

October 8, 2001

REPORT TO THE COMMITTEE ON RULES,
FINANCE AND INTERGOVERNMENTAL RELATIONS

CHARTER AMENDMENT SETTING THE RATE OF TRANSIENT OCCUPANCY TAX TO
THE AVERAGE OF THE TEN LARGEST WESTERN CITIES THAT COMPETE WITH THE
CITY OF SAN DIEGO FOR CONVENTION AND TOURIST RELATED BUSINESS

INTRODUCTION

At the Rules Committee meeting of September 26, 2001, the City Attorney was asked to report back to the Committee on a potential amendment to the San Diego City Charter [City Charter] that would set the rate of Transient Occupancy Tax [TOT] to the average of the ten largest western cities that compete with the City of San Diego [City] for tourist and convention business. Such a City Charter amendment is enclosed as attachment 1.

BACKGROUND

The TOT was first imposed by the City in 1964 by amendment to the San Diego Municipal Code, effective following the defeat of a referendum on the implementing ordinance in early 1965. The rate of TOT was first set at 4% (*Atlas Hotels v. Acker*, 230 Cal. App. 2d 658, 659-660 (1964)), but has been raised since then from time to time. The provisions regarding TOT are currently embodied in Article 5, Division 1, commencing with section 35.0101. The last raise in the TOT rate was in August of 1994, and the combined current rate of TOT is 10.5%. The City Manager is providing a concurrent report on this matter which provides more detailed background on the TOT and its uses.

Proposition 218, embodied in article XIII C of the California Constitution, requires that all new local taxes be submitted to the electorate before they become effective. Taxes for general governmental purposes of the City require a majority vote and taxes for specific purposes, even if deposited in the City's General Fund, require a two-thirds vote. Further, any general purpose tax which the City imposed, extended or increased, without voter approval, after December 31, 1994, may continue to be imposed only if approved by a majority vote in an election which must be held within two years of November 5, 1996. The City has not imposed, extended or increased any such taxes which are currently in effect; as mentioned above, the last increase in the TOT rate was in August of 1994, prior to the benchmark date set forth in Proposition 218.

Current state law, therefore, requires a two-thirds vote of the electorate for any imposition or increase in a special tax, but only requires a majority vote of the electorate for the imposition or increase in any general tax.¹

In September of 2000, an initiative measure qualified for the March 2002 ballot [General Tax Initiative]. Entitled “The San Diego Taxpayers Protection Act of 2000,” the initiative, if adopted, would require a two-thirds vote of the electorate for “any increase in an existing general tax or imposition of a new general tax *proposed by the San Diego City Council.*” The initiative would add section 76.2 to the City Charter to that effect.² The highlighted language is critical to the measures implementation, as it applies only to new general taxes, or general tax increases, proposed by the City Council. If a general tax increase were provided by some other method, the provisions of the General Tax Initiative would not be applicable.

Under current law, the General Tax Initiative may be adopted by a simple majority of the electorate. California Constitution, article XI, 3(a); City Charter section 223.

It has been proposed that the City Charter be amended to set the rate of TOT for the City at the average of the rates of the ten largest cities in the western United States which compete with the City for tourist and convention business.

ANALYSIS

I

THE CHARTER MAY BE AMENDED TO SET THE RATE OF TOT

San Diego is a charter city, as it is thus within the authority of the City to impose a TOT. California Constitution, article XI, 5(a); *City of San Bernardino Hotel/Motel Assn. v. City of San Bernardino*, 59 Cal. App. 4th 237, 241-244 (1997). As mentioned above, the TOT is imposed by ordinance as codified in the Municipal Code, and is not itself adopted in the City Charter. However, the City Charter may provide for the rate of TOT even though the TOT is imposed by the Municipal Code and may be repealed or otherwise modified in the future by amendment to the Municipal Code.

An argument may be made that such a measure, appearing on the same ballot as the General Tax Initiative, would conflict with the General Tax Initiative, giving rise to questions as to its validity especially if the General Tax Initiative gained more votes.

