Ballot Box Planning and Finance

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Municipal Finance at the Ballot Box

by
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I. Introduction

This paper presents updates on a range of legal issues that arise when cities and counties confront ballot measures affecting local government finance. Some are established principles of elections law, some reflect new developments and some are pending cases. In general, this area of law is developing quickly — via initiatives, legislation and court cases — and practitioners should be alert for new developments.

II. *California Cannabis Coalition v. City of Upland*: Tax Initiatives Not Subject to Same Rules as Taxes Proposed by Government

The recent California Supreme Court decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 ("*Upland*") has generated much commentary and some — including the San Francisco City Attorney's Office — predict local special taxes might be allowed on a simple majority vote, rather than the two-thirds required by Propositions 13, 62, and 218.[1] However, I conclude the two-thirds-voter-approval requirement survives.

Here are *Upland*'s facts: Proponents circulated an initiative to allow three marijuana dispensaries in Upland.[2] They collected signatures of more than 15% of City voters on a petition calling for a special election, as the Elections Code then allowed.[3]

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[1] Cal. Const., art. XIII A, § 4 [Prop. 13]; Gov. Code, § 52723 [Prop. 62]; Cal. Const., art. XIII C, § 2, subd. (d) [Prop. 218].) The San Francisco City Attorney's opinion appears at <htpps://www.sfcityattorney.org/wp-content/uploads/2015/07/CA-Cannabis-Coalition-Memo-1.pdf> (last viewed Mar. 17, 2018).

[2] *Upland, supra*, 3 Cal.5th at p. 931.

[3] *Id*. at pp. 931–932. Effective January 1, 2018, Elections Code section 9214 has been repealed and initiative proponents may no longer compel a special election. This is part of a legislative trend to consolidate elections on the state election dates to encourage voter participation. (Senate Rules Committee Analysis of AB 765, June 22, 2017 at pp. 4–5.)

A City report prepared pursuant to Elections Code section 9212 estimated the City's annual cost to regulate a dispensary at $15,000 per year, concluding the $75,000 fee therefore included a $60,000 general tax — i.e., a tax to fund any City purpose.[4] Under Proposition 218, general taxes may only appear on general election ballots when city council seats are scheduled to be contested.[5] The City Council therefore set the measure for a general election two years later.[6] The Coalition sued to compel an earlier, special election.[7] The trial court agreed with the City that the measure imposed a general tax and could not be set for a special election.[8]

The Court of Appeal reversed, concluding Proposition 218's general-election rule does not apply to initiatives.[9] The Supreme Court agreed.[10] The Court reasoned that limits on initiatives are disfavored and must be plainly stated and the general-election rule is a procedural requirement that applies to government, but not to initiative proponents.[11]

The Court makes clear, however, that the two-thirds-voter-approval requirement for special taxes — taxes which may be spent only for stated purposes — does apply to initiatives:

> [F]or example, the enactors [of Prop. 218] adopted a requirement providing that, before a local government can impose, extend, or increase any special tax, voters must approve the tax by a two-thirds vote. That constitutes a higher vote requirement than would otherwise apply. … [V]oters explicitly imposed a procedural two-thirds vote requirement on themselves in article XIII C, section 2, subdivision (d) … ."[12]

However, other language leads some to argue the decision imperils the two-thirds rule. First, Justices Kruger and Liu, dissenting in part, characterize the language just quoted as less than definitive: "the majority opinion contains language that could be read to suggest that article XIII C, section 2(d) [the two-thirds rule] should be

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[4] *Upland, supra*, 3 Cal.5th at p. 932.
[5] Cal. Const., art. XIII C, § 2, subd. (b).
[6] *Upland, supra*, 3 Cal.5th at p. 932.
[7] *Ibid*.
[8] *Ibid*.
[9] *Id*. at pp. 932–933.
[10] *Id*. at p. 931.
[11] *Ibid*.
[12] *Id*. at p. 943.

interpreted differently from section 2(b) [the general election rule]."[13] However, this was a rebuttal to the majority, not a holding that could undermine its conclusion.

Other parts of the opinion refer to the general-election rule by citing the entire section which includes it— article XIII C, section 2.[14] That is unhelpfully ambiguous, as section 2 includes the general election rule, the two-thirds vote requirement, and three other rules. Moreover, the Court expressly leaves open the impact of its conclusion on article XIII D — governing assessments on property and property related fees, including many retail water, sewer and trash fees. As Propositions 13 and 62 use language very similar to that of Proposition 218,[15] these questions arise under all three measures.

Still more alarming for Proposition 218's advocates is the Court's expressly refraining from deciding whether a city council could adopt an initiative tax proposal without submitting it to voters at all — as is increasingly common in the land use context.[16] I expect courts to conclude a City Council cannot adopt an initiative tax without voter approval because the Court's language preserving the two-thirds rule describes it as a procedural restriction voters imposed on themselves. If voters cannot tax themselves without two-thirds voter approval, governments cannot either.

While the *Upland* opinion is not as clear as one would hope, I conclude the two-thirds voter approval requirement for special taxes — and the election requirement for taxes generally — survive. This may change in future cases, of course, so time will tell.

III. *City of San Buenaventura v. United Water Conservation District*: A Temporary Suggestion that Special Taxes Differ under Propositions 13 and 218

City of San Buenaventura v. United Water Conservation District (2017) 3 Cal.5th 1191 (*Ventura*) involved Ventura's challenge to a groundwater augmentation charge to fund the services of a water conservation district imposed on the City's use of its groundwater rights. Under Water Code section 75594, the respondent agency was obligated to set rates for municipal and industrial uses of groundwater at between three and five times the rate set for agricultural groundwater use.[17] The case's conclusion that

[13] *Id*. at p. 956, fn. 7 (Kruger, J., concurring and dissenting).
[14] *Id*. at pp. 932, 936, 938, 939, 941, 947, 948.
[15] Cal. Const., art. XIII A, § 4 [Prop. 13]; Gov. Code, § § 53722–53723 [Prop. 62].
[16] *Upland, supra*, 3 Cal.5th at p. 947.
[17] *Ventura, supra*, 3 Cal.5th at p. 1197.

this challenge arises under Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)) rather than Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (b)) is not our present concern. What is of interest is that the opinion originally included a footnote 3 stating that the special taxes which require two-thirds voter approval under Proposition 13 (Cal. Const., art. XIII A, § 4) are not the special taxes which require such approval under Proposition 218 (Cal. Const., art. XIII C, § 2, subd. (d)) because the former include only taxes on real property. That statement, taken together with *Upland*'s suggestion that an initiative tax proposal might be adopted without voter approval under Elections Code section 9215 [council option to adopt initiative rather than order an election] seemed to portend the demise of the two-thirds voter approval requirement for special taxes. The Howard Jarvis Taxpayers Association, *amicus* in the case, petitioned the Court for rehearing seeking deletion of this statement from footnote 3. The Court made that correction (and others sought by Ventura and the respondent district) on denial of rehearing.

