

Daily Journal

www.dailyjournal.com

THURSDAY, SEPTEMBER 7, 2017

PERSPECTIVE

It's now easier to pass local taxes

By Meriem L. Hubbard

Californians have repeatedly expressed their wish to vote on new or increased taxes, fees and assessments. The California Tax Revolution began in 1978, when taxpayers approved Proposition 13 in order to limit the ability of local governments to increase property taxes without voter approval. In the ensuing years, voters approved three more initiatives drafted to secure the right to vote on taxes that were recharacterized as fees, special taxes, charges or assessments. The most recent initiative was passed in 2010. It may be time for another one.

Last week in *California Cannabis Coalition v. City of Upland*, 2017 DJDAR 8407 (Aug. 29, 2017), the California Supreme Court held that all tax initiatives are not created equal. Whether or not the public is entitled to vote depends upon who proposes an initiative. The public is entitled to vote on new or increased general taxes if local government officials seek to impose, extend or increase a general tax. But the public does not have the right to vote on general taxes proposed by a voter initiative. The majority of the court agreed that “local government is an entity distinct from the public.”

The Cannabis Coalition sought to enact an initiative that would have allowed up to three medical marijuana dispensaries in the city of Upland. The coalition obtained signatures from at least 15 percent of the registered voters in the city, and asked that the city council either schedule a special election of the voters or adopt the proposed ordinance without alteration. The city council did neither. Why? Because the initiative required each dispensary to pay an annual licensing and inspection fee of \$75,000 to the city, which amount exceeded the city's costs to regulate the marijuana dispensary. Thus, the city argued that it is a tax, and pursuant to Article

XIII C, Section 2, of the California Constitution (Proposition 218), new taxes must be approved by a vote of the electorate in a regularly scheduled general election where members of the governing body are to be elected.

The Cannabis Coalition argued that a different section of the constitution controls. Article II, Section 8 explains the people's power to propose and adopt laws, and Section 11 states that initiative powers may be exercised by local

Justices Leandra Kruger and Goodwin Liu, in a concurring and dissenting opinion, made that very argument, explaining that all taxes are imposed by local government, and “when a city's voters enact legislation by initiative, they do so ‘by and for’ the city itself.” In other words, the voters act as legislators.

electors. Section 11 also says that the Legislature will provide procedures for exercising that power, so the Legislature adopted Elections Code Section 9214. That section sets out the procedures a local government must follow when electors propose an initiative and request a special election. The city could either hold a special election or adopt the initiative itself.

The city prevailed in the trial court, but the coalition won in the end. The 4th District Court of Appeal held that taxes imposed by an initiative — as opposed to those imposed by a local governing body — are exempt from the provisions of Prop. 218. And the appellate court directed the superior court to issue a writ compelling the city to place the initiative on a special ballot in accordance with Elections Code Section 9214. The initiative was defeated, and the case was moot.

Nevertheless, the Supreme Court forged ahead, noting that important questions remained which may evade review. The court viewed its role as reconciling the intent of the constitutional provisions argued by the parties — Prop. 218 and Article II. The majority opinion, drafted by

Justice Mariano-Florentino Cuellar, and joined by Chief Justice Tani G. Cantil-Sakauye, and Justices Kathryn Werderger, Ming Chin and Carol Corrigan, concluded that local government is an entity distinct from the public. “Given the language and other indicia of intended purpose for article XIII C, section 2, subdivision (b), we conclude the provision's requirements apply only when a local government seeks to impose, extend, or increase a general tax.”

But when an initiative is proposed by an individual or a group, Elections Code Section 9214 prevails, and an initiative can be adopted by special election or a vote of the local officials.

Attorneys at the Howard Jarvis Taxpayers Association, who represented the city of Upland in the appellate courts, remember that from the beginning of the so-called Tax Revolt, local governments sought creative ways to avoid the peoples' mandate. And they are concerned that this new decision will create more mischief. For instance, public agencies could deny taxpayers their rights by colluding with outside interests to propose taxes in the form of an initiative, and then submitting a new tax under a lower vote threshold than that currently mandated by the constitution. Or, a local government could impose a tax without an election.

The majority opinion is perplexing, not because of the law it relies on, but rather the law it ignores. For instance, the majority was unable to find an “unambiguous indication” in the text of Prop. 218 or expressions of purpose in the ballot materials to support a conclusion

that local government includes the electorate. But it has long been the law in California that all power of government ultimately resides in the people, and the courts should apply a liberal construction to this power wherever it is challenged. Justices Leandra Kruger and Goodwin Liu, in a concurring and dissenting opinion, made that very argument, explaining that all taxes are imposed by local government, and “when a city's voters enact legislation by initiative, they do so ‘by and for’ the city itself.” In other words, the voters act as legislators.

The concurring opinion also chided the majority for attempting to avoid an implied repeal of Elections Code Section 9214, suggesting that the more specific provisions of Prop. 218 must control. Prop. 218 “is a constitutional restriction on the taxation power of local government, and, by its terms, it applies to the imposition of all local government taxes.” The dissenting portion of the opinion agreed that the city should have put the Cannabis Coalition's initiative on a special election ballot, and then let the courts sort out the validity of the fee.

Time will tell what this decision means for local taxation. But it appears to make it easier to pass local taxes, and that is not something California voters want to happen.

Meriem L. Hubbard is a senior attorney at Pacific Legal Foundation. PLF attorneys filed an amicus brief in support of the city in *California Cannabis Coalition v. City of Upland*, describing the four successful tax-cutting initiatives, why they were



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adopted, and the importance of preserving the right of the people to vote on all taxes.