Digest: Greene v. Marin County Flood Control and Water Conservation District

Christopher L. Tinen

Opinion by Moreno, J., with George, C.J., Kennard, Chin, Corrigan, JJ., Reardon, J.,[1] and Raye, J.[2]

Issue

Are special fee elections subject to the secret voting requirements in Article II, section 7 of the California Constitution?

Facts

The Marin County Flood Control and Water Conservation District (District) proposed that a new storm drainage fee be imposed on property owners in an area with a history of chronic flooding.[3] The proposal called for a fee amount per property owner based on the size and type of parcel owned.[4] The Marin County Board of Supervisors accepted the proposal, adopted written protest procedures, scheduled a public hearing on the fee, and directed mailing of notices to affected property owners—all pursuant to Article XIIID, section 6, of the California Constitution.[5] No majority protest was presented at the public hearing, and the Board scheduled a special election on the fee to be held solely by mailed ballot.[6]

The ballot mailed to the affected property owners consisted of instructions on one side, the ballot on the other, and contained the name and address of the property owner, the exact amount of the fee to be imposed, and a designated space for a signature.[7] Returned ballots were received and placed unopened in a "lock

---

[1] Associate Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.

[2] Associate Justice, Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.

[3] Greene v. Marin Cnty. Flood Control & Water Conservation Dist., 231 P.3d 350, 352 (Cal. 2010).

[4] *Id.*

[5] *Id.* at 352–53 (citing CAL. CONST. art. XIIID, § 6).

[6] *Id.* at 353.

[7] *Id.*

box," and were not opened until all the ballots were due.[8] The fee proposal passed by a slim margin, with roughly twenty percent of the ballots invalidated due to a lack of signature.[9]

Ford Greene, a property owner in the District who voted in the election, demanded a recount of the election results pursuant to Elections Code section 15620 and then, receiving no response from the District, filed a "Verified Complaint for an Election Contest" pursuant to the Elections Code.[10] Greene's main complaint was that the notice given to the voters did not adequately inform them of the signature requirement due to its inconspicuous size and lack of bold font.[11] He further alleged that, as a result of this defect, twenty-one percent of the votes cast—in contrast to the usual one percent invalidation rate in Marin County elections—were invalidated.[12]

The District denied the allegations in its answer, and both parties stipulated to proceed solely on the pleadings and the face of the ballot, thus waiving an evidentiary hearing.[13] Several other citizen groups intervened, requesting declaratory relief that the election was lawful.[14] Greene answered the intervention with an affirmative defense that the signature requirement violated the ballot secrecy requirement of Article II, section 7 of the California Constitution.[15]

The trial court denied Greene's election contest in its entirety, holding that the requirement to sign ballots was expressly authorized by Article XIIID of the California Constitution.[16] On appeal, the Court of Appeal framed the issue to be decided differently.[17] Rather than focusing on the signature requirement, the Court of Appeal noted that Greene's central legal argument had always been that Article II, section 7's secret voting requirement applies to an Article XIIID, section 6(c) fee election.[18] Proceeding on this basis, the Court of Appeal reversed the trial court, concluding that the secret voting requirement did apply to the fee election at issue and that the District's

---

[8] *Id.*
[9] *Id.*
[10] *Id. See also* CAL. ELEC. CODE §§ 16100–16101 (West 2010).
[11] *Greene*, 231 P.3d at 353.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (citing CAL. CONST. art. II, § 7).
[16] *Id.* at 353.
[17] *Id.*
[18] *Id.* at 353–54.

procedures did not adequately protect voter privacy.[19] The District petitioned the California Supreme Court for review.[20]

Analysis

The court analyzed Proposition 218 and Government Code section 53753 et seq. to determine the underlying constitutional and statutory scheme of Article XIIID, section 6.[21] Proposition 218 was adopted as an addition to Proposition 13, which acted to cut local property taxes by prohibiting local municipalities from enacting any special tax without a two-thirds vote of the electorate.[22] Particularly, Proposition 218 added Articles XIIIC and XIIID to the California Constitution, which extended the reach of Proposition 13's limitations on property and special taxes to analogous special fees and assessments.[23]

The court then looked to Article XIIID, section 4, which sets forth in considerable detail the procedures for adopting assessments.[24] Specifically, subdivision (d) provides that notice be mailed to owners of identified parcels which shall contain the property owner's name, a reasonable identification of the parcel, and either support or opposition to the proposed assessment.[25] Article XIIID, section 6 provides a somewhat different procedure for property related fee assessments.[26] The court noted that section 6 provides that "an agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision."[27]

Shortly after passage of Proposition 218, the legislature passed Government Code section 53753, which was designed to facilitate the implementation of Proposition 218.[28] Section 53753 did not contain provisions for assessment ballot secrecy as originally enacted.[29] Further, the court noted that the statute expressly provided that assessment ballots would be signed, but would not amount to voting for purposes of Article II of the California Constitution or the California Elections Code.[30] The

---

[19] *Id.* at 354.

[20] *Id.*

[21] *Id.* (citing RIGHT TO VOTE ON TAXES ACT; CAL. GOV. CODE § 53753 et seq. (West 2010)).

[22] CAL. CONST. art. XIIIC–D.

[23] *Id.*

[24] *Greene*, 231 P.3d at 354–55 (citing CAL. CONST. art. XIIID § 4).

[25] CAL. CONST. art. XIIID § 4(d).

[26] § 6.

[27] *Greene*, 231 P.3d at 355 (citing CAL. CONST. art. XIIID § 6).

[28] *Id.* at 355 (citing CAL. GOV. CODE § 53753).