Plainly this is a fertile time in the law of municipal revenues and new case law warrants close attention.

IV. Preemption of Initiatives Limiting Municipal Financial Authority

Our courts have confronted local initiative proposals to impose voter approval requirements on local government taxes more stringent than those established by our often-amended state Constitution. *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466 ("*Atascadero*") was a post-Proposition 13 dispute involving an initiative requiring voter approval of any City revenue measure. The Court of Appeal concluded it was both preempted by, and exceeded the scope of, the initiative power "as an unlawful attempt to impair essential governmental functions through interference with the administration of the City's fiscal powers."[18]

Proposition 218 brought a similar challenge. *Howard Jarvis Taxpayers Association v. City of San Diego* (2004) 120 Cal.App.4th 374 invalidated an initiative amendment to the City charter purporting to require two-thirds voter approval of general taxes. The Court of Appeal had little difficulty concluding the measure was preempted by Proposition 218. The California Supreme Court reached the same conclusion as to a water district initiative to require voter approval of water rates in *Bighorn-Desert View Water Agency* v. *Verjil* (2006) 39 Cal.4th 205, 218–221. As Proposition 218 allows water rates to be

[18] *Atascadero, supra*, 135 Cal.App.3d at p. 471.

imposed by a legislative body after a majority protest proceeding, without an election (Cal. Const., art. XIII D, § 6, subd. (c)), local voters cannot initiate legislation to the contrary.

Thus, local governments confronted with an unwelcome initiative commonly find that preemption is their most serviceable defense.

V. Mandatory Content of Special Tax Measures

When tasked to draft a special tax measure for the ballot, public lawyers should attend to the requirements of Government Code sections 50075.1 and 50075.3. The first requires a special tax proposal to include:

> (a) A statement indicating the specific purposes of the special tax.
>
> (b) A requirement that the proceeds be applied only to the specific purposes identified pursuant to subdivision (a).
>
> (c) The creation of an account into which the proceeds shall be deposited.
>
> (d) An annual report pursuant to Section 50075.3.

Government Code section 50075.3 requires a special tax proposal to require an annual report prepared by the "chief fiscal officer of the levying local agency" stating:

> (a) The amount of funds collected and expended.
>
> (b) The status of any project required or authorized to be funded as identified in subdivision (a) of Section 50075.1.

These provisions purport to apply to charter cities.[19] Compliance seems advisable. These provisions are not onerous, provide public confidence in tax proposals, and omitting them will invite unwelcome controversy. Nevertheless a persuasive argument can be made that these are matters of local concern and a charter city which has contrary local policy may enforce them.[20]

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[19] Gov. Code, § 50075.5, subd. (a).

[20] (E.g., *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 20–26 [requiring substantial justification of statewide concern to preempt local tax ordinance].)

VI. AB 195's Requirements for Ballot Labels for Finance Measures

Effective January 1, 2018, tax measures local legislative bodies place on the ballot are subject to a new ballot-label requirement. AB 195 (Obernolte, R-Big Bear Lake) amended Elections Code section 13119 to require all local measures imposing or increasing a tax — including those proposed by a local agency rather than by initiative — to be accompanied by a ballot statement specifying the annual revenue to be raised and the rate and duration of the tax.[21] A similar, earlier requirement applied only to initiatives.[22] The requirement seems targeted at ballot labels — the questions actually printed on ballots — because it refers to "the statement of the measure" "included" in "the ballot" and only the ballot label would seem to fit this description. Thus, it can be argued that inclusion in an impartial analysis or other provision of the ballot pamphlet is insufficient. The conservative course will be to include it in a ballot label, although the language will support other interpretations.

The amendment was spurred by suit on a tax the Los Angeles Metropolitan Transportation Authority ("MTA") placed on the November 2016 ballot.[23] Measure M proposed a half-cent sales tax to support MTA services.[24] Seven cities filed a pre-election challenge citing Elections Code section 13119, alleging ballot materials did not state the amount to be raised annually nor accurately state its rate and duration.[25] The MTA argued section 13119 applied only to initiatives — not measures a legislative body places on the ballot.[26] The trial court agreed and the Court of Appeal denied writ review. [27]

The Howard Jarvis Taxpayers Association sponsored AB 195 to extend section 13119 to tax measures placed on the ballot by local governments.[28] Its requirements also

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[21] Elec. Code, § 13119, subd. (b).
[22] Stats. 2015, c. 337, § 1 (adopting earlier version of Elections Code, § 13119).
[23] Senate Floor Analysis, A.B. 195, June 27, 2017 at p. 2 (citing *City of Carson, et al. v. Dean Logan, Registrar-Recorder/County Clerk of the County of Los Angeles* (2016) Los Angeles County Superior Court Case No. BS164554.
[24] <www.theplan.metro.net/#measurem> (last viewed Mar. 17, 2018).
[25] Senate Floor Analysis, A.B. 195, June 27, 2017 at p. 2.
[26] *Id*. at pp. 2–3.
[27] *Id*. at p. 3. The Second District denied an appellate writ on September 9, 2016. (*City of Carson v. Superior Court*, 2nd DCA Case No. B277440.)
[28] Senate Floor Analysis, A.B. 195, June 27, 2017 at p. 1.

apply to measures to approve bonds or other debt.[29] AB 195 also mandates a ballot statement be an "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."[30]

The new requirements apply to measures proposed by general law and charter cities, general law and charter counties, and special districts — including school districts. While there might be an argument charter cities are beyond the Legislature's reach, many charter cities adopt the Elections Code by reference and others must confront the Legislature's declaration that section 13119 serves a statewide purpose and the likely political consequences of ignoring the statute.

Local governments placing revenue measures on the ballot should be careful to include in ballot labels the annual revenue expected from proposals — which can be difficult to estimate — and to state the rate and duration of taxes. For taxes which have no sunset, a common formula states "the tax will remain in effect until voters amend or repeal it." The more essential task may be to ensure the ballot statement is impartial, arguing neither for nor against the measure.

No doubt, those opposed to local tax measures will continue to look to the courts to edit ballot language to which they object and such suits may become more common. Careful drafting and legal review are therefore essential.

VII. Impartial Analysis under Elections Code Section 9280

City attorneys are familiar with their responsibility to prepare impartial analyses of ballot measures, whether proposed by initiative or the city council. Still, it is useful to closely scrutinize the language of Elections Code section 9280.

