

Date: July 29, 2019

To: Finance Committee

From: Sharon L. Anderson, County Counsel 

Re: **SALES TAX MEASURES - GENERAL, SPECIAL, VOTER-INITIATED,
COUNTYWIDE, OR UNINCORPORATED AREA ONLY**

SUMMARY

This Office has been asked to outline the procedural steps necessary to bring a general or special sales tax measure¹ to the voters for approval. An ordinance proposing a local sales tax increase must be approved by a supermajority, four-fifths vote of the board of supervisors. This is true both for an ordinance proposing that the revenues be used for any county purpose (i.e., a general tax) or for a specific purpose (i.e., a special tax). A general sales tax measure must be approved by a majority of the electorate. A special sales tax requires a two-thirds vote of the electorate.

A “general” sales tax measure can only be placed on the ballot when consolidated with a “regularly scheduled general election for members of the governing body,” unless an emergency is unanimously declared by the governing body.² The next potential dates for a general sales tax measure would be March or November of 2020.³ A “special” sales tax election could be scheduled for the second Tuesday in April in even-numbered years (April 2020); the first Tuesday after the first Monday in March of odd-numbered years (March 2021), the first Tuesday after the first Monday in November of each year (November 2019), and the first Tuesday after the first Monday in March in each even-numbered year (March 2020), or any other date permitted by law.⁴ Mailed ballot election dates are the first Tuesday after the first Monday in May of each year (May 2020) and the last Tuesday in August of each year (August 2019).⁵ There are no published decisions that discuss the submission of a sales tax measure to the voters through a mailed ballot election. In the abstract, an all mail ballot election might be permissible

¹ A locally enacted sales tax is known as a “transactions and use tax.” See Rev. & Tax. Code, § 7285et seq., for county transaction and use taxes.

² Cal. Const., art. XIII C, § 2, subd. (b).

³ Elec. Code, §§ 1001, 1300, 1405

⁴ Gov. Code, § 53724(d).

⁵ Elec. Code, § 1500.

for a countywide special sales tax measure under Elections Code section 4000(c)(8), but further review would be needed to determine if there are practical limitations to this approach.

Theoretically, a citizen sales tax initiative could be scheduled on any of the dates authorized for a general or special sales tax countywide election.⁶ But, because some cities in this county are already at the statutory 9.25% sales tax cap, a countywide sales tax increase could not be proposed unless the cap for this county were first increased by legislative action. It is unlikely that a citizen sales tax initiative could be proposed for the unincorporated area only. That question would require further research. This memorandum pertains only to sales tax measures authorized by Revenue and Taxation Code sections 7285 and 7285.5. Different laws may apply to other types of tax measures.

This procedural guide has been divided into the following independent sections and subsections to assist the reader.

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BACKGROUND

Local governments levy many types of taxes, such as property taxes, parcel taxes, hotel taxes, utility taxes, sales taxes and other types of taxes, including Mello-Roos and property transfer taxes. Since 1978, the state's voters have amended the California Constitution several times, most significantly through the approval of Proposition 218 in 1996, to require that local government tax increases be approved by the local electorate. Proposition 218 added article XIII C and article XIII D to the California Constitution. Subsequent voter initiatives⁷ and legislative action,⁸ as well as guidance supplied by California courts, have resulted in a complex system of voter approval requirements for local taxes. The laws directly governing voter approval of local

⁶ This was the holding in *California Cannabis Coalition v. City of Upland* (2017) 39 Cal.5th 282.

⁷ Proposition 26, which amended article XIII A, section 3 of the California Constitution (adopted by Proposition 13 and relating to state taxes) and article XIII C section 1 (adopted by proposition 218) to add new definitions of state and local "taxes" and define all revenue measures imposed by the government as "taxes" unless within one of seven express exemptions for local government.

⁸ Including the Proposition 218 Omnibus Implementation Act, Gov. Code, §§ 53750-53758.

sales tax measures are found at Revenue and Taxation Code sections 7285 and 7285.5. These statutes specify that a four-fifths vote of the board of supervisors is required to place either a general or a special sales tax measure on the ballot. Thereafter, a simple majority of voters may approve the levy of a sales tax for general governmental purposes; however, a sales tax for a specific purpose requires that the tax and an expenditure plan for the projects to be funded by the tax be approved by a supermajority of two-thirds vote of the electorate.

Section 3 of article XIII C of the California Constitution addresses the role of citizen initiatives in matters affecting local taxes assessments, fees, and charges.⁹ Over the years it has generally been understood that citizen initiatives to increase taxes must secure the same vote of the electorate as those placed on the ballot by local governing bodies, i.e., a majority vote for general taxes and a two-thirds vote for special taxes.

On August 28, 2017, the California Supreme Court issued its decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924. The court held that a citizen-initiated general tax, as compared with a general tax initiated by a city council alone, does not have to comply with the Proposition 218 requirement that a general tax must be approved by the voters at a general election. The case involved an initiative to legalize medical marijuana dispensaries and impose a \$75,000 per year “annual Licensing and Inspection fee,” which the City of Upland concluded was a general tax, i.e., a tax to fund any lawful purpose of the city. Because article XIII C, section 2(b) only permits general tax measures to appear on ballots when city council seats are contested, the city council set the measure for the 2016 general election. The coalition supporting the initiative sued to compel an earlier special election. The trial court agreed with the city that the general tax measure could not be set for a special election. The Court of Appeal reversed and concluded that the article XIII C, section 2(b) requirement that general tax measures be on a regularly scheduled general election ballot does not apply to initiatives. The city obtained Supreme Court review. The Supreme Court affirmed the appellate decision.

Neither the Court of Appeal nor the Supreme Court decided whether the measure under consideration imposed a tax, but the Supreme Court concluded that even if it was a tax it was not subject to the general-election rule because that rule only applies to taxes proposed by the city council, not by initiative. Specifically, the 5-2 ruling stated that article XIII C, section 2(b) of the California Constitution does not restrict the provision of the state’s laws governing local initiatives that allows petitioners to collect enough signatures to qualify a tax measure for a special election ballot.

⁹ “Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees, and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.” Cal. Const., art XIII C, § 3.

The *Upland* case did not say whether other portions of article XIII C, such as the requirement that special taxes be approved by a supermajority of two-thirds of the voters, would still apply to citizen initiatives. The only guidance we have on the issue are the following arguments made by the majority in support of the ruling: (1) the citizen initiative process is separate from the actions of *local government* as defined by Proposition 218; (2) article XIII C, section 2 does not explicitly mention initiatives; (3) article XIII C, section 2(d) was not specifically intended to apply to initiatives either by proponents of Proposition 218 or by the voters that approved Proposition 218; and (4) the court's obligation to "protect and liberally construe the initiative power and to narrowly construe provisions that would burden or limit its exercise" means it must err on the side of not applying restrictions to citizen initiatives.

It may take years of litigation involving citizen-initiated tax measures, and potentially additional legislation, to fully understand which Proposition 218 requirements carry over to the citizen initiative process. In the *Upland* case, the Supreme Court specifically declined to address a hypothetical situation where signature gatherers would gather enough signatures to qualify a tax for the ballot and then a city council would adopt the tax without submitting it to a vote of the people.¹⁰ However, given that California voters have explicitly imposed voter approval requirements on themselves through article XIII C, section 2(c) and (d) of the state Constitution, we expect the courts to confirm that a legislative body cannot adopt a citizen-initiated sales tax without submitting the ordinance to the voters for approval.

On July 5, 2019, in *Howard Jarvis Taxpayers Association, et al., v. City and County of San Francisco, et al.*, San Francisco Superior Court Case No. CGC-18-568657, a San Francisco Superior Court judge ruled that city officials did not violate state law or the City Charter by allowing two special tax measures to pass with a simple majority vote, rather than the supermajority, two-thirds vote requirement ordinarily applied to special tax measures. A copy of that decision is attached. It is anticipated that this ruling will be appealed, potentially all the way to the California Supreme Court. A complete resolution of the case could take as long as three years. Given the uncertainty in the law, for the foreseeable future it is likely that any effort to impose a citizen-initiated special purpose sales tax by majority vote under the *Upland* decision (as opposed to the two-thirds vote required by Propositions 13 and 218) will face immediate legal challenge.¹¹

¹⁰ *Upland, supra* at 947.

¹¹ In November 2018, a charter amendment proposing a parcel tax to fund education services and career readiness was approved by 62% of the voters in the City of Oakland. The ballot measure, Measure AA, was placed on the ballot through a citizens' initiative. The city council certified the measure as approved on December 11, 2018, based on the argument that after the *Upland* case, a voter-initiated ballot tax measure only requires the approval of a majority of the city's voters. The city council's decision is being challenged in court. On April 16, 2019 the city council will decide whether to begin collecting the parcel tax or to wait for the outcome of the pending litigation. (See, East Bay Times, "Oakland Sued Over Measure AA Parcel Tax," by Ali Tadayon, February 1, 2019, updated February 4, 2019, and East Bay Times "Oakland City Council to Decide Whether to Collect Parcel Tax," by Ali Tadayon, April 3, 2109.)

