COLAB
San Luis Obispo County

July 2012 Newsletter **Volume 2, Issue 6**

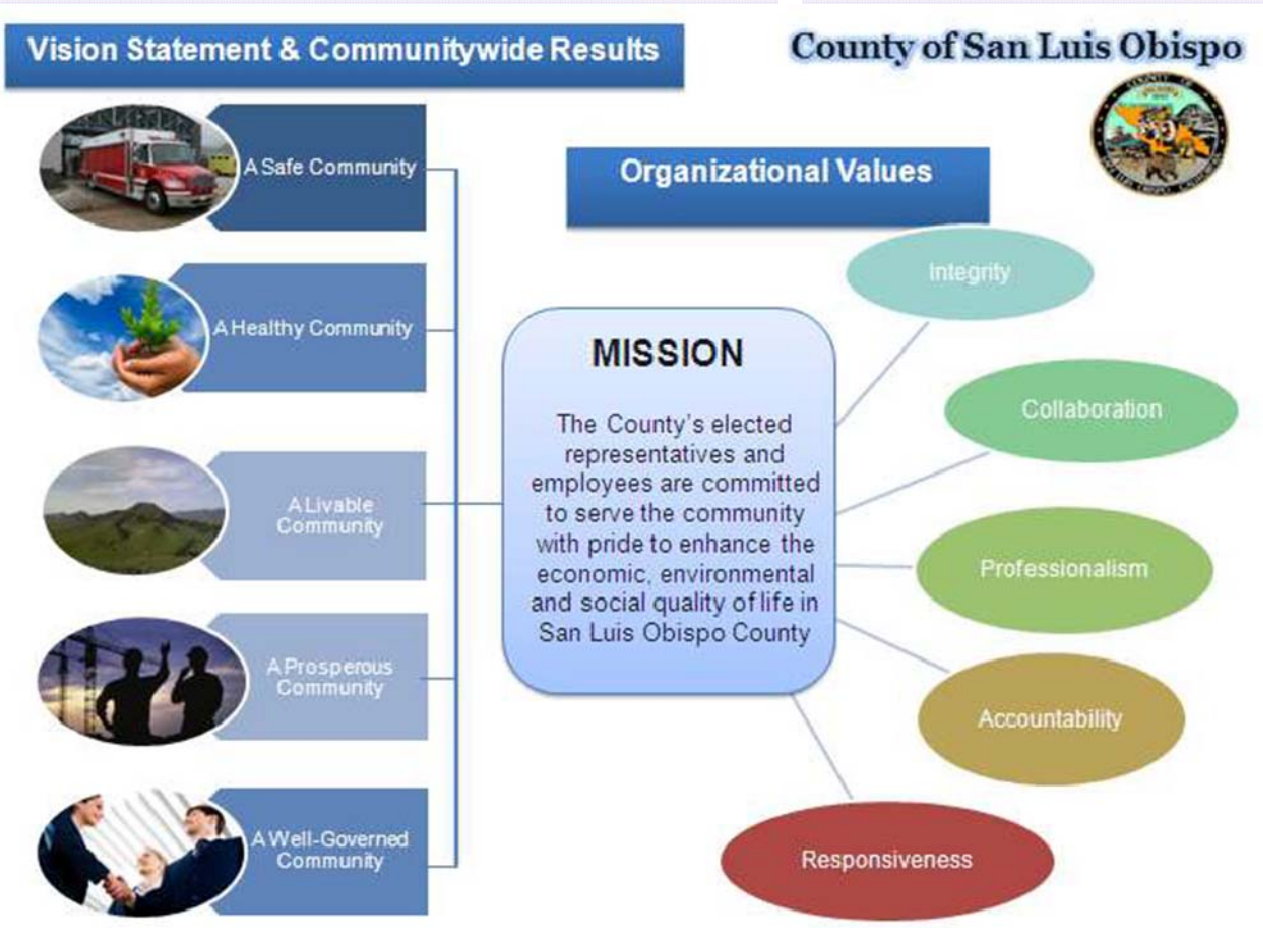
OVERHAUL COUNTY POLICY FROM THE TOP

The County's mission, as stated in its chart below, is to enhance the economic, environmental, and social quality of life in San Luis Obispo County[1]. This is the overarching policy of the County. On the surface it sounds like a benign general statement. Digging a little deeper, the statement is explicated by five desired end states (desired conditions) which are described below the chart. These include public safety, a healthy community, a livable community, a prosperous community, and a well-governed community.

Vision Statement and Communitywide Results

A Safe Community – The County will strive to create a community where all people – adults and children alike – have a sense of security and wellbeing, crime is controlled, fire and rescue response is timely and roads are safe.

A Healthy Community – The County will strive to ensure all people in our community enjoy healthy, successful and productive lives, and have access to the basic necessities.



A Livable Community – The County will strive to keep our community a good place to live by carefully managing growth, protecting our natural resources, promoting life- long learning, and creating an environment that encourages respect for all people.

A Prosperous Community – The County will strive to keep our economy strong and viable and assure that all share in this economic prosperity.

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[1]County of San Luis Obispo Proposed FY 2012-13 Annual Budget, County Administrator's Office, May 2012.

A Well Governed Community – The County will provide high quality "results oriented" services that are responsive to community desires.

It is not clear whether the goals are listed in priority order or command equal status. The first one on the list, safety, is a fundamental county responsibility mandated in the State statute, which creates and assigns responsibility to counties as the primary unit of local government. The authors narrowly construe safety as provision of policing and fire, rescue, and emergency medical services. But what about even more fundamental responsibilities and safeguards, such as providing the infrastructure of