Technically, such analyses are optional.[31] Section 9280 states "the governing body **may** direct the city elections official to transmit a copy of the measure to the City Attorney." But, of course, such analyses are expected and provide useful information to voters and useful legislative history, and are therefore typically provided. If "the

[29] Elec. Code, § 13119, subd. (a).
[30] *Id*., subd. (c).)
[31] Elec. Code, § 9280 (emphasis added); Elec. Code § 354 ("'Shall' is mandatory and 'may' is permissive.")

organization or salaries of the office of the city attorney are affected," the impartial analysis is to be prepared by the city clerk.[32]

Section 9280 mandates an impartial analysis state "whether the measure was placed on the ballot by a petition signed by the requisite number of voters or by the governing body of the city." The analysis is limited to 500 words, counted as provided in Elections Code section 9.

Most substantively, section 9280 provides: "The city attorney shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure." This is in contrast with the title and summary of an initiative, which Elections Code section 9203 requires to "express … the purpose of the proposed measure." The latter speaks to the intent of initiative proponents and the measure they propose. Section 9280 speaks to the "effect of the measure on the existing law and the operation of the measure." This invites a broader discussion of background law and the effect of the measure and would seem to encompass any legal flaws in a measure that might cause all or part of it to have no "effect … on existing law" or no "operation."

Of course, impartial analyses, like other ballot materials, can be challenged by a timely writ under Elections Code section 9295 and a recent decision suggests an impartial analysis must be just that — impartial, even though the duty to write such that the text neither argues for or against the measure appears in section 9203 as to titles and summaries and not in section 9280 as to impartial analyses. Still, the use of the word "impartial," in the latter is likely sufficient. Moreover, there is little doubt that courts will find that requirement in the statute as they did for ballot labels (the question printed on the ballot as to a measure) in *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169 (granting writ to excise "reform" from title of pension reform measure).)

Accordingly, many city attorneys are reluctant to express views in impartial analyses regarding the lawfulness of a ballot measure. Further, such views can cause difficulties in defense of a measure should it pass. When confronted with a plainly illegal measure, the better approach may be to consult the city council about the desirability of pre- or post-election judicial review under cases such as *Widders v.*

[32] Elec. Code, § 9280.

Furchtenicht (2008) 167 Cal.App.4th 769 [granting city attorney's declaratory relief from duty to prepare title and summary for initiative that directed city council to act rather than proposed legislation as required by *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504].)

Another common question for city attorneys is whether to allow their clients to review and comment on a draft title and summary or a draft impartial analysis. As city officials can be particularly hostile to initiative measures that, by definition, are measures a city council has refused to adopt, some city attorneys view this as something like an ex parte contact in the due process context. Others are comfortable allowing such review and comment provided it is clear that the end product is the city attorney's own work and reflects his or her own judgment as to a fair and impartial analysis of the measure. I place myself in the latter camp, but am aware that it is necessary to avoid the appearance of impropriety in this context, as judicial review is always possible.

VIII. Marijuana Taxes

Given the adoption of Proposition 62 in 2016 and the development of a legal market in cannabis in California, marijuana tax proposals are appearing on many ballots. A few observations about such taxes are timely.

First, although it is common to impose local taxes as a percentage of the retail sales price and to require them to be collected upon sales, they cannot be —formally — sales and use taxes. Uncodified language in the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) preempts any other local sales and use tax. (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 Los Angeles* (1970) 7 Cal.App.3d 616, 626 [invalidating LA's sales tax on alcoholic beverages, citing this language].)

Local cannabis taxes should therefore be structured as business license taxes, which can be in lieu of or in addition to general business license taxes. They should be legally incident on the seller, even if they permit a seller to pass the charge through to buyers and to reflect it on receipts in doing so. (Cf. *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"].) Ordinance language to make these points clear might be as follows:

> The taxes imposed under this chapter are excises on the privilege of engaging in commercial cannabis activity in the city. It is not a sales or use tax and shall not be calculated or assessed as such. Nevertheless, at the option of a commercial cannabis business, the tax may be separately identified on invoices, receipts and other evidences of transactions.

It can be helpful to include language in a cannabis business tax to allow it to be enforced in conjunction with the city's general business license tax. This can ease the administrative burden and ensure a complete body of local law to govern the full range of tax administration issues. Such a provision might read like this:

> The city council of the City of _____ intends this chapter to be enforced consistently with [article/chapter] of this code and any rule or regulation promulgated under that [article/chapter], except as expressly provided to the contrary in this [article/chapter].

Another topic of concern when drafting a tax ordinance is the duty arising from the Dormant Commerce Clause of the federal Constitution and comparable principles of state law to avoid discrimination in favor of intra-city economic activity or against inter-city economic activity. (E.g., *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444 [invalidating payroll and gross receipts tax provisions preferring intra-city activity].) This can arise, for example, from proposals to reserve cannabis opportunities to city residents or residents of disadvantaged neighborhoods in the city. It can also arise from proposals to allow retail delivery services only if operated from a fixed location in the city. The fixed location requirement is lawful, but the requirement that it be located in the city is not. Such provisions invoke the right to travel, as well. (E.g., *Cooperrider v. San Francisco Civil Service Com*. (1979) 97 Cal.App.3d 495 [invalidating one-year residency requirement for applicants for City employment].)

A model cannabis business tax I prepared for the Public Health Institute, that imposes higher taxes on sweetened beverages infused with cannabis ("canna-pops") and on high potency cannabis products like wax and shatter, appears at <https://www.gettingitrightfromthestart.org/california-local-regulation> (as of Mar. 17, 2018).

IX. Referenda and Initiatives to Repeal or Reduce Taxes

a. *Mission Springs Water District v. Verjil*: Initiatives to Reduce or Repeal Revenue Measures

Proposition 218 expressly establishes the right to use the initiative "in matters of reducing or repealing any local tax, assessment, fee or charge." (Cal. Const., art. XIII C, § 3.) The power is not unlimited. Rates proposed by initiative cannot contradict Proposition 218. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 218–221 [initiative requiring voter approval of water rates preempted by Prop. 218].) Nor may they violate statutes governing the rates. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892 [invalidating initiative to set rates which violated Water Code § 31007, which obliges county water districts to set rates sufficient to cover costs] ("*Mission Springs*").) Nor could Proposition 218 or a local initiative violate the Contracts Clause of the federal Constitution, as by setting rates in violation of covenants to a utility's bondholders. (*Consolidated Fire Protection Dist. of Los Angeles County v. Howard Jarvis Taxpayers' Ass'n* (1998) 63 Cal.App.4th 211, 219–225 [rejecting contracts clause claim to defend fire assessment but discussing law which would support such a claim as to a bond covenant].)

