THE SUTTON LAW FIRM

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FROM: Bradley W. Hertz, Esq.

RE: Budget Set-Asides After the Coalition of County Unions v. Los Angeles County Board of Supervisors Court Ruling

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This memorandum analyzes the recent Los Angeles County Superior Court ruling in Coalition of County Unions, et al. v. Los Angeles County Board of Supervisors, et al., LASC Case No. 20STCP04019 ("CCU"), and provides recommendations for organizations such as Funding the Next Generation ("FNG") as to how they might want to proceed with their plans for voter-adopted spending requirements, also known as set-asides or baselines, in light of the CCU decision.

EXECUTIVE SUMMARY

Although the Los Angeles County Superior Court ruling in the CCU case casts doubt on, and is a cause for concern about, the legal viability of certain types of voter-approved set-asides – particularly in counties – its holding is limited in many ways as discussed below, and it should not be considered a fatal blow to set-asides.

Great care must be taken when researching and drafting ballot measures, to be as certain as possible that the measures are likely to satisfy the many constitutional and other legal requirements that apply to this form of direct democracy. Exactly how such measures should be worded on a going forward basis is beyond the scope of this memo, and of course varies from jurisdiction to jurisdiction, but much can be learned from the CCU Court's analysis, and the Court's concerns can be addressed and mitigated with careful research and artful drafting.

In light of the CCU ruling, actions that FNG and similar organizations should consider undertaking on a going forward basis are: (1) monitoring the appeal of the CCU ruling and considering drafting, and seeking permission to file, an amicus (friend of the court) brief in connection with the appeal; (2) monitoring what, if anything, the San Francisco City Attorney

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does with regard to the CCU ruling; (3) working with like-minded organizations to ensure, to the extent possible, that their set-aside proposals do not run into the same problems as Measure J; and (4) considering seeking amendments to the State's County Budget Act to enable certain set-asides not to run afoul of that Act.

L.A. County's Measure J

Measure J, officially entitled "COMMUNITY INVESTMENT AND ALTERNATIVES TO INCARCERATION MINIMUM COUNTY BUDGET ALLOCATION," was placed on the ballot by the L.A. County Board of Supervisors and was approved by a majority of L.A. County's voters in the November 3, 2020 election. It amended the L.A. County Charter to: (1) set aside a baseline minimum threshold level of funding for various enumerated purposes pertaining to community investment and alternatives to incarceration; and (2) prohibit those funds from being used for "carceral" systems and law enforcement.

According to the L.A. County Counsel's July 24, 2020 Analysis, Measure J would "annually allocate in the County's budget no less than ten percent of the County's locally generated unrestricted revenues in the general fund to address the disproportionate impact of racial injustice through community investment and alternatives to incarceration and prohibit using those funds for carceral systems and law enforcement agencies. . . ." This amount is estimated to be between $900 million and $1 billion per year.

The CCU Litigation

On August 5, 2020, the Coalition of County Unions (the "Coalition") and others filed a pre-election lawsuit (LASC Case No. 20STCP02478) in an effort to remove Measure J from the ballot, but that effort was unsuccessful. In making its ruling on August 28, 2020, the Court stated that the Coalition had not met its burden of showing that Measure J was clearly invalid and that therefore there was no justification for departing from the general rule that the substantive validity of a ballot measure is better reviewed in a post-election context.

On December 8, 2020, after the election results were certified and Measure J passed by a 57% to 43% margin, the Coalition and two individuals filed a post-election lawsuit seeking to invalidate Measure J. Among the grounds raised in the lawsuit were that: (1) county voters have no power to limit a Board of Supervisors' discretion with regard to budgetary decisions, because the State Legislature has exclusively delegated that power to the

Board of Supervisors; (2) a legislative body may not tie the hands of a future legislative body; and (3) the voters may not direct the ministerial actions of the County Auditor or the County CEO, as they each have duties in connection with the County's annual budget.

The Board of Supervisors and others, including "Re-Imagine Los Angeles County Coalition" – which had been the main backer of Measure J and which intervened in the case – opposed the Coalition's efforts to invalidate Measure J. On July 14, 2021, however, Judge Mary Strobel issued a Final Statement of Decision granting the Coalition's Petition for Writ of Mandate and overturning Measure J. The Court's formal Judgment followed on August 16, 2020.

Judge Strobel's decision is currently on appeal to the Second District Court of Appeal (Appellate Case No. B314973), where briefing of the issues has not yet begun. In addition, the Coalition is planning to seek attorneys' fees from the County, but the parties have agreed to delay the fee motion until the appeal is resolved.

In the Court's ruling, Judge Strobel stated as follows:

Measure J restricts the budgeting discretion of the current and any future elected Board of Supervisors by prohibiting them from using portions of the General Fund for "carceral" or law enforcement purposes, and requiring them to allocate those funds to other designated programs.

The question presented in the CCU lawsuit was whether the ballot process can be used to take this budgeting choice out of the hands of the current and future elected Boards of Supervisors. The Court concluded that it could not. In reaching this conclusion, the Court made the following determinations, many of which are instructive to those seeking to pass set-asides in their communities.