II

THE INTENT OF THE ELECTORATE CONTROLS THE EFFECTIVENESS OF PROPOSITIONS ON THE SAME SUBJECT OR THAT CONFLICT

When two propositions on the same ballot are on the same subject, the initial question is whether the two measures irreconcilably conflict. If they do, the proposition gaining the highest number of votes controls. California Constitution, article XI, 3(d); *Sacramento County Deputy*

Sheriffs' Assn. v. County of Sacramento, 85 Cal. App. 4th 960, 965 (2001). In a number of instances the courts have considered measures that on the surface appear to conflict, but were found not to conflict because of the specific purpose and language of each. In such instances, the specific intent of one measure controlled the other despite the number of votes for each. *See generally id.* at 965-967.

For example, in *Horn v. Allen*, 195 Cal. 121 (1924), the voters of the City of Los Angeles were presented with a proposal to adopt a new City Charter containing eleven "at large" council members. As an alternative, and on the same ballot, the voters were given a discrete option of dividing the city into fifteen districts, with council members elected from each district. Both proposals passed, with the general charter proposal containing the "at-large" method gaining the most votes. In determining the controlling measure, the California Supreme Court held: "[I]f the form of the ballot presented to the voters was such as to permit a free expression on their part of a preference for the at-large plan . . . on the one hand or for the district plan on the other, and the intention of the voters be readily ascertained and determined, we feel impelled to give full effect [to the intent of the voters]." *Id.* at 129. The court approached the matter from the viewpoint of the voters and determined there was no fatal conflict because, while the voters expressed a choice as to the adoption of a new charter, a majority of them also expressed a preference for the discrete idea of district elections, thus district elections were the adopted method under the new charter. *Id.* at 132.

In 1992, the Supreme Court elaborated on the nature of competing ballot measures and held that, to uphold the rights of the electorate, propositions approved at the same election should not be declared as competing and ineffective if they reasonably may be construed as not competing. *Yoshisato v. Superior Court*, 2 Cal. 4th 978, 988-989 (1992).

In *Sacramento County*, the court was called upon to determine the effectiveness of two measures. The first was a general amendment to the county's charter which required disputes over certain labor contracts to be submitted to binding arbitration, with the results of the arbitration not subject to any other action. The second measure required certain of those arbitration results to be submitted to a vote of the electorate in order to be effective. 85 Cal App. 4th at 963-964. The court, finding that there was no fatal conflict, upheld the effectiveness of the former as modified by the requirements of the latter holding:

[T]he intent of the electorate was readily and freely expressed and easily ascertainable from the terms of the measures and the method by which they were presented to the voters. . . .

...

A voter who wished to adopt binding arbitration without reservation could vote yes on [the first measure] and no [on the second]. A voter who wished to adopt binding arbitration with the reservations expressed in [the second measure] could vote yes on both measures. . . .

...

By adopting [the second measure] the electorate of Sacramento County

can have meant and intended only one thing – to withhold limited types of contract provisions from the full reach of the [first measure].

Id. at 967-968.

Thus, if the intent of the electorate can be readily ascertained as to the choice between two competing measures, that intent will control and no fatal conflict will be found. In the absence of such readily ascertainable intent, if two propositions fatally conflict, the measure gaining the most votes prevails.

III

A PROPOSITION MAY BE CRAFTED WHICH CLEARLY GIVES THE ELECTORATE A CHOICE REGARDING THE TWO PROPOSED INITIATIVES

The General Tax Initiative is a general measure requiring a two-thirds vote of the electorate to impose or increase any general tax *proposed by the City Council*. Any proposed measure, to appear on the same ballot as the General Tax Initiative, setting the rate of TOT in the City Charter must clearly express the intent of the electorate that it be applicable despite the language of the General Tax Initiative in order to avoid the requirement of gaining more affirmative votes.

Enclosed as Attachment 1 is a draft ordinance which sets forth such a ballot measure [TOT Rate Initiative]. The proposition would add section 76.3 to the City Charter to provide:

