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REPORT TO THE HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

PROPOSED INITIATIVE ON THE CITIZEN'S PLAN FOR THE RESPONSIBLE MANAGEMENT OF MAJOR TOURISM AND ENTERTAINMENT RESOURCES

INTRODUCTION

At the request of Mayor Kevin Faulconer, our office conducted a review of a citizen's initiative, proposed by attorney Cory Briggs, former City Councilmember Donna Frye and others, called the "Citizen's Plan for the Responsible Management of Major Tourism and Entertainment Resources" (the Briggs/Frye Initiative or Initiative) to amend the San Diego Municipal Code (Municipal Code or SDMC) by repealing and adding several sections.

The Initiative proponents have submitted a notice to the Office of the City Clerk for the City of San Diego (City) of intent to circulate their petition.[1] The proponents state that the Initiative's purpose is "requiring tourists and tourism businesses to pay their fair share, and reforming the City's overall management of its tourism- and entertainment-related resources."[2]

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[1] An initiative petition may not be circulated for signatures until the proponent has published a notice of intention to do so in at least one daily newspaper of general circulation. SDMC § 27.1002.

[2] Donna Frye, "Statement of Reasons" (Oct. 26, 2015); and also, Briggs/Frye Initiative, Part 2, subpart (a), "This Ordinance is necessary to . . . establish transparent financing mechanisms that support [tourists and residents] paying their fair share," and subpart (f), "a coordinated and consolidated governance structure can provide the efficiencies necessary to relieve the public" of "operational deficits and deferred-maintenance debts" and "adoption of this Ordinance would serve in part to give the hotel industry incentives to assume their fair share." Other purposes stated in Part 3 of the Initiative are:

(1) to set the City's Transient Occupancy Tax (TOT) at "a competitive rate compared to other cities: 15.5% for large hotels and 14% for small hotels,"
(2) to repeal an existing earmark on TOT that is used to promote the City as a tourism destination and the San Diego Tourism Marketing District Procedural Ordinance and to replace them with a mechanism for hoteliers to create Tourism-Financed Improvement Districts, which allow for assessments to pay for promoting the City and to finance an off-waterfront expansion of the San Diego Convention Center (Convention Center) and which allow hoteliers to deduct up to 4% from collected TOT to pay for specified activities,
(3) to prohibit the expansion of the Convention Center on the downtown waterfront and to create an area east of Petco Park for the Convention Center expansion and a stadium, and to authorize private management of the Convention Center, under specified conditions,
(4) to authorize, but not require, the sale of the Qualcomm Stadium site, subject to specific conditions, including specified uses of the property, and
(5) to allow "retention of the San Diego Chargers in Mission Valley or downtown without taxpayer funding."

The Initiative proponents have not yet submitted signatures to mandate action by the City Council (Council). Once that occurs, under the City's elections ordinance,[3] the Council normally must adopt or reject the Initiative as presented.[4] The Council may not amend the Initiative.[5] If the Council rejects the Initiative or fails to act, then the Council must submit the Initiative to City voters at a special election.[6]

As requested, this Report will explain the Briggs/Frye Initiative and describe and discuss some of the legal issues raised by the Initiative. Nothing contained in this Report should be interpreted as indicating support for or opposition to the Briggs/Frye Initiative. The purpose of this Report is solely to explain its terms and flag and discuss some of the legal issues it raises. Some of those legal issues raise significant risk to the City.

[3] The San Diego Charter (Charter) requires the Council to adopt an election code ordinance, providing procedures to govern municipal elections, including initiatives. Charter §§ 8, 23. The City's procedures regarding initiatives are set forth in Municipal Code sections 27.1001 through 27.1051.
[4] SDMC § 27.1034.
[5] *Id*.
[6] SDMC § 27.1035.

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DISCUSSION

I. THE "POISON PILL" PROVISION AND THE INITIATIVE'S LEGALITY

Part 6 of the Briggs/Frye Initiative, "Interdependence; Interpretation," states that all of the codified provisions,[7] discussed below, are "inseparably interconnected and interdependent" such that if "any portion" of the codified sections "is held to be invalid by a court of competent jurisdiction after any and all appeals are complete, then none of the remaining portions of the Ordinance shall have any force or effect."

This provision voids the entire Initiative if any substantive provision is successfully challenged in court. It operates as a "poison pill" by eliminating the entire Initiative upon one provision being held invalid.

This is a very unusual provision. An initiative would typically state just the opposite to ensure that all of its terms are not jeopardized by one legal issue. By including this "poison pill" in the Briggs/Frye Initiative—a complicated and varied initiative containing some legally questionable terms—the authors have rendered the measure legally unreliable.

This Report identifies six provisions that are arguably invalid, any one of which, if found invalid, would invalidate the entire initiative:

- Allowing hotel operators to retain tax revenue collected from guests (who are the taxpayers) is at odds with state and local laws, including San Diego Charter section 85, requiring deposit of all tax revenue in the City's treasury. See Part IV.C. and D.

- Allowing hotel operators to exercise discretion in deciding whether to fund certain outside agencies may be at odds with Charter section 11.1, which prohibits delegation of the City Council's legislative discretion to third parties. See Part IV.D.

- Creating a new "Downtown Convention and Entertainment Overlay Zone" (Overlay Zone) in the City in which CEQA does not apply to certain types of development and replacing CEQA with a local environmental law goes well beyond current law, including recent California Supreme Court decisions. This could result in a legal challenge and "test" case. See Part III.

- Requiring "any project" authorized under the new downtown Overlay Zone to pay $15 million to the Port District and $5 million for a Mission Valley reserve fund may be challenged on constitutional grounds. See page 6, note 16 and page 10, note 41.

[7] The codified provisions are contained in Part 4 of the Initiative and are the proposed changes to the San Diego Municipal Code to achieve the purposes of the Initiative.

- Directing the San Diego Unified Port District (Port District), a separate government agency, on the use and expenditure of certain funds may infringe on the Port District's jurisdiction under state law. See page 7, notes 17 and 18.

- Including various provisions in the Initiative to increase taxes, create new downtown zoning (Overlay Zone), prohibit expansion of the convention center on its current site, authorize sale and set conditions for development of the Qualcomm Stadium site in Mission Valley, create a new environmental law to replace CEQA in the Overlay Zone, direct use of Port District funds, create an environmental reserve fund for Mission Valley, and address the land use needs of San Diego State University and other educational institutions, creates a strong likelihood that the Initiative violates the constitutional requirement that initiatives contain a single subject. See Part VII.

This unusual "poison pill" provision contains no protections for the City in the event of litigation. For example, because this Office questioned the legality of the original convention center tax increase designed by outside tax counsel, we insisted that no tax be collected until final court approval on a validation action we would file. When the tax was found illegal years later, the City was not ordered to pay refunds since no taxes were collected. This Initiative also contains legally questionable provisions any one of which could invalid the entire Initiative, including the tax increase. Litigation challenging the measure could take many years to conclude during which the measure requires that the new taxes be collected. The Initiative contains no protection or security for the City from having to repaytaxes or rescind actions upon a court finding one provision invalid, thereby rendering the entire Initiative void.

II. DOWNTOWN DEVELOPMENT AND CONVENTION CENTER EXPANSION

The Briggs/Frye Initiative includes provisions to allow a Convention Center expansion to be built in a downtown Overlay Zone and to allow hoteliers to create an "improvement district" to collect assessments to be used for construction of an expansion. It also includes required mitigation measures for convention center or sports facilities projects built within the overlay zone, including a $15 million payment to the Port District.

A. No Contiguous Convention Center

The Briggs/Frye Initiative makes clear that the City may not have any part in development or operation of a Convention Center expansion located next to the existing Convention Center on Harbor Drive.[8] The language used in the Initiative is broad and states that the City "shall not" "directlyor indirectly participate" in a contiguous expansion, or in any "acquisition, development, design, entitlement, construction, operation, or maintenance" of a structure or infrastructure or use intended for a contiguous expansion.[9] "Direct or indirect

[8] Initiative § 61.2805(a).
[9] *Id*.

participation" includes to "seek the approval of, operate, lease, own, loan money to or for" and "financially support" such an expansion.[10]

After this broad prohibition, the Initiative states: "Nothing in this Division prevents the City from seeking the qualified electors' approval of a future expansion of the San Diego Convention Center in the coastal zone."[11] It appears from this language that the City could take the steps it needs to place a measure on the ballot in the future for a contiguous Convention Center expansion that would then supersede the prohibition contained in the Initiative.