liberty and democracy? The County conducts most elections, and not just for County offices, but elections for State and Federal officials. The County still provides some support for the courts of primary jurisdiction. It also provides the peoples' prosecutor, the District Attorney, and their Public Defender. It also, even though it is an administrative subdivision of the State, is governed by a five-member local legislature, the Board of Supervisors, elected by districts to represent the people's interests.

Taken collectively, without these fundamental functions and officers, no one would be safe, even if there were police forces and fire and rescue services with unlimited resources. This is because the very government that provides the safety services does this by exercising a monopoly of force and violence. By whom and how that is monopoly controlled? How are ordinary citizens protected from the protectors? It was for this reason that The US Constitution and the state constitutions contain provisions such as the division of power into legislative, executive, and judicial. These fundamental laws also allocate limited power to the Federal government and reserve most powers to the states and the people. Even more fundamentally, these basic laws contain provisions which forbid government officials at all levels from imposing a religion, conducting unreasonable searches, falsely imprisoning citizens, and seizing private property. In fact all elected officials and high-level appointed officials, as well as all judges, court officers, prosecutors, peace officers, and other sworn officers, individually take oaths to defend and obey theses constitutional provisions.

The most fundamental and highest priority County goal and purpose should be to do just that. Protect liberty, protect private property, defend citizens from arbitrary and inefficient government officers and employees, protect citizens from intrusive rules and inspections, and leave as much wealth and material resource as possible in the hands of private citizens. If this bundle of God-given rights, which are protected by constitutions and subordinate law, were explicitly made the first and highest priority of the County and the key criteria by which public policy decisions were judged, the change would be profound and valuable.

