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MEMORANDUM OF LAW

DATE: June 7, 2017
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Local Hire Requirement in Proposed Transient Occupancy Tax Measure

INTRODUCTION

The Mayor has proposed a ballot measure for a special election in November 2017 that increases the City's Transient Occupancy Tax (TOT) by one, two, or three percent, depending on the location of each affected lodging establishment within the City (TOT Measure). The TOT Measure is not to be a general tax used to fund general governmental purposes, but instead is a special tax used to fund the following special purposes: (i) the contiguous expansion and modernization of the San Diego Convention Center (Convention Center), as well as other Convention Center purposes; (ii) street improvements, repairs, and maintenance in the City; and (iii) homelessness programs in the City. The TOT Measure also authorizes the City to issue bonds to finance costs related to the permitted uses of proceeds from the TOT increase.

In a recent memorandum dated May 19, 2017 (May 19 Memorandum), this Office concluded that adding a requirement in the TOT Measure for a project labor agreement concerning the construction phase of the Convention Center expansion project would likely violate the single subject rule governing ballot measures. City Att'y MOL No. 2017-5 (May 19, 2017); *see* Attachment A. During the Council meeting on May 22, 2017, Councilmember Barbara Bry asked whether a local hire requirement could be added to the TOT Measure without violating the single subject rule.¹ This Office responded verbally that this concept had not been specifically evaluated, but could be legally problematic.

QUESTION PRESENTED

Would the addition of a local hire requirement to the TOT Measure comply with the single subject rule?

¹ Generally, a local hire requirement would obligate the City to ensure that City residents constitute a specified minimum percentage of the workforce for construction of future Convention Center improvements.

ANSWER

Likely, no. As explained in the May 19 Memorandum, the single subject rule requires that all components of a statutory initiative measure be reasonably germane to a common theme, purpose, or subject. The purpose of the TOT Measure is to provide tax revenue and allow bond financing to support Convention Center expansion and modernization, among other specified purposes. A local hire requirement for the construction phase of the Convention Center improvements is not reasonably germane to, and does not have a necessary or natural connection to, the subject of the TOT Measure: funding and financing Convention Center improvements and other specified purposes.

While it is not certain how a court would rule on this question, at the very least, it opens up the entire TOT Measure to challenge. If a court finds the inclusion of a local hire requirement in the TOT Measure violates the single subject rule, the TOT Measure may not be submitted to the voters and is invalid. Given the harsh result in the event of an unfavorable outcome, we recommend not including a local hire requirement in the TOT Measure.

Alternatively, the City could explore including a local hire requirement in a separate, stand-alone ballot measure or in a future agreement regarding construction of the Convention Center expansion project.² In that event, we would need to perform additional legal analysis in light of memoranda previously issued by this Office. Those memoranda explain that, among other legal concerns, the City's imposition of a local hire requirement may be legally problematic under the Privileges and Immunities Clause of the United States Constitution, which prohibits a state from discriminating between its residents and non-residents without a substantial basis for the discrimination. *See* 2013 City Att'y MOL 79 (2013-10; June 17, 2013); 2010 City Att'y Report 794 (2010-27; July 7, 2010); 2010 City Att'y Report 599 (2010-15; Apr. 22, 2010); and 2009 City Att'y Report 601 (2009-26; Oct. 22, 2009).

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Kevin Reisch
Kevin Reisch
Chief Deputy City Attorney

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Attachment

² If the City wishes to impose a local hire requirement in a future construction contract for the expansion project, the City would likely need to include that requirement in any competitive solicitation materials (such as a request for proposals) so that any potential bidders could take the requirement into account when formulating their bids.

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MEMORANDUM OF LAW

DATE: May 19, 2017
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Proposed Transient Occupancy Tax Measure and the Single Subject Rule

INTRODUCTION

The Mayor is proposing a ballot measure for a special election in November 2017 that increases the City's Transient Occupancy Tax (TOT) by one, two, or three percent, depending on the location of each affected lodging establishment within the City (TOT Measure). The TOT Measure is not to be a general tax used to fund general governmental purposes, but instead is a special tax used to fund the following specific purposes: (1) the contiguous expansion and modernization of the San Diego Convention Center (Convention Center), the ongoing maintenance, operation, and repair of the Convention Center, and programs supporting Convention Center business development; (2) street improvements, repairs, and maintenance in the City; and (3) homeless programs in the City. The TOT Measure also authorizes the City to issue bonds to finance costs related to the permitted uses of proceeds from the TOT increase.

