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MEMORANDUM

TO: John Arntz, Director of Elections

FROM: Burk E. Delventhal, Deputy City Attorney *BE Delventhal*
Scott M. Reiber, Deputy City Attorney *SM Reiber*

DATE: October 17, 2017

RE: Voting Threshold For Initiative Tax Measures Following *California Cannabis Coalition v. City of Upland*

1. Summary.

The California Supreme Court recently decided *California Cannabis Coalition v. City of Upland* ("*California Cannabis*"). The Court interpreted Article XIII C, Section 2(b) of the California Constitution,¹ which requires local government proposals imposing general taxes to be submitted to the voters at an election at which members of the governing body stand for election (a "general election"), not to apply to measures submitted through the citizen initiative process. Under this decision, citizens exercising their right of initiative may now call for placing general (or special) taxes on the ballot at a special election, as long as they comply with the City Charter and the San Francisco Elections Code requirements for qualifying an initiative measure for a special election.

You have asked what the Court's ruling means for the voting threshold required to pass a special tax measure that the voters may, going forward, submit to the ballot by initiative. A special tax measure is a charter amendment or ordinance imposing a tax and designating the revenues for a specific purpose, not allowing the revenues to be used for general governmental purposes.

The decision did not reach the issue of whether a special tax submitted by voter initiative needs only a simple majority vote, and not the two-thirds vote required of special taxes placed on the ballot by the Mayor or the Board of Supervisors. But because the Court's analysis and reasoning also appear to apply to the two-thirds voting requirement for special taxes, both special and general taxes proposed by voter initiative now likely require only a majority vote of the electorate to pass. Indeed, the language of the constitutional provisions imposing the two-thirds voting requirement is substantially the same as the language addressed in *California Cannabis*. And these constitutional provisions were passed to satisfy the same general purposes that the *California Cannabis* Court cited as supporting its conclusion that the constitutional requirements related to the timing of elections do not apply to voter initiatives.

Future litigation, legislation, or a ballot measure to amend the State Constitution to address the *California Cannabis* decision may resolve this issue with more certainty.

It is very unlikely that the City, by virtue of being a charter city and county, retains the authority to require a two-thirds vote for initiative tax measures despite the implications of the *California Cannabis* decision.

¹ Article and section references are to the California Constitution, unless otherwise specified.

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2. Background: The *California Cannabis* Decision.

The *California Cannabis* case involves a voter initiative ordinance that would have required medical marijuana dispensaries to pay an annual \$75,000 "licensing and inspection fee." After the proponents obtained the necessary signatures to qualify the initiative for the ballot, the City of Upland determined that the fee was actually a general tax. Because Article XIII C, Section 2(b) precludes local governments from imposing general taxes unless they are submitted to the voters at a general election, Upland refused to call a special election for the proposed initiative, and instead ordered the initiative submitted to the voters at the next general election.

The initiative proponents sued Upland arguing that it violated the California Elections Code by failing to submit the initiative to the voters at a special election because, among other reasons, Article XIII C, Section 2(b) did not apply to taxes proposed by voter initiative. The trial court found in Upland's favor, the Court of Appeal reversed and found in the proponents' favor, and Upland petitioned the California Supreme Court. The Court granted the petition and elected to hear the case, even though the initiative at issue was defeated at the November 8, 2016 ballot, because the case presented "important questions of continuing public interest." (*California Cannabis*, p. 5.)

The California Supreme Court held that the requirement in Article XIII C, Section 2(b) that general taxes be submitted to the voters at a general election did not apply to taxes proposed by voter initiative. The Court interpreted the clause in Article XIII C, Section 2(b) ("no local government may impose, extend, or increase any general tax") to exclude taxes emanating from voter initiative petitions. It further found that interpretation consistent with the apparent purpose of Proposition 218 in placing Article XIII C in the Constitution. The Court concluded that the purpose was to limit the powers of politicians, and not the electorate. It also supported its conclusion by noting that the voters' initiative power must be interpreted broadly, resolving "doubts about the scope of the initiative power in its favor whenever possible." (*California Cannabis*, p. 9.)

Two Justices dissented. They would have found that Article XIII C, Section 2(b) applied to taxes proposed by voter initiative. In addition to disagreeing with the majority's analysis of the language and purpose of Article XIII C, Section 2, they expressed concern about the consequences of the majority's decision: "[F]rom here on out, special taxes can be enacted by a simple majority of the electorate, as long as proponents can muster the necessary quantum of support to require consideration of the measure." (*California Cannabis, concurring and dissenting opinion*, p. 12.)

