

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair

***Court Facility Bonds: How Can the State Best Address Its
Court Facility Deficiencies?***

A Background Paper by the Counsel of the Assembly Judiciary Committee for the
Special Informational Hearing To Review Current Court Facility Bond Proposals

One measure of a society is its ability to ensure public order and security while protecting the rights of the individual, no matter how weak or powerful. Courts stand at the forefront of this endeavor. If we abandon the goal of accessible justice for all, we surrender not only our court system, but one of the most fundamental compacts of our democratic system of government.

- Chief Justice Ronald George, State of the Judiciary Speech
to the California Legislature, March 15, 2004

The Problem: As California's esteemed Chief Justice Ron George has often noted, California's courts are citadels of justice in our democratic society. However the state's Judicial Council, the policymaking body of the state's court system, states that there is an urgent need for construction of new courts and renovation of existing ones throughout California in order to protect these vital assets. With more than 8 million filings annually, California's court system is the largest in America. Of the state's approximately 450 court facilities, the Council reports that a high percentage are in need of significant maintenance, repair, or renovation.

According to the Judicial Council's Task Force on Court Facilities (discussed more fully below), many courts have no way to bring in-custody defendants to courtrooms without using public hallways and coming in direct contact with witnesses, potential jurors, victims, and court users; many courtrooms literally have no space for a jury; many court buildings do not have up-to-date fire and life safety systems, including sprinklers, proper exits, and emergency lighting; many court facilities lack safe children's waiting rooms for the over 300,000 children that come to court each year; many facilities do not have adequate access for people with disabilities; and a small percentage of court facilities in the state are now actually in trailers. In addition, the Task Force determined that one third of existing court facilities are 40 years old or older, meaning that many do not comply with current seismic codes or disabled access requirements. Finally, the Task Force also found that less than half of the state's courthouses have "adequate" security.

Due to the sheer size and number of facilities in the state, the great bulk of which remain under county ownership and control, the Legislature has not been able to independently verify the scope and depth of these problems, but collaborative discussions are on-going to evaluate these important issues. However there is little

question that, like so many government facilities across the state, there are a substantial number of court facilities with structural and safety deficiencies.

Current Proposed Solutions: Reflecting the concern of all three branches of government about this situation, several measures have been introduced in the past two years which seek legislative approval to submit a bond act to the voters to help with the acquisition, maintenance, renovation, and building of state court facilities. Current proposals before the Legislature include:

- AB 1831 (Jones) and SB 1163 (Ackerman): These are recently introduced and identical Administration-sponsored measures which seek to enact the California Critical Infrastructure Facilities Bond Acts of 2006 and 2010. They authorize the issuance of bonds in the amount of approximately \$800 million for the acquisition, design, construction, or renovation of trial court facilities in 2006. (Another \$427 million would be available for state parks and other capital outlays – proposals being examined by other policy committees in the Legislature.) They also authorize the issuance of court bonds in the amount of \$1,000,000,000 for voter approval at the November 7, 2010 general election.
- SB 395 (Escutia): This two-year bill, currently in the Assembly Appropriations Committee, seeks to enact the California Court Facilities Bond Act of 2006. Unlike the above measures, SB 395 does not specify the amount of funds that would be authorized. In its current form this bill specifies that any funds generated by the bond would become available only through a subsequent appropriation by the Legislature, thus seeking to ensure appropriate legislative oversight of particular facility expenditures.

Statutory Backdrop: The Jones and Ackerman proposed court bonds are part of a package of bills introduced as part of the Governor’s Strategic Growth Plan. Proponents of these measures argue that they are a logical culmination of two prior acts approved by the Legislature. The Lockyer-Isenberg Trial Court Funding Act of 1997 (AB 233) restructured the funding for operation of the state's trial courts and, among other things, created a Task Force on Court Facilities that was charged to report on the status of court facilities, and to make recommendations to the Legislature and the Judicial Council.