DISCUSSION

I. GENERAL SALES TAX MEASURES
INITIATED BY THE BOARD OF SUPERVISORS

A. Countywide General Sales Tax Measures.

1. **The Board of Supervisors Must Adopt a Countywide General Sales Tax Ordinance by a Four-Fifths Vote.** To initiate a countywide general sales tax measure, the board of supervisors must adopt an ordinance proposing a countywide transactions and use tax under Revenue and Taxation Code section 7285. The board must introduce the proposed tax ordinance at one regular meeting and adopt it at a second regular meeting held at least five days after the date of its introduction.¹² A general sales tax ordinance must be approved by at least four members of the board of supervisors.¹³

2. **Contents of a Countywide General Sales Tax Ordinance.** The ordinance proposing the tax must include the type of tax and rate of tax to be levied, the method of collection and the date upon which an election shall be held on the issue.¹⁴ The form of the ordinance is supplied by the California Department of Tax and Fee Administration.

3. **The Countywide General Sales Tax Ballot Measure Must Be Approved by A Majority of all Voters in the County.** A proposed countywide general sales tax ordinance would be submitted to the voters of the entire county for approval. A majority of the electors voting on the measure must approve it.¹⁵ The ordinance is not effective until after it is approved by the voters.¹⁶

4. **Election Dates for a Countywide General Sales Tax Measure.** The timing of general sales tax measures is governed by Proposition 218. Proposition 218 requires that a general tax measure be on a regularly scheduled election date for members of the

¹² Gov. Code, § 25131.

¹³ Gov. Code, § 53724(b); Rev. & Tax. Code, § 7285.

¹⁴ Gov. Code, § 53724(a).

¹⁵ Cal. Const., art. XIII C, § 2, subd. (b); Rev. & Tax. Code, §7285: "The board of supervisors of any county may levy, increase, or extend a transactions and use tax throughout the entire county or within the unincorporated area of the county for general purposes at a rate of 0.125 percent or a multiple thereof, if the ordinance proposing that tax is approved by a two-thirds vote of all members of the board of supervisors and the tax is approved by a majority vote of the qualified voters of the entire county if levied on the entire county or the unincorporated area of the county if levied on the unincorporated area of the county, voting in an election on the issue. The board of supervisors may levy, increase, or extend more than one transaction and use tax under this section, if the adoption of each tax is in the manner prescribed in this section. The transactions and use tax shall conform to Part 1.6 (commencing with Section 7251). The revenues derived from the imposition of a tax pursuant to this section shall only be used for general purposes within the area for which the tax was approved by the qualified voters."

¹⁶ Gov. Code, § 53723.

board of supervisors, except in cases of emergency declared by a unanimous vote of the governing body.¹⁷ Pursuant to Government Code section 24202 and Elections Code section 1300, the election dates for boards of supervisors are on the same schedule as statewide elections. Elections Code section 1001 establishes these election dates to be March and November of even numbered years. *Silicon Valley Taxpayers Association v. Garner* (2013) 216 Cal.App.4th 402, clarified that either the March date or the November date is appropriate, even if a supervisor is not, in fact, on the November ballot because the race was decided at the primary election. The next two available dates would be March or November of 2020.

5. Mailed Ballots for an Election on a Countywide General Sales Tax. Elections Code section 4000 specifies nine distinct situations under which elections may be conducted entirely by mailed ballot. One of the nine situations, identified in subsection (c)(8) of Section 4000, is “[a]n election or assessment ballot proceeding required or authorized by article XIII C or XIII D of the California Constitution.” In *Greene v. Marin County Flood Control & Water Conservation District* (2010) 49 Cal.4th 277, 297, the California Supreme Court noted in dicta that: “The elections authorized by Proposition 218 may be conducted by mail alone, while most other elections may not be.”

When considering the possibility of a mailed ballot election, however, the Proposition 218 requirement that elections on a general tax be consolidated with “regularly scheduled general election of members of the governing body” must also be considered.¹⁸ We are not aware of any other county that has held a countywide general tax election by mailed ballot. If an all mail ballot election to approve a general sales tax is something that this county wishes to pursue, we recommend that the costs, and legal, and logistical concerns, be further reviewed by the County Administrator’s Office, the Elections Department, and this Office before proceeding.

6. Legislation is Required Before a Countywide General Sales Tax Can be Levied. The Revenue and Taxation Code caps the sales tax rate at 9.25%, which is composed of a 7.25% statewide tax rate plus a 2% local tax rate cap. The cities of Antioch, El Cerrito, Martinez, Moraga, Pinole, and Richmond each have their own locally-imposed sales tax which, combined with existing state and county sales taxes, puts the sales tax rate in these cities at or above the 9.25% cap.¹⁹ This means that legislation to increase the cap would be required before a countywide sales tax increase could be proposed to the voters. A copy of the California Sales and Use Tax Rate Schedule, effective April 1, 2019, is attached.

¹⁷ Cal. Const., art. XIII C § 2, subd. (b).

¹⁸ Cal. Const., art. XIII C, § 2, subd. (b).

¹⁹ The cap in El Cerrito is 9.75% (presumably due to special legislation). The other cities are at the 9.25% cap.

B. Unincorporated Area General Sales Tax Measure.

1. The Board of Supervisors Must Adopt an Ordinance by a Four-Fifths Vote to Initiate an Unincorporated-Area-Only General Sales Tax. The process to initiate a general sales tax measure in the unincorporated area is the same as for a countywide general sales tax.²⁰ The proposed tax ordinance would be introduced at one regular meeting of the board of supervisors and adopted by a four-fifths vote at a second regular meeting held at least five days after the date of its introduction.²¹

2. Contents of an Unincorporated-Area-Only General Sales Tax Ordinance. The contents of an ordinance proposing an unincorporated area only general sales tax would be similar to the ordinance for a countywide tax measure. The form of the ordinance is supplied by the California Department of Tax and Fee Administration.

3. The Unincorporated-Area-Only General Sales Tax Measure must be Approved by Voters in the Unincorporated Area. The ordinance would only need to be submitted to the voters in the *unincorporated* area of the county and approved by majority vote of those voters. The ordinance is not effective until after it is approved by the voters.²²

4. Unincorporated-Area-Only General Sales Tax Election Dates. The election dates would be the same as for a countywide general sales tax measure. The next two available dates would be March or November of 2020.

5. Mailed Ballots for an Election on an Unincorporated-Area-Only General Sales Tax. A mailed ballot election for a general sales tax measure in the unincorporated area theoretically may be possible, but potentially would not be practical due to the constitutional requirement that an election on a general tax measure be consolidated with a regularly scheduled general election of members of the governing body.²³

6. Ability to Levy an Unincorporated-Area-Only General Sales Tax. Because the unincorporated area sales tax rate is only at 8.25%, the voters could authorize a general sales tax of up to 1% in the unincorporated area only.

²⁰ Rev. & Tax. Code, § 7285; Elec. Code, § 9140.

²¹ Gov. Code, § 25131; Gov. Code, § 53724(b).

²² Cal. Const., art. XIII C, § 2, subd. (b); Rev. & Tax. Code, § 7285; Gov. Code, § 53723.

²³ Cal. Const. art. XIII C, § 2, subd. (b).

**II. SPECIAL SALES TAX MEASURES
INITIATED BY THE BOARD OF SUPERVISORS**

A. Countywide Special Sales Tax Measures.

1. The Board Must Adopt a Countywide Special Sales Tax Ordinance by a Four-Fifths Vote. To initiate a countywide special sales tax measure, the board of supervisors must adopt an ordinance proposing a countywide sales tax for a specific purpose under Revenue and Taxation Code section 7285.5.²⁴ The proposed tax ordinance would be introduced at a first regular board of supervisors meeting and adopted at a second regular meeting held at least five days after the date of its introduction.²⁵ A special sales tax ordinance must be approved by at least four members of the board of supervisors.²⁶

2. Contents of a Countywide Special Sales Tax Ordinance. The ordinance proposing a countywide special sales tax must include the type of tax and rate of tax to be levied, the method of collection, the date upon which an election shall be held on the issue, the purpose or service for which its imposition is sought and “an expenditure plan describing the specific projects for which the revenues from the tax may be expended.”²⁷ The form of the ordinance is supplied by the California Department of Tax and Fee Administration.

3. Two-thirds Voter Approval Required to Pass a Countywide Special Sales Tax Ordinance. The ordinance proposing the countywide special sales tax must be submitted to the voters of the entire county for approval. Two-thirds of the electors voting on

²⁴ Rev. & Tax. Code §7285.5 provides: “(a) As an alternative to the procedure set forth in Section 7285, the board of supervisors of any county may levy, increase, or extend a transactions and use tax throughout the entire county or within the unincorporated area of the county, as applicable, for specific purposes. The tax may be levied, increased, or extended at a rate of 0.125 percent, or a multiple thereof, for the purpose for which it is established, if all of the following requirements are met:

(1) The ordinance proposing that tax is approved by a two-thirds vote of all members of the board of supervisors and is subsequently approved by a two-thirds vote of the qualified voters of the entire county if levied on the entire county or the unincorporated area of the county if levied on the unincorporated area of the county, voting in an election on the issue.