B. An Overlay Zone for Convention Center and Sports Facilities

The Initiative creates a new "Downtown Convention and Entertainment Overlay Zone" (the Overlay Zone) that applies to all property north of Imperial Avenue, west of 17th Street, south of K Street and east of Park Boulevard.[12] In addition to all uses already authorized by the City's zoning codes, properties in the Overlay Zone can be used to build meeting facilities ("[c]onvention center, exhibition, and meeting facilities"), sports facilities ("[p]rofessional, semi-professional, collegiate or recreational sports facilities"), or combined facilities.[13]

Under the Briggs/Frye Initiative, properties in the Overlay Zone are subject to new environmental mandates in place of the California Environmental Quality Act (CEQA).[14] The new environmental mandates are discussed in Section II below entitled "CEQA and New Environmental Mandates."

C. The $15 Million Payment to the Port District and the $5 Million Reserve Fund

The Briggs/Frye Initiative requires proponents of "any project" authorized under the new Overlay Zone to pay $15 million to the Port District.[15] This payment is listed as one of several required mitigation measures.[16]

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[10] *Id.*

[11] Initiative § 61.2805(c).

[12] Initiative § 61.2804(a). These downtown blocks are located east of Petco Park and include the existing City-owned Tailgate Park, San Diego Metropolitan Transit System's bus yard, and privately owned property.

[13] Initiative § 61.2804(b). The properties within the Overlay Zone are within the Centre City Planned District and East Village sub-district, subject to the Downtown Community Plan, and currently designated for either Ballpark Mixed-Use (BP) or Mixed Commercial (MC) uses. *See* SDMC Ch. 15, Art. 6, Div. 3 and Figures A and B, and the Downtown Community Plan (http://civicsd.com/planning/regulatory-documents.html).

[14] Initiative § 61.2804(c).

[15] Initiative § 61.2804(c)(3). It is unclear whether recreational sports facilities constructed as part of a hotel or condo project would fall within "any project" and be required to pay $15 million to the Port District.

[16] A mandate to pay money as a condition to developing property is subject to limitations under the takings clauses of the United States and California Constitutions. U.S. Const. amend. V; Cal. Const. art. I, § 19. If an exaction is part of a legislatively enacted program of general application, then such fees must be substantially related to a legitimate public welfare need. *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 455-56 (2015); *and see Erlich v. City of Culver City*, 12 Cal. 4th 854, 860-63, 886, 907 (1996), *cert. den.* 519 U.S. 929 (discussing the overlay of the California Mitigation Fee Act). If the government's demand is made on a case by case basis as part of a quasi-judicial land use decision, then the government must show that there is an "essential nexus" between a legitimate government interest (e.g., reducing traffic congestion or preventing flooding) and the exaction,

The Initiative refers to the payment as a "one-time payment," due from "the proponent or proponents of any project authorized by this section" within one year of issuance of a certificate of occupancy. The $15 million is paid "in exchange for the Port District's binding legal commitment to match that payment with $35 million over a 30-year period."[17] The Initiative specifies how the total $50 million can be used by the Port District and mandates that those funds "may not be used for any purpose not expressly authorized by this paragraph . . . ."[18]

The Initiative also requires, as a mitigation measure, that project proponents create a reserve fund for a $5 million bond.[19] This reserve fund enables "one public agency recipient" to issue debt, secured by the reserve fund, for development of an "Urban Rivers Scientific Interpretive Center."[20] The "public agency recipient," also referred to as a "Qualified Recipient," means a purchaser of the City's 166-acre Qualcomm Stadium property and is limited to San Diego State University, the University of California at San Diego, the San Diego River Conservancy, and the San Diego Community College District.[21] The requirement that downtown project proponents create a reserve fund coincides with the requirement imposed on the Qualified Recipient to design and construct the Urban Rivers Scientific Interpretive Center on the Stadium property.[22] Through this mechanism, the developer of convention center or sports facilities in the Overlay Zone creates a funding source to be used by the developer of the Stadium property for design and construction of the Interpretive Center.

For both the $15 million payment and the $5 million reserve, the Initiative does not address application of these mitigation measures to multiple projects, whether the requirement applies to each or can be split among several, or whether the fee should be allocated based on size or impact of the project.[23] The reserve fund (created as part of a convention center or sports facility project in the Overlay Zone) would need to be established before the Qualified Recipient

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and a "rough proportionality" between the amount of the exaction and the project's impact as demonstrated by an "individualized determination." *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *see also Erlich* at 881-85. A flat assessment of $15 million on all projects and subject to the agreement of the Port District, may not meet these legal requirements.

[17] A citizens' initiative proposing a change to local law is limited to the jurisdiction of the local government, and cannot extend beyond the authority of the local government body. 5 McQuillin Mun. Corp. § 16:52 (3d ed. 2015). The Port District is a separate state agency with sole authority within its boundaries. Cal. Pub. Res. Code § 6009(b) and (c). Accordingly, the Port District will not be bound by the Initiative.

[18] Initiative § 61.2804(c)(3). The "total $50 million in funds" are for use by the Port District to develop park and recreational facilities in Phase 2 of the North Embarcadero Visionary Plan. *Id*. For information and documents on the North Embarcadero Visionary Plan and its implementation, see https://www.portofsandiego.org/north-embarcadero.html.

[19] Initiative § 61.2804(c)(4).

[20] *Id*.

[21] Initiative § 61.2806(a).

[22] Initiative § 61.2806(a)(1)(i): "A portion of the site . . . shall also be . . . developed as an Urban Rivers Scientific Interpretive Center, to be operated by the Qualified Recipient . . . ."

[23] As with the $15 million fee, there is a legal issue as to the constitutionality of requiring the establishment of a reserve fund for development of an Urban Rivers Scientific Interpretive Center as a condition to construction of a convention center or sports facility downtown. It is also unclear whether all "recreational" and "meeting" facilities must contribute, including those built as part of a hotel, housing, or commercial building project.

is prepared to issue bonds for design and construction of the Interpretive Center, which must take place within five years of purchase of the Stadium property.[24]

D. Creation of Tourism-Financed Improvement Districts

The Initiative repeals the City's existing Tourism Marketing District (TMD)[25] and provides for the creation of Tourism-Financed Improvement Districts (TFIDs).[26] Each TFID is an assessment district that can be created by hoteliers to finance "convention center, exhibition, and meeting facilities," transportation infrastructure that serves tourists, and maintenance and repair costs for "tourist-related facilities."[27, 28]

The Initiative incorporates state law for the creation of property and business improvement districts (PBIDs)[29] but places several key restrictions on the use of funds:

1. TFID assessments cannot be used for typical PBID "activities," "including but not limited to sales and marketing or promotion."[30]

2. TFID assessments cannot be used for a contiguous convention center expansion.[31]

3. TFIDs cannot finance any portion of an "entertainment or professional sports facility."[32]

Creation of a TFID is voluntary, but the Initiative requires that the first district cover the downtown area (the Downtown TFID) and the second district cover the rest of the City (the

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[24] The Interpretive Center must be built "not more than five years after the first transfer of ownership." Initiative § 61.2806(a)(1)(i). The reserve fund must be established "not later than one year after the first issuance of any certificate of occupancy for the project . . . ." Initiative § 61.2804(d). These deadlines do not appear to be affected by the sunset provision in § 61.2808(d) relating to tourism financed improvement districts, discussed in Part II.D. below.

[25] Initiative § 61.2528. The TMD Procedural Ordinance (SDMC §§ 61.2501-61.2526) provides for the creation of an assessment district to fund coordinated marketing and promotional activities for businesses within the district. There is currently one citywide TMD. http://www.sdtmd.org.

[26] Initiative §§ 61.2801-61.2803.

[27] Under the Initiative, only property or business owners who hold a valid Transient Occupancy Registration Certificate within the district may form a TFID. Initiative § 61.2802(k). A hotel operator is required by existing law to obtain a Transient Occupancy Registration Certificate in connection with operating a hotel and collecting transient occupancy taxes (TOT). SDMC § 35.0113.

