

California Leads The Way!

The Editor interviews Dario J. Frommer, Partner in California Public Law and Policy Practice in Akin Gump's Los Angeles office.

Editor: Dario, please tell our readers about your former role as a Majority Leader of the California State Assembly. Who was the governor at the time you performed this service?

Frommer: I served as Majority Leader under two governors, the first being Governor Gray Davis, for whom I had worked as appointments secretary before I went to the legislature. The second half of my service was under Governor Arnold Schwarzenegger. I like to describe the role of the Majority Leader as one part cat herder and one part traffic cop, since the job is to move matters the Democrat majority wants to have accomplished. It entails dealing with many personalities with differing political interests and sometimes using artful persuasion to get them to vote for a bill. It was a challenging job, but it was great to play a part in some very, very major legislation.

Editor: Would you mention some of that legislation?

Frommer: One piece that I was particularly proud of was California's landmark Global Warming Solutions Act (AB32) that passed in 2006. California was the first state to institute requirements for reducing our greenhouse gas emission footprint.

Editor: Not only were you Majority Leader, but you were also Chair of the Health Committee. What legislation was introduced by that Committee?

Frommer: I worked on passing a health care plan that was a precursor to the Affordable Care Act in 2003 (SB2). In addition, I authored legislation that allowed working people who did not qualify for insurance to get a discount on prescription drugs, created a public website where



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consumers can compare charges by hospitals and allowed patients with acute conditions to stay with their doctors in the event their HMO was no longer contracting with that physician.

Editor: California has always been a progressive state in terms of providing many benefits to its constituents, including health benefits. What has been the general reaction by Californians to signing up for health care insurance through the exchanges?

Frommer: Californians are generally excited about the exchanges, which California elected to set up. California has been one of the best states in terms of rolling out the ACA, allowing for many options. The big challenge for California is reaching communities in our state that traditionally have not had insurance or that have experienced lower numbers of persons buying insurance, primarily the Latino community. Their numbers have lagged behind in terms of signing up at the exchanges, but there is much

outreach to these less-advantaged communities, which will help them take advantage of all that ACA offers.

Editor: California is noteworthy for the number of cars on the road. You have also been active as chair of the state's Transportation Commission. What did your duties entail? What is the jurisdiction of the Commission?

Frommer: The California State Transportation Commission is responsible for parceling out billions of dollars in state and federal money to fund highways, roads and transit programs. Most of the money is raised through excise taxes paid by motorists when they buy gasoline or diesel fuel and by the weight fees that are paid by truckers. We also have been responsible for administering \$9 billion in bond funds that the voters approved for highway construction as well as successfully administering many of those programs. We were the lead agency for putting the American Recovery and Reinvestment Act funds from the stimulus program into various projects. Federal law required that the projects be obligated in a short period of time. In order to avail California of its committed amount, we succeeded in having more than 90 percent of the funds committed within the required time.

Our big challenge in California is having enough money to maintain our current roads. Because we collect our revenues for roads from excise taxes on motor vehicle fuels, the amount of money we are collecting from this source has been falling for several reasons. One is the economy. Another reason is as gasoline prices go up, consumption often falls. A third reason is that, in California, more people are buying fuel-efficient vehicles. So, our big challenge is to find a proxy for excise taxes to properly maintain our roads. Because of declining revenues, our highway fund has been depleted by about \$400 million over the past few years.

The Commission also assists localities with their rail systems. Los Angeles had a fabulous

system of light rail up until the 1950s. It was eliminated because automobiles became very popular along with our freeways. The Los Angeles County Metropolitan Transportation Agency and former Los Angeles Mayor Villarraigosa have done a tremendous job of raising funds to expand our intercity rail system, and the Commission has been able to provide some funding for that. We have also provided funding to cities like San Diego to help build out their light rail systems.

The Commission is able to help to fill the gaps in funding where federal or other state money falls short, assisting various agencies to leverage their money. It is not able to float bonds, since it is initiated by legislative action or by voter petition, but the Commission administers how the bond proceeds are used and reports back to the legislature.

Editor: What is California doing to control air pollution?

Frommer: As a child, I recall there were days when I could not go outside in Los Angeles. But in the last several years, there has not been a single smog alert day. However, there is still work to be done in terms of limiting emissions from mobile sources, such as cars, buses and trucks. California has recently adopted new rules concentrating on eliminating greenhouse emissions, and these are also helping to reduce toxic and particulate matter that creates pollution and smog. This bold new program is providing inducements to put more electric and natural gas vehicles on the road. For example, we are building an EV charging station network.

California is also controlling pollution produced by ships using bunker fuel. They are turning off their engines as they come into ports and charging up with electricity plugged in at the ports.