3. Two-Thirds Voting Requirement for Special Taxes.

In three different places the California Constitution requires a two-thirds vote to approve special taxes: Article XIII A, Section 4; Article XIII C, Section 2(d); and Article XIII D, Section 3(a)(2). The *California Cannabis* decision does not address whether the two-thirds voting requirement for special taxes in those provisions also does not apply to special tax measures emanating from an initiative petition.

As we explain below, the *California Cannabis* decision placed great weight on the difference between taxes emanating from the legislative body and taxes emanating from an initiative petition. The Court noted that the special rules for when general tax measures may be

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submitted to the voters apply to general taxes that the “local government” imposes, but not to general tax measures emanating from an initiative petition because such taxes are not imposed by the local government. And the Constitution uses substantially the same “local government” language when specifying which taxes require a two-thirds vote in contravention of the general default rule that all measures require only a majority vote unless the California Constitution specifies otherwise. Therefore, a court would likely conclude that special tax measures emanating from an initiative petition no longer require a two-thirds vote. Because a different analysis may apply to each of the constitutional provisions listed above, we discuss each separately below.

a. *The Two-Thirds Voting Threshold For Special Taxes In Article XIII C, Section 2(d) Very Likely Does Not Apply To Voter Tax Initiatives.*

Article XIII C, Section 2(d) provides, in relevant part, that “[n]o local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.” As indicated on page 12 of the dissent in *California Cannabis*, this language is virtually identical to the language in Article XIII C, Section 2(b), which was pivotal in the *California Cannabis* decision, such that there is no meaningful way to distinguish the two. But the Court made remarks on page 20 of the majority opinion that could be interpreted as suggesting that the two-thirds voting requirement in Article XIII C, Section 2(d) will continue to apply to voter initiatives:

[T]he enactors [of Article XIII C, Section 2(d)] adopted a requirement providing that, before a **local government** can impose, extend, or increase any special tax, voters must approve the tax by a two-thirds vote. That constitutes a higher vote requirement than would otherwise apply. [Citations omitted.] That the voters explicitly imposed a procedural two-thirds vote requirement on themselves in article XIII C, section 2, subdivision (d) is evidence that they did not implicitly impose a procedural timing requirement in subdivision (b). [Emphasis added.]

This language could lead to the inference that the Court believed that the two-thirds voting requirement in Article XIII C, Section 2(d) applies to voter initiatives as well as to other ballot measures. But the Court’s use of the phrase “local government,” which the Court interpreted to exclude the voters, seems to contradict such a reading. As the concurring opinion points out, this statement appears to confirm that the voters imposed the two-thirds voting requirement on themselves *only with respect to taxes placed on the ballot by the local government* – e.g., by the Mayor, the Board of Supervisors, or four members of the Board in San Francisco. (See *California Cannabis, concurring and dissenting opinion*, p. 12, n.7.)

Accordingly, because the language in subsection (d) of Article XIII C, Section 2 requiring a two-thirds vote for special taxes is the same as the language in subsection (b) relating to the timing of the election for general taxes, a court would very likely rule that the two-thirds voting requirement in Article XIII C, Section 2(d) applies only to special taxes emanating from the legislative body or the Mayor, and not to special taxes emanating from an initiative petition.

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b. Article XIII D, Section 3(a), Which Covers Taxes, Assessments, Fees, And Charges On Property Or On Persons As An Incident Of Property Ownership, Very Likely Does Not Apply To Voter Initiatives.

Article XIII D, Section 3(a) provides, in relevant part, that “[n]o tax ... shall be assessed by any agency upon any parcel or property or upon any person as an incident of property ownership except...[a]ny special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.” “Agency,” as used in this section, is defined to have the same meaning as “local government” in Article XIII C. Thus, the only true distinction in language between Article XIII D, Section 3(a), and Article XIII C, Section 2(b) is that the former refers to taxes “assessed” by a local government, and the latter refers to taxes “imposed” by a local government.