This Office has been asked whether the TOT Measure can include a provision that would require the general contractor selected to build the Convention Center expansion to enter into a project labor agreement establishing the terms and conditions of employment on construction of the Convention Center expansion project. No provision of that nature is currently included in the TOT Measure.

QUESTIONS PRESENTED

1. Does the proposed TOT Measure comply with the single subject rule?
2. If the project labor agreement requirement is added, would the TOT Measure comply with the single subject rule?

Attachment A

SHORT ANSWERS

1. Yes. The single subject rule requires that all components of a statutory initiative measure be reasonably germane to a common theme, purpose, or subject. The TOT Measure would authorize a special tax. A special tax may fund multiple purposes so long as those purposes are identified in the ballot language. Those multiple purposes need not be related to one another. Here, the TOT increase would fund several purposes identified in the TOT Measure. The TOT Measure also authorizes the City to issue bonds payable from the increased TOT proceeds and for the same purposes. The special tax component of the measure and the bond authorization are reasonably germane to the purpose of the TOT Measure, which is to fund the desired government programs and services.

2. Likely, no. The purpose of the TOT Measure is to provide tax revenue and allow bond financing to support the Convention Center expansion, among other specified purposes. A requirement that a project labor agreement be included in the prospective construction contract for the Convention Center expansion that is not before the voters is not reasonably germane to the subject of the measure: funding and financing the Convention Center and other purposes. If a court finds the inclusion of the project labor agreement requirement in the TOT Measure violates the single subject rule, the measure may not be submitted to voters and is invalid.

ANALYSIS

I. THE TOT MEASURE, WHICH AUTHORIZES THE CITY TO IMPOSE A SPECIAL TAX FOR IDENTIFIED PURPOSES AND ISSUE RELATED BOND FINANCING, COMPLIES WITH THE SINGLE SUBJECT RULE

The San Diego Charter and the California Constitution require that initiative measures be limited to a single subject. 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 may not be submitted to the electors or have any effect.”). The purpose of the single subject rule with respect to initiatives is both to prevent “logrolling” (the practice of combining two or more unrelated provisions in one measure, thereby forcing a single take-it-or-leave-it vote on matters that should be voted on separately) and to avoid voter confusion. *Raven v. Deukmejian*, 52 Cal. 3d 336, 361 (1990). If a court finds a violation of the single subject rule, the court’s remedy is to invalidate the entire measure. *Californians for an Open Primary v. McPherson*, 38 Cal. 4th 735, 781 (2006).

An initiative does not violate the single subject rule if its parts are reasonably germane to the general purpose or object of the initiative. *Brosnahan v. Brown*, 32 Cal. 3d 236, 245 (1982). A provision that is auxiliary to or promotive of the main purpose or has a necessary and natural connection with such purpose is germane within the rule. *Id.* at 247. The reasonably germane test does not require that each provision have a functional relationship. *California Family Bioethics Council v. California Institute for Regenerative Medicine*, 147 Cal. App. 4th 1319, 1340 (2007). Initiative measures “which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose” will be upheld. *Senate of State of*

California v. Jones, 21 Cal. 4th 1142, 1157 (1999). The courts liberally construe the single subject rule in order to uphold the people's right to the initiative process. *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 38 (1979).

Although the majority of appellate decisions in California have upheld initiatives challenged on single subject grounds, the courts have invalidated a number of initiatives. *Jones*, 21 Cal. 4th at 1158. In *Jones*, the Supreme Court invalidated an initiative that would have transferred the power to reapportion various state and federal districts from the Legislature to the California Supreme Court and would have revised provisions relating to the compensation of state legislators and other state officers. *Id.* at 1146. In *McPherson*, the California Supreme Court invalidated an initiative placed on the ballot by the Legislature that combined a constitutional amendment having to do with primary elections with a component dealing with bond repayments. *McPherson*, 38 Cal. 4th at 300-301.

The California Constitution provides that special taxes may be imposed for more than one specific purpose.¹ Cal. Const. art. XIII C, §1(d); *see also Neilson v. City of California City*, 133 Cal. App. 4th 1296, 1311 (2005). In *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, the California Supreme Court upheld a tax on tobacco products, the proceeds of which were to be used for various smoking-related purposes such as preventing its harmful effects, and for environmental purposes including recreational uses at state and local parks. *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245, 254 (1991). The fact that the environmental purposes of the tax were not related to tobacco use did not cause the measure to violate the single subject rule. *Id.*

In light of this legal authority, the TOT Measure does not violate the single subject rule. The TOT Measure is a single special tax, the revenue from which will be used for three, unrelated purposes. The imposition of the special tax for multiple, unrelated purposes is consistent with the California Constitution. The provisions of the TOT Measure authorizing the City to issue bonds are reasonably germane to the common purpose of the TOT Measure, which is to allow the City to fund or finance the specific purposes authorized by the TOT Measure.