Air emission standards are primarily the purview of the EPA, but the state and its regional air districts are accountable to the EPA in terms of attainment of air quality standards. California's state Air Resources Board oversees the regional districts in terms of air quality. It has been very aggressive in working with the districts to come up with innovative ways to meet air quality standards. While California has still not attained its goals in meeting the federal standards, we have made tremendous progress. Our regional air districts are extremely active in administering both state and federal air quality laws.

In many respects, California has been ahead of the federal government and the rest of the nation in enacting air pollution and greenhouse gas emissions legislation. Our law governing auto tailpipe GHG emissions, which I co-authored, had to be approved by the EPA because it was more stringent than required by existing EPA standards for auto manufacturers.

Editor: What kinds of green energy projects have you been involved with?

Frommer: I have been involved primarily in development of solar and biogas projects. Biogas is generated from landfills or by removing substances from the waste stream and converting them to biomethane to generate electricity. We have a renewables portfolio standard that requires all our utilities to procure 33 percent of their power from renewable sources. Biogas is one of the renewable energy resources that utilities can use to comply with the law. We have farmers in the state who are taking their dairy waste and converting it into electricity, developing a whole new industry. Two years ago, I was very involved in drafting legislation to allow biogas to be transported in state gas pipelines whose end-users are electric utilities or transportation.

We have been involved in some large-scale solar energy projects in the California desert. While it would appear simple to extract energy from the sun, getting these projects permitted has been more difficult. A number of the entities that were trying to build these projects have had financial problems because the permitting process takes such a long time and because of California's strict environmental rules. It's a big public policy problem for those of us who favor solar energy. Fortunately, the state and federal government are working together to try and balance environmental and energy interests in a smart way. This is all new for us, as it is for most states that are doing this, and we're having growing pains.

Editor: Do you ever go before FERC with any of these projects?

Frommer: My practice is entirely before California agencies, such as the California Energy Commission, at times the California Public Utilities Commission, and local agencies. We deal with local agencies because a lot of these projects have components for which a local agency must give its blessing, whether it's for a conditional use permit or because they are the lead agency for the environmental impact report.

Having the local agency's support is important, since it can be influential in winning over the public to a project. Opponents of renewable energy projects can use many different pressure points to slow or halt project approval. For example, the construction trades, which are strong in California, sometimes use the environmental permitting process for renewable energy projects to pressure developers to sign collective bargaining agreements.

Editor: You recently spoke on the subject, "Can State or Local Governments Use Eminent Domain to Seize Underwater Mortgages?" There have been several instances where governmental bodies have used this authority in the past year or so. What are the pros and cons of this practice?

Frommer: There are groups of investors who have shopped this idea to local governments with the prospect of stabilizing the real estate market in their communities. The question from a legal perspective is whether using eminent domain, in effect, to take over a loan and to truncate the rights of bond holders is constitutional. Obviously, lenders and investors believe that these schemes are not a proper use of the eminent domain power. This issue will ultimately be sorted out by the courts. One action is pending in U.S. District Court to enjoin the city of Richmond, California, from implementing its program, and I'm sure there will be others. It is also important to point out that there is a lot of misinformation about what these mortgage takeover programs would do and who would benefit.

For example, the programs at issue in the cities of Richmond and Pomona are not targeted to aid people with underwater mortgages who are in foreclosure or in danger of default. These programs would target mortgages where the owners of the properties are current on their payments even though their home mortgages are underwater. This has led critics to charge that the investors promoting these programs to cities are trying to cherry-pick properties whose values are expected to rise and use eminent domain to acquire the mortgage at a steep discount. But clearly, the mortgages are not being acquired for a sanctioned governmental purpose.

Editor: California has recently been lauded for improving its financial standing. Do you expect continued improvement?

Frommer: I do. We have had many, many years of massive structural deficits. Governor Jerry Brown deserves a great deal of credit for ending the slide on two fronts: first, he convinced the Democratic-controlled legislature to cut massive amounts from programs, and then he got voter approval for a temporary income and sales taxes increase. Governor Brown vowed to give more money to education as well as hold the line on spending. He has proposed and won an education reform bill that will provide more funds for schools and that is being well received. California is on a good track, and hopefully that will continue. In fact, the Legislative Analyst's Office has just predicted that, at the current spending rates, with no additional taxes, we will be running a surplus of \$10 billion a year by about 2016. While the legislature would like to spend this money, the governor thus far has resisted.

What is missing in California is tax reform. Our state budget is heavily reliant on personal income tax revenue. When the economy heats up, tax bills on the wealthy rise and state revenues shoot up, while in depressed times, tax revenues decline sharply. We need a tax structure that spreads state revenue around on a more even basis through good times and bad.