[28] The Initiative would allow hotel operators to retain a portion of the TOT funds they collect as repayment for assessments paid to the TFID. See Part IV.C., below, for further discussion.

[29] Initiative § 61.2802, incorporating the Property and Business Improvement District Law of 1994, Cal. Sts. & High. Code §§ 36600-36671.

[30] Initiative § 61.2802(g). "Activities," as defined in California Streets & Highways Code section 36606, are those that benefit businesses or property in the district and include promotion of tourism and events, marketing and economic development, and services that supplement those provided by the City, such as security, street and sidewalk cleaning, and graffiti removal.

[31] Initiative § 61.2802(h).

[32] Initiative § 61.2802(j).

Suburban TFID).[33] While these two TFIDs would cover the City's entire geographic area, the Initiative states that there is "no limit on the number of such districts that may be created."[34]

The TFID provisions sunset after five years unless a TFID dedicated to development and operation of a convention center expansion in the Overlay Zone, "with a size deemed appropriate by the City," has been created.[35] If such a TFID is not created within five years, then the sections authorizing TFIDs "shall be deemed withdrawn and shall have no further force or effect, and no district created thereunder shall have the legal authorityto continue its operations."[36] The TFID sunset provision does not include language to reinstate the repealed TMD Procedural Ordinance.[37]

III. CEQA AND NEW ENVIRONMENTAL MANDATES

A. CEQA Exemption and Environmental Mandates for Overlay Zone Projects

As discussed above, the Briggs/Frye Initiative creates an Overlay Zone allowing the property within the Overlay Zone to be used for a convention center, exhibition and meeting facilities, as well as professional, semi-professional, collegiate, or recreational sports facilities.[38] The Initiative exempts projects in the Overlay Zone fromCEQA, but at the same time requires that such projects comply with "any and all mitigation, monitoring, and reporting requirements that would be required under [CEQA]" if the projects were not exempt.[39]

Since all reporting requirements under CEQA are still required, environmental impact reports would still be required. Since all mitigation requirements under CEQA are still required, the environmental impact reports would need to explore alternatives and conduct the necessary scientific studies to determine the project's impacts and the measures needed to mitigate them.

In addition to all mitigation measures that would be required under CEQA, the mitigation measures, "at a minimum,"[40] would include compliance with a plan to reduce vehicle miles

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[33] Initiative § 61.2802(a) and (s).
[34] Initiative § 61.2802(s).
[35] Initiative § 61.2808(d) ("by the last day of the sixtieth calendar month after this section takes effect").
[36] Initiative § 61.2808(d)(2). Since the first TFID must be the Downtown TFID created for the purpose of financing a convention center, meeting facilities, or related infrastructure, if this TFID does not exist, there should be no other TFIDs in existence and affected by the five year sunset.
[37] The TMD Procedural Ordinance is repealed in section 61.2528 of the Initiative; the five-year sunset in section 61.2808(d) applies to sections 61.2802 and 61.2803, which provide for creating the TFIDs.
[38] The Briggs/Frye Initiative waives CEQA for any of the uses specifically authorized by the Initiative in the OverlayZone. The California Supreme Court, in *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029 (2014) (discussed further in Part III.C. below), determined that CEQA did not applyto a citizens' initiative brought forward for a specific development proposal. This Initiative tests the boundaries of the law by seeking to exempt an entire geographic area from CEQA for certain uses, not a specific proposed project. If upheld by the courts, this extension would enable voters to exempt entire cities and counties from CEQA. There is no case law allowing or prohibiting this extension of the Supreme Court decision. In this case, as discussed below, voters would be replacing CEQA with potentiallystricter controls than CEQA.
[39] Initiative § 61.2804(c).
[40] No "maximum" is discussed.

traveled to the project, incentives for use of public transit, compliance with all rules governing historical resources, as well as the $15 million payment and reserve fund, discussed above.[41]

The Initiative's exemption of these projects from CEQA appears to mean that the noticing, public hearing, time limitations and other procedural requirements included in CEQA may not apply. Under CEQA, there is a 45 to 60 day comment period for a draft environmental impact report followed by public notice and then a certification hearing before the applicable public body.[42] Instead of this process, the Initiative provides that the City "shall provide the public with an opportunity to review and comment on any proposed mitigation, monitoring, and reporting requirements."[43]

Instead of a certification hearing under CEQA, the Briggs/Frye Initiative provides that the City "shall adopt the requirements at a public hearing noticed in accordance with the Land Development Code's requirements for Process Five decisions."[44] "Process Five" is a decision making process that includes review and recommendation by the Planning Commission and review and decision by the Council.[45] Under CEQA, the Council must use its own independent judgment to certify that the environmental document complies with CEQA and make written findings addressing the significant effects of the project.[46]

Under CEQA, a lawsuit to challenge the sufficiency of an environmental impact report and mitigation must be filed within 30 days after the filing of the notice of determination by the public agency.[47] It is unclear as to whether this CEQA process would apply to the Briggs/Frye Initiative or, in any event, how the Initiative's terms would be enforced. There is a provision, however, stating that the mitigation requirements may "be legally enforceable by any member of the public." There is no time limit. CEQA's rules require standing to sue, include deadlines for bringing a challenge, and provide the standard for review by the court.[48] The Initiative does not contain these limitations.

B. CEQA Exemption and Environmental Mandates for a Mission Valley Stadium Project

The Briggs/Frye Initiative creates a conditional CEQA exemption for the City's proposed Qualcomm Stadium Reconstruction Project at the existing Mission Valley Qualcomm Stadium

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[41] Initiative § 61.2804(c)(1)-(3). Requiring these additional mitigation measures for any project in the Overlay Zone that includes "meeting facilities" or "sports facilities," may raise legal issues relating to the reasonableness of imposing these requirements. *See* fn. 16, above.

[42] Cal. Code Regs. § 15201; SDMC § 128.0306.

[43] Initiative § 61.2804(e).

[44] *Id*.

[45] SDMC §§ 112.0509, 156.0304(c)(5).

[46] Cal. Code Regs. §§ 15090, 15091. *See also* SDMC § 128.0311(a):

> [B]efore approving a *development permit* or other discretionary action, the decision maker shall certify that: (1) The final environmental document has been completed in compliance with CEQA and the State CEQA Guidelines; and (2) The information contained in the final environmental document reflects the independent judgment of the City of San Diego as the Lead Agency and has been reviewed and considered by the decision maker before approving the project.

[47] Cal. Pub. Res. Code § 21167(b); Cal. Code Regs. § 15112(c)(1).

[48] *Practice Under the California Environmental Quality Act*, Kostka & Zischke, §§ 23.2, *et seq.* (2nd ed. 2015).

site.[49] This exemption would apply if the City certifies a final environmental impact report and meets certain conditions.

C. Creation of a CEQA Exemption by Local Voter Initiative

In setting forth exemptions to CEQA, the Briggs/Frye Initiative raises the legal issue of whether voters can, through a local citizens' initiative, exempt an entire geographical area from the requirements of a state law. The California Supreme Court has found that parts of CEQA do not apply to local land use initiatives proposed by voters and adopted at an election.[50] For example, in *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029 (2014), the court did not require the town council to conduct full CEQA review before directly adopting the voter initiative for a proposed WalMart project because the time required for CEQA compliance conflicted with the deadlines in the California Elections Code for the council to act on the initiative.[51] The court reasoned that the voter initiative statutes, founded in the constitutional right of the people to propose legislation, took precedence, and that requiring CEQA review in that case was "contraryto the statutory language and legislative history pertaining to voter initiatives."[52]

In that case, the initiative did not seek to create a CEQA exemption. Rather, the local agency was faced with a deadline for taking action on the voter initiative and could not comply with the CEQA requirements for review and reporting on the environmental impacts within that timeframe. The court determined that the local agency should act to meet the initiative deadline and relieved the local agency of its obligation to comply with CEQA as part of that action.[53]

A local initiative may not change state law.[54] Here, the Briggs/Frye Initiative does not seek to "waive" CEQA for a specific project, but seeks to create a geographical area (i.e. the Overlay Zone) in which CEQA does not apply for certain types of projects. In place of CEQA, the Initiative sets forth a local environmental law that incorporates that same reporting, mitigation and monitoring as if CEQA applies plus additional mitigation requirements and payments and sets forth a new procedure, including the right of enforcement by any person.