The trite and vacuous mission statement portrayed in the graphic above could be eliminated and replaced with a new substantive overarching priority designed to enlighten and guide both policy substance and official behavior: "**Protect liberty, personal security, private property, and freedom from government interference while promoting individual responsibility, strong families, and economic independence." It would constitute a prime directive by which existing and proposed policy and organizational behavior would be judged.**

Imagine the following scenario: A Director of a county agency is standing before the Board of Supervisors (APCD, SLOCOG, Waste Authority) to propose a new regulation and supporting fees in the name of some asserted utilitarian benefit (pick your poison – greenhouse gas reduction, compelling people to ride mass transit, forcing people to build smaller, denser, more expensive houses, banning sugary soft drinks, banning plastic bags, limiting not-for-profit events at wineries and historic barns, limiting wine tasting rooms, etc.). In addition to the usual trifling questioning about the details of the driveways involved or some equivalent, what if the official were required to present his or her analysis of the impact of the proposal on what *should* be the County's highest stated policy priority – the protection of its citizen's property rights and liberty. This should trump propagandistic policy sophistry, such as a "livable community," which the County achieves "by carefully managing growth, protecting natural resources, (and) promoting life-long learning."

As to life-long learning (see the "livable community" goal above), they can start with themselves and the staff by reading the Bill of Rights and the Federalist Papers.

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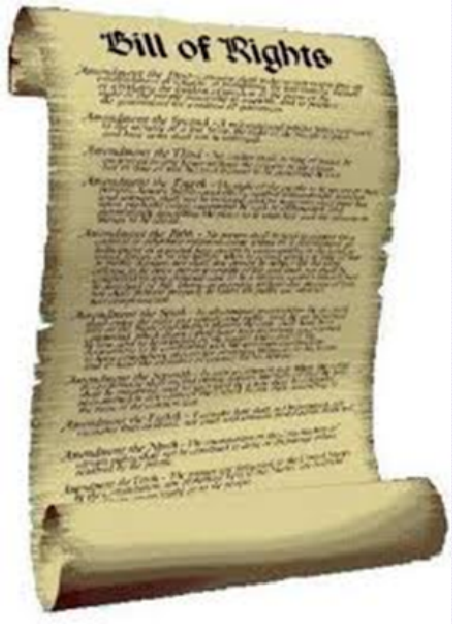

CALIFORNIA PUBLIC PENSIONS NOT BULLET PROOF

One of the sacred cows of California state and local politics is the continuing support by public employee unions of the left Enviro-Socialist Machine (ESM). The support of these groups through campaign contributions, candidate endorsements, and boots on the ground campaigning in the past is certainly understandable. After all, the ESM delivered decades of exponentially compounding "cost of living" raises and guaranteed retirement formulae which often provided career employees with pensions that are equal to their highest lifetime salaries. The current employees working towards retirement and the current retirees (and their survivors) believe that it is legally impossible for either the various pension systems (CAL PERS, UC, County 1937 Act, And CAL STRS [the teachers]) or the funding jurisdictions (the State, public university systems, counties, cities, public school systems, and thousands of special districts) to abridge or otherwise modify benefits once promised. For this reason, they have little reason to support reform and have only recently acquiesced, in some cases, to adoption of two-tier systems under which future hires would receive lower benefits and contribute more to the cost than their currently serving colleagues.

Not So Fast: The widely growing realization that these systems are so deeply underfunded raises the specter of potential collapse of the funds and/or collapse (bankruptcy) of the funding jurisdictions. In other words the current retirees may not be safe. The current working employees certainly are not safe. If local governments, school districts, and universities flounder, the public may simply contract with private sector alternatives. Voters may well reject tax increase bailouts. You would think that these retirees and future retirees would wake up and support candidates and officials who support growing the economy, more private sector jobs, and vigorous private investment, all of which would make it easier to meet the existing pension obligations.

Consider the following, which is a portion of a very extensive article by Girard Miller entitled "Pension Puffery," which appeared in the January 2012 edition of *Governing Magazine*. (The full article can be accessed at the link: http://www.governing.com/columns/public-money/col-Pension-Puffery.html). The article lists twelve half-truths about public pensions and provides incisive critiques . On the subject of existing pension inviolability: ***"This is a contract, protected by the federal Constitution's contracts clause. You can't reduce my pension."*** Miller points out:

The federal Constitution also authorizes Congress to create bankruptcy courts, which routinely overturn contracts, although I doubt that municipal bankruptcy proceedings will be the solution to pension problems, as explained in an earlier column on bankruptcy and benefits reform.