II. IF A PROJECT LABOR AGREEMENT REQUIREMENT IS ADDED, THE TOT MEASURE WOULD LIKELY VIOLATE THE SINGLE SUBJECT RULE

A project labor agreement relates to a contract that is not before the voters. There is no Convention Center construction contract in the proposed TOT Measure and there are no other contracts related to the other specific purposes of the special tax. The TOT Measure does not address contracting at all. The City has not completed a competitive solicitation process for the construction of the Convention Center expansion and is not ready to award a construction contract to a general contractor for the expansion project. Assuming the City wishes to proceed with the Convention Center expansion after the outcome of the public vote on the TOT Measure,

¹ Similarly, California Government Code section 50075.1 provides that a voter-approved local measure allowing a local agency to impose a special tax must indicate the specific purposes of the tax and must satisfy other accountability measures. That statute does not require that the identified specific purposes be related to each other.

the City Council will need to consider approval of a construction contract in the future. Since a construction contract is not addressed, or even mentioned in the TOT Measure, adding the project labor agreement component would significantly increase the risk of a successful legal challenge to the TOT Measure.

A court would likely find that adding a component to the TOT Measure that would require a project labor agreement in the future construction contract is not reasonably germane to the TOT Measure.² A component related to the construction phase of the Convention Center expansion does not have a necessary or natural connection to the other components of the TOT Measure, which seek to generate tax revenues and allow related bond financing. A violation of the single subject rule would render the entire TOT Measure invalid.

Although a project labor agreement requirement is not appropriate for inclusion in the TOT Measure, the voters could be asked to approve two separate measures on the November 2017 special election ballot, including the TOT Measure and a separate measure requiring the project labor agreement for the construction phase of the Convention Center expansion.³

CONCLUSION

The San Diego Charter and the California Constitution each require that initiative measures be limited to one subject. Courts have interpreted the single subject rule liberally to protect the voters' initiative power. All parts of an initiative measure must be reasonably germane to a common purpose. A special tax measure, such as the TOT Measure, that is intended to fund various unrelated specific purposes is authorized under California constitutional and statutory provisions and does not violate the single subject rule. The inclusion of bond authorizations in the TOT Measure does not violate the single subject rule because the bond authorizations are reasonably germane to the specified tax purposes of the TOT Measure.

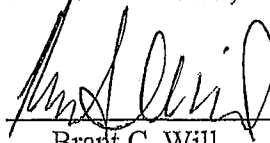
² Proposition A, an initiative passed by San Diego voters in June 2012, generally prohibits the City from requiring a project labor agreement "[e]xcept as required by state or federal law as a contracting or procurement obligation, or as a condition of the receipt of state or federal funds." San Diego Municipal Code § 22.4402. This Office has advised that the exception clause in Proposition A protects the City's access to State funds by maintaining the City's ability to require a project labor agreement as required by law as a condition of the receipt of State funds. *See 2014 City Att'y MOL 138 (2014-12; Oct. 17, 2014); 2012 City Att'y MOL 168 (2012-10; Nov. 30, 2012)*. California Public Contract Code sections 2500-2503 would prohibit the City from receiving State funding and financial assistance for its construction projects if the City did not have discretion to adopt, require, or utilize project labor agreements on all City construction projects. The City Council has confirmed its intention that Proposition A does not prohibit, limit, or constrain the City's ability to adopt, require, or utilize project labor agreements. San Diego Resolution R-309276 (Oct. 21, 2014).

³ The analysis in this memorandum could change if the City advanced a comprehensive plan for all material aspects of the Convention Center expansion, including financing, design and construction. However, as described above, the TOT Measure is focused on generating tax proceeds and bond proceeds for the Convention Center expansion. The TOT Measure does not address specific aspects of the design and construction of the Convention Center expansion, and the City is not ready at this time to proceed with awarding a construction contract.

Adding provisions in the TOT Measure to require a project labor agreement on the future construction of the Convention Center expansion would likely cause the TOT Measure to violate the single subject rule. If a court determines that the TOT Measure violates the single subject rule, the court would invalidate the entire TOT Measure and it may not be submitted to the voters.

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