The terms “assessed” and “imposed” are not materially different. Indeed, the definition of “assessment” in Black’s Law Dictionary includes “the *imposition* of something, such as a tax or fine, according to an established rate.” (Black’s Law Dictionary (10th ed. 2014) (emphasis added).) Moreover, the policy arguments that the Court made in *California Cannabis* (e.g., that the ballot materials were focused on taxes politicians propose as opposed to taxes the voters themselves initiate, that the direct initiative right should be zealously protected, and that finding otherwise would improperly conflict with the California Elections Code provisions permitting initiative measures), should also apply to Article XIII D.

For all these reasons, it seems very unlikely that a court would conclude that Article XIII D’s use of the term “assess” instead of “impose” is sufficient to strip the voters of the right to direct democracy. If Article XIII D did so, any taxes imposed on a parcel of property or upon any person as an incident of property ownership (e.g., parcel taxes) would be required to be passed by a two-thirds vote of the electorate, regardless of how they were placed on the ballot. Instead, it appears that courts will conclude that taxes on parcels or persons as an incident of property ownership emanating from an initiative petition are not constrained by the two-thirds voting requirement in Article XIII D, Section 3.

c. The Two-Thirds Vote Requirement In Article XIII A, Section 4 Very Likely Does Not Apply To Voter Initiatives.

The language in Article XIII A, Section 4 imposing a two-thirds voting requirement for special taxes is substantively similar to the language in Article XIII C, Sections 2(b) and (d). It provides:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district. [Emphasis added.]

Although this section is drafted as a grant of power, California courts have stated that “section 4 is actually a limitation on the imposition of ‘special taxes’ because it requires a two-thirds vote for their approval.” (See, e.g., *Los Angeles County Transportation Com. v. Richmond*, 31 Cal.3d 197, 201 (1982).) The only real distinction between the language requiring a two-thirds vote in Article XIII C, Section 2(b) and Article XIII A, Section 4, appears to be that Article XIII A applies to taxes imposed by “cities, counties and special districts,” whereas Article XIII C applies to taxes imposed by “local governments,” which are defined in Article XIII C,

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Section 1(b) as “any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.” As described below, a court is unlikely to reach a different result based on this minor distinction in language.

The Court’s reasoning interpreting “local government” to exclude matters emanating from the electorate by initiative would also apply to the phrase “cities, counties and special districts.” For example, the Court’s description of the ballot materials as focusing on politicians imposing taxes on the electorate, rather than the electorate initiating the imposition of taxes on themselves, appears to apply equally to Article XIII A, Section 4, as the Court recognizes on page 16 of its opinion. (*See also Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal.3d 245, 250 (1991) (“nothing in the official ballot pamphlet [for Proposition 13, which added Article XIII A] supports the inference that the voters intended to limit their own power to raise taxes in the future by statutory initiative”).) Indeed, the ballot pamphlet for Proposition 13 refers to Article XIII A, Section 4 as limiting the tax authority of “local governments,” using the same term as in Article XIII C, Section 2.

And throughout, the *California Cannabis* opinion (pages 2, 7-9, 13, 23-25, and 28) relies on the Court’s duty to protect and liberally construe the people’s constitutional right to direct democracy, which duty would apply equally when deciding whether Article XIII A, Section 4 limits that right. This liberal construction of the right to direct democracy is consistent with what the Court in *Los Angeles County Transportation Commission v. Richmond* referred to as the “fundamentally undemocratic nature” of the two-thirds voting requirement in Article XIII A, Section 4, which the Court noted meant that the language of that section “must be strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and ‘special districts’ to enact ‘specials taxes’ by a majority rather than a two-thirds vote.” (31 Cal.3d at 205.) Moreover, the Court’s conclusion on page 23 that applying Article XIII C, Section 2 to voter initiatives would impliedly repeal Elections Code section 9214 would also apply to an analysis of Article XIII A, Section 4.

Because the Court’s *California Cannabis* decision appears primarily tethered to Proposition 218’s purpose as evidenced by the ballot materials, and to the general policy of protecting the public’s right to direct democracy, a court is likely to interpret Article XIII A, Section 4 the same as Article XIII C, Section 2(b), and likely would not distinguish between the two based on a technical analysis of the specific phraseology of each provision. This likely outcome is further supported by the Court’s express reference on pages 16-17 of its opinion to the purposes of Propositions 13 and 26 as suggesting that Propositions 13, 218, and 26 all furthered the shared intent of limiting *politicians’* power, and not the voters’ power acting through the initiative process. And the Court’s decision in *Kennedy Wholesale*, which concluded that Article XIII A, Section 3 did not limit the rights of the voters to enact state taxes, appears to support the conclusion that Article XIII A, Section 4 similarly did not limit the voters’ rights to initiate and adopt all taxes by a majority vote.

