Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: August 5, 2016

TO: Elizabeth Maland, City Clerk

FROM: City Attorney

SUBJECT: Vote Requirements for Special Tax Initiatives

INTRODUCTION

In your memorandum dated June 7, 2016, with regard to the upcoming November election, you asked this Office for guidance regarding whether a simple majority or a two-thirds vote of the electorate is required to adopt a citizen's initiative that includes a special tax increase. Your request relates specifically to two citizens' initiatives, "The Citizens' Plan for the Responsible Management of Major Tourism and Entertainment Resources" (Briggs/Frye Initiative or Initiative) and the "San Diego Integrated Convention Center Expansion/Stadium and Tourism Initiative" (Chargers' Initiative), both of which qualified for the upcoming November ballot. In your memorandum, you indicate that at the time you submit materials to the Registrar of Voters, you must also provide the Registrar of Voters with the percentage of the vote required for each measure to pass. This information is then included in voter materials to inform the electorate as to the vote needed to pass each measure.

ANALYSIS

In City Attorney Report No. 2016-5, dated April 11, 2016 (Report), this Office discussed whether a two-thirds vote, required for the adoption of a special tax, applies to a citizens' initiative. As stated in part IV.E of the Report, for a general tax increase, the California Constitution requires the approval of a simple majority of voters, while a special tax increase requires approval by two-thirds of the voters. Cal. Const. art. XIIIC, § 2 (b) and (d). The San Diego Charter (Charter) also requires approval by a two-thirds vote for a special tax. Charter § 76.1.

A. A Special Tax Requires a Two-Thirds Vote

General taxes are taxes placed in the taxing entity's general fund to be used for "general governmental purposes." *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57 (1982). Special taxes are imposed for "specific purpose[s]." *Id.* 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) (characterization of the tax is a legal question).

The designation or name of the tax as general or special is not determinative. *Weekes v. City of Oakland*, 21 Cal. 3d 386, 392 (1978). "The character of a tax is ascertained from its incidents, not its label." *Id.; see also Douglas Aircraft Co., Inc. v. Johnson*, 13 Cal. 2d 545, 550 (1939) (legislative designation of nature of tax entitled to "some weight" but not conclusive). Accordingly, to determine whether a tax is general or special, we must ascertain the purpose of the tax.

B. The Briggs/Frye Initiative and the Chargers' Initiative are Special Tax Measures

The City's transient occupancy tax (TOT) is currently set at 10.5 percent of the room rate for hotels, recreational vehicle parks, and campgrounds. San Diego Municipal Code §§ 35.0103-35.0108. Both the Chargers' Initiative and the Briggs/Frye Initiative would increase the City's TOT rate.

The Chargers' Initiative proposes a 6 percent TOT increase to raise revenue to build a downtown convention center and stadium project. It specifically provides that the new revenues shall be "dedicated to special trust funds" for the "financing, planning, construction, maintenance and operation of an integrated convention center expansion and stadium."[1] Based on its intended purpose, the tax increase proposed in the Chargers' Initiative is a special tax.

The Briggs/Frye Initiative proposes a 5 percent TOT increase for hotels with at least 30 rooms, and for recreational vehicle parks and campgrounds,[2] and a 3.5 percent increase for hotels with less than 30 rooms.[3] The Briggs/Frye Initiative characterizes this TOT increase as a "general tax" to be deposited in the general fund. It states that the increase can be used "to support general government services, facilities, and infrastructure" and that all revenues "shall be deposited in the General Fund of the City and be used for

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[1] Chargers' Initiative, Section 2, Findings and Declarations, paragraph 8 ("As provided in this Initiative, the Transient Occupancy Tax is increased by an additional six percent (%) and the new revenues are dedicated to special trust funds, the Convention Center Expansion and Stadium Fund and the San Diego Tourism and Marketing Fund, as provided for by this Initiative.") and § 35.0101(c).
[2] Briggs/Frye Initiative § 35.0109(b).
[3] Briggs/Frye Initiative § 35.0109(c).

general governmental purposes."[4] It further states that the tax "is intended to be and shall be a general tax and not a special tax."[5]

