

MUNICIPAL FINANCE AT THE BALLOT BOX

City Attys Dept., League of CA Cities

May 3, 2018

San Diego, CA

MICHAEL G. COLANTUONO

Colantuono, Highsmith & Whatley, PC

420 Sierra College Drive, Suite 140

Grass Valley, CA 95945-5091

(213) 542-5737

(530) 432-7357

(530) 432-7356 (fax)

MColantuono@chwlaw.us

Twitter: @MColantuono

LinkedIn: Michael G. Colantuono

TAX INITIATIVES

Cal. Cannabis Coalition v. City of Upland (2017) 3 Cal.5th 924

- DCA concluded Prop. 218 does not require 2/3-voter approval of tax imposed by initiative, only of taxes proposed by government; Supreme Court affirmed
- Dispute over scope of decision
 - Portions hold article XIII C, § 2 does not apply to voter-initiated taxes, and some argue this means all parts of § 2 do not apply Other parts suggest only parts of § 2 – specifically, that requiring an election on a general tax at a general election – does not apply
 - Court identified “loophole” that might allow governing body to adopt taxes without public vote
- Cal. Bus. Roundtable initiative would reverse this and many other Prop. 218 & 26 cases

SPECIAL TAXES

Ventura v. UWCD (2017) 3 Cal.5th 1191

- Groundwater charges subject to Prop. 26 not 218
- Remanded to decide if:
 - 3:1 ratio of ag. to non-ag. rates mandated by Water Code §75594 violates Prop. 26
 - Adequate justification for rates on UWCD's record
- Back in DCA, may return to Cal. S. Ct. later this year
- Footnote 3 originally distinguished special taxes under Prop. 13 from those under Props. 62 and 218, suggesting two-thirds rule might not survive for non-property taxes
- HJTA sought rehearing and Court deleted the reference

PREEMPTION OF INITIATIVES LIMITING FISCAL AUTHORITY

City of Atascadero v. Daly (1982) 135 Cal.App.3d 466, 471

- Initiative to require voter approval of any City revenue measure “an unlawful attempt to impair essential governmental functions.”
- *HJTA v. City of San Diego* (2004) 120 Cal.App.4th 374
 - Prop. 218 preempted initiative charter amendment to require 2/3-voter approval of general taxes
- *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 218–221
 - Same as to water rates of special district

MANDATORY CONTENT OF SPECIAL TAXES

- Gov't Code, § 50075.1
 - Special tax measures must include
 - Purposes
 - Limit expenditures to those purposes
 - Provision for separate fund
 - Requirement for annual report
- Gov't Code, § 50075.3
 - Annual report prepared by CFO must state:
 - Amount collected and spent
 - Status of any project to be funded by the tax as a part of its purpose
- These provisions apply to charter cities by their terms

BALLOT LABELS FOR TAXES

- AB 195 (Oberholte, R-Hesperia)
 - Effective 1/1/18, amends Elections Code § 13119 to apply to all ballot measures that propose taxes
 - Label must be: “Shall the measure (stating the nature thereof) be adopted?”
 - Must state “the amount of money to be raised annually and the rate and duration of the tax”
 - Label “shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure.”
 - Purports to apply to charter cities, but many charters adopt the Election Code anyway.

IMPARTIAL ANALYSES

- Elections Code § 9280 says Council “may” direct City Attorney to prepare an impartial analysis, or the Clerk if the measure affects the organization or pay of City Attorney’s office
- Must state whether measure proposed by Council or by initiative
- 500 words, counted under rule of Elections Code § 9

IMPARTIAL ANALYSES

- Elections Code § 9280: “impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure.”
- Compare Elections Code § 9203 provision for title and summary of initiative: “express ... the purpose of the proposed measure.”
- So, more freedom to discuss legal effect of measure in impartial analysis and that might include legal flaws.
- But, writ review under Elections Code § 9295
 - *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169 [“pension reform” was insufficiently neutral for ballot label on San Jose City Council proposal]

IMPARTIAL ANALYSES

- Discussing legal flaws has pros and cons
 - More information for voters
 - Risk of suit, risk of impairing defense of measure post-election, political risk to City Attorney and to City
- Alternatives
 - Alert proponents by letter when you provide the title and summary
 - Seek pre- or post-election judicial review
 - E.g. *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769 [relieving City Attorney of duty to prepare title and summary for plainly invalid initiative]
 - Competing measures

IMPARTIAL ANALYSES

Do you allow your client to review and comment?