- A) Notwithstanding any other provision of this Charter, if the City of San Diego has imposed any tax on the privilege of occupying any hotel within the City of San Diego [Transient Occupancy Tax], as such tax may be more fully imposed and described in the San Diego Municipal Code, the rate of such Transient Occupancy Tax will be determined every two fiscal years as more fully set forth in this section 76.3.
- B) The City Manager shall include in the City Manager's proposed budget for fiscal year 2003, prepared and submitted to the City Council as set forth in Charter section 69, the tax rates on hotel occupancy then in effect in the ten largest cities in the western United States with convention facilities that compete with the City of San Diego for convention and tourist business, such cities to be determined by the City Manager [TOT Rates]. The City Manager's proposed budget shall also set forth the average of the TOT Rates [Average TOT Rate].
- C) At the time the Annual Tax Levy ordinance is adopted for fiscal year 2003, pursuant to Charter section 75, the San Diego Municipal Code shall be amended to set forth any addition to or subtraction from the total Transient Occupancy Tax rate as set forth in the San Diego Municipal Code such that the total Transient Occupancy Tax rate for the City of San

Diego shall be equal to the Average TOT Rate.

- D) The determination of the Transient Occupancy Tax rate for the City of San Diego as set forth in this section 76.3 shall occur every two fiscal years, commencing with fiscal year 2003 as set forth in sections 76.3 (B) and (C), and is declared to be administrative in nature, and shall not be subject to initiative or referendum.
- E) This Section 76.3 may be adopted by a simple majority vote of the electorate and shall be applicable to any amendment of this Charter proposed to be adopted at the municipal election by which this Section 76.3 is approved by the electorate.

The language of this City Charter provision would not conflict with the General Tax Initiative because it would provide a formula in the City Charter for the setting of the TOT rate, and such rate setting would not be “proposed” by the City Council, which is the predicate for the application of the General Tax Initiative.

The intent of the electorate, that the TOT Rate Initiative be effective despite the language of the General Tax Initiative, could be further set forth in the ballot question to appear on the ballot. Attachment 1 sets forth a ballot question that provides such intent:

Shall the City Charter be amended to set the total Transient Occupancy Tax rate for the City of San Diego every two years at the average of similar rates for the ten largest cities in the western United States with convention facilities that compete for convention and tourist business with San Diego?

The City Attorney’s Office believes that the TOT Rate Initiative, if approved by a majority vote of the electorate, would provide a readily ascertainable intent of the electorate that the rate of TOT be set pursuant to the formula in the new Charter provision. The provisions of the General Tax Initiative could be given effect, as they are general provisions applicable to any new general tax or general tax increase *proposed by the City Council*. The setting of the TOT rate by a formula embodied in the City Charter would avoid this condition because the City Council would not propose any rate; the City Council would merely have the administrative duty to embody the rate determined by application of the formula in the Municipal Code.

In addition, and consistent with the analysis in the cases discussed above, the intent of the voters could be given effect because a voter desiring to require a two-thirds vote for general tax increases but not wanting to set a formula in the Charter to determine the rate of TOT could vote yes on the General Tax Initiative and no on the TOT Rate Initiative. A voter in favor of requiring a two-thirds vote for new general taxes or general tax increases, but also in favor of setting a formula for the TOT rate in the City Charter could vote yes on the General Tax Initiative and yes on the TOT Rate Initiative. If both matters passed, new general taxes or general tax increases proposed by the City Council would be subject to a two-thirds vote requirement, but the TOT rate would be set as provided in the City Charter and not be subject to

a two-thirds vote requirement because such rates would not be proposed by the City Council.

As an alternative to setting a formula for the calculation of the TOT rate in the City Charter, and consistent with the discussion in the cases set forth above, the City Charter could be amended to except from the application of the General Tax Initiative the setting of the TOT rate, which would leave the setting of the TOT rate subject to the general majority vote requirements of state law. Such a City Charter amendment would also make clear the voters' intent as to its applicability by providing a clear choice between excepting the TOT rate from the general tax vote requirements of the General Tax Initiative, or merely providing for a two-thirds vote requirement for all general tax increases. Attachment 2 sets forth the language of such a possible City Charter amendment.

CONCLUSION

The City Charter may be amended to provide a formula for the setting of the TOT rate. Such an amendment would be effective even if the General Tax Initiative passed because its provisions would not conflict with the provisions of the General Tax Initiative, and the intent of

the voters could be readily ascertained. In the alternative, increases to the TOT rate could be excepted out of the General Tax Initiative by adoption of a City Charter amendment to that effect.

Respectfully submitted,

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LJG:je(043.1)
Attachment 1
cc: City Manager
City Auditor & Comptroller
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