The Initiative includes other provisions, however, that would divert these funds to the operators of hotels, recreational vehicle parks and campgrounds (collectively referred to as hotel operators), intercepting them before they are deposited in the City Treasury.[6] These provisions permit the creation of assessment districts (called Tourism-Financed Improvement Districts or TFIDs) by hotel operators to finance construction and maintenance of certain facilities, namely "convention center, exhibition, and meeting facilities," transportation infrastructure that serves tourists, and maintenance and repair costs for "tourist-related facilities."[7] The primary purpose of the TFID is to develop and operate a downtown convention center.[8] The Initiative then authorizes the hotel operator to use the revenue from the TOT increase to pay for the assessments owed by the hotel operator to the TFID, and to pay for assessments to any newly formed tourism marketing district.[9] By doing so, the Initiative intercepts the new tax revenue and diverts it to funding a downtown convention center and tourism marketing. It allows the hotel operators to take the revenue directly, bypassing the City Treasury and any City budgeting or decision-making process.

As explained in our Report, the taxes collected by hotel operators are public funds. The hotel operator is not the taxpayer; the taxpayer is the guest who pays the tax at the time the room is rented. The City's laws, including the Charter, require that taxes be paid into the City's treasury.[10] The Briggs/Frye Initiative would change that to allow the hotel operator to keep the funds to pay for marketing and the convention center.

Again, to determine whether the tax increase in the Briggs/Frye Initiative is a special or a general tax, a court would look at the Initiative as a whole and the intended purpose of the new revenue stream. Here, notwithstanding the Initiative's characterization of the tax as a general tax, the Initiative gives hotel operators the right to bypass the City's general fund and use the new revenue for a convention center and marketing. Despite the Initiative's stated requirement for depositing the new revenue in the general fund, it permits diversion of the funds before they reach the City, making them unavailable for

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[4] Briggs/Frye Initiative § 35.0109(a) and (d). Section 35.0109(a) states that the increase is "to enable the City to keep its competitive advantage over other major tourism destinations while at the same time generating additional revenues to . . . support general government services, facilities, and infrastructure, and the protection of the environment that make the City one of the nation's top tourist destinations."
[5] Briggs/Frye Initiative § 35.0109(d).
[6] Briggs/Frye Initiative § 61.2807(b)-(d).
[7] *See* Report at 8; Briggs/Frye Initiative §§ 61.2801-61.2803.
[8] Report at 9; Briggs/Frye Initiative § 61.2807(d). The first TFID must be a downtown TFID created for the purpose of financing a convention center, meeting facilities, or related infrastructure.
[9] Briggs/Frye Initiative § 61.2807. The Initiative allows the hotel operators to deduct from the TOT revenue they have collected up to four percentage points of the TOT rate (e.g., revenues based on 4% of the 15.5% rate), for the specific purpose of reimbursing themselves for assessments they have paid to a TFID and to a newly formed tourism marketing district.
[10] *See* Report, part IV.D.

more general use. In so doing, the Initiative authorizes an expenditure of taxpayer money for a specific purpose, and is a special tax.

Moreover, if the TOT increase included in the Briggs/Frye Initiative were simply a general tax, available for use by the City as the City saw fit, then it would bear no relation to the balance of the Initiative, and would be a separate subject.[11] The clear intent of the Initiative is to create a revenue stream to further the Initiative's purposes. This underscores the character of the increase as a special, not a general, tax.

C. Absent Direction from the California Supreme Court, Special Tax Measures Require Two-Thirds Majority Vote to Pass

In our Report, we discussed the Court of Appeal's March 18, 2016 decision in *California Cannabis Coalition v. City of Upland*, 245 Cal. App. 4th 970 (2016) (*Cannabis Coalition*).[12] This case questions whether the additional requirements that apply to passage of a special tax, apply to a special tax increase presented to the voters as part of a citizens' initiative.

The question before the court in *Cannabis Coalition*, now being reviewed by the California Supreme Court (Supreme Court), 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 new tax. *Cannabis Coalition*, 245 Cal. App. 4th at 974. 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 adoption of 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." *Id.* at 983. 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. *Id.* at 987. The court stated:

> 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.

Id. Instead, based on its review of the intent and language of Propositions 13, 26, and 218, the court concluded that the phrase "imposed by local government" did not include taxes imposed by citizens' initiative. *Id.* at 988.