The Task Force on Court Facilities: As part of its effort, the Task Force on Court Facilities reportedly visited many of the 450 or so county-owned court facilities to identify physical and functional deficiencies in court buildings statewide. In October 2001 the Task Force completed its study and submitted its report to the Legislature. As noted above, the Task Force report identified structural and safety problems in many of these county-owned facilities – problems that regrettably are similarly present in many state-owned facilities across the state. It also noted that many counties have taken the position that they are not able financially to prioritize the needed maintenance and repair of their courthouses due to other financial needs and priorities, and many court structures have thus been neglected.

In order to achieve uniformity and improve public access, the Task Force recommended that the state assume full responsibility for county-owned court facilities over a three-year period, with counties retaining responsibility for facility maintenance costs through Maintenance of Effort (MOE) obligations to the state as well as payments on existing court facility debts. Legislation to implement the recommendations of the Task Force was co-sponsored by the Judicial Council and the California State Association of Counties. In 2002, the Legislature enacted the Trial Court Facilities Act (TCFA) (Escutia, SB 1732, Chapter 1082, Statutes of 2002), which set forth the basic ground rules for the transfer of responsibility for court facilities from counties to the state.

Transfers Have Been Virtually Non-Existent Due to Seismic and Other Hurdles: Since passage of the TCFA in 2002, counties and the courts have been working to implement an orderly transfer of existing trial court facilities. Unfortunately, the initial seismic safety ratings of existing facilities, the complicated nature of transfer negotiations, and other hurdles have impeded the transfers. Less than one percent of available county court facilities have transferred to date (just four so far.) According to Judicial Council statistics (not yet independently verified by the Legislature) over half of the total court facilities statewide reportedly have an unacceptable seismic safety rating of Level V, making those facilities ineligible for transfer from county to state ownership under existing law, unless provision is made to correct the seismic safety deficiency, as required by the TCFA.

Under the leadership of the chairs of the Assembly and Senate Judiciary Committees, discussions are underway by the affected parties to see if there is a way to solve these difficult seismic safety and other transfer hurdles. However it remains unclear whether there will be an adequate number of court facilities transferred to state ownership that will be able to utilize any bond funds provided under the current bond proposals.

The Council's Evolving Five-Year Facility Ranking Plan: In order to plan for the transfer process in 2004, the Judicial Council approved a Trial Court Five-Year Capital Outlay Plan which sought to rank court facility improvement needs statewide. The plan initially called for the renovation or improvement of approximately 201 of the 450 or so facilities considered. The Administrative Office of the Courts (AOC), the administrative body of the courts, states that it continues to work closely with court and county personnel to develop this plan. However the plan has not yet been widely reviewed by legislative personnel. Nor is it clear to what extent Administration personnel have been involved in this evolving prioritization report. The Council recently noted that this prioritization report is being revised, so it is still not clear what specific projects might be potential recipients of any bond funding provided under these proposals. It is evident however that the \$1.8 billion provided in the Administration's proposed bond measures will cover only a small portion of the Council's Five-Year Plan, projected to cost almost \$10 billion to renovate and maintain 300 facilities between now and 2017.

A Closer Look at the Administration-Sponsored Court Bond Proposals: As the Committee considers testimony at its special informational hearing on court bonds, a

closer look at the Governor's current court bond proposals may be helpful. Among other things, these identical proposals:

- 1) Enact the California Critical Infrastructure Facilities Bond Acts of 2006 and 2010, authorizing the issuance in 2006 of \$1,227,000,000 in bonds relating to the acquisition and maintenance of court facilities and other state facilities. (The sum of \$800,000,000 is for trial court facilities and \$427,000,000 for other state obligations.) Also authorize the issuance in 2010 of \$1,000,000,000 in bonds relating to acquisition and maintenance of court facilities.
- 2) Create the California Critical Infrastructure Facilities Finance Committee for the 2006 and 2010 bond acts consisting of the Director of Finance, the Treasurer, the Controller, the Director of General Services, the Director of Parks and Recreation, the Director of Mental Health, and the Administrative Director of the Courts.
- 3) Provide that proceeds from the issuance of the bonds be deposited in the State Treasury in the 2006 California Critical Infrastructure Facilities Bond Act Fund.
- 4) Provide for the submission of the 2006 bond act to the voters at an unspecified election this year and the 2010 bond act at the November 7, 2010 general election.