There is no question that some state constitutions declare the pension promise to be inviolable and some state courts have held that the pension promise is a contract. In "normal" economic times when the pension plan is properly funded, almost everybody would agree that contractual pension obligations should be fulfilled. But these are not ordinary times, and dozens of major public pension plans are facing the potential for depletion of their assets during the lifetimes of current employees if nothing is changed. Ultimately, some municipal employers will face a genuine financial emergency if they don't significantly revise their plans' benefits structures. We have already seen such actions upheld in Colorado and Minnesota, where courts held that benefits changes could be made, in order to preserve a reasonable benefit for everybody in the plan. Rhode Island just enacted a law to change benefits including the retirement age for incumbent employees. The city of Cincinnati took similar actions. In some states, these "breaches of contract" will go to court, but what the plaintiffs often do not understand when they file suit is that several courts have supported the police power of the state to make plan modifications if they are necessary — provided that the remaining benefits are reasonable, and if the plan change is the minimum change required to fix the plan. The simple economics of pension plans inform us that the sooner you fix them, the less pain the beneficiaries will suffer later on. This does not mean that every underwater pension plan should stiff its retirees; the plan must clearly be at risk and alternative remedies should be explored. In fact, the courts typically require such efforts before they impair contracts and reduce vested benefits.

Similarly, Liam Dillon, who is a news reporter for Voice of San Diego[1] and covers San Diego City Hall, argues that California's current legal theory that pension payments constitute a binding legal contract is based on a faulty 1917 court decision.

[1] *Updated: 7:01 pm, Tue Jun 26, 2012. Liam Dillon*

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This article was prepared by Mike Brown, Governmental Affairs Director of the Coalition of Labor, Agriculture and Business of San Luis Obispo County. Brown has 42 years of state and local government experience.

As it stands in California law, on the day municipal workers start their jobs; their pension benefits can only go up, not down.

This legal principle has been bedrock behind the city of San Diego's decade-long pension drama. Despite a growing pension debt that has dominated the city's political discourse, reforms have focused on new employees, not the retirees or current workers who are owed the bill.

Its one reason why the June pension initiative, Proposition B, stuck new workers with 401(k) s yet did nothing to guarantee San Diego's existing pension debt would be cut. This legal principle is important, foundational even, to how California governments do business. And, according to a fascinating new article in the Iowa Law Review, it all goes back to three words in a 1917 California Supreme Court decision about benefits for a police widow.

At issue in that 1917 decision was the legal status of pensions. Are they bonuses granted to employees after their service to the government? Workers' property akin to their houses or other possessions? Or part of their employment contracts?

The 1917 decision didn't make a definitive call. Instead it used the three words, "in a sense," to link pensions to unbreakable contracts for the first time. In the 95 years since that initial decision, courts in California and other states have expanded on that three-word phrase to the point where we are now with pensions. The article calls the legal principle the "California Rule."

The article's author, University of Minnesota law professor Amy B. Monahan, argues the California Rule is off the mark. She contends the state's court system improperly infringed on legislative power and the pension rule doesn't fit with both contract and economic theory. Her review of case law found the state Legislature never said pensions were untouchable.

"California courts have put in place a highly restrictive legal rule that binds the legislature without the court ever finding clear and unambiguous evidence of legislative intent to create a contract," Monahan wrote (emphasis in original).

Monahan says the law should allow governments to make prospective changes to current employee pensions. In other words, she believes California courts should reverse their position and give governments the right to cut pension benefits for the time current employees haven't yet worked.