Litigation along the lines of *Mission Springs*, which involved a water district's suit to keep a water-rate-reduction measure off the ballot, has proliferated since the adoption of Proposition 218. Courts can be reluctant to interfere with the initiative power, but should follow the law described here.

b. *Howard Jarvis Taxpayers Association v. Amador County Water Agency*: Referenda to Prevent Adoption of Revenue Measures

Proposition 218's extension of the initiative power to reducing and repealing revenue measures is specific to the initiative power. Article II, section 9, subdivision (a)'s exclusion from the referendum power of "statutes providing for tax levies or appropriations for usual current expenses of the State" remains in force. This provision applies to local government and the State alike. (*Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832.) A critical difference between referenda and initiatives is that the former immediately suspend what would otherwise be new legislation while the latter take effect only prospectively — after the election. (*Rossi v. Brown* (1995) 9 Cal.4th 688,

710 [upholding initiative to repeal utility tax, noting distinction between prospective initiatives and immediately effective referenda].)

Notwithstanding this established law, three recent cases litigated the availability of a referendum to prevent adoption of water charges. A case in Yorba Linda was resolved by changes in the water district's board. One against the Amador County Water Agency is fully briefed and awaiting argument in the Third District Court of Appeal.[33] I won an unpublished decision for the Monterey Peninsula Water Management District in the Sixth District on April 11, 2018, but the Court did not reach this issue.[34] Thus, new law on this issue may be expected in the *Amador* case.

X. Tax Fairness, Transparency and Accountability Act of 2018

The California Business Roundtable is now circulating an initiative constitutional amendment for the fall ballot that would amend articles XIII A, XIII C, and XIII D of the California Constitution to further restrict state and local government revenue authority.[35] It seeks to overturn the results of nearly every published appellate decision under Propositions 218 and 26 favorable to government. As of February 26, 2018, its proponents certified to the Secretary of State that they had collected a quarter of the signatures necessary to place the matter before voters. It is not yet clear they will succeed in doing so. Space does not allow an exhaustive analysis of the measure, but the highlights follow. References are proposed provisions of the Constitution except as otherwise noted.

1. **Taxes**: The proposal eliminates the distinction between general and special taxes, requires two-thirds voter approval of all local taxes, and requires a separate statement in a tax ordinance of the purposes to which funds may be devoted. If for general government purposes, the tax must use these words: "unrestricted general revenue purposes." (Art. XIII C, § 1, subds. (a) & (d) repealed; new art. XIII C, § 2, subd. (f) and art. XIII D, § 3, subd. (a)(2).)

[33] *Howard Jarvis Taxpayers Association v. Amador Water Agency*, 3d DCA Case No. C082079 (fully briefed as of 11/3/16 and awaiting argument).
[34] *Monterey Peninsula Taxpayers Association v. Board of Directors of the Monterey Peninsula Water Management District*, 6th DCA Case No. H042484 (opinion filed Apr. 11, 2018).
[35] Initiative number 17-0050, which can be viewed at <https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0050%20%28Two-Thirds%20Vote%20Requirement%20V1%29.pdf> (as of Mar. 17, 2018).

2. **Fees**: It requires a two-thirds vote of the city council to adopt or increase any of the few revenues not defined as taxes (art. XIII C, § 2, subd. (d)); limits all taxes to general election ballots absent a fiscal emergency declared by a unanimous vote of councilmembers present (art. XIII C, § 2, subd. (b)); and allows a referendum on such fees (which suspends the increase as soon as the signatures are certified) using the very low standard under Proposition 218 for a tax initiative (5% of the number of voters who cast votes in the last gubernatorial election). (Art. XIII C, § 2, subd. (d).)
3. **Initiatives**: *Upland* is expressly overruled and voters acting by initiative are subject to the same two-thirds requirement as taxes proposed by local legislative bodies. (Art. XIII C, § 1, subd. (b), § 2, subd. (e), § 5.)
4. **Standard of proof**: It requires "clear and convincing evidence" to justify a fee as other than a tax. (Art. XIII C, § 1, subd. (i).)
5. **Window period**: It invalidates all local taxes (as this measure defines them — to include some fees) adopted or increased in 2018 unless they meet the standards of this proposal, including its requirements for a separate statement of the purposes for which revenue can be spent and its particular label for general fund revenues. (Art. XIII C, § 2, subd. (i).)
6. **Invalidating precedent**: It expressly invalidates *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310 (fees for paper bags in plastic bag ban ordinance not taxes under Prop. 218 because they do not fund government), *California Chamber of Commerce v. State Air Resources Board* (2017) 10 Cal.App.5th 604 (AB 32 auction fees not taxes under Prop. 13 because voluntarily paid for the right to pollute) ("*Cal. Chamber*"), and *Upland*, *supra*, 3 Cal.5th 924 (different standards for initiatives than legislative tax proposals [statement of intent].)
7. **Franchises**: It eliminates the Proposition 26 exception for fees for a benefit or privilege (art. XIII C, §, 1, subd. (e)(1) deleted), but retains the exemption for uses of property, in an effort to undo *Cal. Chamber*. Query whether franchises can be uniformly defined as for use of government property.
8. **Development impact fees**: It retains existing exemptions for these fees and the Legislative Analyst predicts such fees will become more vital than ever in funding local government infrastructure and services. (Art. XIII C, § 1, subd. (e)(5).) These now specifically include tourism marketing district assessments. Non-property-based business assessments (such as those under *Evans v. San Jose* (2005) 128 Cal.App.4th 1123 and the 1989 Business Improvement District Law) now require two-thirds voter approval as taxes by the silent implication of this exception.

9. **Service charges and regulatory fees**: These are limited to the "reasonable and actual cost" of service, not just the "reasonable cost." (Art. XIII C, § 1, subds. (e)(2) & (3); art. XIII C, § 1, subd. (i).)
10. **Imposed**: It eliminates the requirement that revenue measures be "imposed" to constitute taxes. This is intended to invalidate *Cal. Chamber,* but it may have unpredictable impacts on voluntary relationships between businesses and government. It also states that a voluntary relationship between a payor and government does not defeat characterization as a tax. (Art. XIII C, § 1, subd. (h)(2).) This may have unpredictable consequences, too. It would seem to prevent in lieu fees outside the development context except with two-thirds voter approval.
11. **Fines & penalties**: These are not taxes only if imposed to punish law violations and "pursuant to adjudicatory due process." (Art. XIII C, § 1, subd. (e)(4).) Will administrative citations suffice?
12. **Revenues to non-government actors**: These are made taxes if government imposes any restriction on use of the funds. This invalidates *Schmeer* without preventing minimum wage laws. (Art. XIII C, § 1, subd. (h)(1).)
13. **Proportionality requirement**: 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." (Art. XIII C, § 1, subd. (i).)
14. **Broader definition of "extend":** Voter approval is required to "extend" a revenue measure by extending its duration, applying it to new territory (this invalidates *Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th 1182 and effectively requires two-thirds voter approval for inhabited annexations), to a new class of customers or to a wider tax base. (Art. XIII C, § 1, subd. (g).)
15. **Bonds**: It disclaims any impact on voter-approval of bonds backed by property taxes (art. XIII C, § 5) likely to avoid the political problem of undermining school funding.

If this measure is approved, public lawyers will have much to analyze and their clients will face few options to fund public services. I, for one, hope it is not.