[29] *Id.*

[30] *Id.* (citing former CAL. GOV. CODE § 53753(c), (e)(4), as enacted by 38 Stat. 5 (1997)).

court noted that section 53753 was amended three years later to provide a certain measure of assessment ballot secrecy prior to being tabulated, but that the ballots were to be made public record thereafter.[31]

The court then examined the extent of the voting secrecy requirements under Article II, section 7 of the California Constitution.[32] This section provides that "voting shall be secret" and the "right to a secret ballot . . . is the very foundation of our elections system."[33] The court noted that although these secrecy requirements have been uniformly applied to candidate elections, initiatives, and referenda, other types of elections have not been invariably subjected to the constitutional right of secrecy.[34] For support, the court looked to *Alden v. Superior Court*, where the court of Appeal concluded that an election to form a water district was not bound by the constitutional secrecy requirements of Article II, section 7 because "the creation of such a district is a legislative act."[35] The court in *Alden* also cited *Tarpey v. McClure*, which upheld the constitutionality of an act that provided for a formation election in which only property owners were entitled to vote.[36] The court in *Tarpey* made it clear that the formation of a water storage district is "a function pertaining purely to the legislative branch of the government" and thus could not be challenged based on the constitutional right to a secret ballot.[37]

The court next turned to whether and to what extent special assessment balloting requires secrecy under Proposition 218 and Article XIIID.[38] The court pointed out that the Court of Appeal did not decide whether Article XIIID, section 4 required secret voting.[39] Instead, the Court of Appeal reasoned that "an agency could comply with Article XIIID, section 4 while maintaining secrecy in voting."[40] However, the question is not whether secrecy *could* be maintained, but rather whether it is *required*.[41] In order to discern the requirements of secrecy under Article XIIID, section 4, the court began a constitutional construction analysis.[42] First, the court looked to the face of the constitutional

---

[31] *Id.* at 355–56.
[32] *Id.* at 356–57.
[33] *Id.* at 356 (quoting Scott v. Kenyon, 16 Cal. 2d 197, 201 (1940)).
[34] *Greene*, 231 P.3d at 356.
[35] Alden v. Superior Court, 212 Cal. App. 2d 764, 770 (1963).
[36] Tarpey v. McClure, 190 Cal. 593 (1923).
[37] *Id.* at 606.
[38] *Greene*, 231 P.3d at 357.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 358.

text to give the words their ordinary meaning.[43] As the court previously noted, section 4 provides that the ballot must be one in which the property owner indicates their name, an identification of the parcel, and their support of or opposition to the proposed assessment.[44] The court inferred that the ballot requirements suggest that these pieces of information will appear on a single piece of paper.[45] Furthermore, section 4 requires that the ballots must be tabulated at a public hearing, which weighs in favor of interpreting section 4 to authorize non-secret voting.[46]

Recognizing a lack of explicit language in section 4, the court consulted "contemporaneous constructions" of the constitutional provision made by the legislature to assess their judgment as to its appropriate reach.[47] Specifically, the court noted that Government Code section 53753, enacted to address the implementation of section 4, provides that the secrecy provisions of Article II, section 7 of the California Constitution do not apply to the assessment ballot procedures prescribed in section 4.[48] The court further noted that section 53753 "was later amended to specifically address voter secrecy requirements," but did not alter the voter identification provisions of assessment ballots.[49] Therefore, the court concluded that section 4 authorizes a ballot that indicates a property owner's vote, name, and parcel while allowing public disclosure of the ballots once due.[50]

Finally, the court compared section 4 of Article XIIID to section 6 to determine the kinds of balloting procedures set forth in section 4 that may have been incorporated into section 6 elections.[51] The court analyzed the subdivisions of both sections and determined that the notice provisions and rules for public hearings are similar in both sections, but section 6 does not have any provision regarding the composition of the ballot to be sent to property owners in the event of a special fee election.[52] The court inferred from the plain language of section 6 that "procedures similar to those for increases in assessments in the conduct of elections under this subdivision" includes the use of a ballot

---

43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.* (citing CAL. GOV. CODE § 53753).
49 *Id.* at 359 (citing CAL. GOV. CODE § 53753).
50 *Id.* at 359.
51 *Id.*
52 *Id.* (citing CAL. CONST. art XIID, §§ 4, 6).

similar to the one used in section 4.[53] As previously discussed, the ballot set forth in section 4 includes voter identification of both name and property of the voter on the ballot.[54] Therefore, in the absence of explicit language or legislative history to the contrary, the court concluded that section 6 also authorizes a ballot with voter self-identification.[55]

Holding

The court reversed the judgment of the Court of Appeal and remanded the case with directions to reinstate the judgment of the trial court.[56] The court held that there was no basis for invalidating the fee election at issue due to its compliance with the required measures of Article XIIID, section 6.[57] Whether or not greater protective measures or voter assurances could have given the ballot heightened secrecy was deemed immaterial.[58] Therefore, the secrecy requirements employed by the District were sufficient to constitute a valid fee election.[59]

Legal Significance

The court's decision excludes special fee elections from the secrecy requirements provided to candidate elections, initiatives, and referenda under the California Constitution. This ruling precludes property owners from invalidating special assessment elections on the grounds that it violates their right to a secret ballot insofar as it complies with the procedures and provisions of Article XIIID, enacted by the passage of Proposition 218.

---

[53] *Id.* (quoting CAL. CONST. art XIIID, § 6).
[54] *Id.* at 360 (citing CAL. CONST. art XIID, § 4).
[55] *Id.* at 360.
[56] *Id.* at 364–65.
[57] *Id.* at 364.
[58] *Id.*
[59] *Id.*