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[49] Initiative § 61.2806(b) (referencing "the project that is within the scope of that certain Draft Environmental Impact Report for the Qualcomm Stadium Reconstruction Project (City of San Diego Project No. 437916; State Clearinghouse No. 2015061061)") and § 61.2806(c).

[50] *DeVita v. County of Napa,* 9 Cal. 4th 763 (1995); *Stein v. City of Santa Monica*, 110 Cal. App. 3d 458, 460-61 (1980).

[51] *Id.* at 1033, 1036.

[52] *Id.* at 1036; Cal. Const. art. IV, § 1 and art. II, §§ 8, 10, 11.

[53] Following these cases, the Council maynot be obligated to comply with CEQA when taking action on the Initiative (i.e., to adopt it or place it on the ballot) to meet the required timeframe. These cases do not provide a basis for not complying with CEQA when the City is taking action on the future projects anticipated by the Initiative.

[54] 5 McQuillin Mun. Corp. § 16:52 (3d ed. 2015) (electorate has no greater power to legislate than the municipality itself); *Citizens f orJobs & the Economy v. County of Orange*, 94 Cal. App. 4th 1311 (2002) (county initiative invalid because it involved state matters that were not the proper subject of initiative power); *DeVita v. County of Napa*, 9 Cal. 4th 763, 775-76 (1995) (right to initiative is generallycoextensive with local governing body's legislative power).

The Briggs/Frye Initiative pushes the boundary of existing law and, if successful, would allow cities and counties—through citizen initiatives—to exempt themselves from CEQA. Clearly, this Initiative could result in a very significant test case.

IV. TAX INCREASE AND RELATED CHANGES

As explained earlier, the Briggs/Frye Initiative eliminates the TMD and its assessments that currently fund marketing and promotional activities intended to increase hotel stays. In its place, the Initiative increases the City's hotel room tax or TOT, and gives hoteliers the option of using a portion of this tax increase to offset assessments paid to the TFID, discussed above.

The City's TOT is charged as a percentage of the hotel guest's bill, and is currently set at 10.5% for hotels, recreational vehicle parks, and campgrounds.[55] Under existing law, operators have a duty to collect the TOT from their guests and hold the funds "in trust for the account of the City until payment thereof is made to the City Treasurer."[56] If operators fail to collect the TOT from guests, the City must require the operators to pay the tax.[57] The Briggs/Frye Initiative increases the tax to 15.5% for hotels with at least 30 rooms, and for recreational vehicle parks and campgrounds.[58] It increases the tax to 14% for hotels with fewer than 30 rooms.[59]

A. Elimination of Requirement to Use Some TOT Funds for City Promotion

Existing law earmarks a portion of the TOT revenue collected by the City for deposit in the City's TOT Fund to be "used solely for the purpose of promoting the City," and identifies a smaller portion for deposit in the City's TOT Fund to be used for any purpose as directed by Council, including City promotion.[60] The remaining revenues are to be deposited in the City's General Fund.[61] The Briggs/Frye Initiative repeals the requirement that a portion of the revenues be used for City promotion.[62] The Initiative does not require deposit of these funds in the City's General Fund, but removes the existing limitation as to how the City can use them.

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[55] SDMC §§ 35.0103-35.0108.
[56] SDMC § 35.0114 (g).
[57] SDMC § 35.0112 (a), (b).
[58] Initiative § 35.0109(b).
[59] Initiative § 35.0109(c). This difference between hotels with more or less than 30 rooms is part of the existing TMD structure for marketing and promotion to benefit hotels. Larger hotels receive more of the benefits and are assessed at a higher percentage rate. San Diego Resolution R-307843 (Nov. 27, 2012). This distinction between large and small hotels is not currently part of the City's TOT structure. SDMC §§ 35.0101, *et seq.*
[60] SDMC §§ 35.0128(a) and (b).
[61] SDMC §§ 35.0128(c), 35.0129-35.0133.
[62] Initiative § 35.0139(a) (repealing SDMC § 35.0128(a) requiring two-thirds of the revenue from the TOT increase (four percentage points), less administrative costs, be used for City promotion). The Initiative leaves the balance of Municipal Code section 35.0128 in place: the provision in section 35.0128(a) requiring revenues attributable to one percentage point of the tax rate, less administrative costs, be deposited in the TOT Fund and used for any purpose as directed by Council, including City promotion; the provision in section 35.0128(b) requiring one percentage point, less administrative costs be deposited in the General Fund, and the provision permitting the Council to allocate funds to the Housing Trust Fund.

B. Termination of TMD Assessment

The Briggs/Frye Initiative repeals the existing TMD Procedural Ordinance and states that "all legal authority, rights, and obligations conferred" by the Ordinance "shall be deemed withdrawn."[63] There are a number of actions taken by the City since the enactment of the Ordinance that are potentially affected by repeal of the Ordinance including authorization of the tourism marketing district, approval of the district management plan, activities, and assessment to pay for the activities, and levy of the assessment.[64] The current TMD assessment authorized by the Council pursuant to the Ordinance is 2% for hotels with at least 30 rooms and 0.55% for hotels with fewer than 30 rooms.[65]

The existing TMD Procedural Ordinance obligates a TMD association to report its activities, revenues, and expenditures for approval by the Council, and to comply with open government laws.[66] The City has also entered into a contract with the San Diego Tourism Marketing District (SDTMD) for operation of the TMD in accordance with the approved plan.[67] It appears that the Initiative would repeal the TMD Procedural Ordinance, end the levy of assessments, and eliminate the purpose and funding for the operating agreement.[68]

C. The Initiative Allows Hotel Operators to Keep Taxpayer Funds

The Briggs/Frye Initiative recites, at section 35.0109(d), that all tax revenue collected pursuant to its provisions are to be deposited in the General Fund. In section 61.2807, however, the Initiative allows the operator of a hotel, recreational vehicle park, or campground (collectively referred to as "the hotel operator"), who collects the tax from the hotel guest, to retain a portion of the taxes collected without depositing the funds in the City's treasury. The two provisions are in direct conflict.

This conflict in the Initiative's provisions may arise out of the authors' erroneous assumption that the hotel operator is the taxpayer of the TOT tax. As discussed in section D below, the hotel guest is the taxpayer, not the hotel operator. Thus, when the Initiative authorizes

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[63] Initiative § 61.2528.

[64] SDMC §§ 61.2506-61.2510; *see e.g.,* San Diego Resolutions R-303226 (Dec. 12, 2007) (establishing the district and levying assessments), R-307702 (Sept. 26, 2012) (mailing ballots for renewal of district), R-307843 (Nov. 27, 2012) (renewing the district for 39½ years).

[65] San Diego Resolution R-307843 (Nov. 27, 2012).

[66] SDMC § 61.2521.

[67] San Diego Resolutions R-308062 (Mar. 26, 2013) (five-year operating agreement); R-308065 (Apr. 23, 2013) (first amendment); R-308588 (Dec. 9, 2013) (second amendment).

[68] Neither the TMD Procedural Ordinance nor the operating agreement between the City and SDTMD permit the City to unilaterally disestablish the TMD or terminate the operating agreement without cause. SDMC § 61.2524 (TMD may be "disestablished" by resolution of the Council based on mismanagement or by request of the assessed business owners); Agreement for the Operation of the San Diego Tourism Marketing District, Art. V (San Diego City Clerk Doc. No. RR-308062, Mar. 26, 2013) (provides for termination if SDTMD fails and refuses to perform its obligations under the agreement, but not at the will of the City). The TMD Procedural Ordinance is modeled on state law. *See* Cal. Sts. & High. Code §§ 36600 *et seq*. The Initiative's repeal of the TMD Procedural Ordinance raises legal issues relating to limitations on the initiative power and compliance with state law. *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22, 26 (1976) (city ordinance proposed by initiative must be legislation that the council has the legal power to enact).

the hotel operatorto retain revenue collected fromguests ratherthan deliver it to the City, it is authorizing the hotel operator to keep taxpayer funds.

The Briggs/Frye Initiative allows the hotel operator to retain from the TOT tax revenue collected fromguests up to four percentage points of the TOT rate (e.g., revenues based on 4% of the 15.5% rate), as reimbursement for assessments paid by the hotel operator to a TFID and to a newly formed tourism marketing district.

