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OFFICE OF THE ATTORNEY GENERAL  
State of California

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OPINION	:	No. 02-1103
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of	:	January 13, 2003
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BILL LOCKYER	:	
Attorney General	:	
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DAVID M. VERHEY	:	
Deputy Attorney General	:	
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JOE KERR, TERRY MARTIN, THOMAS DOMINGUEZ, and CAROL BURKE have requested this office to grant leave to sue in quo warranto upon the following questions:

1. Does the Orange County Charter lack the necessary elements of a county charter enumerated in the California Constitution, article XI, section 4, thus rendering the charter invalid?
2. Did the ballot materials in connection with Measure V of the March 5, 2002 general election, establishing the Orange County Charter, mislead the voters by failing to inform them that the charter would change the structure of the Orange County government, thus rendering the charter invalid?
3. Did the ballot materials in connection with Measure V in the March 5, 2002 general election, establishing the Orange County Charter, mislead the voters by failing to address the fiscal impact of the charter, thus rendering the charter invalid?

## CONCLUSIONS

1. Whether the Orange County Charter lacks the necessary elements of a county charter enumerated in the California Constitution, article XI, section 4, thus rendering the charter invalid, does present substantial issues of law and fact which warrant judicial resolution, and for which leave to sue is granted.

2. Whether the ballot materials in connection with Measure V of the March 5, 2002 general election, establishing the Orange County Charter, misled the voters by failing to inform them that the charter would change the structure of the Orange County government, thus rendering the charter invalid, does present substantial issues of law and fact which warrant judicial resolution, and for which leave to sue is granted.

3. Whether the ballot materials in connection with Measure V of the March 5, 2002 general election, establishing the Orange County Charter, misled the voters by failing to address the fiscal impact of the charter, thus rendering the charter invalid, does present substantial issues of law and fact which warrant judicial resolution, and for which leave to sue is granted.

## ANALYSIS

In July 2001, the Orange County Board of Supervisors approved and ordered the submission of Measure V to the electorate of Orange County at the general election to be held on March 5, 2002. Measure V contained the full text of a proposed County Charter consisting of two Articles and six sections. It also included the county counsel's "impartial analysis," which stated, among other things, that the Measure "would change Orange County from a general law county to a charter county in the way vacancies are filled in the office of Supervisor" and that "[w]here a charter does not mention a subject, the subject is governed by general law." A majority of Orange County voters approved the measure on March 5, 2002. County election officials filed the charter with the Secretary of State on April 4, 2002, and the charter became effective on the same day.

An action in quo warranto is a proper remedy by which to challenge the legality of a city or county charter. (*The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 595; *International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694; *Oakland Mun. Imp. League v. City of Oakland* (1972) 23 Cal.App.3d 165, 169.)

In determining whether to grant leave to sue, we consider two questions: has a substantial question of law of fact been presented requiring judicial resolution, and if so, would the overall public interest be served by allowing the action in quo warranto to be filed. (84 Ops.Cal.Atty.Gen. 206, 207 (2001); 83 Ops.Cal.Atty.Gen. 181, 182 (2000).)

Relators first contend that the county charter is invalid because it does not contain the necessary elements of a county charter enumerated in article XI, section 4 of the California Constitution. They assert that this alleged deficiency renders the charter unconstitutional and unenforceable. Article XI, section 4 states in pertinent part that county charters *shall provide* for:

“(a) A governing body of 5 or more members . . . . (b) The compensation, terms, and removal of members of the governing body . . . . (c) An elected sheriff, an elected district attorney, an elected assessor, other officers, their election or appointment, compensation, terms and removal. (d) The performance of functions required by statute. (e) The powers and duties of governing bodies and all other county officers, and for consolidation and segregation of county officers, and for the manner of filling all vacancies occurring therein.”

The latter provision further provides that general laws enacted by the Legislature shall be “superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided.” (Cal. Const., art. XI, § 4, subd. (g).) Finally, subdivision (h) of section 4 specifies that charter counties have at minimum those powers provided by the Legislature to general law counties. (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1206-1207.)

California courts have held that “substantial compliance” with the Constitution is sufficient to sustain the validity of a local government charter. (*People ex rel. Levin v. County of Santa Clara* (1951) 37 Cal.2d 335, 341-342; *Brown v. Francisco* (1954) 123 Cal.App.2d 413, 416; *Nicholl v. City and County of San Francisco* (1927) 201 Cal. 470, 472-473; *Jones v. De Shields* (1921) 187 Cal. 331, 336-337; *Winter v. DeShields* (1920) 46 Cal.App. 574, 575.) Relators contend that the Orange County Charter does not survive the substantial compliance test, because the charter expressly provides only for the organization of the board of supervisors and the method for filling vacancies on the board, but does not specifically set forth any other element enumerated in article XI, section 4 of the California Constitution. The County disagrees, contending that the charter does provide for the “critical aspects of county government,” including the requirements of article XI, section 4, because the charter incorporates by reference the entire California Constitution and all of the general laws of the state.