4. San Francisco’s Charter Does Not Likely Retain the Two-Thirds Voting Requirement in the City.

The constitutional provision reserving the voters’ right to initiative on which the *California Cannabis* decision relies states that it “does not affect a city having a charter.” (Cal. Const. Art. II, § 11(a).) Rather, Section 14.100 of the City Charter grants the initiative power to

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the City's voters ("Except as otherwise provided in this Article, the voters of the City and County shall have the power to enact initiatives and the power to nullify acts or measures involving legislative matters by referendum."). Article XVII of the City Charter defines "initiative" as follows:

"Initiative" shall mean (1) a proposal by the voters with respect to any ordinance, act or other measure **which is within the powers conferred upon the Board of Supervisors to enact**, any legislative act which is within the power conferred upon any other official, board, commission or other unit of government to adopt, or any declaration of policy; or (2) any measure submitted to the voters by the Mayor or by the Board of Supervisors, or four or more members of the Board.
[emphasis added]

Thus, the plain language of the City Charter appears to permit voter initiatives only where such initiatives are within the power conferred upon the Board of Supervisors to enact. But this provision does not change the conclusion after *California Cannabis* that special taxes placed on the ballot by voter initiative now need only a simple majority to be enacted.

We have been asked whether, because the Board of Supervisors may place special taxes on the ballot only if they are subject to a two-thirds vote (and, similarly, may place general taxes on the ballot only at a general election), the initiative power in the City is similarly constrained. The answer is very likely "no" for three reasons.

First, on pages 18 and 19 of the *California Cannabis* decision, the Court concludes that procedural requirements (such as two-thirds voting requirements) are presumed not to apply to the initiative power absent evidence that they were intended to so apply, whereas substantive restraints on legislative power (such as state preemption of a field) apply equally to voter initiatives. Under this analysis, a court would likely conclude that the limitation in Article XVII of the City Charter applies only to *substantive* restraints on the Board's power, and not to procedural requirements, such as the two-thirds voting requirement in Articles XIII A, XIII C, and XIII D of the California Constitution.

Second, the language in Article XVII of the City Charter is ambiguous, because the Board of Supervisors may not *enact* any local taxes—it may only pass a motion to submit such taxes to the voters. So relying on a strict reading of the Charter would lead to the absurd result that no taxes could be proposed by initiative. And the constitutional amendments precluding the Board of Supervisors from imposing taxes without a vote of the electorate were passed *after* the language in Article XVII was made a part of the City Charter. Given the ambiguity in Article XVII and the rule favoring exercise of the initiative right, a court is unlikely to infer a limitation on the voters' right to impose taxes through the initiative process because a subsequent constitutional amendment took the power to directly impose taxes away from the Board of Supervisors. (See *California Cannabis*, pp. 2, 7-9, 13, 23-25, and 28.)

Finally, the logical extension of this argument would mean that the City could impose any voting requirement on the power of initiative. For example, the City could amend its Charter to require a three-quarters vote for all tax measures or even all initiative measures for that matter. It is highly unlikely a court would find that a charter city had that authority to infringe on the initiative power.

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5. Conclusion.

Under the *California Cannabis* decision, voters may propose initiatives that would submit either general or special taxes to the electorate at a special election. Although the Court in *California Cannabis* did not reach the issue of whether a special tax proposed by voter initiative is subject to the two-thirds voting requirement applicable to special taxes proposed by a legislative act, it seems very likely that voters may now propose special taxes by initiative subject only to a majority vote.

Future litigation, legislation, or ballot measures to amend the State Constitution may more definitively resolve this issue. For example, Assembly Member Chad Mayes has already introduced a resolution to propose a constitutional amendment that would amend Article XIII C to reverse the *California Cannabis* decision with respect to the elections at which general taxes may be submitted to the voters, and to confirm that the two-thirds voting requirement applies to voter initiatives, by defining "local government" to include the electorate exercising its initiative power. (ACA-19 (Sept. 6, 2017).)

The City of Upland has filed a petition for rehearing in the *California Cannabis* case. Given the scope of the petition for rehearing, it is unlikely that it will affect the substantive conclusions in this memorandum. But we will update this memorandum if the Supreme Court grants the petition for rehearing and makes material changes to its opinion.