- Pro: You get a second read by someone who may have more knowledge of the details than you do
- Con: It may look like you are allowing your impartiality and duty to the voters to be impaired
- I do it, but make clear that the analysis is mine and must be fair and impartial

MARIJUANA TAXES

- Sales taxes are preempted
 - Stats. 1968, ch. 1265, § 2, p. 2388 [“Therefore, the Legislature declares that the state, by the enactment of the Sales and Use Tax Law and the Bradley-Burns Local Sales and Use Tax law, has preempted this area of taxation.”]
 - *Century Plaza Hotel Co. v. City of LA* (1970) 7 Cal.App.3d 616, 626 [this language preempted charter city “tippler’s tax”]
- Better to structure as a business license tax, even if the ordinance permits the taxpayer to pass the tax on to customers and to show the amount on receipts
 - *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 271 [“the economic incidence of a charge does not determine whether it is a tax.”]

MARIJUANA TAXES

- Dormant Commerce Clause
 - No discrimination in favor on in-city commerce or against outside-city commerce
 - “Equity” licensees must be defined as not to favor City residents
 - Requiring delivery services to have a storefront is okay, but requiring that storefront to be in the City is not.
 - *Macy’s Dept. Stores, Inc. v. City and County of SF* (2006) 143 Cal.App.4th 1444 [applying Dormant Commerce Clause to city business taxes]
 - *Cooperrider v. SF Civil Service Com.* (1979) 97 Cal.App.3d 495 [invalidating 1-year residency requirement for applicants for City employment]

MARIJUANA TAXES

Model ordinances to tax and regulate marijuana commerce:

- <https://www.gettingitrightfromthestart.org/california-local-regulation>

INITIATIVES ON TAXES

- Prop. 218 authorizes initiatives to repeal taxes and the authority to propose them by initiative has long been clear. (Cal. Const., art. XIII C, § 3)
 - *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 218–221 [initiative may not require voter-approval that 218 does not or violate statutory duty to set rates sufficient to cover service costs]
 - *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892 [initiative invalid for setting water rate too low to cover costs in violation of Water Code § 31007]
 - *Consolidated Fire Protection Dist. of LA County v. HJTA* (1998) 63 Cal.App.4th 211, 219–225 [contracts clause applies to Prop. 218]
- No City analog to WC § 31007, but bond covenants make for a powerful contracts clause argument

REFERENDA ON TAXES

- Forbidden by Cal. Const., art. II, § 9(a) and Prop. 218 speaks only of initiatives (Cal. Const., art. XIII C, § 3)
- Initiatives are prospective – they take effect after election day
- Referendum have immediate effect – they suspend the effectiveness of legislation – and are therefore much more destabilizing.
 - *Rossi v. Brown* (1995) 9 Cal.4th 688, 710 made that point when upholding initiative to repeal a tax.
- *HJTA v. Amador Water Agency*, 3d DCA Case No. 082079 tests whether water rate can be referended. Case is fully briefed as of 11/3/16 and awaiting argument.

TAX FAIRNESS, TRANSPARENCY & ACCOUNTABILITY ACT OF 2018

- Initiative Sponsored by Ca. Bus. Roundtable to overturn range of court decisions under Props. 13, 218 and 26
- **Taxes:** All taxes requires 2/3 voter approval
- **Fees:** 2/3 vote of legislative body to adopt or increase any of the few revenues not defined as taxes
- allows a referendum on fees using the very low standard under Prop. 218 for a tax initiative
- **Initiatives:** Overturns *Upland*; initiative subject to the 2/3 requirement
- **Window period:** Invalidates all local taxes (as this measure defines them to include some fees) adopted or increased in 2018

TFTAA OF 2018 (CONTINUED)

- Invalidates *Schmeer* (plastic bag ban fees), *Cal. Chamber v. ARB* (AB 32 fees), and *Upland* (different standards for initiatives than legislative tax proposals)
- **Franchises:** Eliminates the Prop. 26 exception for fees for a benefit or privilege (13C, 1(e)(1) deleted), but retains the exemption for uses of property in an effort to undo *Cal. Chamber*.
- Development impact fees: retains exemptions for these fees; these now specifically include Tourism Marketing District assessments. Non-property-based business assessments (*Evans v. San Jose*, the 1989 BID act) require 2/3 voter approval as taxes

TFTAA OF 2018 (CONTINUED)

- **Service Charges and Regulatory Fees:** limited to the reasonable and actual cost of service, not just the reasonable cost
- Eliminates the requirement that revenues be “imposed” to constitute taxes to undermine *Cal. Chamber*; will have unpredictable impacts on voluntary relationships between business and government.
- **Fines & Penalties:** not taxes only if imposed to punish law violations and “pursuant to adjudicatory due process.”
- Revenues to non-government actors are taxes if government imposes any restriction on use of funds. This undermines *Schmeer* without preventing minimum wage laws.

