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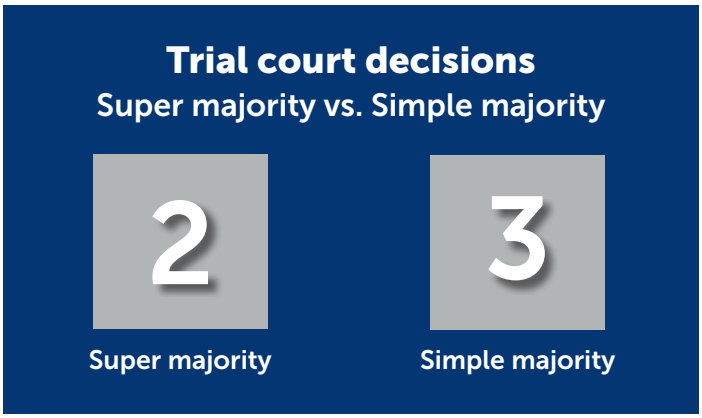
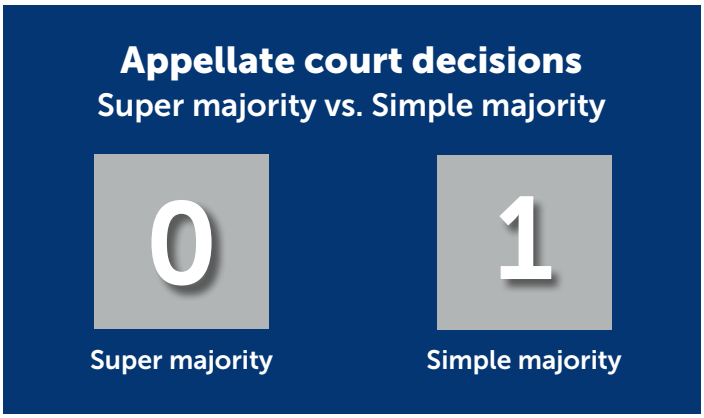
Overview

A recent wave of local tax initiatives passed by simple majority vote in cities and counties across California has resulted in either court validation actions or challenges under the state constitution. Article XIII C, Section 2(d) of the California Constitution provides that "[n]o 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." Thus far, trial courts have split as to whether this provision applies to voter-initiated local taxes, and one appellate court already has concluded it does not.

By and large, the cases turn on the interpretation of *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, wherein the California Supreme Court held that Article XIII C, Section 2(b) of the California Constitution does not require voter-initiated local general taxes to be submitted to the electorate at a general election, as opposed to a special election. Article XIII C, Section 2(b) states "[n]o 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" at a "general election." The Court in *Upland* concluded that in the context of this specific provision, "local government" does not extend to the electorate and voter initiatives related to local general taxes may be considered in a special election. Given the similarity in language between Article XIII C, Sections 2(b) and 2(d), a San Francisco trial court – and now the First District Court of Appeal – concluded the reasoning and holding of *Upland* apply and that special taxes introduced by voter initiative only require a simple majority vote. Trial courts in Fresno and Oakland, on the other hand, relied on language in *Upland* that distinguished the "procedural timing requirement" in Section 2(b) and the "procedural two-thirds vote requirement" in Section 2(d) to conclude *Upland* does not demand a similar result when interpreting the latter.

This special edition of Eversheds Sutherland's SALT Scoreboard – California Local Tax Cases, discusses the five key California cases showcasing this divide. A number of the cases are now on appeal, and since one appellate court already weighed in, the question remains whether the California Supreme Court will take review of the case and clarify its decision in *Upland*.





Cases

Proposition C (San Francisco Nov. 2018)

CASE: *City and County of San Francisco v. All Persons Interested in the Matter of Proposition C*, (2020) 51 Cal.App.5th 703 (petition for review by California Supreme Court pending).

SUMMARY: Proposition C, a voter initiative on San Francisco's November 2018 ballot, received 61.34% affirmative votes. Proposition C imposed an additional gross receipts tax on certain businesses with receipts in excess of $50 million to fund homelessness reduction efforts. (San Francisco Ord. No. 69-19.) Anticipating a challenge due to the proposition passing by a simple majority, the City and County of San Francisco brought an action in Superior Court on January 28, 2019 to validate the voter initiative based on the reasoning in *Upland*. The trial court agreed, concluding the term "local government" in Article XIII C, Section 2(d) must be interpreted in the same way as in Article XIII C, Section 2(d) per *Upland*, and therefore does not encompass the electorate. On June 30, 2020, a First District Court of Appeal affirmed the trial court's decision, holding *Upland* controls and that voter-initiated taxes are not subject to the two-thirds vote requirement under Article XIII C, Section 2(d). The Court of Appeal similarly held that Article XIII A, Section 4 of the Constitution, which provides that "Cities, Counties and special districts" may impose certain special taxes "by a two-thirds vote of the qualified electors of such district" does not apply to voter initiated local taxes either. The Court concluded that this provision "does not repeal or otherwise abridge by implication the people's power to raise taxes by initiative, and to do so by majority vote." The Court of Appeal's decision became final on July 30, and a petition for review by the California Supreme Court was filed on August 7.

Proposition C (San Francisco June 2018)

CASE: *Howard Jarvis Taxpayers Association et al. v. City and County of San Francisco*, San Francisco Cty. Superior Ct. Case No. CGC-18-568657 (July 24, 2019) (currently on appeal at California's 1st Appellate District, Div. 5).