First, for TFID assessments, the Initiative allows a hotel operator who is a member of and paying assessments to a TFID, to deduct and retain from the TOT tax revenue collected from guests up to two percentage points of the TOT rate.[69] For the Suburban TFID, the Initiative permits a deduction of up to the actual rate of the TFID assessment or 2%, whichever is less, provided that the Suburban TFID is using a portion of the assessments for improvements at the existing convention center or for construction of a convention center expansion in the Overlay Zone.[70]

Second, for tourism marketing district assessments, the Initiative allows a hotel operator who is a member of and paying assessments to a newly formed tourism marketing district (not the existing TMD) to deduct and retain from the TOT tax revenue collected from guests up to two percentage points of the TOT rate.[71]

Under the Initiative, these deductions fromTOT revenue are made by a hotel operator in the operator's "sole discretion,"[72] but may not exceed amounts paid by the operatorto a TFID and to a tourism marketing district. The funds are deducted from the taxes paid by the guest (i.e., the transient) and collected by the operator.

D. Allowing Hotel Operators to Keep Taxpayer Funds Violates the City's Charter

The direct diversion of tax revenue is not consistent with local and state law for the safe handling of tax payments. Under the TOT system, the hotel operator is not the taxpayer; the TOT taxpayer is the guest who pays the tax at the time the room is rented.[73] The guest or transient will find the TOT amount itemized on the bill.[74] Hotel operators are prohibited fromadvertising or stating that the TOT "will be assumed or absorbed by the Operator."[75]

As taxes, the moneys collected by the hotel operator are public funds, and the City is responsible for ensuring that they are accounted for and properly spent.[76] The City's laws

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[69] Initiative § 61.2807(b) and (c).
[70] Initiative § 61.2807(c)(3).
[71] Initiative § 61.2807(d).
[72] Initiative § 61.2807(b) and (c).
[73] SDMC § 35.0102 (defining "transient" as any person who exercises or is entitled to use or possession of anyhotel room, recreational vehicle park space, or campground for dwelling, lodging, or sleeping); SDMC §§ 35.0103-35.0108 (imposing the tax on transients); SDMC § 35.0110 (stating the tax is "a debt owed by each Transient to the City").
[74] SDMC § 35.0112(c).
[75] SDMC § 35.0112(e).
[76] *See, e.g.*, 2011 CityAtt'yMS 628 (2011-2; Apr. 1, 2011) at 7, citing *Epstein* v. *Hollywood Entertainment District IIBusiness Improvement District,* 87 Cal. App. 4th 862 (2001).

regulating collection and use of the TOT require payment of the tax to the City.[77] The hotel operator collects the tax revenue for the City, and must remit the full amount of taxes collected monthly along with tax returns.[78] All TOT revenue collected by a hotel operator must be "held in trust for the account of the City until payment thereof is made to the City Treasurer."[79]

This requirement to pay the collected TOT tax to the City Treasurer is consistent with the duty and obligation of the City Treasurer to receive and safeguard tax revenue funds under state and local law.[80] Unlike a private party, the City Treasurer is duty-bound to safeguard public funds and comply with all state laws for the protection and investment of such funds.[81] For that reason, collected taxes must be immediately deposited with the Treasurer or deposited according to the instructions of the Treasurer.[82]

The Charter also requires that taxes be paid into the City's treasury.[83] Charter section 85 states, "[a]ll moneys received from taxes," as well as "all moneys accruing to the City from any source . . . shall be paid into the treasury daily." Similarly, Charter section 45 requires payment of funds collected from the public into the treasury either daily or as authorized by ordinance.[84]

These state and City laws require the deposit of tax funds with the City Treasurer to protect them as public funds. By authorizing hotel operators to keep tax revenue without first depositing them with the City's treasury, the Initiative appears to violate the City Charter and interferes with the Treasurer's obligations under the law.

In addition, allowing hotel operators to retain general tax funds interferes with the Council's legislative authority to make decisions on the expenditure of those funds.[85] As

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[77] SDMC § 35.0114(a) and (d) (requiring each Operator to pay each month the full amount of taxes collected for the previous month); § 35.0114(b) (taxes not actually received by the City are delinquent and subject to penalties).
[78] SDMC §§ 35.0110 (if the tax is not paid by the transient to the Operator, City Treasurer may require that the tax be paid directly to the City); § 35.0112 (each Operator must collect the tax and account for it separately); § 35.0114 (remitting and reporting requirements).
[79] SDMC § 35.0114(g). *See also Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310, 1326-28 and n.7 (2013) (the definition of a "tax" in article XIIIC, section 1(e) of the California Constitution is limited to charges payable to a local government and includes a charge payable to a third party on behalf of the local government).
[80] San Diego Charter § 45 (City Treasurer shall perform the duties imposed by state and local law); Cal. Gov't Code §§ 41001-41005 (duty to safeguard public funds and to carry out duties related to tax collection); Cal. Const., art. XI, § 11 (authorizing state regulation of deposit and investment of public funds); Cal. Govt. Code §§ 53630 *et seq*.
[81] Cal. Govt. Code §§ 53635.2 (requiring that the official with legal custody of money belonging to a local agency deposit or invest the money consistent with state law), 53649 (duty to safeguard public funds), 53656 (only authorized entities shall act as "agents of depository"), and 53681 (an officer or employee who fails to comply with state law in depositing the City's funds is subject to forfeiture of office).
[82] Cal. Govt. Code § 53680. The Initiative seeks to interject the City Auditor into the City Treasurer's role, ignoring the respective roles and duties of the Auditor and Treasurer established by the Charter and creating duplicate responsibilities. Initiative § 35.0121.5; San Diego Charter §§ 39.2, 45.
[83] The Charter is the City's supreme law; changes to the Municipal Code must be consistent with the Charter. *See* Cal. Const. art. XI, §§ 3(a) and 5(a); *Harman v. City & Cnty. of S.F.*, 7 Cal. 3d 150, 161 (1972).
[84] *Also*, SDMC § 22.0704 (requiring daily deposit of money received directly from the public unless an alternate depositing schedule is authorized in writing by the City Treasurer); *and see* 1985 City Att'y MOL 500 (85-94; Dec. 13, 1985) (applying a reasonable care standard to review of funds lost when not timely deposited).
[85] Whether the tax is for a general or special purpose, collected tax revenues must be deposited in the City's treasury. *See* citations above.

discussed above, the Briggs/Frye Initiative provides for diversion of the TOT tax revenue to a private party, to cover an obligation of the private party, at the private party's discretion. This very specific diversion contradicts the Initiative's earlier characterization of the TOT increase as "a general tax" to be "deposited in the General Fund" and "[t]o be used for general governmental purposes as the City Council may from time to time provide . . . ."[86] Instead of following the budget process, the Initiative allows hotel operators to take taxpayer funds *before* they are allocated through the budget process. Either way—whether through a cash payment deducted fromtaxpayer funds being held by the hotel operatoror throughthe budget process—the result is an expenditure of taxpayer funds.

Charter section 11.1 grants nondelegable authorityto the Council to spend public money, including taxes.[87] Had the Initiative required certain funding, it might be viewed as the City Council directing the expenditure by way of an initiative. By giving hotel operators the discretion to decide whether and to what extent City funds are used to fund certain outside agencies, the legislative authorityof the City Council is delegated—through the Initiative—to hotel operators, and hotel operators are empowered to exercise the Council's legislative discretion.

Neither state nor local law provides a basis for sidestepping the Council's legislative authority by authorizing a hotel operator to choose whether to deposit the collected tax funds with the City Treasurer or to exercise legislative discretion by expending them.

E. Majority or Two-Thirds Vote for Local Tax Increase by Citizens' Initiative

Under the California Constitution, a general tax increase requires the approval of a majorityof voters, while a special tax increase requires approval by two-thirds of the voters for passage.[88] The City's Charter also mandates that special taxes be approved by a two-thirds vote of the qualified electors of the City voting on the measure.[89] However, a recently decided case questions whether those distinctions apply to taxes proposed and adopted by citizens' initiative.