This change would give governments the chance to face their existing pension problems head-on by addressing the debt owed to current workers without infringing on employees' contractual rights. These kinds of pension cuts, she contends, could even benefit workers. In the face of mounting budget pressures, she says, government employees might prefer pension cuts to salary freezes or layoffs. In short, Monahan concludes making current pensions untouchable is both bad law and bad policy.

As noted by public finance columnist Girard Miller, courts might have a chance to weigh in again on the California Rule after pension ballot measures passed here and in San Jose earlier this month. San Jose's measure addressed the California Rule more directly by forcing current employees to pay much more toward their pensions than they do now or accept a new plan with lower benefits.

Miller also says that the overwhelming election results in favor of pension reform in San Diego and San Jose means it makes sense for unions in California to make deals:

Taking a page from Machiavelli's playbook written centuries ago, enlightened union leaders and their political surrogates should now see that it's time to offer up enough reforms to placate the voters and avoid judicial decisions that take them back to the 1950s. They risk irreversible losses in all-out wars on multiple fronts. And the Governor's proposed tax increase will likely be dead on arrival this November without pension reform, even if it means more draconian cuts in state spending and public education.

What current retirees and current vested public employees need to understand is that all boats rise with a vigorous and growing economy. The historically accumulated and continually growing avalanche of State and local regulations, fees, and taxes undermine investment, job creation, and the generation of State income tax, corporate income tax, sales taxes, and property taxes. This reduction in resources will in turn increase the pressure for the State and localities (cities, counties, school districts, and special districts) to find ways around the pension cost dilemma. Voter initiatives and legal remedies will be attempted. In the face of this growing and necessary pressure (if public services and education are to be preserved), it would be prudent for public employees and public retirees to reject the enviro-socialist status quo and to elect officials who will ease the problem by enabling a better economy and a naturally growing revenue base.

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COLAB "SMART GROWTH" LAWSUIT GOES FORWARD

As our readers may recall, COLAB filed a lawsuit in 2010 against the County's Strategic Growth ("Smart Growth") amendment to the San Luis Obispo General Plan on the grounds that it was a violation of CEQA because the County did not conduct an Environmental Impact Report (EIR) addressing significant environmental impacts for the project area (the entire county)[1]. The trial court found for the County of San Luis Obispo and against COLAB. On January 10, 2012, COLAB's attorneys filed an appeal with the Second Appellate District of the California Court of Appeals.

It is inconceivable that an appeal was even necessary. The trial court went against all precedent in finding for the County, because CEQA very clearly requires an open, public, and documented presentation of areas potentially having significant negative effects on the environment, as well as clearly defined means of mitigating those effects, and the only way to do this is to produce an EIR. A Negative Declaration containing only a promise by the Board of Supervisors that the project will not adversely impact the environment, because the planners will make sure that doesn't happen does not meet with CEQA's mandate. Broad of Supervisors goals, with no underlying data that could reasonably show results, do not meet with CEQA's mandate.

The Board has shown unrivaled hubris in even approving the massive scheme of land use regulation utilizing a Negative Declaration. Elected public representatives, answerable to their constituencies, have a duty to be open and accountable to the citizens who entrust them with the public good. The back room "trust me" policy of governing has no place in an open society. No matter how responsible today's leaders may be, promises of future events cannot be made with any surety if there is nothing but promise to ensure good outcomes. What if the Founding Fathers had decided that our Country's faith in their honest expectations for the future would be good enough to ensure a democratic and free nation, and there was no need for a Constitution or a Bill of Rights? Thankfully, our early leaders planned for the worst-case scenario, not the optimism that all would go well just because they wanted it to.

Background: On June 7, 2005, the County Board of Supervisors adopted a resolution setting in motion a Strategic Growth policy and principles. Ostensibly a plan to protect the beauty and natural environment of the County,

[1] *COLAB San Luis Obispo v. County of San Luis Obispo*

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this plan was intended to accomplish its goals by redistributing development to existing areas with denser population and/or planned communities.(inside the cities and inside unincorporated urban limit lines). The redistribution plan includes infill, densification and compact building for existing communities and urban areas and by intermingling residential and commercial/industrial uses in an attempt to bring residential, shopping, work and school, and recreation within a small area reachable by foot, bikes, or mass transit.

