

December 15, 2006

Hon. Bill Lockyer
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Patricia Galvan
Initiative Coordinator

Dear Attorney General Lockyer:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative state constitutional amendment entitled the "Proposed Public Agency Accountability Ballot" (File No. 06-0036, Amdt. #1-S).

Background

Taking of Private Property. Under the State Constitution, state and local government agencies can take private property for public use so long as the government provides "just compensation" to the property owner as determined by a court.

Claims Against State and Local Agencies. The State Constitution and state statutes establish procedures for parties to file claims against the state and local government agencies. If payment of a claim is denied, state law and the courts have also established procedures for parties to file suit to pursue their claims.

In some cases, the liability of state and local agencies for such lawsuits has been limited or they are immune completely from legal claims. For example, public employees are ordinarily immune from being sued for actions taken while on the job. Also, in cases where a government agency is subject to claims, there may be time limits for a party to file a claim.

Where a state or local government agency can be held liable in a civil lawsuit for a claim, the burden of proof for the party filing suit is generally "proof by a preponderance of the evidence."

Attorney-Client Privilege. Under the legal doctrine of attorney-client privilege, private parties as well as state and local agencies involved in litigations are permitted to

keep conversations and other communications between a client and their lawyer confidential.

Proposal

This measure contains a number of changes to the State Constitution that are intended to reduce the ability of state and local governments to defend themselves against claims or allegations by private individuals and the ability of these agencies to obtain private property for public use. The major provisions we have identified are discussed below.

Definition of "Public Entity." This measure proposes to provide that all agents, attorneys, and employees of state and local governments, including police, judges, and legislators, be deemed public entities subject to the various provisions of this measure.

Restrictions on Taking of Private Property. This measure proposes to make it more difficult for governments to take private property by requiring that they show a "compelling need" for that property. The measure also proposes that the amount of money paid to the owner of the property be an amount "which the owner believes is fair to the owner."

Claims Against Public Entities. This measure proposes a number of changes to the State Constitution to make it easier for individuals to file and prevail in claims against public entities.

First, the measure proposes to reduce the burden of proof for parties filing a claim against public entities, while also increasing the burden of proof for public entities to prevail against such claims. While, under current law, the plaintiff must show a preponderance of the evidence to prevail in a claim against a public entity, under this measure he or she would only have to show "some evidence" to support the claim. In addition, public entities would have to provide "clear and convincing evidence" to defeat a claim.

This measure also proposes to strike down various provisions in current law that limit the liability of public agencies or provide them immunity from litigation. As we noted earlier, under current law, government agencies and employees are entitled to certain protections from litigation. This measure proposes to eliminate these legal protections, including time limits on filing of claims or immunity for public officials for actions they take on the job.

This measure proposes to also deny attorney-client privilege for public entities. This loss of confidentiality could, in some cases, provide an advantage for a plaintiff in litigation over a claim.

In addition, this measure proposes that any claims filed against public entities after January 1, 1980 be revived, so that claims that have been previously concluded can be considered a second time. Also, any prior decisions that were favorable for public entities would be deemed invalid if the public entity relied on any provision of existing law for their legal defense that would be deemed invalid by this measure.

Lifetime Bans on Holding Public Office for Violators. This measure proposes that any judges, lawyers, or legislators who were found to have violated the various provisions of the measure would lose their membership with the State Bar of California for life and never be allowed to hold public office.

Provisions Raise Constitutional Issues. A number of provisions in this measure could be subject to legal challenge under the U.S. Constitution and therefore might not go into effect. For example, as noted earlier, this measure proposes to deny attorney-client privilege to public entities, defined in this measure as including employees of state and local government. These provisions could be found by the courts to be a violation of the 14th Amendment to the U.S. Constitution, which prohibits the deprivation of liberty or property without due process of law.

Fiscal Effects

Assuming that the major provisions of this measure were deemed constitutional and went into effect, this measure could significantly increase costs for state and local governments in several ways.

By making it more likely that parties could prevail in their claims, the measure would likely increase the number of claims filed against state and local government agencies and reopen a number of previous claims dating back to 1980 that had been resolved. The filing of new claims and the reinstatement of old claims could, in turn, increase administrative costs for the trial courts, the Department of Justice (which defends state agencies in court proceedings), the Victim Compensation and Government Claims Board (which handles initial claims by private citizens against the state), as well as for local government agencies.

The various proposals to decrease the burden of proof required for parties to prove their claims against public agencies could result in increased payments by state and local government agencies for the settlement of claims made against them.

The total costs resulting from this measure are unknown and would depend on a number of factors, including the number of claims filed, the number of past claims that were reopened, and the number of cases that were subsequently lost by state and local government in litigation. If the provisions of this measure were deemed

unconstitutional by the courts, these fiscal effects would be reduced accordingly or might not occur at all.

Summary of Fiscal Effects

- Unknown but potentially significant costs to state and local governments due to increased claims against public agencies and increased payments resulting from these claims.

Sincerely,

Elizabeth G. Hill
Legislative Analyst

Michael C. Genest
Director of Finance