(2) The transactions and use tax conforms to the Transactions and Use Tax Law Part 1.6 (commencing with Section 7251).

(3) The ordinance includes an expenditure plan describing the specific projects for which the revenues from the tax may be expended.

(b) A county shall be deemed to be an authority for purposes of Chapter 1 (commencing with Section 55800) of Part 3 of Division 2 of Title 5 of the Government Code.

(c) The revenues derived from the imposition of a tax pursuant to this section shall only be used for specific purposes within the area for which the tax was approved by the qualified voters.”

²⁵ Gov. Code, § 25131.

²⁶ Rev. & Tax. Code, § 7285.5; Gov. Code, § 53274.

²⁷ Gov. Code, § 53274; Rev. & Tax. Code, § 7285.5.

the measure must approve it. The ordinance is not effective until after it is approved by the voters.²⁸

4. Election Dates for a Countywide Special Sales Tax Ordinance.

Proposition 218 does not regulate the timing of an election to approve a special tax. Those requirements are set forth in Government Code section 53724, enacted as part of Proposition 62.²⁹ The ordinance proposing the special tax “shall be consolidated with a statewide primary election, a statewide general election, or a regularly scheduled local election at which all of the electors of the [county] are entitled to vote.”³⁰ Pursuant to this authority, the board of supervisors could order a countywide special sales tax election on the following dates: the second Tuesday in April in even-numbered years; the first Tuesday after the first Monday in March of odd-numbered years, the first Tuesday after the first Monday in November of each year, and the first Tuesday after the first Monday in March in each even-numbered year.³¹ Alternatively, the board of supervisors could call the election on any other date “otherwise permitted by law” but would need to bear all of the costs of that election.³² If the board of supervisors calls a special election, the measure must appear on the ballot before the next statewide election for which it would qualify. The special election must be held not less than 88 days nor more than 103 days after the order of the election.³³

5. Mailed Ballots for a Countywide Special Sales Tax Ordinance.

A mailed ballot election on a countywide special sales tax measure may theoretically be possible under Elections Code section 4000(c)(8), provided that the election was held on a date permitted by law and the county was willing to pay the cost of the mailed ballot. If an all mail ballot election to approve a special sales tax is something that this county wishes to pursue, we recommend that the costs, and legal and logistical concerns, be reviewed with the County Administrator’s Office, the Elections Department, and this Office before proceeding.

6. Legislation is Required Before a Countywide Special Sales Tax Can be Levied. A countywide special sales tax election presents the same problem as a countywide general sales tax election. Because Antioch, El Cerrito, Martinez, Moraga, Pinole, and Richmond each have their own locally-imposed sales tax which, combined with existing state and county taxes, puts the sales and use tax rates in these cities at or above the 9.25% cap, the county cannot levy a countywide sales tax absent legislation that increases the cap.

²⁸ Cal. Const., art. XIII C, § 2 subd. (d); Rev. & Tax. Code, § 7285.5.

²⁹ Government Code sections 53720 - 53730 were added by initiative measure (Prop. 62) approved by the voters on November 4, 1986.

³⁰ Gov. Code, § 53724(c); Rev. & Tax. Code, § 7285.5.

³¹ Elec. Code, §§ 1000, 1002.

³² Gov. Code, § 53724(d).

³³ Elec. Code, § 1405, subd. (b).

B. Unincorporated Area Special Sales Tax Measure.

1. The Board of Supervisors Must Adopt an Ordinance by a Four-Fifths Vote to Initiate an Unincorporated-Area-Only Special Sales Tax. Revenue and Taxation Code section 7285.5 authorizes a county board of supervisors to adopt an ordinance proposing a sales tax for a specific purpose on the unincorporated area of the county. The proposed tax ordinance is introduced at a first regular meeting of the board of supervisors and adopted at a second meeting held at least five days after the date of its introduction.³⁴ The special sales tax ordinance must be approved by at least four members of the board of supervisors.³⁵

2. Contents of Ordinance for an Unincorporated-Area-Only Special Sales Tax. The form of the ordinance would be similar to a countywide special sales tax, including the necessity of an expenditure plan. The form of the ordinance is supplied by the California Department of Tax and Fee Administration.

3. Two-Thirds Voter Approval Required to Approve an Unincorporated-Area-Only Special Sales Tax. The ordinance must be submitted to the voters of the unincorporated area of the county for approval. Two-thirds of the electors voting on the measure must approve it.³⁶ The ordinance is not effective until after it is approved by the voters.

4. Election Dates for an Unincorporated-Area-Only Special Sales Tax. The election on the ordinance proposing a special sales tax in the unincorporated area only would be the same as for a countywide special sales tax, discussed above.

5. Mailed Ballots for an Election on a Special Sales Tax Ordinance in the Unincorporated Area Only. A mailed ballot election on a special sales tax measure for the unincorporated area may theoretically be possible under Elections Code section 4000(c)(8), provided the election were held on a date permitted by law and the county was willing to pay the cost of the mailed ballot. This question would require further investigation.

6. Ability to Levy a Special Sales Tax in Just the Unincorporated Area. Because the unincorporated area sales tax rate is only at 8.25%, the voters could authorize a special sales tax of up to 1% in the unincorporated area only.

III. CITIZEN-INITIATED SALES TAX MEASURES

The laws governing county initiative petitions are set forth in Elections Code sections 9100-9126. A detailed discussion of the initiative process is beyond the scope of this memorandum. However, a few issues are worth noting.

³⁴ Gov. Code, § 25131.

³⁵ Rev. & Tax. Code, § 7285.5.

³⁶ Cal. Const., art. XIII C, § 2 subd. (b); Rev. & Tax. Code, § 7285.5; Gov. Code, § 53722.

A. Ability to Levy. As was noted above, the Revenue and Taxation Code caps the sales tax rate at 9.25%. The most significant impediment to a citizen initiative to increase the sales tax in Contra Costa County is likely to be the fact that, to date, five cities in this County are at or above the statutory cap on sales taxes. The cities of Antioch, El Cerrito, Martinez, Moraga, Pinole and Richmond each have their own locally-imposed sales tax which, combined with existing state and county sales taxes, puts the sales tax rates in these cities at or above the 9.25% cap.³⁷ As such, legislation to increase the sales tax cap would be necessary before a countywide sales tax measure could be proposed to the voters.

B. Tax in the Unincorporated Area Only. Although Revenue and Taxation Code sections 7285 and 7285.5 give county boards of supervisors the authority to levy, increase, or extend transactions and use taxes throughout the county or within the unincorporated area, there is no general authority in the Elections Code to divide up the county electorate in this manner for purposes of a sales tax initiative. The Elections Code defines a “local election” as “a municipal, county, or district election.”³⁸ In defining a “county measure,” the Elections Code refers to any “question or proposition submitted to the voters of a county at any election held throughout an entire single county.”³⁹ We think it highly questionable that the law could be read to authorize a citizen-initiated ballot measure proposing a sales tax increase in the unincorporated area only.⁴⁰

C. Procedural Matters. Article XIII C, section 3 prohibits local governments from imposing “a signature requirement higher than that applicable to statewide statutory initiatives” for fiscal initiatives. This means that the number of signatures necessary to qualify a citizen-initiated county sales tax measure for the ballot can be no higher than five percent of the votes cast in the county for all candidates for governor at the last gubernatorial election preceding the publication of the notice of intention to circulate an initiative petition.⁴¹

³⁷ The cap in El Cerrito is 9.75% (presumably due to special legislation). The other cities are at the 9.25% cap.

³⁸ Cal. Elec. Code, § 328.

³⁹ Cal. Elec. Code, § 312.

⁴⁰ When the City of San Diego authorized a special tax on hotels, it submitted the tax to a specially defined electorate consisting solely of owners of real property in the city on which a hotel is located and the lessees of government-owned real property on which a hotel is located. The court held the election was invalid because the tax should have been submitted to the “electorate” consisting of all registered voters in the city. (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 761, 771.) The court explained: “There is nothing in either the text or the constitutional history of Proposition 13 that suggests that voters intended for local governments to be able to exclude large numbers of registered voters from voting in a special tax election by limiting who would be deemed ‘qualified electors’ for purposes of the election.” (*Id.* at 776.) While that decision is not directly on point because it did not concern a tax imposed only in an unincorporated area of a county submitted to a vote by persons residing in the unincorporated area, it weighs against defining the electorate as a subset of the voters of a county.

⁴¹ Cal. Const., art. II, § 9, subd. (b); Elec. Code, § 9035. The total number of votes cast for Governor in the November 6, 2018 election was 416,150.