In *California Cannabis Coalition v. City of Upland* (*Cannabis Coalition*),[90] the Court of Appeal held that the California Constitution's requirement that general tax increases be voted on at a general election, applies to taxes "imposed by government," and not to taxes proposed and adopted by citizens' initiative. This recent case, and the California Supreme Court's 1991 decision in *Kennedy Wholesale, Inc. v. State Board of Equalization* (*Kennedy Wholesale*),[91] raise the question of whether the constitutional requirement for a two-thirds vote of the electorate for a special tax applies only to taxes being imposed by a local government, or to any special tax imposed within a city, county, or special district.

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[86] Initiative § 35.0109(d).
[87] Charter section 11.1 is based on article XI, section 11 of the California Constitution, and prohibits the delegation of the Council's legislative authoritypertaining to the raising or spending of public funds, "including but not limited to the City's annual budget ordinance or any part thereof."
[88] Cal. Const. art. XIIIC, § 2 (b) and (d).
[89] San Diego Charter § 76.1.
[90] E063664, 2016 WL 1072858 (Cal. Ct. App. Mar. 18, 2016).
[91] 53 Cal. 3d 245 (1991).

The California Constitution includes limitations on the imposition of taxes that are the result of several different voter initiatives, including Proposition 13 approved on June 6, 1978, Proposition 218 approved on November 5, 1996, and Proposition 26 approved on November 2, 2010. These initiatives were each part of an effort to lessen the burden of taxes, assessments, and fees and restrict the imposition of new taxes, assessments, and fees.

The purpose of Proposition 13 was to cut local property taxes.[92] "To prevent local governments from subverting" the changes by trying to impose new taxes to replace lost property tax revenue,[93] Proposition 13 included article XIIIA, section 4, requiring a two-thirds vote of the electorate before cities, counties, and special districts may impose a special tax. Section 4 states:

> *Cities, Counties and special districts*, by a two-thirds vote of the qualified electors of such district, *may impose* special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.[94]

Proposition 218 focused on the ability of local governments to assess fees and raise taxes.[95] It added article XIIIC, distinguishing and defining general and special taxes imposed on a local level, and requiring different voting standards for the adoption of each. It broadly defined a "general tax" as "any tax imposed for general governmental purposes," and a "special tax" as "any tax imposed for specific purposes," and added the requirements in section 2 for a vote of the electorate before a "*local government may impose*" a general or special tax. Those sections state:

> (b) *No local government may impose*, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. . . .
>
> (d) *No local government may impose*, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. . . .[96]

Proposition 26, intended to address government's use of fees in lieu of taxes, tightened the definition of a "tax" in articles XIIIA and XIIIC to mean, respectively, "any levy, charge, or exaction of any kind *imposed by the State*" and "any levy, charge, or exaction of any kind

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[92] *Howard Jarvis Taxpayers Assn. v. City of Riverside*, 73 Cal. App. 4th 679, 681-82 (1999).

[93] *Rider v. County of San Diego,* 1 Cal. 4th 1, 6-7, 11 (1991); *Los Angeles County Transportation Com'n v. Richmond,* 31 Cal. 3d 197, 206 (1982); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 231 (1978).

[94] Cal. Const., art. XIIIA, § 4 (emphasis added).

[95] Proposition 218's Findings and Declarations state:

> The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself.

[96] Cal. Const., art. XIIIC, § 2(b) and (d) (emphasis added).

imposed by a local government."[97] Proposition 26 does not mention tax increases proposed by citizens' initiative.

The third and final section of Article XIIIC addresses the role of the citizens' initiative to "reduce or repeal" a tax and seeks to protect that right from interference by local government. On its face, its intent is that the right of initiative not be constrained, but it does not appear to contemplate or address an initiative seeking to raise a tax. It states, in full:

> Initiative Power for Local Taxes, Assessments, Fees and Charges. 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.[98]

Charter section 76.1, Special Taxes, requires a two-thirds vote of the electorate before a special tax can "be levied by the Council." It was placed on the November 8, 1993 ballot as "strictly an enabling measure" to allow the voters to approve "special tax levies for desired additional improvements or services" in the City or in a specific community, as provided by Proposition 13.[99] Section 76.1 states:

> Notwithstanding any provision of this Charter to the contrary, a special tax, as authorized by Article XIIIA of the California Constitution may be levied by the Council only if the proposed levy has been approved by a two-thirds vote of the qualified electors of the City voting on the proposition; . . . .

The reference in section 76.1 to "a special tax, as authorized by Article XIIIA," means the authority in article XIIIA, section 4 that "Cities, Counties and special districts . . . may impose special taxes" by a two-thirds vote of the electorate. The word "levy" used in section 76.1 has the same meaning as "impose." To "levy" a tax means to "impose or assess" the tax by legal authority.[100] Neither Charter section 76.1 nor article XIIIA, section 4 mentions imposing or levying a tax by citizens' initiative.

The question before the court in *Cannabis Coalition* was whether Article XIIIC, section 2 of the California Constitution requiring that the vote on a general tax be held during a general election, applied to a local citizens' initiative that included a regulatory fee that was arguably a

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[97] Cal. Const., art. XIIIA, § 3 and art. XIIIC, § 1(e) (emphasis added; the definitions also list exceptions, not pertinent here).
[98] Cal. Const., art. XIIIC, § 3.
[99] San Diego Ordinance O-16017 (Aug. 1, 1983); Ballot Pamp., Gen Elec. (Nov. 8, 1983), argument in favor of Prop. B. No opposing argument was filed. *Id.*
[100] Black's Law Dictionary 1047 (10th ed. 2014).

new tax.[101] The court was not faced with the question of whether the fee was a special tax requiring a supermajority vote, but the court reviewed and discussed the language of the voting requirement provisions in article XIIIC, section 4 in the course of its opinion.

The court reviewed the restrictions on the adoptionof new taxes, and found that article XIIIC, section 2 "is limited to taxes imposed by local government and is silent as to imposing a tax by initiative."[102] The court rejected the idea that the term "imposed" was intended to include the collection of taxes by the government, so that any tax collected by the government is a tax "imposed by" the government.[103]

Taxation imposed by initiative is not taxation imposed by local government. We do not construe the term "impose" to include, not only creating or enacting a tax, but also collecting or receiving tax proceeds after the tax has been enacted.[104]

Instead, based on its review of the intent and language of Propositions 13, 218, and 26, the court concluded that the phrase "imposed by local government" did not include taxes imposed by citizens' initiative.[105] This conclusion is consistent with the people's right to exercise the power of initiative found in article II.[106]

The *Cannabis Coalition* decision appears consistent with California Supreme Court's *en banc* decision in *Kennedy Wholesale.* That case, decided before the passage of Propositions 218 or 26, focused on the effect of the requirements in article XIIIA, sections 3 and 4, added by Proposition 13. The court held that a special tax on tobacco products created by a statewide citizens' initiative petition was properly adopted by a majority vote, and did not require a two-thirds vote of the Legislature under article XIIIA, section 3, or a two-thirds vote of the electorate as a limitation on legislative power under article XIIIA, section 4. The court interpreted the language of section 3 to preserve the ability of the people to adopt an initiative by majority vote, even though the initiative imposed a special tax.[107]

The plaintiff in *Kennedy Wholesale* argued two alternative theories: first, that taxes could only be imposed by a two-thirds vote of the Legislature and not by initiative at all, and second, thatthe two-thirds requirement is a limitation on legislative power, and must also apply, implicitly, to the electorate.[108] The court rejected the first argument because interpreting section 3 as the only means to increase taxes would restrict or implicitly repeal the powers of initiative reserved to the people in article IV, section 1.[109] The court cited the need to protect "this precious right" of initiative and resolve any reasonable doubts on interpretation in its favor,

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[101] *Cannabis Coalition* at *1.
[102] *Id.* at *7.
[103] *Id.* at *9.
[104] *Id.*
[105] *Id.* at *10.
[106] *Id.*
[107] *Kennedy Wholesale*, 53 Cal. 3d at 249, 251-52.
[108] *Id.* at 249, 251.
[109] *Id.* at 249.

and looked to the intent behind Proposition 13 to limit "spendthrift politicians" and not the power of the voters.[110]

Similarly, the court rejected plaintiff's second argument because interpreting section 3's two-thirds requirement as applying to initiatives would conflict with the express language of article II, section 10 of the Constitution, "that an initiative statute takes effect if '*approved by a majority*.'"[111] The two-thirds vote requirement for the Legislature to impose a special tax was not a limitation on the state's lawmaking power, but a *procedure* that applied to the state legislature and not to initiatives. Thus, although the voters may not enact a law by initiative that exceeds the state's legislative power, procedures that apply to the Legislature do not "apply to the electorate without evidence that such was intended."[112]

The plaintiff also argued that because section 4 of article XIIIA requires a two-thirds vote of the electorate for cities, counties, and special districts to impose special taxes, it provides the exclusive means by which voters may raise taxes. The court disagreed, stating that if the voters had intended to create such a limitation, they would have done so.[113]

As a new decision, the parties to the *Cannabis Coalition* case may yet seek review of the decision by the California Supreme Court. In the meantime, current law appears to support interpreting section 2 of article XIIIC as not applying to tax measures placed on the ballot by way of a citizens' initiative petition. That means the distinction between whether the tax is general or special is irrelevant, and the Initiative must receive the vote of only a majority of the electorate to be adopted.