Charter Counties Have Considerably Less Power Than Charter Cities.

The powers of a charter county are not the same as those of a charter city. (See California Constitution Article XI, Sections 4 & 5.) Whereas charter county home rule authority is limited to matters concerning the structure and operation of local government, the version of home rule afforded to a charter city is substantially more expansive. (See Dibb v. City of San Diego (1994) 8 Cal.4th 1200, 1208.)

Accordingly, set-asides that are approved by the voters in a charter city will be much more likely to survive a legal challenge than set-asides that are approved by the voters of a county, whether charter or general law.

Measures Placed on the Ballot by Legislative Bodies are Entitled to Less Deference Than Those Placed on the Ballot by Voter Initiative.

There is a meaningful distinction between measures placed on the ballot by a legislative body and measures placed on the ballot via voter initiative. Where measures reach the ballot via voter initiative, there is a policy to jealously guard the initiative power (See California Constitution Article II, Section 11; DeVita v. County of Napa (1995) 9 Cal.4th 763; and Totten v. Board of Supervisors (2006) 139 Cal.App.4th 826.) On the other hand, when a legislative body places a measure directly on the ballot, the measure is not entitled to as much deference. Accordingly, where circumstances such as timing and budgets permit, it is worth considering whether the set-aside measure should be placed on the ballot via voter initiative as opposed to by the legislative body itself.

The County Budget Act Expressly Delegates to County Boards of Supervisors Authority Over County Budgets.

The County Budget Act (Cal. Gov't Code sections 29000 - 29093) codifies the procedures for the preparation and management of county budgets, expressly delegates to county boards of supervisors authority over county budgets, and applies to both charter and general law counties. (See Totten and Gates v. Blakemore (2019) 39 Cal.App.5th 32.) In addition to the issue of whether various matter are exclusively delegated to a legislative body, other factors must be examined as well.

County Budgets for Law Enforcement are of Statewide Concern.

Public safety services are critically important to the security and well-being of the State's citizens and to the growth and revitalization of the State's economic base. County budgets for public safety agencies are of particular statewide concern. (See California Constitution Article XIII, Section 35(a)(1) & Totten, at 836.) Accordingly, where set-asides can address issues other than law enforcement, they may have a greater chance of withstanding judicial scrutiny.

The Relative Size of the Budgetary Set-Aside is Significant.

The monetary restriction in Measure J is significant. Measure J could restrict the Board of Supervisors from using approximately $300 million per year in discretionary county funds on public safety agencies or the county courts. Accordingly, if the amount or percentage of funds that are set aside can be made somewhat less financially significant in the scheme of things, the set-aside may have a greater chance of withstanding judicial scrutiny.

Los Angeles County's Fiscal Management and Budgeting are Matters of Statewide Concern.

Because counties are merely political subdivisions of the State, the State necessarily has an interest in county fiscal management and budgeting – especially with regard to the State's most populous county. (See Constitution Article XI, Section 1(a); Younger v. Board of Supervisors (1979) 93 Cal.App.3d 864; Golightly v. Molina (2014) 229 Cal.App.4th 1501; Greiger v. Board of Supervisors (1957) 48 Cal.2d 832 & County of Butte v. Superior Court (1985) 176 Cal.App.3d 693.) Therefore, the Court was protective of the Board of Supervisors' legal ability to make budgeting decisions, and was troubled by the fiscal impact of Measure J.

Measure J Significantly Impairs Essential Government Functions, Including Budgeting for Law Enforcement Agencies and Otherwise.

Measure J seriously impairs the exercise of essential government functions related to county budgeting for public safety needs and for the general management of the County's financial affairs. (See Citizens for Jobs and the Economy v. County of Orange (2002) 94 Cal.App.4th 1311.) The amount of funds being set aside, and the fact that a large portion of these funds could not be used for law enforcement purpose gave the Court pause with regard to the essential government functions, including public safety, for which the County is responsible.

The Court's Ruling is Limited to Measure J and Does Not Mean That Voters Can Never Impose Local Budgetary Set-Asides.

The CCU Court made clear that its ruling was limited to the specifics of the matter before it – Measure J. The Court did not decide if the voters can ever impose restrictions on a Board of Supervisors' authority over budgeting and financial affairs.

However, with regard to Measure J's specific restrictions relating to public safety agencies and more general restrictions on the Board's authority over budgeting and financial affairs, the Court reached the conclusion that Measure J seriously impaired the exercise of essential government functions.

The Court Also Found it Significant that Measure J Not Only Sought to Require a Certain Amount of Spending on Specific Programs, But Also Prohibited Spending on Other Programs.

In analyzing what Measure J purported to do, the CCU Court pointed out that Measure J not only would have required the Board to allocate a percentage of unrestricted general funds to specified programs each year, but also would have prohibited the Board from using those funds for carceral or law enforcement purposes. Accordingly, to the extent a measure sets aside funds for particular purposes, but does not expressly prevent those funds from being used for other, related purposes, a court might not be as troubled by the measure as it was by Measure J.