The proponents have 180 days to circulate the petition.⁴² The Registrar of Voters is responsible for verifying whether the initiative petition meets the required number of signatures. Upon receipt of a verified petition, a county board of supervisors' actions would be guided by Elections Code section 9118 and Revenue and Taxation Code section 7285 (for a general sales tax) or Revenue and Taxation Code section 7285.5 (for a special sales tax), meaning that the board could either: (1) adopt the ordinance without alteration by four-fifths vote at a regular meeting and submit it to the voters without alteration; (2) submit the ordinance directly to the voters without adopting it and without alteration; or (3) first order a report under Elections Code section 9111 and then adopt the ordinance or submit it to the voters. Pursuant to Elections Code section 1405, the election date for a county citizen initiative that qualifies for the ballot would be the next statewide election unless the board of supervisors decides to call a special election, i.e., in March and November of even numbered years.⁴³

D. *California Cannabis Coalition v. City of Upland.* The *Upland* case, discussed more fully in the Background section of this memorandum, may not have the profound impact that some hope and others potentially fear. Few taxes are proposed by initiative. Moreover, the initiative process can be expensive. The Los Medanos Healthcare District recently paid a signature gatherer \$11 per signature in an effort to acquire enough signatures to force the issue of its dissolution to an election. The total number of votes cast for Governor in this county in the November 6, 2018, election was 416,150. This means that it could cost in the vicinity of \$250,000 for a paid signature gatherer to collect the five percent of signatures necessary to qualify a sales tax initiative for the ballot at a regularly scheduled election.

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⁴² Elec. Code, §§ 9110, 9113.

⁴³ Elec, Code, § 1001.

California Sales and Use Tax Rates by County and City*
Operative April 1, 2019 (includes state, county, local, and district taxes)

ALAMEDA CO. 9.25% City of Alameda 9.75% City of Albany 9.75% City of Hayward 9.75% City of Newark 9.75% City of San Leandro 9.75% City of Union City 9.75%	HUMBOLDT CO. 7.75% City of Arcata 8.50% City of Eureka 8.50% City of Fortuna 8.50% City of Rio Dell 8.75% City of Trinidad 8.50%	MADERA CO. 7.75% City of Chowchilla 8.75% City of Madera 8.25%	ORANGE CO. 7.75% City of Fountain Valley 8.75% City of Garden Grove 8.75% City of La Habra 8.25% City of La Palma 8.75% City of Placentia 8.75% City of Santa Ana 9.25% City of Seal Beach 8.75% City of Stanton 8.75% City of Westminster 8.75%
ALPINE CO. 7.25%	IMPERIAL CO. 7.75% City of Calexico 8.25% City of El Centro 8.25%	MARIN CO. 8.25% Town of Corte Madera 9.00% Town of Fairfax 9.00% City of Larkspur 9.00% City of Novato 8.50% Town of San Anselmo 8.75% City of San Rafael 9.00% City of Sausalito 8.75%	PLACER CO. 7.25% Town of Loomis 7.50% City of Roseville 7.75%
AMADOR CO. 7.75%	INYO CO. 7.75%	MARIPOSA CO. 7.75%	PLUMAS CO. 7.25%
BUTTE CO. 7.25% City of Oroville 8.25% Town of Paradise 7.75%	KERN CO. 7.25% City of Arvin 8.25% City of Bakersfield 8.25% City of Delano 8.25% City of Ridgecrest 8.25% City of Wasco 8.25%	MENDOCINO CO. 7.875% City of Fort Bragg 8.875% City of Point Arena 8.375% City of Ukiah 8.875% City of Willits 8.375%	RIVERSIDE CO. 7.75% City of Cathedral City 8.75% City of Coachella 8.75% City of Hemet 8.75% City of Indio 8.75% City of La Quinta 8.75% City of Menifee 8.75% City of Murrieta 8.75% City of Norco 8.75% City of Palm Springs 9.25% City of Riverside 8.75% City of Temecula 8.75% City of Wildomar 8.75%
CALAVERAS CO. 7.25% City of Angels Camp 7.75%	KINGS CO. 7.25% City of Corcoran 8.25%	MERCED CO. 7.75% City of Atwater 8.25% City of Gustine 8.25% City of Los Banos 8.75% City of Merced 8.25%	SACRAMENTO CO. 7.75% City of Galt 8.25% City of Isleton 8.75% City of Rancho Cordova 8.25% City of Sacramento 8.75%
COLUSA CO. 7.25% City of Williams 7.75%	LAKE CO. 7.25% City of Clearlake 8.75% City of Lakeport 8.75%	MODOC CO. 7.25%	SAN BENITO CO. 8.25% City of Hollister 9.25% City of San Juan Bautista 9.00%
CONTRA COSTA CO. 8.25% City of Antioch 9.25% City of Concord 8.75% City of El Cerrito 9.75% City of Hercules 8.75% City of Martinez 9.25% Town of Moraga 9.25% City of Orinda 8.75% City of Pinole 9.25% City of Pittsburg 8.75% City of Pleasant Hill 8.75% City of Richmond 9.25% City of San Pablo 8.75%	LASSEN CO. 7.25%	MONO CO. 7.25% Town of Mammoth Lakes 7.75%	SAN BERNARDINO CO. 7.75% City of Barstow 8.75% City of Montclair 8.00% City of San Bernardino 8.00% Town of Yucca Valley 8.75%
DEL NORTE CO. 7.50%	LOS ANGELES CO. 9.50% City of Avalon 10.00% City of Burbank 10.25% City of Commerce 10.00% City of Compton 10.25% City of Covina 10.25% City of Cudahy 10.25% City of Culver City 10.25% City of Downey 10.00% City of El Monte 10.00% City of Glendale 10.25% City of Hawthorne 10.25% City of Huntington Park 10.25% City of Inglewood 10.00% City of La Puente 10.00% City of Lawndale 10.25% City of Long Beach 10.25% City of Lynwood 10.25% City of Pico Rivera 10.25% City of Pasadena 10.25% City of Pomona 10.25% City of San Fernando 10.00% City of Santa Fe Springs 10.50% City of Santa Monica 10.25% City of So. El Monte 10.00% City of South Gate 10.25%	MONTEREY CO. 7.75% City of Carmel-by-the-Sea 8.75% City of Del Rey Oaks 9.25% City of Gonzales 8.25% City of Greenfield 9.50% City of King City 8.75% City of Marina 9.25% City of Monterey 8.75% City of Pacific Grove 8.75% City of Salinas 9.25% City of Sand City 8.75% City of Seaside 9.25% City of Soledad 8.75%	SAN DIEGO CO. 7.75% City of Chula Vista 8.75% City of Del Mar 8.75% City of El Cajon 8.25% City of La Mesa 8.50% City of National City 8.75% City of Oceanside 8.25% City of Vista 8.25%
EL DORADO CO. 7.25% City of Placerville 8.25% City of So. Lake Tahoe 7.75%		NAPA CO. 7.75% City of St. Helena 8.25%	SAN FRANCISCO CO. 8.50%
FRESNO CO. 7.975% City of Coalinga 8.975% City of Fowler 8.975% City of Huron 8.975% City of Kerman 8.975% City of Kingsburg 8.975% City of Reedley 8.475% City of Sanger 8.725% City of Selma 8.475%		NEVADA CO. 7.50% City of Grass Valley 8.50% City of Nevada City 8.375% Town of Truckee 8.25%	
GLENN CO. 7.25% City of Orland 7.75%			

*(For more details, refer to www.cdfa.ca.gov/taxes-and-fees/sales-use-tax-rates.htm.)

Please note: Some communities located within a county or a city may not be listed. If you are in doubt about the correct rate or if you cannot find a community, please call our toll-free number at 1-800-400-7115 (TTY:711), or call the local California Department of Tax and Fee Administration office nearest you for assistance.

CDTFA-95 (BACK) REV. 15 (4-19)
SALES AND USE TAX RATES

SAN JOAQUIN CO. 7.75%

City of Lathrop 8.75%
City of Lodi 8.25%
City of Manteca 8.25%
City of Stockton 9.00%
City of Tracy 8.25%

SAN LUIS OBISPO CO. 7.25%

City of Arroyo Grande 7.75%
City of Atascadero 7.75%
City of Grover Beach 7.75%
City of Morro Bay 7.75%
City of Paso Robles 7.75%
City of Pismo Beach 7.75%
City of San Luis Obispo 7.75%

SAN MATEO CO. 8.75%

City of Belmont 9.25%
City of Burlingame 9.00%
City of East Palo Alto 9.25%
City of Redwood City 9.25%
City of San Mateo 9.00%
City of So. San Francisco 9.25%

SANTA BARBARA CO. 7.75%

City of Carpinteria 9.00%
City of Guadalupe 8.00%
City of Santa Barbara 8.75%
City of Santa Maria 8.75%

SANTA CLARA CO. 9.00%

City of Campbell 9.25%
City of Los Gatos 9.125%
City of San Jose 9.25%

SANTA CRUZ CO. 8.50%

City of Capitola 9.00%
City of Santa Cruz 9.25%
City of Scotts Valley 9.00%
City of Watsonville 9.25%
Santa Cruz (Unincorporated Area) 9.00%

SHASTA CO. 7.25%

City of Anderson 7.75%

SIERRA CO. 7.25%

SISKIYOU CO. 7.25%
City of Dunsmuir 7.75%
City of Mount Shasta 7.50%
City of Weed 7.50%
City of Yreka 7.75%