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[11] *See* Report, part VII, for discussion of the single subject rule that applies to initiatives.
[12] Report, part IV.E.

At the time of our Report, the *Cannabis Coalition* decision was a binding decision of the Court of Appeal, and binding authority on all superior courts of the State of California. Cal. Rules of Court, rule 8.1115(d); 16 Cal. Jur. 3d *Courts* § 313 (2016). However, the *Cannabis Coalition* decision lost its binding authority when the Supreme Court granted the City of Upland's petition for review of the Court of Appeal's decision in late June. Cal. Rules of Court, rule 8.1105(e), 8.1115(a); *Hazelton v. City of San Diego*, 183 Cal. App. 2d 131, 136 (1960).[13]

Now that *Cannabis Coalition* is being reviewed, there is no legally binding authority for the distinction made by the Court of Appeal between taxes "imposed by voters" and taxes "imposed by government." This distinction between the requirements for a tax brought forward by citizens' initiative and those for a tax placed on the ballot by a local government, has not been squarely presented to a higher court for review, and presents a new question for the Supreme Court's review.

Absent the authority of *Cannabis Coalition*, we look to and are bound by the authority of earlier cases that, for the purpose of exercising the right of initiative, puts voters in the place of the local legislative body, and imposes the same legislative restrictions on both. *DeVita v. County of Napa*, 9 Cal. 4th 763, 775 (1995) (initiative rights are generally co-extensive with local governing body's legislative power); *Legislature of the State v. Deukmejian*, 34 Cal. 3d 658, 674 (1983). Under this existing legal authority, statutory and legislative limits on local legislative power also apply to local citizens' initiatives. *Id.* Accordingly, the two-thirds vote requirement, found in the California Constitution and the City's Charter, currently applies to a special tax brought before the voters as part of a citizens' initiative.

In light of the citizens' initiatives on the ballot and the Supreme Court's decision to review the *Cannabis Coalition* decision, this Office filed a letter with the Supreme Court requesting expedited review of the decision (a copy of the City Attorney's letter is attached as Exhibit A). Absent interim direction from the Supreme Court, the special tax increases contained in the Briggs/Frye Initiative and the Chargers' Initiative must garner two-thirds of the votes cast in the election to be approved, consistent with California Constitution article XIIIC, sections 2(b) and 2(d), and Charter section 76.1.

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[13] The Supreme Court recently adopted an amendment to Cal. Rules of Court, rule 8.1115(e). Beginning on July 1, 2016, pursuant to California Rules of Court, rule 8.1115(e), as amended, the Supreme Court's granting of review of a lower appellate court's decision does not automatically depublish the Court of Appeal opinion under review. Rather, the lower appellate court's decision remains citable as persuasive authority. "A published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only." California Rules of Court, rule 8.1115(e), as amended, effective July 1, 2016. The Supreme Court granted the City of Upland's petition for review of the *Cannabis Coalition* decision on June 29, 2016, two days before California Rules of Court, rule 8.1115(e), as amended, took effect.

CONCLUSION

As the *Cannabis Coalition* decision is no longer binding legal authority, absent direction from the Supreme Court, the current state of the law is what existed the day before the *Cannabis Coalition* decision was issued by the Court of Appeal: a special tax increase requires approval by two-thirds of the voters casting votes on the measure as provided for by sections 2(b) and 2(d) of the California Constitution and Charter section 76.1.

Both the Chargers' Initiative and the Briggs/Frye Initiative include a special tax increase. The Briggs/Frye Initiative diverts new tax revenue from the hotel guest to the hotel operator and into the financing vehicle for a new convention center project and marketing, outside of the City's control and prior to deposit of the funds with the City. Under this arrangement, the City is given no opportunity to decide how the new revenue should be spent, and no ability to use it for general purposes. As such, it is a special tax.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Carrie G. Townsley
Carrie G. Townsley
Chief Deputy City Attorney

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Doc. No.: 1332719

Attachment: Exhibit A

cc: Honorable Mayor Kevin Faulconer
City Councilmembers
Andrea Tevlin, Independent Budget Analyst

EXHIBIT A

JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

July 20, 2016

Presiding Chief Justice and Associate Justices of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *California Cannabis Coalition v. City of Upland*
California Supreme Court case number S234148

Dear Presiding Chief Justice and Associate Justices of the Supreme Court:

I bring to the Court's attention, and seek its assistance with respect to, a legal question regarding the vote threshold required of two measures on the November 2016 ballot in the City of San Diego.