XI. Conclusion

After 40 years of initiative measures intended to reduce the cost of government, California has crafted an extraordinarily complex set of rules governing municipal revenues. Significant new revenues to fund local government services generally require voter or property owner approval. Accordingly, knowledge of the rules for ballot measures noted here would seem to be an essential part of any city attorney's skill set. And, no doubt, these rules will continue to change. Staying current will be essential to staying afloat!

Ballot Box Planning and Finance — Evolving Case Law Regarding the Electorate's Right to Referendum

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I. Recent Cases Addressing the Electorate's Right to Referendum

This paper discusses background law and recent cases regarding referenda, particularly with respect to (a) the electorate's right to referendum on a zoning ordinance adopted by a City Council to bring zoning into compliance with the General Plan and (b) determining whether a resolution adopted by the City Council, e.g., to approve the purchase or sale of real property, is a legislative action subject to referendum.

In addition, we provide pointers for evaluating and processing petitions that seek to place a non-legislative matter to a vote of the electorate, including from our recent experience handling a San Bruno matter that ultimately resulted in a favorable Court of Appeal decision, *San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524.

Finally, we provide a "cheat sheet" of Elections Code provisions applicable to the circulation, processing and voting on referenda petitions.

A. Right to Referenda on Zoning Ordinance Amendment that Brings Zoning into Compliance with General Plan: The Law in Flux.

1. Under Longstanding Precedent, the Electorate Has Lacked a Right to Referendum on an Ordinance that Brings Zoning into Compliance with the General Plan, but Two Courts of Appeal Recently Ruled Otherwise.

We are all well aware of the electorate's fundamental right to initiative and referendum, reserved for (rather than granted to) the people by Article 2, sections 8 and 11 of the California Constitution. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934.)[1] It is "'one of the most precious rights of our democratic process.'" (*Id.* at 930 (quoting *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591).) The "courts have consistently declared it their duty to jealously guard and liberally construe the right so that it be not improperly annulled." (*Id.* at 934.)

We are also well-aware of the general law rule that zoning ordinances (and other land use decisions) must be consistent with general plans. (*Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 544; Gov. Code § 65860.)[2] Indeed, "[a] zoning ordinance that conflicts with a general plan is invalid at the time it is passed." (*Lesher,* 52 Cal.3d at 544.)

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[1] This fundamental right "is generally coextensive with the legislative power of the local governing body." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775.)

[2] The consistency rule does not apply to charter cities, unless (1) required by their charter, or (2) the city has a population of 2,000,000 or more. (*Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, 1213-14; Gov. Code § 65860(d).)

Pursuant to the latter rule, initiatives and referenda must be consistent with a city's general plan. (*Lesher*, 52 Cal.3d at 541; California Municipal Law Handbook (Cal CEB), § 3.113, p. 273.)

Which brings us to the question: does the electorate have the right to vote on a referendum for a zoning ordinance that, if repealed, will revert to zoning that conflicts with the general plan?

For 32 years, the answer was no, pursuant to Fourth District case law. (*deBottari v. City Council of the City of Norco* (1985) 171 Cal.App.3d 1204, 1212; see also *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 879.)

But in 2017 and 2018, the Sixth District and First District Courts of Appeal, respectively, rejected the Fourth District's conclusion. (*City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34, *review granted* Aug. 23, 2017; *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 667.) While the Sixth District's 2017 decision is not citeable pursuant to the grant of review, the First District's decision is final, resulting in an active split among the Courts of Appeal, which split will be decided by the Supreme Court.

Below, we address the underpinnings of the Court of Appeal decisions and offer some educated predictions for the anticipated Supreme Court ruling.

2. The Fourth District's Conclusion Is Founded on the Rule that the Restoration of Prior Zoning Is the Equivalent of the Adoption of Zoning that Conflicts with the General Plan.

In *deBottari* and *City of Irvine*, the Norco and Irvine City Councils had recently amended their zoning ordinances, each time in response to development applications. The amendments brought their zoning ordinances into compliance with previously-adopted general plan amendments. Opponents of the projects submitted referendum petitions to challenge the amended zoning, but did not challenge the underling general plan amendments. The Fourth District ruled in each case that the electorate had no right to vote on the amended zoning ordinances because their repeal would restore zoning that was inconsistent with the cities' general plans, an illegal act. (*deBottari*, 171 Cal.App.3d at 1212; *City of Irvine,* 25 Cal.App.4th at 879.)[3]

The referendum proponents argued in each case that the city could cure the inconsistency that would be caused by rescission, and that the Court should thus not invalidate the referendum. The Fourth District rejected the argument. No law authorized the electorate to take action that would cause the zoning to be inconsistent with the general plan (*City of Irvine,* 25 Cal.App.4th at 879), and the attempt to restore the prior zoning was void "*ab initio*." (*deBottari*, 171 Cal.App.3d at 1212.)

[3] Irvine, a charter city, had an ordinance mandating that zoning be consistent with its General Plan. (*City of Irvine,* 25 Cal.App.4th at 874, 875.)

3. The Sixth and First District Decisions (1) Differentiate between the Prohibition Against *Enacting* a Zoning Ordinance by Initiative from the Preservation of the Status Quo by Referendum, and (2) Observe that Cities Retain Discretion to Adopt Alternative Zoning Ordinances that Are Consistent with General Plans, and thus Reject the Fourth District's Conclusion.

In *City of Morgan Hill* and *Save Lafayette*, the Sixth and First Districts expressly disagreed with the Fourth District. Underlying each decision are two related concepts.

The first is that the prohibition against enacting a zoning ordinance that conflicts with the general plan is different than the preservation of the status quo by referendum. As to the former, the voters could not adopt an initiative that created inconsistent zoning. As to the latter, by contrast, a referendum only preserves the status quo, and the law does not preclude a temporary inconsistency between a general plan and a zoning ordinance. (*City of Morgan Hill,* 12 Cal.App.5th at 41; *Save Lafayette, 2*0 Cal.App.5th 657, 669.) As the Sixth District explained:

> [U]nlike an initiative, a referendum cannot "enact" an ordinance. A referendum that rejects an ordinance simply maintains the status quo. Hence, it cannot violate [Gov. Code] section 65860, which prohibits the *enactment* of an inconsistent zoning ordinance.

(*City of Morgan Hill,* 12 Cal.App.5th at 42 (italics in original).)

The second concept is that, in the event that the electorate rejected the zoning amendments, the city councils retained discretion to adopt an alternative zoning ordinance amendment that would bring the zoning back into compliance with the cities' general plans. As the Sixth District stated:

> We disagree with *deBottari* and hold that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning.

(*City of Morgan Hill*, 12 Cal.App.5th at 37-38.)[4]

[4] The Sixth District further explained that the prohibition against the enactment of zoning that conflicts with a general plan did not dictate the adoption of the ordinance amendment at issue, and that the city retained "discretion to select one of a variety of zoning districts for the parcel that would be consistent with the general plan." (*Id.* at 40-41.)

