertisement would nonetheless be improper. The opinion reasoned that,

Viewed as a whole, the advertisement cannot properly be held to be a publication primarily designed to educate the voters as to the activities carried on by or the conditions of the schools of the district. . . . The style, tenor and timing of the advertisement placed by the board of trustees points plainly to the conclusion that the publication was designed primarily for the purpose of influencing the voters at the forthcoming school bond election."

Stanson, 17 Cal. 3d at 222, n. 8 (citing 35 Ops. Cal. Att'y Gen. 112, 114 (1960)).

In some cases, the distinction between information and advocacy is less obvious. In *Choice In Educ. v. Los Angeles Unified School Dist.*, 17 Cal. App. 4th 415 (1993), the District School Board took a position opposing a parental choice in education initiative at a public meeting, which was twice televised on a television station funded and operated by the district. While the Board had the authority to take such a position on an issue at a public meeting, the focus of the court's attention was the public broadcasts. The court held that although the nature and timing of the broadcasts reasonably supported the inference that the primary purpose of the expenditure was to provide greater access to the board's meetings, the actions constituted illegal advocacy of a partisan position and an illegal expenditure of public funds because the broadcast supported one side only and dissenters were given no opportunity to present their side. *Id.* at 430.

By contrast, in *League of Women Voters*, the drafting of an initiative, the search for a willing proponent, the drafting of a

"suggested core speech" in support of the initiative, and an informational article written by a district attorney were held not to be actions taken to attempt to influence voters. The court reasoned that the audience at which these activities were directed was not the electorate per se. *League of Women Voters*, 203 Cal. App. 3d at 550. The court explained that the drafting of a "suggested core speech" might have been such an action, but there was no evidence that expenditures of public funds were made in such drafting. *Id.* at 559. In addition, an article by a district

attorney was a fair presentation of relevant information, not designed to influence voters, and the simple decision of the board of supervisors to endorse the measure did not entail an improper or reportable expenditure. *Id.* at 555.

Therefore, it may not always be clear when an activity is improper advocacy or informational only. Generally, the City may "inform" or "educate" the public regarding a ballot measure so long as it fairly represents both sides. It is only at the point that the activities cross the line of improper advocacy or promotion of a single viewpoint in an effort to influence the electorate on a particular issue that the actions become unlawful. Thus, developing campaign literature, making bumper stickers or advertisements, or exhorting the public to "vote yes," or any other purpose primarily intended to influence voters without giving dissenters an opportunity to present their side is unlawful unless there is proper legislative authority. In close calls, the style, tenor, and timing of their activities should be used to determine their primary purpose.

3. MAY PUBLIC FUNDS BE USED TO PAY FOR THE SERVICES OF CONSULTANTS HIRED BY THE CITY TO POLL CITY RESIDENTS AND HOLD FOCUS GROUPS TO DETERMINE SUPPORT OF THE BRANCH LIBRARY BALLOT MEASURE?

The first question is whether this expenditure is a campaign contribution. It is a campaign contribution only if the expenditure is for campaign activities. Cal. Code Regs. tit. 2, Section 18420(b) (1995). Such payments are for campaign activities if services are rendered "for political purposes." *Id.* Section 18423(a). The phrase "for political purposes" means "for the purpose of influencing or attempting to influence the action of the voters for or against the . . . qualification or passage of any measure." *Thirteen Committee v. Weinreb*, 168 Cal. App. 3d 528, 532-533 (1985). If the expenditure is for campaign activities, explicit legislative authority for the expenditure is required. *Stanson*, 17 Cal. 3d at 216.

This one is a close call because there are arguments both ways. On the one hand, this may not be considered campaign activity since polling public opinion does not normally direct information at voters, or entail an attempt to persuade or influence any vote. Nothing suggests anything more than polling public opinion was involved in this case. Therefore,

arguably this does not fall within the definition of campaign activity. See *League of Women Voters*, 203 Cal. 3d at 554 (holding that the

activities of identifying and securing a willing proponent for a draft initiative was lawful because it did not entail any degree of public advocacy or promotion, directed at the electorate, of the single viewpoint embodied in the measure).

If the purpose of the polling was to determine whether City residents would like the opportunity of voting on the issue of additional funding for branch libraries without attempting to advocate for or against the passage of such a measure, then it is probably an appropriate use. If, on the other hand, it was determined to be advocacy, then it is not an appropriate use. Ultimately this is a factual determination subject to review by the courts.

## CONCLUSION

The City may not use the Benjamin Trust Fund to advocate to voters the passage of the branch library ballot measure, nor can public funds be used in any way to promote a partisan position. However, the Fund may be used for informational purposes to educate the electorate on a campaign issue so long as each side's views are fairly represented. Furthermore, there appear to be no restrictions in the City Ordinance which prohibit such a use. Lastly, the Benjamin Fund may be used to pay for consultants who polled public opinion on the ballot measure only if it is determined that such polling was for purposes of determining the interest of citizens in having the opportunity to vote on the issue rather than advocating the passage of such a measure.

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By

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