On June 29, 2016, this Court granted the City of Upland's Petition for Review in the matter of *California Cannabis Coalition v. City of Upland*, California Supreme Court case number S234148 ("*Upland.*") The question this Court will decide in *Upland* is whether a proposed initiative measure that would impose a tax subject to the requirement of California Constitution, art. XIII C, section 2, is a tax imposed by a local government such that the proposed initiative must be placed on the ballot at a general election. As the Court of Appeal in *Upland* noted "[t]axation imposed by initiative is not taxation imposed by local government" (*Upland* (2016) 245 Cal.App.4th 970, 987), and thus, California Constitution, art. XIII C, section 2 did not apply to the proposed initiative in that case. (*Id.* at 984.) This Court's decision may alter the required vote necessary to pass an initiative that proposes a new tax.

While the Court of Appeal's decision has been depublished, the rationale used by the Court of Appeal to reach its decision remains intact and the issue is now before this Court. The Court of Appeal's decision in *Upland*, and this Court's ultimate decision has created a question regarding whether or not a citizens' initiative that would create a new tax for a specific purpose requires a simple majority or two-thirds vote in favor of the initiative.

As a result of this question, the City of San Diego is facing a legal "perfect storm". In November 2016, the City of San Diego will have two citizens' initiatives on the ballot. One measure is proposed by a group of citizens and would seek to increase the City of San Diego's transient occupancy tax to promote tourism and entertainment opportunities within the City of San Diego. The other initiative is proposed by the City of San Diego's National Football League franchise, the San Diego Chargers, and seeks a financially viable way for the Chargers to remain

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in San Diego. Needless to say, both initiatives are of great importance to the City of San Diego and its 1.37 million citizens.

While the legal question is pending before this Court, the City of San Diego must designate the required number of votes required to pass each initiative - either greater than 50% or greater than two-thirds of the votes cast. If this Court ultimately determines, during its normal course of reviewing cases, that initiatives are not subject to California Constitution, art. XIII C, section 2 and the City designates one or both of the initiatives to require greater than two-thirds of the vote, and one or both of those initiatives receive over 50% but less than two-thirds votes in favor, the City and its citizens would have been denied an accurate election result which could result in the San Diego Chargers making an irrevocable decision to leave the City of San Diego.

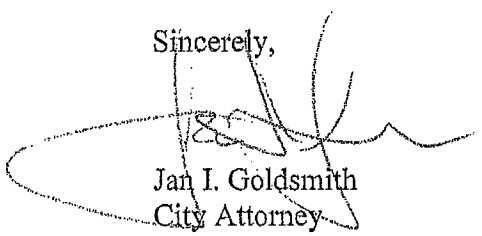
The City of San Diego takes no position on the substantive issues presented in *Upland.* Rather, the City simply seeks a final determination by this Court sooner rather than later.

Accordingly, I write this letter to request help that only this Court can provide – to make an expedited final determination of the question this Court granted review upon in the *Upland* case. I believe this is an exceptional situation that requires this Court's prompt attention. Therefore, pursuant to art. XVII of this Court's Internal Operating Practices and Procedures, I request this Court consider accelerating this Court's consideration of the *Upland* matter so that the City of San Diego and its citizens can know with certainty whether or not either of the initiatives passed following the November election.

Alternatively, if this Court cannot make such a determination by the November election, and should one or both of the measures obtain 50% plus one, but less than two-thirds of the vote, we would request that this Court entertain an original mandamus action seeking this Court to instruct the San Diego Registrar of Voters and the City of San Diego as to the required number of votes necessary to pass either or both of the initiatives so that the results can be certified. (*See e.g. California Redevelopment Assn. v. Matosantos* (2011) 53 Cal. 4th 231, 253, "We will invoke our original jurisdiction where the matters to be decided are of sufficiently great importance and require immediate resolution....")

The City of San Diego and its citizens greatly appreciate this Court's consideration of this request.

Sincerely,



Jan I. Goldsmith
City Attorney

JIG:cs