TFTAA OF 2018 (CONT.)

- All non-taxes are subject to an oddly stated **proportionality requirement**: “proportional based on the service or product provided” or “proportional to the cost to government created by the payor in performing regulatory tasks.”
- Voter approval is required to “extend” a revenue measure by extending its duration, applying it to new territory, class of customers or wider tax base (this repeals *Sunset Beach* and effectively requires 2/3 voter approval for inhabited **annexations**)
- Bonds: It disclaims any impact on voter-approval of bonds backed by property taxes (13C, 5) likely to avoid the political problem of undermining school funding.

BALLOT BOX PLANNING: EVOLVING CASE LAW REGARDING THE ELECTORATE'S RIGHT TO REFERENDUM

Presented by:

Kevin D. Siegel, Burke, Williams & Sorensen, LLP

Marc L. Zafferano, San Bruno City Attorney



PRESENTATION TOPICS

- Ordinances that bring zoning into compliance with general plan:
Is there a right to referendum?
 - Conflict among Courts of Appeal
 - Review by Supreme Court
- Resolutions: When is there a right to referendum?
 - Legislative acts
 - Settled law: e.g., general plan approvals, adoption of franchise agreements
 - General (and vague) test for unsettled matters
 - Case applications
 - Approval of *purchase* of real property
 - Approval of *sale* of real property
- Practice tips
- Cheat Sheet (required contents, deadlines, etc.)
- San Bruno suit



ZONING ORDINANCE AMENDMENTS AND GENERAL PLAN COMPLIANCE

- ZO and GP consistency is the general rule
- Settled law for 32 years:
 - *deBottari v. City of Norco* and *City of Irvine v. Irvine Citizens* (4th District)
 - No referendum if rejection would restore inconsistent zoning
- New law as of 2017-18:
 - *City of Morgan Hill v. Bushey* (2017, 6th District);
Save Lafayette v. City of Lafayette (2018, 1st District)
 - Referendum only preserves status quo
 - “Enact by initiative” vs. “Retain by referendum”
 - Council may adopt alternative, consistent ordinance
- Supreme Court review in *City of Morgan Hill v. Bushey*
 - *LOCC amicus*
 - *Predictions*



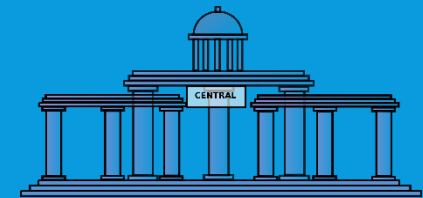
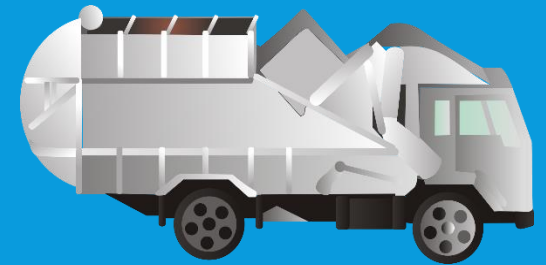
TO BE LEGISLATIVE, OR NOT TO BE LEGISLATIVE: THAT IS THE QUESTION



- General rule: Referendum only for legislative acts
- What's legislative?
 - Form of action not dispositive
 - Ordinance: Legislative (but see *Southwest Diversified v. City of Brisbane*)
 - Resolution: Depends on the nature of the action
 - Type of Approval
 - General plan approval: Yes
 - *Napa Citizens for Honest Gov't v. Napa County*
 - Development approval (e.g., subdivision, CUP): No
 - *Arnel v. City of Costa Mesa*
 - Statute may dictate
 - Contract
 - to Purchase Property?
 - to Sell Property?

LEGISLATIVE VS. NON-LEGISLATIVE: HOW CAN YOU TELL?