SOLANO CO. 7.375%

City of Benicia 8.375%
City of Fairfield 8.375%
City of Rio Vista 8.125%
City of Suisun City 8.375%
City of Vacaville 8.125%
City of Vallejo 8.375%

SONOMA CO. 8.25%

City of Cotati 9.25%
City of Healdsburg 8.75%
City of Rohnert Park 8.75%
City of Santa Rosa 9.00%
City of Sebastopol 9.00%
City of Sonoma 8.75%

STANISLAUS CO. 7.875%

City of Ceres 8.375%
City of Oakdale 8.375%

SUTTER CO. 7.25%

TEHAMA CO. 7.25%
City of Corning 7.75%
City of Red Bluff 7.50%

TRINITY CO. 7.25%

TULARE CO. 7.75%
City of Dinuba 8.50%
City of Farmersville 8.75%
City of Lindsay 8.75%
City of Porterville 9.25%
City of Tulare 8.25%
City of Visalia 8.50%
City of Woodlake 8.75%

TUOLUMNE CO. 7.25%

City of Sonora 7.75%

VENTURA CO. 7.25%

City of Oxnard 7.75%
City of Port Hueneme 8.75%
City of Santa Paula 8.25%
City of Ventura 7.75%

YOLO CO. 7.25%

City of Davis 8.25%
City of W. Sacramento 8.25%
City of Woodland 8.00%

YUBA CO. 7.25%

City of Marysville 8.25%
City of Wheatland 7.75%
Yuba (Unincorporated Area)
8.25%

Editorial: Fate of SF citizen initiatives far from settled

JULY 08, 2019



This is no way to resolve an election in which more than 61% percent of San Franciscans made their intention clear, with neither doubt about the accuracy of the count nor any other allegations of irregularities. The only question was whether the threshold for passage should be a simple majority or two-thirds vote.

That question moved a significant step toward an answer Friday when a Superior Court judge agreed with City Attorney Dennis Herrera's office that two tax measures from last year required only a simple majority. November's Proposition C, taxing the city's largest businesses to raise \$300 million a year for housing and services for the homeless, received 61.3% of the vote; June's

Proposition C, taxing commercial landlords to raise \$146 million a year for child care programs, received just under 51% of the vote.

The delegation of the outcome to the courts was regrettable but inevitable because of the ambiguity about whether initiatives resulting from citizen petitions are subject to the same threshold as those put on the ballot by elected officials. Two constitutional amendments passed by state voters decades ago (Propositions 13 and 218) had set a two-thirds standard for tax increases.

The state Supreme Court has not directly addressed this issue. But its 2017 ruling on an Upland (San Bernardino County) cannabis-tax measure that citizen initiatives can be decided in a primary election — instead of a general election, as required of government-sponsored measures — was interpreted by Herrera as a green light for citizen initiatives to pass with a simple majority.

This dispute goes beyond San Francisco. Across the bay, 62.4% of Oakland voters last year supported Measure AA, a \$198 parcel tax increase to raise \$30 million a year for pre-K through college readiness programs. Unlike Herrera, Oakland City Attorney Barbara Parker had interpreted state law as requiring a two-thirds vote for passage — which underscores the lack of clarity in state law. The Oakland City Council nevertheless certified Measure AA's passage, but voted 5-2 to hold off collecting the tax until the court challenge is settled.

San Francisco is collecting those taxes, though not spending the money until they get a final go-ahead from the courts. That could take years, with

business and anti-tax groups promising to appeal Friday's ruling.

The status quo is unfair all around. For individual voters considering the merits of a new tax, the threshold for passage might not make any difference on what they decide. It makes a huge difference, however, to the approach of a campaign. The two-thirds barrier is daunting even in the most progressive of cities. It requires a greater infusion of money for voter education — and more intensive collaboration with potential opponents.

Indeed, one of our criticisms of Prop. C, for all our concern about the homelessness crisis, was the deficiency of accountability on the \$300 million surge in spending and the absence of input from all relevant interests in the ballot measure. If faced with a two-thirds threshold, the advocates of Prop. C might have gone to greater lengths to address those issues.

But fair is fair. The Prop. C campaign was assured by the city attorney's office *before* the election that it needed a simple majority to prevail. It did. It would be eminently unfair for the courts to invalidate that result after the vote, especially with all the ambiguity in the law.

It seems likely that either side that loses the court case will go back to California voters to make state law crystal clear. The unfortunate reality is that campaigns in the meantime are certain to face two battles, one at the ballot box and the other in courts.

This commentary is from The Chronicle's editorial board. We invite you to express your views in a letter to the editor. Please submit your letter via our online form: SFChronicle.com/letters.

FILED
San Francisco County Superior Court

JUL 05 2019

CLERK OF THE COURT

BY:  Deputy Clerk

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

HOWARD JARVIS TAXPAYERS
ASSOCIATION, BUILDING OWNERS AND
MANAGERS OF CALIFORNIA, CALIFORNIA
BUSINESS PROPERTIES ASSOCIATION, and
CALIFORNIA BUSINESS ROUNDTABLE,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO
and ALL PERSONS INTERESTED IN THE
MATTER OF Proposition C of the June 5, 2018
San Francisco ballot, a commercial rent tax for
childcare and early education in San Francisco
and other matters related thereto,

Defendants.

Case No. CGC-18-568657

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

1 On July 3, 2019, this matter came on regularly for hearing before the Court pursuant to the
2 motion for summary judgment filed by Plaintiffs Howard Jarvis Taxpayers Association, Building
3 Owners and Managers Association of California, California Business Properties Association, and
4 California Business Roundtable (Plaintiffs) and the cross-motion for summary judgment filed by
5 Defendant City and County of San Francisco (the City). All parties appeared by their respective
6 counsel of record, as reflected in the minutes and reporter's transcript. Having fully considered the
7 papers filed in support of and in opposition to the cross-motions for summary judgment on the
8 pleadings, and the arguments of counsel presented at the hearing, this Court rules as follows:

9 **I. Introduction**

10 Plaintiffs brought this reverse validation action following the June 5, 2018 Consolidated
11 Statewide Direct Primary Election in the City and County of San Francisco to obtain a ruling
12 concerning the validity of Proposition C, a voter initiative that appeared on the ballot in that
13 election. Proposition C, which in the Voter Information Guide bears the short title, "Additional
14 Tax on Commercial Rents Mostly to Fund Child Care and Education," would add Article 21, the
15 "Early Care and Education Commercial Rents Ordinance," to the City's Business and Tax
16 Regulations Code. (Prop. C, Legal Text, in Voter Information Pamphlet, Arntz Decl., Ex. F at 141-
17 144.) Article 21 would impose additional gross receipts taxes on revenues that certain local
18 businesses receive from the lease of warehouse and other commercial spaces in the City; would use
19 15% of funds collected from these additional taxes for any general purpose; and would devote the
20 remaining 85% of the funds to fund quality early care and education for young children and other
21 related purposes. (*Id.* at 143.) Proposition C received the affirmative votes of 50.87% of the
22 236,284 City voters who voted on that measure. (Arntz Decl., Ex. G at 16; Compl., pg. 1.)¹

23 Plaintiffs' verified Complaint to Invalidate Special Tax, filed on August 3, 2018, contains a
24 single cause of action. Plaintiffs allege that Proposition C is invalid because it imposed a special

25 _____
26 ¹ The Court grants the City's unopposed request for judicial notice of various provisions of the San
27 Francisco and Municipal Elections Code.

1 tax that required the approval of two-thirds of the voters under two different provisions of the
2 California Constitution—Article XIII C, section 2(d) and Article XIII A, section 4. (Compl. ¶¶ 8,
3 9.) Thus, Plaintiffs contend that the tax enacted by Proposition C is “invalid for failing to receive
4 two-thirds voter approval under the California Constitution.” (*Id.* ¶ 14.)

5 Plaintiffs also allege that the proponents of Proposition C were individual members of the
6 City’s Board of Supervisors, and that after the proponents obtained the requisite number of
7 signatures for a citizens’ initiative, the City placed Proposition C on the June 2018 ballot as a
8 citizens’ initiative. (*Id.* ¶ 10.) Plaintiffs allege that the City proposed Proposition D, a tax on
9 commercial rent for the purpose of funding affordable housing and homeless programs, on the
10 same ballot, and that because the two propositions both contained provisions that only the one
11 receiving the most affirmative votes would take effect, “this is evidence of a degree of coordination
12 between the supervisors who served as proponents of Proposition C and the City.” (*Id.* ¶ 11.)
13 Plaintiffs assert that “[w]hether City leadership places a special tax measure on the ballot by
14 incubating an initiative or by going directly through its Board of Supervisors, the measure requires
15 a two-thirds vote under the California Constitution to pass.” (*Id.* ¶ 12.) Plaintiffs’ complaint
16 makes no reference to the San Francisco Charter.