If the Court of Appeal's decision in *Cannabis Coalition* is overturned or depublished, and the California Supreme Court determines the distinction between special and general taxes applies, then the two-thirds vote requirement would likely apply to the Briggs/Frye Initiative because the tax imposed by the Initiative is a special tax.[114]

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[110] *Id.* at 250-51.
[111] *Id.* at 251.
[112] *Id.* at 252.
[113] *Id.* In *Kennedy Wholesale*, the court characterized article XIIIA, section 3's two-thirds vote requirement for the Legislature to adopt a special tax as a "procedure" that by its language applies to the Legislature but not to a state-wide initiative. In contrast, referencing article XIIIA, section 4's two-thirds vote requirement that specifically applies to any ballot measure before the people to raise a special tax, the court said it "demonstrates, unambiguously, that the voters knew how to impose a supermajority voting requirement upon themselves when that is what they wanted to do." *Id.* The *Cannabis Coalition* decision does not cite or discuss *Kennedy Wholesale.*
[114] General taxes are those where the revenue is placed in the taxing entity's general fund to be used for "general governmental purposes." Special taxes are "imposed for specific purposes." *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57 (1982). Whether something is a general tax, special tax, or assessment is a question of law, ultimately for a court to decide, based upon the purpose of the funding. *See, e.g., City of San Diego v. Shapiro*, 228 Cal. App. 4th 756, 771 (2014). Advocates of the Briggs/Frye Initiative argue that its tax increase is not a special tax because it does not require any expenditure of taxpayer money. They appear to assume the Operator of the hotel is the taxpayer and is receiving a credit against taxes the Operator owes. However, as discussed in Part IV.C. above, the hotel guest is the taxpayer and the Operator's only role is to collect the tax as trustee for the City and pay it to the City. The funds collected by the Operator are taxpayer funds. By mandating that the City allow the Operator to keep a portion of the tax money being held in trust for the City, the Initiative authorizes an expenditure of taxpayer money

V. USE OF QUALCOMM MISSION VALLEY PROPERTY

Section 61.2806 of the Briggs/Frye Initiative, "Protection and Enhancement of Mission Valley Options for Shared Visitor and Resident Use Including Eco-Tourism, Higher Education, Environmental Science, and Professional and Collegiate Sports," contains several provisions related to the future use of Qualcomm Stadium in Mission Valley.

As the Initiative states, the Qualcomm Stadium site is composed of 166 acres. Under Charter section 221, a future sale of the property must be approved by City voters.[115] Proposed section 61.2806 provides the Charter-mandated authorization to allow for the future sale of Qualcomm Stadium to specified buyers, known as "Qualified Recipients," if the site ceases to serve as the stadium for the San Diego Chargers or another National Football League franchise.

The City is authorized to sell the stadium to San Diego State University, the University of California at San Diego, the San Diego River Conservancy, any San Diego Community College, or any combination of these public agencies.[116] The Initiative mandates that the transfer of the property to any of the Qualified Recipients include specific covenants and restrictions running with the land, "for the benefit of the City."[117]

The restrictions and covenants include a provision that approximately 28 acres proximate to the San Diego River be reserved exclusively in perpetuity for restoration of the river in accordance with the San Diego River Conservancy's Strategic Plan Update 2012-2017. A portion of the site must also be reserved exclusively for development, within five years of the transfer of the property, of an Urban Rivers Scientific Interpretative Center for education and research related to monitoring the San Diego River from its source to the Pacific Ocean.[118] Within five years of transfer of the property, an additional 22 acres minimum must be developed and maintained as an active public recreational space. The entire site must have an eight- to ten-foot-wide walking and biking path or trail. The portions of the property not covered by the preceding specified uses must be developed as university-related facilities.[119] The City may reserve for itself, through easements or other means, any and all rights and privileges to carry out municipal functions on or through the site, including City groundwater rights.[120] The total sale price must not be lower than the fair market value of the property as determined by any appraisal

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for a specific purpose, thereby creating a special tax. By contrast, a general tax would go to the City's general fund to be allocated by the Council and Mayor as they see fit.

[115] Charter section 221 states:

> Real property owned by The City of San Diego consisting of eighty (80) contiguous acres or more, whether or not in separate parcels, shall not be sold or exchanged unless such sale or exchange shall have first been authorized by ordinance of the Council and thereafter ratified by the electors of The City of San Diego. The foregoing shall not apply to the sale or exchange of real property to a governmental agency for bona fide governmental purposes, which sale or exchange was duly authorized by ordinance of the Council, nor shall it apply to properties previously authorized for disposition by the electors of The City of San Diego.

[116] Initiative § 61.2806(a).

[117] Initiative § 61.2806(a)(1).

[118] Initiative § 61.2806(a)(1)(i).

[119] Initiative § 61.2806(a)(1)(ii-iv).

[120] Initiative § 61.2806(a)(2).

report submitted to the City between January 1, 2015, and August 1, 2015, and the proceeds of the sale should be directed to the City's Infrastructure Improvement Fund.[121]

The sale and development of the site is not exempt from CEQA. However, the Initiative does exempt the Qualcomm Stadium Reconstruction Project[122] from CEQA if certain conditions, including binding commitments by the City, are met: (1) the Council certifies the Draft Environmental Impact Report (Draft EIR) without expanding the scope of the project, (2) the mitigation measures are consistent with the Draft EIR and ensure adequate and appropriately managed riparian buffers, (3) the mitigation measures can be enforced in the same manner as if the project is not exempt from CEQA, (4) the City "makes a binding legal commitment" to develop the remainder of the Qualcomm Stadium site in a manner consistent with the set-asides for restoration of the San Diego River and development of an Urban Rivers Scientific Interpretative Center,[123] and (5) the project must not require taxpayer financing, including funding from the City.[124]

VI. STATUTE OF LIMITATIONS

Proposed section 61.2811 of the Briggs/Frye Initiative seeks to bar a challenge to the validity of any portion of the new Municipal Code Division created by the Initiative unless the action "is commenced within 90 days after the Division takes effect."[125] This provision purports to cut off the ability of a future project proponent to challenge conditions on the project, mandated by the Initiative. It is unclear whether a court would enforce a 90 day local statute of limitations. For example, challenges may be made beyond the 90 day limit where specific conditions are placed on property and, under established constitutional principles, the owner is afforded procedural due process.[126]

Constitutional notice and hearing requirements are triggered by governmental action which results in "significant" or "substantial" deprivations of property.[127] Barring a challenge to land use conditions or limitations required for approval of a project in the future likely violates the constitutional right to due process of future project proponents.

The best example is a future developer's challenge to the obligation to contribute $15 million to the Port District, discussed above. This requirement has questionable legal basis (see page 6, note 16), but the developers subject to this required payment may not be known for

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[121] Initiative § 61.2806(a)(3). It is unclear what appraisal report, value, or assumptions are intended to be used.
[122] *See* fn. 48, *supra.*
[123] Initiative §§ 61.2806(c)(4). The required conditions include setting aside 50 acres for river restoration and recreational space, developing active recreational space and the Urban Rivers Scientific Interpretive Center, and using the balance of the property for university-related uses. Initiative §§ 61.2806(a). These features are not included in the Draft EIR, which describes a project that covers all of the Qualcomm Stadium site with a stadium, parking, and other facilities.
[124] Initiative § 61.2806(b) and (c).
[125] The "Division" is sections 61.2801 through 61.2811 of the Initiative and includes the bulk of the Initiative's provisions. It does not include the TOT increase or the repeal of the TMD Procedural Ordinance. 1
[126] *San Diego Building Contractors Ass'n. v. City Council*, 13 Cal. 3d 205, 212-13, 217 (1979).
[127] *Horn v. County of Ventura*, 24 Cal. 3d 605, 616 (1979).

many years. They have a due process right to raise a constitutional challenge to the payment at the time they are required to pay it.