SUMMARY: Proposition C, a voter initiative on San Francisco's June 2018 ballot, received 50.87% affirmative votes. This proposition imposed an "Additional Tax on Commercial Rents Mostly to Fund Child Care and Education," targeting corporate taxpayers with significant gross receipts. (Prop. C, Legal Text, in Voter Information Pamphlet.) Prior to the November 2018 election, the San Francisco City Attorney released a guidance letter stating any tax increases placed on the ballot via local initiative process require only a majority vote under *Upland*, regardless if the measure is a special tax. A coalition of interested taxpayers and business associations challenged the passage of Proposition C based on the requirement that the two-thirds vote provisions in the Constitution apply to *all* special taxes at the local level, regardless of whether initially proposed by voter-circulated initiative or by an ordinance adopted by a local governing body. The challengers also argued that passage of Proposition C was an act of gamesmanship and not a true citizen's initiative because the City Supervisor introduced the initiative in his personal capacity. Following its earlier decision in *All Persons Interested in the Matter of Proposition C*, the trial court relied on the reasoning in *Upland* and held Proposition C (June 2018) was validly enacted with a simple majority vote. Additionally, the trial court rejected the challengers' gamesmanship argument, finding the Supervisor, not the City, was the proponent of the measure. This matter is currently in briefing on appeal, with the oral argument yet to be set.

Proposition G (San Francisco June 2018)

CASE: *City and County of San Francisco v. All Persons Interested in the Matter of Proposition G*, San Francisco Cty. Superior Ct. Case No. CGC-18-569987 (May 11, 2020) (currently on appeal at California's 1st Appellate District).

SUMMARY: Proposition G, a taxpayer initiative on the June 2018 San Francisco ballot, received 60.76% affirmative votes. The ballot initiative imposed a $298 per parcel tax on taxable real property for 20 years to benefit the San Francisco Unified School District. The City and County of San Francisco again brought an action to validate the tax, arguing that only a simple majority vote, not a two-thirds vote, was required. The same trial court in both Proposition C cases again found in favor of San Francisco following the reasoning in *Upland*, and rejected the challengers' claim that the initiative was really the City's initiative, not a true voter initiative, because the San Francisco Unified School District and the United Educators of San Francisco were involved in its creation. The trial court was not persuaded by the challengers' argument that a decision in favor of San Francisco effectively blessed local governments to sidestep the two-thirds vote requirement otherwise applicable to local government initiatives by styling such initiatives as voter initiatives. This matter was appealed on July 1 to the First District.

Measure AA (Oakland Nov. 2018)

CASE: *Jobs and Housing Coalition v. City of Oakland*, Alameda Cty. Superior Ct. Case No. RG19005204 (Oct. 15, 2019) (currently on appeal at California's 1st Appellate District, Div. 1).

SUMMARY: Measure AA, a taxpayer initiative on the November 2018 Oakland ballot, received 62.57% affirmative votes. The ballot initiative imposed a 30-year parcel tax to fund educational programs. Although the Oakland City Attorney had stated in ballot materials that a two-thirds vote was necessary, the Oakland City Council still voted after the election to have the measure validated as passing. Taxpayers filed suit in February 2019 against the City to invalidate the Council's position, prevent Measure AA from being enforced, and issue refunds to any taxpayers who remitted the tax. In a taxpayer win, the trial court rejected the City's argument that the two-thirds vote was not required because it was a voter-sponsored initiative and concluded that Measure AA was a "special tax" dedicated to a specific purpose, meeting the supermajority voting requirements. The court also found that enforcing the tax "would constitute a fraud on voters" because the City's pre-election materials "unambiguously advised voters that Measure AA would require two-thirds of the votes to pass." This matter is currently on appeal.

Measure P (Fresno Nov. 2018)

CASE: *City of Fresno v. Fresno Building Healthy Communities*, Fresno Cty. Superior Ct. Case No. 19CECG00422 (Feb. 1, 2019) (currently on appeal at California's 5th Appellate District).

SUMMARY: Measure P, a taxpayer initiative on the ballot in Fresno in November 2018, received 52.17% affirmative votes. The ballot initiative increased sales tax for 30 years to fund city parks, recreation, streets and the arts. The City of Fresno concluded that Measure P was a "special tax" that did not receive the required two-thirds vote and therefore did not pass. The nonprofit Fresno Building Healthy Communities filed suit, arguing that Measure P is a citizen initiative, not requiring the supermajority vote to pass. The trial court concluded in favor of the City, holding that it would be "erroneous to conclude that the two-thirds requirement in article XIII C, section 2, subdivision (d) applies only to a 'local government'" and that the ruling in *Upland* specifically differentiated between the election date issue and the supermajority requirement issue. This matter is currently in briefing on appeal.

Conclusion

Whether a voter-initiated local special tax requires a simple or super majority vote by the electorate will determine the landscape of local California taxes for the near future. If only a simple majority vote is required, then taxpayers may see a dramatic increase in such taxes, particularly given the current economic situation. Further, a disconnect in approval requirements between local government-initiated special taxes and voter-initiated special taxes leaves open the possibility that local government officials might use the voter initiative process as an end-around to avoid the two-thirds supermajority approval requirement by placing initiatives on the ballot in an individual capacity. Ultimately, the issue will be decided by the California Supreme Court. Accepting review of an appellate decision will allow the Court to clarify its position in *Upland*. Refusing review of the First District's decision, on the other hand, could serve as a message the appellate court correctly interpreted *Upland*.

The Eversheds Sutherland SALT team is following these cases as they make their way through the appeal process and will keep you apprised of relevant updates.

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