While *City of Morgan Hill* is on review and thus not citeable, the First District stepped into the fray, siding with the Sixth District, and going a step further by asserting that cities should contemporaneously amend general plans and zoning ordinances to keep them in compliance:

> The referendum does not seek to enact a new or different zoning ordinance; it simply seeks to put the existing ordinance before the Lafayette voters. If the voters reject it, then the zoning ordinance returns to the status quo, which was inconsistent at the time the city council amended the general plan. The referendum does not create the inconsistency. This result simply stresses the need for a city to amend its general plan and any conflicting zoning ordinance at the same time, in order to avoid the result of creating an inconsistent zoning ordinance. Were it otherwise, the holding in *deBottari* effectively precludes citizens from challenging tardy zoning ordinances by referendum following amendments to general plans.

(*Save Lafayette, 2*0 Cal.App.5th 657, 669.)

4. The Supreme Court Granted Review in *City of Morgan Hill*.

In its grant of review in *City of Morgan Hill*, the Supreme Court posed the question as follows:

> Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum—if successful—would leave intact the existing zoning designation that does not conform to the amended general plan?

(*Morgan Hill, City of v. Bushey River Park Hospitality* (Cal. 2017) 221 Cal.Rptr.3d 846, [case no. S243042].)

The competing Court of Appeal decisions rest on important principles of law—the electorate's reserved right of initiative and referendum on one hand, zoning and general plan consistency on the other. Accordingly, the LOCC submitted a neutral amicus brief in the Supreme Court—authored by Thomas Brown, Burke, Williams & Sorensen, LLP—which articulated issues presented by the conflict between the Courts of Appeal and requested that the Supreme Court provide clear guidance, so that cities are not faced with choosing between competing appellate decisions. The Morgan Hill case is fully briefed, and hopefully will be decided within a year.

Our prediction: given the tendency for the Supreme Court to hold that the

electorate has a right to vote[5] coupled with the logic of the First and Sixth District cases, we anticipate that the Court will likely affirm the First and Sixth District decisions and disapprove the Fourth District decisions.

B. Responding to Petitions that Seek to a Place a Non-Legislative Matter on the Ballot for a Vote of the Electorate.

In contrast to the foregoing debate about which bright line rule will prevail in the Supreme Court, there is a relatively murky area of law regarding whether an action is legislative, and thus subject to a vote or the electorate, or administrative (i.e., non-legislative), and thus not subject to a vote of the electorate.[6]

First, we address background law, including the general, vague test for differentiating between legislative and administrative decisions, cases in which the courts have held that the approval of a contract is not legislative and those in which the approval has been held to be legislative. Second, we address a recent First District Court of Appeal decision that sheds further light on the issue.

1. Background Law.[7]

a. The Electorate Has the Right to Vote on Legislative, But Not Administrative (i.e., Non-Legislative) Acts.

"The electorate has the power to initiate legislative acts, but not administrative ones." (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399.) As explained in a 43-year old, but oft-cited case:

> While it has been generally said that the reserved power of initiative and referendum accorded by article IV, section 1, of the Constitution is to be liberally construed to uphold it whenever reasonable [citations], it is established beyond dispute that the **power of referendum may be invoked only with respect to matters which are *strictly* legislative** in character [citations].

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[5] See, e.g., *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 (electorate has right to special election to vote on taxes, even though Proposition 218 requires that a city must submit tax proposals on a general election ballot); *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (electorate has right to initiative to replace fees for services adopted pursuant to Proposition 218).)

[6] The courts commonly, but not always, refer to non-legislative acts, such as the approval of a use permit, variance, or subdivision map, as administrative acts. (See, e.g., *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 518, 522-23; *Essick v. City of Los Angeles* (1950) 34 Cal.2d 614, 623.)

[7] Much of the following discussion applies to both initiatives and referenda. But the principal focus is on responding to referendum petitions, particularly with respect to resolutions.

> Under an unbroken line of authorities, administrative or executive acts are not within the reach of the referendum process [citations]. The plausible rationale for this rule espoused in numerous cases is that **to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality** [citations]. [Emphasis added.]

(*Lincoln Property Co. No. 41 Inc. v. Law* (1975) 45 Cal.App.3d 230, 233-34.)

b. Differentiating Between Legislative Action and Administrative Acts: The Answer Is Often, But Not Always Clear.

You might expect that there are bright line tests for differentiating between legislative and administrative (i.e., non-legislative) acts, and hence whether the electorate has the right to referendum.

Below are three examples that illustrate that lack of a bright-line rule:

1. Is the adoption of an ordinance always legislative?

    a. No doubt it is 99% of the time.

    b. But there is a least one exception: where the council has adopted a minor amendment that merely implements a previously adopted legislative policy. (*Southwest Diversified, Inc. v. City of Brisbane* (1991) 229 Cal.App.3d 1548.) For example, in *Southwest Diversified,* a citizens group presented a referendum petition regarding the council's adoption of an ordinance that adjusted the boundaries of a previously-adopted zoning district. The Court explained that zoning ordinances are typically, but not always, legislative acts. (*Id.* at 1556-58.) Brisbane's new zoning ordinance was such an exception. "[A]t the time the parcel was originally zoned, the legislative body treated the boundaries as provisional and subject to future adjustment according to prescribed standards and procedures." (*Id.* at 1558.) Thus, the new ordinance implementing the prior ordinance was non-legislative, and this Court properly prohibited the City from conducting an election on the referendum. (*Id.* at 1559.)

2. Is the adoption of a resolution always administrative?

    a. Of course not. Consider, for example, that the adoption of general or specific plan by resolution is, indisputably, a legislative act. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 386.) But this rule is a matter of common law; there is no statute on point. (*Midway*

Orchards v. County of Butte (1990) 220 Cal.App.3d 765, 779-81.) Moreover, because the resolution is not effective for 30 days after adoption, it is deemed legislative (so as to provide the electorate a right to submit a referendum petition to preserve the status quo, not because any statute delays the effectiveness for 30 days). (*Id.* at 779, 781.)

b. Note also that, while the Legislature has not prescribed when resolutions, such as approval of general plan amendment, are legislative, the Legislature has in other circumstances provided that certain resolutions are not effective for 30 days so they could be subject to referendum. (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 780-81.) Examples include a resolution forming an improvement district under Water Code section 31608 and a resolution authorizing issuance of bonds under Public Utility Code sections 13105 or 13378. But, as the *Midway Orchard* Court observed, "[w]hile it is true that resolutions ordinarily take effect immediately, the reason is nearly always traceable to court-made law." (*Id.* at 780.)

c. In sum, absent common law or statutory law that provides that a resolution is not effective for 30 days and/or is subject to referendum, the resolution is presumably an administrative act that is immediately effective and not subject to referendum.