- Vague, general rule: Declaration of purpose vs. implementation (see, e.g., *San Diego v. Dunkl*)
- Legislative
 - Resolution adopting contract for public services (e.g., *Lindelli v. Town of San Anselmo*)
 - Resolution *acquiring* real property for public use (e.g., *Hopping v. Richmond*)
 - Unless reso only implements prior legislative act (e.g., *McKevitt v. City of Sacramento*)
- Not Legislative
 - Action prescribed by state or fed'l gov't (e.g., *Assoc. Home Builders*)
 - Contract does not establish citywide rule (e.g., *Worthington v. Rohnert Park*)
 - Referendum would interfere with essential government functions (e.g., *Citizens for Jobs and Economy v. County of Orange*)



LEGISLATIVE VS. NON-LEGISLATIVE: HOW CAN YOU TELL? (CONT.)

- Don't apply rule that award of a contract is legislative, and is thus subject to review by petition for writ of traditional mandate
 - see, e.g., *San Diegans for Open Gov't v. City of San Diego*
- Don't conflate with distinction b/w discretionary and ministerial acts, nor with importance of decision
 - see *San Bruno Committee for Economic Justice v. City of San Bruno*

THE REFERENDUM PETITION HAS LANDED: WHAT NOW?

REFERENDUM AGAINST A RESOLUTION PASSED BY THE CITY COUNCIL
 Resolution Against the City of San Bruno's Resolution to Authorize the City Manager to Execute a Purchase and Sale Agreement for the Sale of the Crockett Hotel Property, and Authorizing the City Manager and City Attorney to Execute All Documents Necessary to Close the Sale, adopted by the City Council of the City of San Bruno on March 29, 2024. We petition the City Council to reconsider and reject said resolution, or else submit the resolution to a vote of the electors. The text of the resolution is set forth in this petition below.

NOTICE TO THE PUBLIC: THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK.

All signatures of this petition must be original signatures of the City of San Bruno.		Official Use Only
1. Signature of Petitioner	City of San Bruno	
2. Signature of Petitioner	City of San Bruno	
3. Signature of Petitioner	City of San Bruno	
4. Signature of Petitioner	City of San Bruno	
5. Signature of Petitioner	City of San Bruno	
6. Signature of Petitioner	City of San Bruno	
7. Signature of Petitioner	City of San Bruno	
8. Signature of Petitioner	City of San Bruno	
9. Signature of Petitioner	City of San Bruno	
10. Signature of Petitioner	City of San Bruno	
11. Signature of Petitioner	City of San Bruno	
12. Signature of Petitioner	City of San Bruno	
13. Signature of Petitioner	City of San Bruno	
14. Signature of Petitioner	City of San Bruno	
15. Signature of Petitioner	City of San Bruno	
16. Signature of Petitioner	City of San Bruno	
17. Signature of Petitioner	City of San Bruno	
18. Signature of Petitioner	City of San Bruno	
19. Signature of Petitioner	City of San Bruno	
20. Signature of Petitioner	City of San Bruno	

CONTINUED ON NEXT PAGE

- Check for timeliness, correct identifying information, declaration of circulator, full text, all exhibits, number of signatures (prima facie)
 - Ministerial duty to reject if absent
- Right to appeal to council if clerk rejects?
 - Exhaustion of administrative remedies req'd
- Options for referendum petition re non-legislative act
 - Reject; burden on proponents to sue
 - City need not make compelling showing of illegality (compelling showing req'd for challenges to *substantive* validity)
 - Sue for declaratory relief to keep off ballot

WHAT HAPPENED IN SAN BRUNO?

- 15 years of unchallenged legislative decisions to develop select service hotel
 - General Plan Amendment, Specific Plan, re-zoning, subdivision map, development agreement, CEQA, project approvals, vote to increase height limits
 - Additional SP Amendment to reduce size of parcel, hotel
- Owner declined to develop hotel
- Everything else completed by 2008
 - Apt's, Senior and Affordable Housing, Retail, Restaurant
- City purchased property for \$1.4M; issued RFP
 - Developers requested public subsidy
 - City evaluated but rejected requests



WHAT HAPPENED IN SAN BRUNO?