VII. SINGLE SUBJECT RULE

The Charter and the California Constitution both require that all initiative measures be limited to a single subject.[128] The purpose of the "single subject rule" is to prevent a proponent fromattaching a less popular measure to legislation that is likely to pass, and thereby increase the likelihood that the less popular measure will be adopted.[129] California courts have upheld initiative measures, which "fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose,"[130] but not those that include two or more subjects that are not "reasonably germane to each other, and to the general purpose or object of the initiative."[131] A provision is deemed "germane" for purposes of the single subject rule if it is "'auxiliary to and promotive of the main purpose of the act or has a necessary and natural connection with that purpose.'"[132]

To avoid unduly interfering with the right of initiative, the California Supreme Court has held that the single-subject rule should be "construed liberally."[133] It "does not require that each of the provisions of a measure effectively interlock in a functional relationship. It is enough that the various provisions are reasonably related to a common theme or purpose."[134] The court has explained: "[W]e have upheld initiative measures which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose."[135] However, courts have also struck down initiatives for violation of the single subject rule and other constitutional issues.[136] The Supreme Court stated in *Senate of State of California v. Jones*, "when a court determines that the challengers to an initiative measure have demonstrated that there is a strong likelihood that the initiative violates the single-subject rule, it is appropriate to resolve the single-subject challenge prior to the election."[137]

In the *Jones* case, the Supreme Court concluded that the provisions of an initiative measure were not reasonably germane, but instead embraced at least two separate and unrelated subjects: (1) transfer of the power to reapportion state legislative, congressional, and Board of Equalization districts fromthe Legislature to the California Supreme Court, and (2) revision of provisions relating to the compensation of state legislators and other state officers. The combination—in a single initiative measure—of provisions addressing these separate subjects

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[128] San Diego Charter § 275(b) ("All ordinances . . . shall be confined to one subject . . . ."); Cal. Const. art. II, § 8(d) ("An initiative measure embracing more than one subject maynot be submitted to the electors or have anyeffect.").
[129] *Senate of State of California v. Jones*, 21 Cal. 4th 1142, 1151 (1999).
[130] *Legislature of the State of California v. Eu*, 54 Cal. 3d 492, 512 (1991) (internal quotations and citations omitted).
[131] *Jones*, 21 Cal. 4th at 1157 (internal quotations and citations omitted).
[132] *Professional Engineers in Calif. Gov't v. Brown*, 229 Cal. App. 4th 861, 869 (2014) (citing and quoting *Planned ParenthoodAffiliates of Calif. v. Swoap*, 173 Cal. App. 3d 1187, 1196-97 (1985)).
[133] *Fair Political Practices Comm'n. v. Superior Court*, 25 Cal. 3d 33, 38 (1979).
[134] *Eu*, 54 Cal. 3d at 513 (citation omitted).
[135] *Jones,* 21 Cal. 4th at 1157 (internal quotations, citations, and italics in original omitted).
[136] *See, e.g., Jones*, 21 Cal. 4th 1142.
[137] *Jones*, 21 Cal. 4th at 1154.

and seeking to accomplish these diverse objectives clearly violates the language and purpose of the single subject limitation. The Supreme Court explained:

> [T]he challenged measure involves one of the classic situations intended to be addressed by the single subject rule: the joining of one measure in which the proponent of an initiative is primarily interested—here, the proposal to transfer the power of reapportionment from the Legislature to the Supreme Court—with an unrelated measure or measures that the proponent views as politicallypopular—here, the proposal to cut state legislators' salaryand expenses—simply to increase the likelihood that the proponent's desired proposal will be adopted.[138]

The Council has a duty to consider a citizens' initiative, like the Briggs/Frye Initiative, if it is filed in "substantial compliance" with the procedures set forth in the Municipal Code and contains the required number of valid signatures.[139] As explained earlier, the Initiative proponents have filed a notice of intent to circulate the initiative petition with the Office of the City Clerk, but have not yet submitted the petitions with signatures. Under the City's election ordinance, if an initiative petition contains the signatures of ten percent or more of City voters, the Council must either adopt or reject the initiative.[140] If the Council rejects it or fails to act, the Council must place the initiative on the ballot.[141] However, as the California Constitution and Charter provide, an initiative measure embracing more than one subject may not be submitted to voters or have any effect, making pre-election review by a court appropriate.[142]

If a legislative body refuses to place an initiative on the ballot, even though it qualified with sufficient signatures, that refusal may be validated by a judicial declaration that the measure should not be submitted to voters.[143] The Supreme Court has confirmed the power of the courts to "determine the invalidity of a measure and to direct the appropriate official not to place it on the ballot."[144] In *Dunkl v. City of San Diego*, this City sought a judicial declaration that a proposed initiative was unlawful, and the court of appeal agreed.[145] "[W]e reiterate the well-established nature of the rule that it is proper to conduct pre-election review of a claim that a proposed measure may not properly be submitted to the voters because, for example, the measure is not appropriately legislative in character."[146]

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[138] *Id. at* 1151.
[139] SDMC §§ 27.1026, 27.1031-27.1035.
[140] SDMC § 27.1034.
[141] SDMC § 27.1035. *See also deBottari v. City Council of the City of Norco*, 171 Cal. App. 3d 1204 (1985) (recognized that once an initiative measure has qualified for the ballot, the responsible entityor official has a mandatory dutyto place it on the ballot).
[142] *Jones*, 21 Cal. 4th at 1153.
[143] *Citizens for Responsible Behaviorv. Superior Court*, 1 Cal. App. 4th 1013, 1021 (1991) (citing *Farley v. Healey*, 67 Cal.2d 325, 327 (1967)).
[144] *Id.*
[145] 86 Cal. App. 4th 384 (2001).
[146] *Id.* at 394.

Whether the Briggs/Frye Initiative violates the single subject rule is ultimately an issue for a court to decide. The proponents state that the subject is the responsible management of the City's major tourism- and entertainment-related resources that are dependent on, benefit from, and impact the City's most valuable visitor and communityresource: the Pacific Ocean and its beaches, harbors, bays, rivers, and tributaries. It does this in a simple and straightforward way."[147] The proponents characterize the Initiative as "related components" with "one overall goal."[148]

However, merely because the proponents say that various subjects in the Initiative are "related components" does not make them so. The measure increases taxes, creates a land use Overlay Zone downtown, limits a convention center expansion downtown, sets forth conditions for future use of the QualcommStadium site in Mission Valley, creates a new environmental process downtown to replace CEQA, directs use of Port District funds, creates an environmental reserve in Mission Valley and addresses Mission Valley land use needs of San Diego State University and other educational institutions.

The Supreme Court has made it clear that an initiative measure that embraces more than one subject may not be submitted to voters or have any effect.[149] Pre-election relief froma court is contemplated where there is a clear showing of invalidity.[150] If an initiative measure is "facially defective in its entirety, it is wholly unjustified to allow voters to give their time, thought, and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots."[151] "When the drafters of an initiative measure join separate provisions dealing with *otherwise unrelated* 'political issues' in a single initiative, the initiative cannot be found to satisfy the single-subject rule simply because each provision imposes a requirement of voter approval, any more than if each provision contained a remedy of money damages or a remedyof injunctive relief."[152] Here, despite the argument fromthe proponents, there is a strong likelihood that the Initiative violates the single subject rule and judicial resolution is required.[153]

This Office is prepared to provide additional analysis on the Initiative as questions arise.

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[147] *See* https://citizensplan.org/faq/questions
[148] *Id*.
[149] *Jones*, 21 Cal. 4th at 1153 (citing Cal. Const. art. II, § 8(d)).
[150] *Id*. at 1154 (citation omitted).
[151] *Id*. at 1154 (citation and internal quotations omitted).
[152] *Jones,* 21 Cal. 4th at 1162-63 (emphasis in original; internal quotations omitted).
[153] *Id*. at 1154.