3. Is the approval of a contract, e.g., by resolution, administrative?

a. Generally, but not always, the approval of a contract is an administrative act. (See, e.g., *Worthington v. City Council of City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1143 (even though approval of a MOU with Indian Tribe regarding measures to mitigate impacts of casino reflected policy decisions, the council adopted "a contract, not a law," and resolution was not subject to referendum).)

b. But other decisions have held that the approval of certain contracts by resolution constituted a legislative act subject to referendum. (See, e.g., *Hopping v. City of Richmond* (1915) 170 Cal. 605, 613-15 (resolution to accept donation of real property for city hall site was legislative act subject to referendum). These cases have tended to be ad hoc and fact-specific, and they do not provide clear, bright-line rules for differentiating between legislative and administrative resolutions.

c. Below, we discuss analytical frameworks for differentiating between approvals of contracts that are subject to referendum and those that are not, with the assistance provided by a recent First District

Court of Appeal decision.

c. The General (and Vague) Test for Determining if an Action Is Legislative.

The Courts of Appeal have set forth extraordinarily general guidance regarding the distinction between legislative and non-legislative action. As summarized by the First District: "The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." (*Worthington,* 130 Cal.App.4th at 1140-41, quoting *Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954, 957-58, internal quotation marks omitted.) In *Valentine*, the Court had explained, somewhat more helpfully*:*

> Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as … legislative …. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.

(*Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954, 957-58, citations and internal quotation marks omitted.)[8]

In addition, the *Valentine* Court elaborated, an act is administrative if it merely pursues a plan prescribed by "some power superior to it," e.g., the state or federal government. (*Valentine*, 39 Cal.App.3d at 957, citations and internal quotation marks omitted); see also *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596 & fn. 14 (electorate lacks the right to initiative and referendum where the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state").)

Applying this general test is, of course, a matter of interpretation. And when proponents of an initiative or referendum are intent on bringing the matter to a vote of the electorate, they may very well disagree with the City's interpretation.

Accordingly, below we set forth some generally applicable rules from the case law to assist in the analysis.

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[8] Many courts have cited the Valentine Court's articulation of this general test. (*See,* e.g., *City of San Diego v. Dunkl*, 86 Cal.App.4th at 399-400.)

d. Substantive Rules to Apply (and Two to Ignore) When Determining if the Adoption of a Resolution Was a Legislative Act Subject to Referendum.

The foregoing legislative v. administrative test is, of course, applicable to both initiatives and referenda. Below, we take a deeper look into one aspect of this issue, to wit, determining if a resolution adopted by the City Council is a legislative act subject to referendum, particularly when it involves the approval of a contract, e.g., to sell or acquire property, or for the provision of public services.

Below, we set forth some generally-applicable rules to follow (and two to ignore).

1. The adoption of a resolution approving a contract to provide public services will typically constitute a legislative act subject to referendum. (See, e.g., *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1113 (resolution granting franchise for waste-hauling services is legislative); *Empire Waste Management v. Town of Windsor* (1998) 67 Cal.App.4th 714 (same).)

2. Similarly, the adoption of a resolution approving a contract to acquire real property for public use will usually constitute a legislative act subject to referendum. (See, e.g., *Hopping,* 170 Cal. at 613-15 (resolution to accept donation of real property for city hall site was legislative act subject to referendum); *Reagan v. City of Sausalito* (1962) 210 Cal.App.2d 618, 621-22, 624 (resolution authorizing expenditure of public funds to acquire waterfront property for park purposes was legislative act subject to referendum); *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, 562 (decision whether to renovate or build a new jail was legislative act); *Teachers Management & Inv. Corp. v. City of Santa Cruz* (1976) 64 Cal.App.3d 438, 447 (the decision of a city to build and operate a public structure is unquestionably legislative in nature," and thus a proper subject to a vote of the electorate).)

3. But if the City Council had previously made the policy decision regarding the acquisition of the property or the provision of the services, and the resolution is a final act that merely implements that policy decision, the adoption of the resolution to approve the contract may be administrative. For example, in *McKevitt v. City of Sacramento*, at issue was whether a resolution which approved the acquisition of property for a park, using funds from a trust bequeathed to the city for park acquisition purposes, was legislative or administrative. (*McKevitt v. City of Sacramento* (1921) 55 Cal.App. 117, 121-23.) The city had previously accepted the trust fund and was bound to comply with its conditions. Thus, the implementation of that previously approved policy was administrative and not subject to

referendum. (*Id.* at 125.)[9]

4. Similarly, if a higher governing body, e.g., the federal or state government, has prescribed or proscribed the City's options, the adoption of the resolution approving the contract will likely be legislative. (*Worthington*, 130 Cal.App.4th at 1140-41; *Associated Home Builders,* 18 Cal.3d at 596 & fn. 14; *City of San Diego v. Dunkl*, 86 Cal.App.4th at 399.) For example, in *Worthington*, the First District explained that federal law and Indian Tribe sovereignty "displace[d] any local regulation" regarding siting of casinos, thereby rending the City's negotiation of an MOU for mitigation measures administrative (in addition to the ruling that the MOU was a contract, not a law). (*Worthington*, 130 Cal.App.4th at 1145; see also *W. W. Dean & Associates v. City of South San Francisco* (1987) 190 Cal.App.3d 1368, 1376-78 (although the original adoption of a Habitat Conservation Plan was a legislative act, the amendment thereof pursuant to the HCP and the Endangered Species Act was an administrative act not subject to referendum).)

5. In addition, if a vote of the people would interfere with essential governmental functions, including by seeking to impose procedural restrictions that would impair the legislative body's ability to carry it its duties, then the matter should not be considered legislative action (*Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1331.) For example, in *Citizens for Jobs and the Economy*, the Fourth District invalided an initiative to require, inter alia, voter approval of county decisions to convert military base, because the ordinance would unduly constrain the board of supervisors from carrying out its duties.

6. Don't be fooled by the oft-stated rule that "[a] public entity's award of a contract, and all of the acts leading up to the award, are legislative in character." (*San Diegans for Open Government v. City of San Diego* (2016) 245 Cal.App.4th 736, 739 (citations and internal quotation marks omitted).) This rule is commonly invoked for the purpose of determining whether a challenge to the contract is subject to review by petition for traditional or administrative mandate (under CCP sections 1085 or 1094.5). As the First District recently made clear, the case law invoking this rule does "not involve the legislative/administrative distinction as it pertains to election jurisprudence." *San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 532 & fn. 4.)[10]

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[9] While the McKevitt case is nearly 100 years old, this holding has neither been abrogated nor distinguished.