Arguments in Support: According to the Judicial Council, the California Judges Association, and other supporters of these measures, the inclusion of court facilities in the Governor's Strategic Growth Plan reflects the need for fast action; the longer the state waits, the more costly it becomes to upgrade court facilities by replacing or renovating aging and deficient county-owned courthouses, enhancing security for court users, and improving access to the courts throughout the state for the multitude of court users. The Judicial Council warns that the courts are currently insufficient in providing even basic life safety and accessibility. It points out that many years of neglect, including inadequate security, places victims, jurors, witnesses, litigants, and employees, all at risk. Without necessary improvements, the Council states, the courts will be unable to function well or safely in the future.

The California Judges Association states that "[c]onditions in many court facilities throughout California jeopardize public safety and security, undermine court efficiency, and limit equal access. Existing court facilities are not equipped for current volumes of caseload administration, do not provide adequate access for people with disabilities, and often lack up-to-date protections including fire safety systems and appropriate barriers between in-custody defendants and the public. These deficiencies pose an unacceptable risk to court users, court staff, judicial officers, and law enforcement."

A multitude of the state's superior courts and many county bar associations also have written the Committee in strong support of these bond measures.

Some Key Issues for the Legislature's Consideration: In evaluating the merits of the current court bond proposals, and other possible solutions to this pressing problem, a

host of issues arise that the Committee may wish to discuss with the witnesses at its special informational hearing. These include:

Might This Potential New Pot of Money Finally Remove the Stubborn Roadblocks that Have Thus Far Prevented Court Transfers? The Committee may wish to discuss with the measures' proponents whether the potential infusion of nearly \$2 billion into the courthouse facilities might finally create the funding momentum and flexibility needed to overcome the many current roadblocks that have thus far effectively prevented transfer of county courts to the state. Alternatively, is it potentially premature to provide bond funding for court facilities that are still mostly under county control?

As noted above, it is currently estimated that approximately one-third of existing county court buildings are 40 years old or older, meaning that many do not comply with current seismic codes or disabled access requirements. Only 4 of the estimated 450 eligible court facilities have actually transferred to state ownership and control. According to the Council, courthouse seismic ratings, so many of which fall into a "Level V" high earthquake risk, have created a confounding impasse in the court transfer process. The conundrum is that the transfers from county to state ownership must precede any state-funded courthouse improvement projects. In addition, SB 1732 bars the transfer of any Level V facilities to the state unless the transfer agreement includes a corrective mechanism to fix the earthquake deficiencies.

The Committee may wish to explore with the Judicial Council whether any court bond proposal should contain authorization for the funds to be used more flexibly in the event current seismic safety hurdles continue to prevent an adequate number of facilities from transferring. A related question is the anticipated cost of seismic safety retrofit repairs. The Committee may also wish to explore with the Judicial Council representatives whether the Council has any contingency plans to address the most pressing facility problems in the event the bond proposals do not pass. Finally, the Committee may wish to explore with the Department of Finance representatives whether there are other steps the Department can take to help expedite court transfers, and what if any new statutory provisions might help unlock the current courthouse transfer process to enable better and more expansive use of the proposed bond monies.

Might These Bond Proposals Lock California Into Programs For Extended Periods Of Time, During Which State Priorities And Circumstances May Substantially Change? While those advocating these proposals have well-noted the serious structural and safety problems present in many of county-owned courthouses throughout the state, opponents of the bond approach contend that committing the state to this task for the remainder of the decade may inflexibly limit the state's ability to change needed course and address other higher priorities in the future. They note that the current bond proposals not only call for bonds to be authorized in 2006, but at the end of the decade as well. They assert that had the state locked itself this way into infrastructure decisions based on what it believed decades ago, many of the state's now-largest suburban areas would now be inappropriately and unfairly locked out of needed funds today. The Committee may

wish to evaluate whether the 2010 bond commitment might risk this asserted planning flexibility problem.