In addition to the foregoing points as raised by the Court in the CCU case, the following points should be considered with regard to the impact of CCU.

As a Trial Court Ruling, and as a Ruling that is Not Final, the CCU Decision Does Not Have Precedential Value.

While definitely of significance, and of particular concern to those who favor set-asides, the CCU case is limited by virtue of being a trial court opinion, and one that is being appealed and therefore not final. Although trial courts throughout the State can take judicial notice of other trial court rulings, they are not bound by them. In other words, a trial court decision is not binding on other trial courts and does not serve as precedent under the principle of *stare decisis*. Only published appellate or Supreme Court decisions have binding authority on other courts. That being said, however, it is likely that opponents of set-asides will hold up the CCU decision – whether in a trial court or in the court of public opinion – as an example of set-asides being legally problematic.

The Possible Impact of the CCU Case on Existing Set-Asides

With regard to the nineteen set-asides in San Francisco, and others in Oakland, Richmond, Los Angeles, and San Diego, it remains to be seen what, if any, impact the CCU case will have on set-asides throughout the State. There are legal principles such as laches, waiver, and estoppel that may apply to prevent a long-standing set-aside from being invalidated. For example, to the extent a public entity has entered into binding contracts as a result of a set-aside, the law may support the furtherance of such contracts and disfavor a ruling that interferes with these contracts. Additionally, where the public entity has come to rely on the funding source to enable certain essential government functions to be carried out, courts may be reluctant to interfere with the funding source.

In addition, an analysis of San Francisco's set-asides should address whether, given San Francisco's status as both a city and a county, it can be characterized as a city, as opposed to a county, in connection with its voter-enacted set-asides. To the extent San Francisco is properly characterized as a city in this regard, its set-asides will be entitled to more deference than if San Francisco is characterized as a county. This is due to the County Budget Act and the guidance from the CCU case and other relevant law that cities, especially charter cities, generally have more power than counties to control their destiny.

The Possible Impact of the CCU Case on Set-Asides That Are In the Process of Qualifying for the Ballot

With regard to set-aside measures that are in the process of qualifying for the 2022 elections, the proponents and supporters of such measures are advised to carefully review the CCU ruling and its possible implications relative to the measures. It is expected that there will be increased scrutiny, and perhaps an increase in legal challenges, with regard to local set-asides in light of the CCU decision.

Becoming Involved in the Appeal of the CCU Decision

Now that the CCU case is before the California Court of Appeal, there are ways for FNG, or others who are displeased with the CCU ruling, to seek to become involved in the litigation. The most formal way is to seek permission from the Court of Appeal to file an "amicus curiae" or "friend of the court" brief. In certain cases, persons and/or entities – even though they are not parties to an appeal – may be permitted to file a brief on the issues.

Such briefs are allowed only by express permission from the Presiding Justice of the Court of Appeal.

If FNG and/or other groups would like to seek permission to file such a brief, a formal application must be filed in the Court of Appeal, along with a proposed amicus brief, and a statement of "the applicant's interest" in the case and an explanation of "how the proposed amicus curiae brief will assist the court in deciding the matter." Amici curiae, when allowed to participate in the case, perform a valuable function for the judiciary because they are nonparties who often have different perspectives than the principal litigants.

The amicus application also must identify: any party or counsel for a party who authored the proposed amicus brief in whole or in part; any party or counsel for a party who made a monetary contribution intended to fund the preparation or submission of the proposed amicus brief; and every person or entity (other than the amicus curiae, its members or its counsel) who made a monetary contribution intended to fund the preparation or submission of the proposed brief.

With regard to timing, the amicus application and proposed amicus brief must be filed within 14 days after the last appellant's reply brief is filed or could have been filed (whichever is earlier). Accordingly, those wanting to be amicus parties generally wait until all of the appellate briefing is completed, and then read all of the appellate briefs. If it is determined that there are important arguments and perspectives that can aid the appellate court in making its ruling on the case, then an amicus application and proposed amicus brief are filed. If the amicus request is granted, the Court of Appeal must specify the time within which the parties to the appeal may file an answer to the amicus brief.

In addition, there are other ways to defend set-asides via the judicial process, such as by helping fund an appellate case or a trial court case favoring set-asides, seeking to become an "Intervenor" or "friend of the court" in litigation, or even becoming a party to litigation where the organization or person has "standing" to be a party.

CONCLUSION

In conclusion, although the CCU decision adds a layer of vulnerability to the legal soundness of ballot box budgeting set-asides, by no means should it be considered a death knell to set-asides. As with any ballot measure, great care must be taken when researching and drafting, to be sure that the measure is likely to satisfy constitutional and other legal requirements.

Exactly how such measures should be worded is beyond the scope of this memo, but suffice it say that much can be learned from the CCU Court's analysis, and the concerns expressed by the judge in that case can be addressed and minimized with careful research and planning.

If we may provide additional information, please contact us.

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