Whether the Orange County Charter substantially complies with constitutional prerequisites does, in our view, present substantial issues of law and fact which warrant judicial resolution.

The second issue presented by relators is that the March 2002 official ballot materials presented to the voters in connection with the charter proposal, including the impartial analysis of the county counsel, were inaccurate and misleading because they failed to inform the voters that the proposed charter would completely change the fundamental structure of Orange County government. Relators allege that this error renders the March 2002 election, as to Measure V, null and void.

The Elections Code contains a comprehensive scheme regulating the process for qualifying and conducting elections on countywide measures, initiatives, and referenda. (Elec. Code, §§ 9100-9190;<sup>1</sup> *Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202, 1206.) When a county measure qualifies for a place on the ballot, county counsel must prepare an “impartial analysis of the measure showing the effect of the measure on existing law and the operation of the measure.” (§ 9160, subs. (a) and (b).) County counsel’s impartial analysis must be printed preceding the arguments for and against the measure, and shall not exceed 500 words in length. (§ 9160, subd. (b).)

The purpose of statutes like section 9160 is to provide the electorate with accurate information in the voter pamphlets. (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1768; *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 776; *Patterson v. Board of Supervisors* (1988) 202 Cal.App.3d 22, 29.) Thus, when a challenge based on alleged deficiencies in a ballot measure is made post-election, courts review the matter to determine whether there was “substantial compliance” with the Elections Code and whether the purported deficiencies “affected the ability of the voters to make an informed choice.” (See *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 180; *Horwath, supra*, 212 Cal.App.3d at p. 776.) Invalidation of a ballot measure is only required if “the materials, in light of other circumstances of the election, were so inaccurate or misleading as to prevent the voters from making informed choices.” (*People v. Scott* (2002) 98 Cal.App.4th 514, 519.)

“In conducting this inquiry courts should examine the extent of preelection publicity, canvassing and other informational activities, as well as the substance or content of such efforts. The ready availability of the text of the ordinance, or the official dissemination and content of other related materials, such as arguments for or against the measure, will also bear on

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<sup>1</sup> All references hereafter to the Elections Code are by section number only.

whether the statutory noncompliance rendered the election unfair. Finally, courts should take into account the materiality of the omission or other informational deficiency. Flaws striking at the very nature and purpose of the legislation are more serious than other, more ancillary matters.” (*People v. Scott, supra*, 98 Cal.App.4th at p. 519, quoting *Horwath v. City of East Palo Alto, supra*, 212 Cal.App.3d at pp. 777-778.)

Whether the ballot materials respecting the effect of the proposed charter on the structure of county government complied with statutory prerequisites does, in our view, present substantial issues of law and fact which warrant judicial resolution.

The third issue presented by relators is whether the ballot materials submitted to the voters in connection with Measure V were misleading and inaccurate because county election officials failed to address the fiscal impact of the proposed charter. Relators claim that this alleged deficiency renders the March 2002 election, as to Measure V, null and void.

The relators’ claim is based on the premise that county officials had a duty to include a fiscal impact statement with the ballot materials. In this regard, section 9160, subdivision (c), provides:

“Not later than 88 days prior to an election that includes a county ballot measure, the board of supervisors may direct the county auditor to review the measure and determine whether the substance thereof, if adopted, would affect the revenues or expenditures of the county. He or she shall prepare a fiscal impact statement which estimates the amount of any increase or decrease in revenues or costs to the county if the proposed measure is adopted . . . .”

As used in the Elections Code, the word “shall” is mandatory and the word “may” is permissive. (§ 354; see also *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) Thus, section 9160, subdivision (c), provides the County with *discretion* to direct the county auditor to review the measure. The auditor is only required to prepare a fiscal impact statement if the county directs the auditor to review the matter.

Nevertheless, it may be argued that the failure of county officers to provide any information concerning the fiscal impact of the proposed charter may well have constituted an abuse of discretion, in view of the public’s “important” right to an impartial analysis, and the state’s “strong interest” in providing the electorate with accurate information in the voter pamphlets. (*Hull v. Rossi, supra*, 13 Cal.App.4th at p. 1768.)

Whether ballot materials respecting the fiscal impact of the proposed charter complied with all legal prerequisites does, in our view, present substantial issues of law and fact which warrant judicial resolution.

Finally, we have generally viewed the existence of a substantial question of law or fact as presenting a sufficient public purpose to warrant the granting of leave to sue in quo warranto. In such cases, leave will be denied only in the presence of other overriding considerations. (82 Ops.Cal.Atty.Gen. 78, 81-82 (1999).) No such considerations are present here. Rather, both the public and the county have an interest in a judicial resolution of the matters herein presented.

Accordingly, the application for leave to sue in quo warranto on the issues presented is GRANTED.

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