Should Courthouse Construction and Renovation Be Treated As A Top State Priority Today? Notwithstanding the Judicial Council's strong presentation of serious structural and safety deficiencies in courthouses today, not all who have interfaced with the court process are yet convinced the state should prioritize courthouse construction and renovation above the other many pressing infrastructure problems facing California.

For example, retired San Diego County Superior Court Judge Victor Ramirez, now in private law practice, earlier wrote the Committee in opposition to the Escutia court bond proposal that "Since my retirement [as a judge] I have returned to the active practice of law, with an emphasis on civil litigation. Since my return to the private practice of law, I have appeared in trial courts in San Diego County, Orange County, Riverside County and Los Angeles County. I have found that the trial court facilities in those Counties to be more than satisfactory to serve the needs of the public now and for the foreseeable future.... The facilities in the county courthouses where I have appeared were excellent and easily met the needs of the attorneys and public who regularly appear in court. I have not found, either as a sitting Judge or now as an attorney that the Jurors, litigants and victims, in the courthouses, were in dire need of expensive or immediate changes. In fact I have found just the opposite...."

Proponents of the court bond measures counter, however, that such claims ignore the severity of the many and serious documented problems facing courthouses across the state, and that while some county facilities are happily not in distress, many others are. Using examples of the few that are in good shape, they state, simply misses the point and ignores the big picture.

Are Bonds the Most Appropriate Method for Addressing Court Facility Deficiencies? As noted, the current proposals propose using bonds rather than current general fund monies to pay for renovating and constructing courthouses. Some argue using bonds this way is unfair to future generations, since general obligation bonds are like IOU's. The state sells them to investors to raise money, and then pays them back out of future general fund dollars with substantial interest over 20 or 30 years, interest to be paid by future taxpayers. According to some opponents of using bonds for such purposes, as a rule of thumb, general obligation bonds generally cost the General Fund approximately at least 1.4 times the principal amount over a 30-year period. With our current state budget deficit running at approximately \$5 billion or more, they contend that the repayment of such bonds will exacerbate the state's ongoing budget deficit. Proponents of the measures, on the other hand, state that capital improvements are the optimal use for bonds, since they take many years to complete, and they benefit future taxpayers directly and profoundly.

Might Some Other Approach to Funding Courthouse Infrastructure Needs Be Preferable, Such As A "Pay As You Go" Funding System? Just this past week some members of the

Governor's own party in the Assembly urged the Governor to take a different approach to funding much of his proposed infrastructure revitalization package. These legislators contend that instead of using bonds – with their attendant substantial interest payment obligations in the future – setting aside some percentage of current revenues to pay for infrastructure is preferable. However thus far these opponents have not similarly identified the attendant revenue increases or programmatic spending cuts that would be required if current General Fund monies are set aside for such infrastructure purposes. Others have noted that perhaps there should be use of some form of "reverse revenue stream" funding process utilized, whereby some or all of bond costs could be paid for by targeted fees connected to the improved services – e.g., special infrastructure court fees.

How Much Might Be Saved Through Court Administrative Efficiencies to Free Up Monies for Courthouse Construction? In considering the bonds proposals, the Committee may wish to discuss with the measures' proponents any revenues currently anticipated as the result of the courts' ongoing efforts to benefit from operational efficiencies derived from the Legislature's trial court funding reforms.

How Do Other States Finance Their Ongoing Court Facility Needs? As noted above, California has had a complicated and sometimes difficult history in converting from a locally-based county court system to a state funded trial court system. As policy-makers consider the merits of taxpayers undertaking substantial new debt for investing in courthouse construction and renovation, it seems wise to inquire of Administration and Judicial Council representatives how other states are addressing similar infrastructure challenges to see whether general obligation bonds or other funding approaches have been more successful in both the short and long terms in other states.