17 In their motion for summary judgment, Plaintiffs abandon their contention in their
18 complaint that Proposition C required a supermajority (two-thirds) vote under either Article XIII C,
19 section 2(d) or Article XIII A, section 4 of the California Constitution. Apparently anticipating the
20 City’s reliance on the California Supreme Court’s decision in *California Cannabis Coalition v. City*
21 *of Upland* (2017) 3 Cal.5th 924, they assert “it is unnecessary for the Court to reach that
22 argument.” Instead, Plaintiffs contend that the San Francisco Charter requires a two-thirds vote on
23 all special taxes, whether they are proposed by the Mayor or Board of Supervisors or by citizens’
24 initiative. Plaintiffs’ motion for summary judgment on this ground is procedurally improper
25
26
27

1 because they did not raise the issue in their complaint.² Nevertheless, because the City does not
2 object on this ground, and because the issue presents a pure question of law on undisputed facts,
3 the Court will deem Plaintiffs' complaint amended to present the issue and will address it on its
4 merits.

5 Plaintiffs' second argument is that Proposition C was not a "real" citizens' initiative, but
6 instead must be treated as having been proposed by the Board of Supervisors and therefore subject
7 to the two-thirds vote requirement.

8 The material facts are undisputed. For the following reasons, Plaintiffs' motion for
9 summary judgment is denied, and the City's cross-motion is granted.

10 **II. Proposition C Is Not Invalid Under The San Francisco Charter.**

11 Plaintiffs contend first that the San Francisco Charter required a two-thirds vote on
12 Proposition C. That contention is based on the following reasoning: (1) Article XVII of the
13 Charter defines "initiative" to include "a proposal by the voters with respect to any ordinance, act
14 or other measure which is within the powers conferred upon the Board of Supervisors to enact"; (2)
15 by virtue of article XIII A, section 4 and article XIII C, section 2(d) of the California Constitution,
16 the Board of Supervisors is not empowered to enact a special tax without the concurrences of two-
17 thirds of the electors; (3) therefore, the voters' initiative power is similarly constrained.

18 This argument is foreclosed by a long line of California Supreme Court authority, which
19 draws a critical distinction between *substantive* limitations on the Board of Supervisors' legislative
20 authority and *procedural* requirements that the Board must follow to enact certain kinds of laws.
21 While the Charter restricts the voters from using their reserved power of initiative to enact any
22 measure that, because of its nature or subject matter, is *substantively* beyond the power of the
23

24 ² Plaintiffs appear "oblivious to the role of the pleadings as the outer measure of materiality in a
25 summary judgment proceeding," treating them instead as "a ticket to the courtroom which may be
26 discarded upon admission." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367,
381; see also *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663 ["Summary
27 judgment cannot be granted on a ground not raised by the pleadings. [Citation.] Conversely,
28 summary judgment cannot be *denied* on a ground not raised by the pleadings."].)

1 Board of Supervisors to enact, the Charter does not require the voters, when they legislate by
2 initiative, to follow the *procedures* the Board would have to follow in order to enact similar
3 legislation. In other words, “*procedural* requirements imposed on the Legislature or local
4 governments are presumed not to apply to the initiative power absent evidence that such was the
5 intended purpose of the requirements.” (*California Cannabis Coalition*, 3 Cal.5th at 942.)

6 *California Cannabis Coalition* addressed this very question. In that case, the California
7 Supreme Court held that article XIII C of the California Constitution, which limits the ability of
8 local governments to impose taxes, “does not limit voters’ ‘power to raise taxes by statutory
9 initiative.” (3 Cal.5th at 931, quoting *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991)
10 53 Cal.3d 245, 251.) In particular, the Court concluded that “local government” as that term is
11 used in article XIII C does not include the electorate, based on the common understanding of that
12 term; how it is used in the text, findings, and declarations of article XIII C; and the ballot materials
13 for Proposition 218, by which that article was enacted, as well as those for Propositions 13 and
14 Proposition 26. (*Id.* at 936-941.)

15 The City of Upland argued that even if “local government” does not directly encompass the
16 electorate, “article XIII C, section 2, subdivision (b) *indirectly* applies to voters for two reasons,”
17 both of which the Court rejected. (*Id.* at 941.) First, Upland contended that the provision applies to
18 the electorate because, in its view, “the voters are the ones who ultimately impose *every* local tax.”
19 (*Id.*) But, the Court observed, “that does not transform voters into the ‘local government’
20 referenced in article XIII C, section 2.” (*Id.* at 942.) Nor does the requirement of voter approval
21 necessarily mean it is the electorate that imposes the tax. (*Id.*)

22 Second, Upland argued, in terms nearly identical to Plaintiffs’ position here, that the
23 provision at issue “constrains voter initiatives because ‘statutory and constitutional limits on the
24 power of local government apply equally to local initiatives.’” (*Id.*) The Court rejected that
25 argument, underlining the distinction summarized above between limits on the substantive
26 authority of the legislative body and procedural requirements governing its exercise of such power:

1 When a local government lacks authority to legislate in an area, perhaps because the state
2 has occupied the field [citation], that limitation also applies to the people's local initiative
3 power. [Citation.] In contrast, where legislative bodies retain lawmaking authority subject
4 to procedural limitations, e.g., notice and hearing requirements [citation] or *two-thirds vote*
5 *requirements* [citation], we presume such limitations do not apply to the initiative power
6 absent evidence that such was the restrictions' intended purpose.

7 (*Id.* [emphasis added].) Numerous other cases reach the same conclusion. (See, e.g., *Kennedy*
8 *Wholesale, Inc.*, 53 Cal.3d at 249 [while "the voters' power is presumed to be coextensive with the
9 Legislature's," that does not mean that "legislative *procedures*, such as voting requirements, apply
10 to the electorate"]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785 ["it is well established in
11 our case law that the existence of procedural requirements for the adoptions of local ordinances
12 generally does not imply a restriction of the power of initiative or referendum."]; *Associated Home*
13 *Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 594 ["Procedural
14 requirements which govern *council* action . . . generally do not apply to initiatives, any more than
15 the provisions of the initiative law govern the enactment of ordinances in council."].)

16 Plaintiffs attempt to distinguish these cases, arguing that the only procedural requirements
17 that do not apply to voter initiatives are those where "voters literally can't do those things," such as
18 introducing bills. Plaintiffs contend that the "common feature" of these cases is that "impossible
19 and unavailable duties or conditions precedent will not be imposed on the electorate so as to nullify
20 their ability to propose legislation in the first instance." However, in *California Cannabis*
21 *Coalition*, the Supreme Court rejected a nearly identical contention by the concurring and
22 dissenting Justices, who interpreted those cases "more narrowly, as applying *exclusively* when the
23 procedural requirements at issue are 'incompatible with initiative procedures.'" (3 Cal.5th at 943;
24 see *id.* at 957-958 [conc. and dis. opn. of Kruger, J.].) The majority disagreed with that reading,
25 observing that it "proves too cramped an understanding of these cases' holdings or their
26 significance. While our cases noted that the restrictions at issue made little sense in light of the
27 distinct initiative process [citation], nothing suggests that those observations formed the metes and
28 bounds of our holding. To the contrary, our reasoning was broader and grew out of our
presumption in favor of the initiative power." (*Id.*)

1 Plaintiffs' argument is also inconsistent with the overall reasoning and thrust of the
2 California Supreme Court's decision in *California Cannabis Coalition*. There, the Court addressed
3 a broadly similar issue to that presented here: whether these provisions, which limit the ability of
4 state and local governments to impose taxes, "also restrict[] the ability of voters to impose taxes via
5 initiative." (*Id.* at 930.) It answered the question in the negative, concluding that "article XIII C
6 does not limit voters' power to raise taxes by statutory initiative." (*Id.* at 931, quoting *Kennedy*
7 *Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 251.) As it explained,

8 A contrary conclusion would require an unreasonably broad construction of the term "local
9 government" at the expense of the people's constitutional right to direct democracy,
10 undermining our longstanding and consistent view that courts should protect and liberally
11 construe it. . . . Without a direct reference in the text of a provision—or a similarly clear,
12 unambiguous indication that it was within the ambit of a provision's purpose to constrain
the people's initiative power—we will not construe a provision as imposing such a
limitation.

13 (*Id.*) The Court based its analysis in part on the text of article XIII C, section 2, which applies only
14 to actions taken by a "local government." (*Id.* at 936.) Article XIII C defines that term to mean
15 "any county, city, city and county, including a charter city or county, any special district, or any
16 other local or regional governmental entity." (Cal. Const., art. XIII C, § 1(b).) The Court rejected
17 Upland's argument that this definition is broad enough to include the electorate. (3 Cal.5th at 937.)
18 It adopted a "clear statement" rule in order to protect the initiative power, which is liberally
19 construed. "Without an unambiguous indication that a provision's purpose was to constrain the
20 initiative power, we will not construe it to impose such limitations. Such evidence might include
21 an explicit reference to the initiative power in a provision's text, or sufficiently unambiguous
22 statements regarding such a purpose in ballot materials." (*Id.* at 945-946.) The Court found no
23 such indication in either the text of Proposition 218 (by which article XIII C was enacted) or the
24 ballot materials of that initiative or of Proposition 13 (by which article XIII C was enacted). "To
25 the contrary: The crux of the concern repeatedly reflected in the ballot materials is with local
26 governments and politicians—not the electorate—imposing taxes. Nowhere in the materials is

1 there any suggestion that Proposition 218 would rescue voters from measures they might, through a
2 majority vote, impose on themselves.” (*Id.* at 940.)