The Board envisioned this as a progressive, forward-looking strategy (design) that was intended to be environmentally friendly and a way to control growth in a positive way while preserving the beauty of the area. But to make this a reality, the County had to conduct an analysis in accordance with the California Environmental Quality Act (CEQA), the purpose of which is to inform public officials about the environmental effects of their decisions. According to CEQA, in initiating a new project, public agencies must inform themselves of the environmental impact of their proposed actions, must give the public the opportunity to comment on the environmental issues, and must avoid or reduce significant environmental impacts where feasible. Under CEQA, the public agency initiating a new project (or having ultimate control over the project if more than one agency is involved) must conduct a study to determine whether its proposed project might have any direct or indirect substantial environmental impacts on the project area and to report those impacts.

After conducting an Initial Study of possible significant effects on the environment, the agency must determine whether an Environmental Impact Report is warranted (if significant effects are found to possibly derive from the project) or a Negative Declaration, if no significant effects are foreseen. There is also the possibility of filing Mitigated Negative Declaration, which can be adopted after a project has been revised to avoid or mitigate environmental impacts. Instead of doing the required EIR (this project creates massive accumulative land use and environmental impacts), the County rationalized that EIRs would be done when implementing ordinances and plans were considered in the future. Even though the county exempted itself, it requires everyone else to conduct extensive environmental review, even for some of the most minor projects. We have seen one-lot splits subjected to extensive environmental analysis and we have seen individual houses held up for years as every minute environmental aspect has been torturously an expensively reviewed and re-reviewed ad nauseum.

In deciding whether to approve projects from the private sector and its citizens, the Board is scrupulous in insisting that all i's are dotted and all t's are crossed. Every detail must be proven to comply fully with environmental law. However, in monitoring itself, the Board appears to believe that its future intention to comply with environmental rules and regulations is sufficient. In the case of the "Smart Growth Plan," the initial environmental review consisted of producing an Initial Study which found that, indeed, there were foreseeable significant negative environmental impacts in areas including air quality, noise, public services/utilities, recreation, transportation/circulation, wastewater and water, as well as possible impacts on aesthetics, agriculture, biological resources, cultural resources, geology, public safety, and population/housing. However, the Initial Study stated that all of these could be reduced by giving "highest priority to avoiding or mitigating environmental impacts through project design… ." It also stated that a Mitigated Negative Declaration would be prepared.

This was followed by staff returning to the drawing board and preparing a Revised Initial Study. This new study found that the "proposed project could not have a significant effect on the environment" and that the potentially significant impacts identified in the original Initial Study were "considered to be mitigated" by other aspects of the project. The Revised Initial Study made no changes to the findings of the original in the areas of wastewater, aesthetics, geology, population/housing, or cultural resources. It deleted language in the air quality section, changed language without changing meaning to biological resources, added verbiage but no answers to transportation/circulation, and promised to mitigate problems with respect to noise, public services/utilities, recreation, and water. At its April 28, 2009 meeting, the SLO Board of Supervisors approved the Revised Initial Study and a Negative Declaration was then issued.

At this point the appeal has been fully briefed by both COLAB and the County. This means all written arguments and supporting legal analysis have been filed and are pending before the California 2nd District Court of Appeals in Ventura. It is not known when exactly the court will set a date for oral arguments. This is likely to take place some time in the next six months.

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Coalition of Labor, Agriculture and Business
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To achieve its mission, COLAB will engage in political activities which promote those common business interests and, in doing so, foster a positive image for agriculture, business, and labor in the community. COLAB represents is members before the SLO County Board of Supervisors and any other local or national governing body. If necessary, we will take legal or administrative action for the mutual benefit of the members.

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