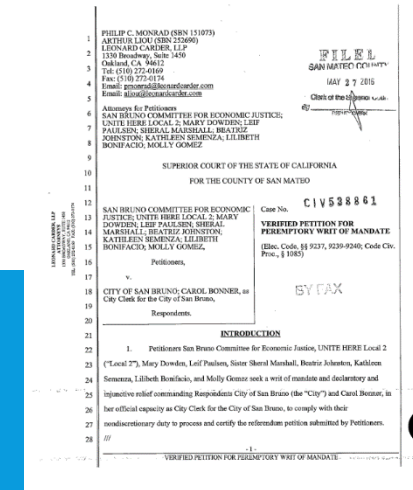
(CONT.)

- March 29, 2016:
 - City Council adopted resolution to sell property to selected developer
 - Appraised market value of \$3.97M via purchase and sale agreement (PSA)
 - No public subsidy
 - Hotel worker's union members objected
 - Demanded that City require union operations in PSA
 - Developer commitment to use some union labor in construction insufficient
- The Day After:
 - Referendum proponents start collecting signatures
 - Obtained signatures of over 15%



CITY'S RESPONSE

- Reject referendum as non-legislative act on May 17, 2016
- Proponents sued city and developers as RPI on May 27, 2016
- City immediately filed ex parte app. to set briefing schedule and hearing date
 - Proponents agreed...November 2016 election?
- Hearing: July 28, 2016; decision August 26, 2016
 - Proponents failed to exhaust administrative remedies
 - Resolution to authorize PSA not a legislative act
- 5 months from contract approval to litigation win: a record?



THEN THERE'S THAT PESKY APPEAL...



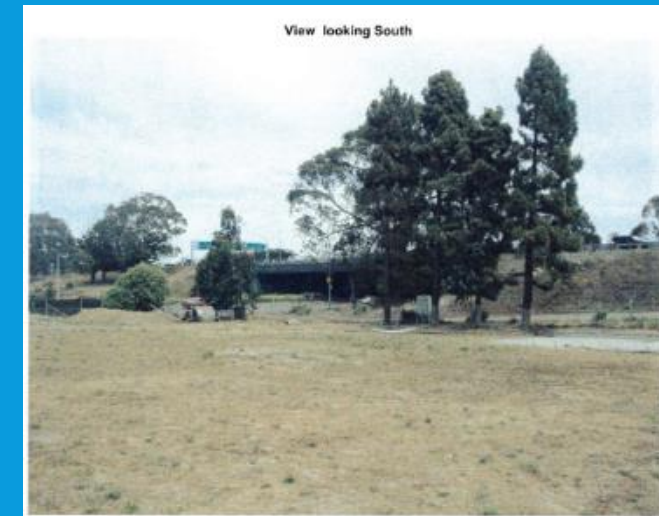
- Proponents' goal shifted to delay: wait until last possible date for everything
- Proponents' motion to stay close of escrow: denied
 - But developer didn't want to close given pending litigation
- City's motion to set early hearing date: denied
- Briefing completed: February 14, 2017
 - Complexity and ambiguity: should we be worried?
- Seven months later: Oral Argument: September 12, 2017
- Decision issued: September 20, 2017

THE APPELLATE COURT'S DECISION

- Just because council's decision is important doesn't mean it's legislative
 - Not a contract for public services
 - Not a contract to acquire land for public purpose
 - Many administrative decisions are important
 - Otherwise, everything's legislative
- Resolution authorizing PSA is final administrative act in long chain of legislative decisions to sell real property
 - Merely implements prior acts
 - Proponents' failure to challenge prior decisions was compelling
 - Rule: sale of public land for private development not a legislative act
 - Prescribing new policy vs. pursuing policy previously adopted by legislative body

POSTSCRIPT: WHERE'S THE HOTEL?

- All litigation resoundingly decided in City's favor
- All deadlines to file new litigation long expired
- Don't forget the Department of Industrial Relations
 - At developer's request, City had requested opinion confirming project not subject to prevailing wage
 - No city funds or subsidy
 - Union alleged project was part of nearby but unrelated redevelopment project previously built with prevailing wage
 - Still pending...



TAKE-AWAYS

- Supreme Court to resolve whether the electorate has right to reject an ordinance that brings zoning into compliance with general plan
- Determining whether an action is legislative—and thus subject to referendum—may depend on a variety of facts and factors
- Carefully consider pros and cons of purchasing property for site control
 - Other nearby cities have hotels built and occupied
- Consult the Cheat Sheet
- Decide early if you want to sue or be sued