3 Plaintiffs insist that Proposition 218 must be construed to apply to voter initiatives because
4 the voters who enacted that proposition in 1996 must have been aware of *Altadena Library Dist. v.*
5 *Bloodgood* (1987) 192 Cal.App.3d 585, which Plaintiffs contend applied Proposition 13’s two-
6 thirds vote requirement to a local special tax brought as a citizens’ initiative. However, that case
7 held only that a library district was a “special district” within the meaning of Proposition 13 (in
8 addition to rejecting a novel claim that the supermajority requirement triggered close scrutiny as a
9 matter of equal protection). (*Id.* at 588.) It did not address the issue presented here (which was not
10 raised): whether the two-thirds vote requirement of Proposition 13 applies to special taxes enacted
11 by voter initiative. The case is not authority for that proposition. (See *People v. Brown* (2012) 54
12 Cal.4th 314, 330 [it is axiomatic that “cases are not authority for propositions not considered.”].)³
13 In any event, of course, *Altadena* long predated the Supreme Court’s 2017 decision in *California*
14 *Cannabis Coalition*, which is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court*
15 (1962) 57 Cal.2d 450, 455; see *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World*
16 *Evangelism* (2018) 23 Cal.App.5th 28, 41 [regardless of whether a recent California Supreme Court
17 decision may be characterized as an intervening change in law, lower courts are bound to follow
18 it].)

19 In short, the procedural two-thirds vote requirement in articles XIII A, section 4 and XIII C,
20 section 2(d) of the California Constitution that limit the Board of Supervisors’ authority to impose
21 new taxes does not apply to the voters’ initiative power, either directly under those provisions or
22 indirectly under the San Francisco Charter.

23
24 ³ *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, which Plaintiffs also cite, is
25 even less helpful to them. The court there held that a surcharge on waste disposal imposed by a
26 voter initiative was not a special tax within the meaning of Proposition 13, but rather was a valid
27 regulatory fee. (*Id.* at 280-285.) As a result, the court did not reach the question whether the
28 initiative required a two-thirds vote. Plaintiffs’ reliance on the dissenting opinion is misplaced.

1 **III. Plaintiffs' Claim That Proposition C Is Not A "True" Citizens' Initiative Is**
2 **Legally and Factually Meritless.**

3 Plaintiffs' second argument, to which they devote the bulk of their briefing,⁴ is that
4 Proposition C was not imposed by a "true" citizens' initiative. Rather, Plaintiffs contend that in
5 reality, "it was a proposal of the Board of Supervisors, the Tax's true creator." Plaintiffs cite as
6 evidence for this proposition that the Board of Supervisors had previously considered a closely
7 similar if not identical initiative, that Supervisor Norman Yee was the initiative's proponent, and
8 that he assertedly used his position and resources as a supervisor to place the initiative on the
9 ballot. Because the Board of Supervisors, as a local government entity, may not impose a special
10 tax absent two-thirds approval by the voters, Plaintiffs contend, the Court should ignore
11 Proposition C's designation as a voter initiative and invalidate it as a legislative initiative.
12 Plaintiffs rely for this argument entirely on the California Supreme Court's decision in *Boling v.*
13 *Public Employment Relations Board* (2018) 5 Cal.5th 898. However, neither that decision nor any
14 other pertinent authority supports Plaintiffs' novel contention.

15 At the outset, Plaintiffs' argument is inconsistent with the plain language of the Charter and
16 of the governing provisions of the California Elections Code, which draw a clear distinction
17 between measures proposed by the voters by initiative petition and measures proposed by a
18 legislative body such as the San Francisco Board of Supervisors or by the Mayor. Thus, as to voter
19 initiatives, Article XIV of the Charter, entitled "Initiative, Referendum and Recall," declares that
20 "the voters of the City and County shall have the power to enact initiatives" (Charter §
21 14.100.) The Charter provides that "[a]n initiative may be proposed by presenting to the Director
22 of Elections a petition containing the initiative and signed by voters in a number equal to at least
23 five percent of the votes cast for all candidates for mayor in the last preceding general municipal
24 election for Mayor." (Charter § 14.101.) In contrast, Section 2.113 of the Charter provides that the

25 ⁴ Notably, Plaintiffs discuss this argument in only 4 pages of their moving papers, but devote nearly
26 all of their 20-page opposition brief to it.

1 Board of Supervisors, or four or more members of the Board, may submit to the voters declarations
2 of policy, and any matter (such as a proposed ordinance) which the Board is empowered to pass.
3 (Charter § 2.113(a).) That provision, entitled "Legislative Initiative," is contained in Article II of
4 the Charter, which governs the City's legislative branch. Likewise, the Mayor herself may also
5 submit a proposed initiative to the Board of Supervisors. (Charter § 3.100(16).) The Board must
6 assign a legislative or mayoral initiative to a committee for a public hearing. (*Id.* § 2.113(b).)
7 Measures proposed by initiative petition are also subject to a different timeline than those
8 submitted by the Mayor, Board of Supervisors, or four or more supervisors. (S.F. Muni. Elec.
9 Code § 300(b), (c).) Nothing in the Charter prevents a single member of the Board of Supervisors
10 from proposing an initiative and, by definition, so long as the initiative is proposed by less than
11 than four members of the Board, it is a citizens' initiative subject to the rules governing such
12 initiatives, not a legislative initiative.

13 These provisions parallel those contained in the state Elections Code. Under the California
14 Constitution, either the Legislature or the voters may place a measure, including a proposed
15 constitutional amendment, on the ballot. (See Cal. Const., art. II, § 8; art. IV, § 8.5; art. XVIII,
16 §§1, 3, 4.) Thus, the Legislature itself may propose an initiative constitutional amendment to be
17 submitted to the voters, in which case it is the official "proponent." (See, e.g., *Californians for an*
18 *Open Primary v. McPherson* (2006) 38 Cal.4th 735 [Legislature proposed constitutional
19 amendment for submission to the voters on the November 2004 ballot as Proposition 60].) If, on
20 the other hand, the measure is proposed by a private organization or an individual, as here, that
21 organization or individual is the measure's proponent. (See generally *Perry v. Brown* (2011) 52
22 Cal.4th 1116, 1139-1143 [discussing the initiative power and the constitutional and statutory basis
23 for official initiative proponents' standing under California law].) The California Elections Code
24 defines the proponent of a local initiative measure as "the person or persons who publish a notice
25 or intention to circulate petitions, or, where publication is not required, who file petitions with the
26 elections official or legislative body." (Elec. Code § 342.)

1 Here, the record establishes beyond dispute that Proposition C had a single proponent, who
2 submitted a notice of intention to circulate petitions for the proposed initiative, caused the notice
3 and ballot title and summary to be published in a local newspaper, and turned in initiative petitions
4 containing the requisite number of voter signatures. (Arntz Decl. ¶¶ 5-8 & Exs. A-E.) Thus,
5 Proposition C was a citizens' initiative as defined in the San Francisco Charter. In contrast,
6 Proposition D on the same ballot was placed on the ballot by five members of the Board of
7 Supervisors, and therefore was a legislative initiative. (Arntz Decl., Ex. F at 98-104, 144-147
8 [text].) That the proponent of Proposition C happened to be a member of the San Francisco Board
9 of Supervisors, Supervisor Norman Yee, or that he allegedly used his title or City resources to
10 advance the initiative, does not somehow transform a citizens' initiative into a legislative petition.
11 Nor does the fact that other members of the Board of Supervisors had previously considered a
12 similar proposed legislative initiative, or that they expressed their support for Proposition C by
13 signing the proponent's argument in the Voter Information Pamphlet (Arntz Decl. Ex. F at 92).⁵

14 Indeed, to articulate the latter argument is to reject it. It is common knowledge, and the
15 Court may take judicial notice, that municipal and statewide legislators routinely serve as
16 proponents of ballot measures or express their support for such measures, including in proponents'
17 arguments included in voter information pamphlets. For example, in May 2002, then-member of
18 the Board of Supervisors (now Governor) Gavin Newsom was one of two proponents of an
19 initiative entitled Care Not Cash that was enacted on the November 2002 ballot as Proposition N.
20 (See *McMahan v. City and County of San Francisco* (2005) 127 Cal.App.4th 1368, 1371.) Two

21 _____
22 ⁵ Plaintiffs devote much of their papers to attacking the motives and good faith of Supervisor Yee
23 and the entire Board of Supervisors. Thus, Plaintiffs insist that Proposition C was "a special tax
24 devised by the Board of Supervisors masquerading as [a] citizens' initiative in the hopes of evading
25 the two-thirds vote required by the San Francisco Charter and the California Constitution"; they
26 charge "City politicians" with "tramp[ing] the established rule" of Propositions 13 and 218 and
27 attempting to "circumvent[]" those provisions; they make factually unsupported charges against
28 Supervisor Yee; and they even accuse him of committing a criminal offense by illegally misusing
the seal of the City and County of San Francisco. The Court disapproves of Plaintiffs' intemperate
political rhetoric, which has no place in contested litigation involving important issues. A lawsuit
is not an election campaign.