What, if Any, Criteria Were Used to Determine the Proposed Funding Levels in the Current Bond Proposals? It is also unclear whether any particular criteria were used by the Department of Finance to support the funding levels in the Administration's proposals. The Committee may wish to explore with Administration representatives whether the \$1.8 billion of bonds authorized for the courts in these proposals was derived from any specific formula or priority list, or is instead a "ball park" determination unrelated to any specific plan. It may also wish to explore how this amount compares to the facility funding needs that have been catalogued by the Judicial Council, which are reportedly more than four times that figure.

Who Should Decide How the Bond Funds Will Best Be Spent? The proposals also do not yet specify precisely how the bond proceeds shall be used. Article 1 of the proposals creates a "California Critical Infrastructure Facilities Finance Committee" which currently consists of the Director of Finance, the Treasurer (who shall act as chair), the Controller, the Director of the General Services, the Director of Parks and Recreation, the Director of Mental Health, and the Administrative Director of the Courts. Though the precise role and responsibilities of this Committee may be further clarified, it appears that it will be up to the Judicial Council to decide how to prioritize the projects that will be funded by the proposed bonds.

Some may contend that having the Council decide which court facilities will be improved or constructed, and which will not, may risk inadvertently politicizing the process within the judicial branch. Seen from another perspective, giving these decisions to the judicial and executive branches, while arguably largely excluding elected officials over the project prioritization process, may be seen as providing too-little opportunity for public participation. Some may assert that elected representatives, who better represent local and regional views, should have more influence over courthouse decisions that will have regional, safety, cost-effectiveness, and other implications. The Committee may thus wish to explore with witnesses their views as to whether it would be preferable for the Legislature to authorize each individual project prior to the bond being authorized, or whether another approval process with greater legislative oversight and input should be considered.

In addition, the Committee may wish to explore with the Administration whether it makes sense to have non-fiscal experts like the directors of General Services, Mental Health and Parks and Recreation serve on what is apparently traditionally a fiscal experts-type finance committee board.

What Is the View of the Legislative Analyst About the Proposed Bond Levels? Regardless of the particular formula or assumptions used by the Department of Finance in fashioning its current court bond proposals, the Committee also may wish to explore with the Legislative Analyst's Office its views about the funding amounts in these proposals. In a report issued just weeks ago, the LAO states that the Administration's proposed court bond amounts will be inadequate to fund court improvements beyond the next two years. The LAO report states: "[O]ver the next ten years, funding of several more billions of dollars would potentially be needed as the state takes over the construction and maintenance of hundreds of court facilities, as required under current law." [LAO Report, January 3, 2006.] In response to this concern, however, the proposals' supporters have noted these proposed bond measures would nevertheless be a helpful addition to any other available funds for such purposes.

Should It Be Possible for Bond Funds to Be Used on Non-State, or Multiuse, Government Facilities? And How Will the Special Funding Needs of Historically Significant County Facilities Be Handled? As noted, the current bond proposals sponsored by the Administration authorize the issuance of bonds for acquisition and maintenance of court facilities. However the proposals do not yet make clear whether any of the bond monies may be spent on county-owned, non-state facilities. Nor do they address how to deal with the common situation of court buildings being shared between various state and non-state tenants. In order to facilitate the use of facilities that are shared by a county and the courts, *i.e.*, shared-use facilities, Senator Escutia's SB 395 provides that bond proceeds may be used specifically for lease financing arrangements between the county and the court, with rental income from the lease to be deposited into the bond act construction fund. The current bond proposals do not yet contain any such authority for the use of bond proceeds to finance leasebacks of existing facilities transferred to the courts or of new court or county facilities. Considering that so many

of these facilities are shared-use, the Committee may wish to explore with measures' supporters whether providing for such lease financing authority makes sense. In addition, the Committee may wish to discuss how the supporters anticipate addressing and funding the special renovation challenges of historically significant courthouses, many of which have major design and permitting challenges.