1 other examples appear on the very same June 2018 ballot on which Proposition C appeared. There,
2 the voters were presented with Proposition E, a proposed ordinance that would have prohibited the
3 sale of flavored tobacco products in San Francisco, and Proposition G, a proposed parcel tax to
4 provide funding to support the San Francisco Unified School District. (Arntz Decl., Ex. F at 105-
5 109, 147-149 [text]; 118-124, 149-152 [text].) The proponents' argument in favor of the former
6 proposition was signed by then-Supervisor Malia Cohen; in favor of the latter, by then-Mayor
7 Mark Farrell and then-President of the Board of Supervisors (now Mayor) London Breed. Neither
8 then-Supervisor's Newsom's role as a proponent of Care Not Cash nor the other Supervisors'
9 support for Propositions E and G transformed those propositions from citizens' initiatives into
10 legislative initiatives, as Plaintiffs' argument would have it, nor do Plaintiffs cite any authority that
11 would compel that unprecedented conclusion.

12 The single case upon which Plaintiffs rely, *Boling v. Public Employment Relations Board*
13 (2018) 5 Cal.5th 898, does not support their position.⁶ In *Boling*, San Diego's mayor sponsored a
14 citizens' initiative to eliminate pensions for new municipal employees and rebuffed union demands
15 to meet and confer over the measure. The Public Employment Relations Board (PERB) held that
16 the city's failure to meet and confer constituted an unfair labor practice in violation of the Meyers-

17 ⁶ At oral argument, Plaintiffs also cited *Rider v. County of San Diego* (1991) 1 Cal.4th 1, but that
18 case does not advance their position. There, a county board of supervisors sought the voters' two-
19 thirds approval of a new sales tax to fund the county's justice facilities and, when that effort failed,
20 directed a local legislator to introduce legislation creating a special district with limited tax powers
21 to impose a sales tax increase upon approval by the county's voters. The initial version of the bill
22 named the county's entire board of supervisors as the agency's board of directors, although under
23 the final version only two county supervisors were included among the agency's seven directors.
24 The county retained substantial control over the agency's operations and expenditures; the act
25 required compliance with the county's master plan; and the agency's boundaries were coterminous
26 with the county's. After the tax scheme was approved by a bare majority of county voters, the
27 agency began operations, hiring several county employees for its staff and incurring expenses paid
28 from funds advanced by the county. (*Id.* at 9.) The Court concluded that the agency was a "special
district" within the meaning of Proposition 13 because it was "created to raise funds for city or
county purposes to replace revenues lost by reason of the restrictions of Proposition 13." (*Id.* at
11.) It held that in the future, courts could infer an intent to circumvent Proposition 13 "whenever
the plaintiff has proved the new tax agency is *essentially controlled* by one or more cities or
counties that otherwise would have had to comply with the supermajority provision of [article XIII
A] section 4." (*Id.*) Thus, *Rider* did not involve a voter initiative, but instead an action by a taxing
agency controlled by "local government."

1 Miliias-Brown Act, Gov. Code § 3500 *et seq.* (the MMBA), and the Supreme Court granted review
2 to settle two questions: (1) the standards of review that apply on appeal to PERB’s decisions; and
3 (2) “When a public agency itself does not propose a policy change affecting the terms and
4 conditions of employment, but its designated bargaining agent lends official support to a citizens’
5 initiative to create such a change, is the agency obligated to meet and confer with employee
6 representatives?” (*Id.* at 903-904; see also *id.* at 914 [“The question is whether the mayor’s pursuit
7 of pension reform by drafting and promoting a citizens’ initiative required him to meet and confer
8 with the unions.”].)

9 As to the second question, the Court held that under the circumstances presented in the
10 case, “the MMBA applies to the mayor’s official pursuit of pension reform as a matter of policy,”
11 and the city therefore was required to meet and confer with the union. (*Id.* at 904.) The Court’s
12 analysis focused on the Government Code provision requiring governing bodies “or other
13 representatives as may be properly designated” to engage with unions on matters within the scope
14 of representation “prior to arriving at a determination of policy or course of action.” (Gov. Code §
15 3505; see *id.* at 904, 913-919.) The Court concluded that these key statutory terms extended to the
16 mayor’s sponsorship of the initiative because he was “using the powers and resources of his office
17 to alter the terms and conditions of employment,” emphasizing his invocation of his position as
18 mayor and use of city resources and employees to draft, promote, and support the initiative, which
19 concerned a determination of policy on pension reform. (*Id.* at 918-919.) Thus, the Court held,
20 “when a local official with responsibility over labor relations uses the powers and resources of his
21 office to play a major role in the promotion of a ballot initiative affecting terms and conditions of
22 employment, the duty to meet and confer arises.” (*Id.* at 919.)

23 *Boling* thus was decided entirely on statutory grounds under the MMBA. Nothing in the
24 decision addressed any issue under the California Constitution, nor did the Court even mention its
25 own recent decision in *California Cannabis Coalition*. The Court decidedly did *not* hold that the
26 mayor’s active involvement in the development and promotion of the ballot initiative transformed

1 it from a voter initiative into a legislative initiative. To the contrary, it repeatedly referred to the
2 citizens' initiative as such, including referring to the individual proponents of the initiative (who
3 did not include the mayor), the signature-gathering campaign, and the certification of voter
4 signatures that led to its being placed on the ballot. (See *id.* at 907-908.) Indeed, the Court
5 specifically recognized that it was required to decide the case because it was unlike a prior
6 decision, *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d
7 591, which "involved a city council's own decision to place a proposal on the ballot, rather than a
8 citizen-sponsored initiative." (*Id.* at 915; see also *id.* at 914 [*Seal Beach* "involved a related but
9 distinct issue: whether the meet-and-confer provisions of section 3505 applied when a city
10 exercised its *own* constitutional power to propose charter amendments to its voters." [emphasis
11 original]].)⁷ Nor, finally, did the Court suggest that the mayor's involvement in the genesis and
12 development of the citizens' initiative invalidated the results of the election, in which the voters
13 approved the initiative. To the contrary, PERB modified the ALJ's proposed remedy to vacate the
14 results of the election, and instead directed the city to pay its employees compensation for the net
15 value of their lost pension benefits, which payments were "to continue for as long as the Initiative
16 was in effect." (*Id.* at 910.) The Court did not decide that issue, but directed the Court of Appeal
17 on remand to address the appropriate judicial remedy for the statutory violation identified in its
18 opinion. (*Id.* at 920.)⁸

19 ⁷ Plaintiffs refer in passing to the *California Cannabis Coalition* Court's brief discussion of a
20 hypothetical situation in which a city council "could conceivably collude with a public employee
21 union to place a levy on the ballot as a means of raising revenue for a goal supported by both," but
22 with the council adopting the ordinance without submitting it to the voters. (3 Cal.5th at 947.)
However, that hypothetical does not advance Plaintiffs' argument, both because it is not what
occurred here and because the Court declined to address how it would decide the issue. (*Id.*) In
any event, as the City pointed out at argument, its Charter would make such a situation impossible.

23 ⁸ On remand, the Court of Appeal held that "the City's failure to comply with the [Meyers-Milias
24 Brown] Act before placing the Initiative on the ballot does not necessarily invalidate the Initiative,"
25 and held further that PERB lacked power to invalidate the initiative, explaining that "any action by
26 PERB effectively invalidating the Initiative or assuming the Initiative is or will be invalidated
impermissibly encroaches on constitutional law, statutory law, and policy matters involving
27 initiatives, elections, and the doctrine of preemption." (*Boling v. Public Employment Relations Bd.*
28 (2019) 33 Cal.App.5th 376, 385, 388.)


1 In short, Plaintiffs' contention that "the City's admitted use of public offices and resources
2 violates *Boling* and invalidates its efforts" is unsupported by *Boling* or any other cited authority,
3 and must be rejected. Proposition C was a valid citizens' initiative under the express terms of the
4 San Francisco Charter and state law, and neither the Charter nor the California Constitution
5 required a two-thirds vote for its passage.

6
7 **IV. Conclusion**

8 For the foregoing reasons, Plaintiffs' motion for summary judgment is denied, and the
9 City's cross-motion for summary judgment is granted.

10 **IT IS SO ORDERED.**

11 Dated: July 5, 2019

12 
13 ETHAN P. SCHULMAN
14 JUDGE OF THE SUPERIOR COURT

CGC-18-568657

**HOWARD JARVIS TAXPAYERS ASSN. ET AL VS. CITY
AND COUNTY OF SAN FRANCISCO ET AL**

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on July 05, 2019 I served the foregoing **Order on Cross-motions for summary judgment** on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: July 05, 2019

By:  SHIRLEY LE

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