How Would the Judicial Council's Current "Five-Year Plan" Priorities Interface With the More Limited Funds Potentially Being Made Available Under the Current Bond Proposals? As noted above, the Judicial Council states it has adopted an impartial and transparent list of ranked trial court capital projects presented in its Five-Year Infrastructure Plan that, once finalized, could be used to make recommendations for courthouse construction and spending priorities. According to Council staff, the Council will consider a revised prioritization methodology this spring. The Committee may thus wish to discuss with Judicial Council representatives how its evolving Five-Year Plan containing individual facility prioritization rankings may change in the coming months, and how the Legislature and Department of Finance will know, and have input on, which particular projects will be prioritized by the Judicial Council for future construction or renovation. The Committee may also wish to discuss whether it is wise, especially given the sizeable costs involved, for an outside entity to make an independent evaluation of courthouse needs.

Is It Clear How Much Additional Court Space Is Actually Needed to Support the Scope of the Bonds Being Proposed? To accommodate population growth over the next 20 years, the Judicial Council Task Force has suggested that California will need almost 6 million square feet of additional court space. The Committee may wish to explore with Council representatives how this figure was determined, and upon what assumptions this figure is based. The Committee may also wish to explore what percentage increase in current court capacity this expansion would accomplish, and how it would compare to the expansion plans for other state facilities, such as hospitals and other needed state facilities.

Are the Provisions Authorizing the Use of Bond Monies Better Spelled Out in SB 395? While the language in the Administration's bond proposals ensures full compliance with the State General Obligation Bond Law, it currently does not contain much guidance to the committee that will eventually administer the funds. For both the 2006 Act and the 2010 Act, SB 1163 provides only a general purpose for the bond issue proceeds: "the acquisition, design, construction or renovation of trial court facilities." In contrast, SB 395, considered last year by this Committee, more precisely lays out that bond proceeds may be used only for the general purposes above, as well as all of the following: (1) acquisition of fee ownership of real property upon which a new court facility may be constructed; (2) performing maintenance or repair of court facilities; (3) performing seismic upgrading of court facilities; and (4) paying pursuant to lease financing for the county's share of the costs in a shared-use facility for one or more of the design, acquisition, construction, maintenance, repair, renovation, or seismic upgrading of the portion of a building containing trial court facilities that is the responsibility of the

county. The Committee may wish to discuss with the bond proposals' sponsors whether they concur such greater specificity is advisable.

Besides the Seemingly Intractable Seismic Safety Hurdles Facing the Court Transfer Process, What Other Issues Are Adding to the Roadblocks Currently Preventing Court Transfers? In addition to the sizeable seismic safety challenges noted below, it appears that there are other problems currently hindering the transfer of court facilities from the counties to the state. As noted above, in an attempt to provide an objective criterion for determining appropriate "maintenance of effort" (MOE) payments once a facility is transferred, Senator Escutia's SB 1732 established a time-period for establishing the MOE (now called County Facility Payment "CFP") calculation. The time-period selected for determining these payments was 1995-2000. However SB 1732 apparently did not take into account that some court facilities reportedly have no historical cost basis for determining a reasonable CFP, thereby inappropriately requiring the state to assume full operations and maintenance costs. The Committee may therefore also wish to explore how such "CFP" transfer hurdles might best be bridged in order to ensure that maximum use of any bond monies can be made.

Letters of Support Received by the Committee Thus Far:

- Beverly Hill Bar Association
- Desert Bar Association
- Fresno County Bar Association
- Hemet/San Jacinto Bar Association
- Riverside County Bar Association
- San Bernardino County Bar Association
- California Court Appointed Special Advocate Association
- California Judges Association
- Disability Rights Legal Center
- Mediation Law Group
- State Bar of California
- Superior Courts of the following Counties: Contra Costa, El Dorado, Fresno, Glenn, Humboldt, Imperial, Inyo, Lake, Napa, Orange, Placer, Riverside, Sacramento, San Benito, San Bernardino, San Diego, Santa Barbara, Santa Clara, Shasta, Solano, Stanislaus, Tulare, and Yolo