[10] In addition, if a vote of the people would interfere with essential governmental functions, then the electorate lacks the right to vote (irrespective of whether the action is legislative or administrative). (*Citizens for Jobs and the Economy v. County of Orange*

7. Similarly, don't conflate the legislative v. administrative test with the discretionary v. ministerial test.[11] Many non-legislative/administrative actions require the exercise of discretion. For example, the decisions on applications for a subdivision map, conditional use permit, or variance are non-legislative/administrative, and thus not subject to referendum. (*Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 518, 522-23; see also *Essick v. City of Los Angeles* (1950) 34 Cal.2d 614, 623.) But these decisions involve exercises of discretion and application of policy.[12] By contrast, differentiating between a discretionary and a ministerial act is not relevant to the determination of whether the electorate has a right to vote on a matter.

e. Processing Issues to Consider When Presented to with a Referendum (or Initiative).

At pages 19-23 below, we set forth a summary of Elections Code requirements applicable to petitioners' circulation of a referendum for presentation to the City, the City's acceptance, processing and consideration of the referendum petition, and the elections process.

First, the City Attorney and City Clerk should conduct an initial evaluation to determine if the petition meets the mandatory Elections Code requirements, e.g., as to timeliness, correct identifying information on each "section" of the petition, declaration of circulator, and that the petition includes the "full text" of the legislation (or purported legislation). If the petition fails to satisfy each of these mandatory requirements, the City Clerk has a ministerial duty to reject it. For example, if the petition failed to including exhibits incorporated by reference into the legislation (or purported legislation), the City Clerk has a ministerial duty to reject the petition. (*Defend Bayview Hunters Point Committee v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 858 (City Clerk properly exercised her ministerial duty to reject referendum petition that did not attach the 57-page redevelopment plan incorporated by reference into the adopting

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(2002) 94 Cal.App.4th 1311.) For example, in *Citizens for Jobs and the Economy*, the Fourth District invalided an initiative to require voter approval of county decisions to convert military base.

[11] "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment." (*Transdyn/Cresci v. City and County of San Francisco* (1999) 72 Cal.App.4th 746, 752.)

[12] Note also that "'[p]olicy' … is not synonymous with legislation." (*Worthington,* 130 Cal.App.4th at 1142.)

ordinance).)[13]

Second, if there is a potential question as to whether the subject of the petition concerns non-legislative action, the City Attorney should evaluate that issue. If you conclude the subject matter concerns administrative action, consider advising the City Clerk to reject the petition (rather than advising the City Council to do so). Two principal reasons:

1. The City Clerk's decision may be subject to an administrative appeal (depending upon your local ordinance). As such, the petitioners would be obligated to exhaust their administrative remedies by appealing to the City Council. If they do, then the City will have the opportunity to consider petitioners' contentions regarding whether the electorate has the right to vote on the matter and, if those contentions have merit, can take corrective action before litigation is filed. If petitioners do not appeal, then the superior court should rule that they failed to exhaust their administrative remedies (as the San Mateo Superior Court ruled in the San Bruno matter, discussed below).[14]

2. Whereas a city bears a heavy burden, in a pre-election challenge, to prove that the initiative or referendum is substantively invalid—it must make a "compelling showing" of illegality (see *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 255-56)—this rule does not apply to a petition regarding non-legislative acts. Since there is no constitutional right to initiative or referendum on a non-legislative act, there is no presumption in favor of deferring a challenge until after an election. (See, e.g., *City of San Diego v. Dunkl*, 86 Cal.App.4th at 399; *Lincoln Property Co. No. 41 Inc. v. Law* (1975) 45 Cal.App.3d 230, 233.) Accordingly, if the City determines that the petition concerns administrative action, its rejection of the petition—in lieu of either initiating a declaratory relief action or deferring a challenge until after an election—is proper.

2. San *Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524.

Our success in the trial and appellate courts with respect to a referendum petition that challenged a resolution approving the sale of real property illustrates much of the

[13] The "full text" requirement is pursuant to Elections Code section 9238, which provides in subsection (b) that "each section of the referendum petition shall contain (1) the identifying number or title, and (2) the text of the ordinance or the portion of the ordinance that is the subject of the referendum."

[14] Of course, this same analysis would apply to the City Clerk's rejection of a referendum petition for other reasons, e.g., the failure to timely submit or to attach the "full text."

foregoing analysis.

a. Statement of Facts.

(1) The City's Proceedings.

Over a 15-year period, the San Bruno City Council made several legislative decisions regarding the development of a hotel at a property fronting El Camino Real near the I-380 interchange. The legislative actions included the adoption of a Specific Plan for a 500-room, full service hotel followed by an amendment to the Specific Plan to reduce the size of the hotel to a 152-room, select service hotel.

In 2012, the City acquired the property for $1.4 million. Thereafter, the City pursued the sale of the site to a hotel developer, OTO Development, LLC (the "Developers").

Some members of the community (e.g., a union and its supporters, the "Petitioners")) thought the City should require that the hotel operate with union labor, despite the Specific Plan amendment paring down the project to a smaller, select service hotel. The Petitioners pursued their agenda by opposing the sale of the property. The City did not acquiesce to their demands.

On March 29, 2016, at a duly-noticed meeting, the City Council adopted a Resolution to sell the Property to the Developers for $3.97 million, and executed a Purchase and Sale Agreement ("PSA") the form of which was referenced in the Resolution and included with the Staff Report. The Petitioners circulated a referendum petition ("Referendum" or "Referendum Petition") seeking either the City Council's rescission of the Resolution or its placement of the Referendum on the ballot. On April 18, 2016, while the Petition was circulating, the City and the Developers executed the PSA.

On April 27, 2016, Petitioners timely submitted their Referendum Petition to the City. It appeared from the face of the Petition that it was in proper form and included a sufficient number of signatures to warrant examination and verification within the next 30 days. However, we (City Attorney Marc Zafferano and Special Counsel Kevin Siegel) identified two potential reasons for rejecting the Petition.

First, we evaluated whether the Resolution at issue was a legislative act subject to referendum. Our take was that it was not, which preliminary conclusion was supported by our initial research.

Second, we evaluated whether the Referendum failed to provide the full text of the Resolution. The Petitioners had attached the form of the PSA, which was included in the Staff Report and referenced in the Resolution, but which important two important exhibits, the Site Plan and legal description, and had a couple of blanks in the text. While the Resolution did not expressly state that the form of the PSA was incorporated therein, we expected that the Petitioners were nonetheless obligated to include the final and complete form of the PSA to fully inform those they requested to sign the Petition

as to the Council action that they sought to reverse.

For these two reasons, we determined that the City Clerk should reject the Petition. The City Attorney sent the City Clerk a brief letter so advising, citing each ground.

By letter dated May 17, 2016, the City Clerk informed Petitioners that "the City will not be taking further action on the referendum petition," because, as the City Attorney advised her, the Resolution was not a legislative act subject to referendum, and the Referendum Petition did not include the final version of the PSA.

Chapter 1.32 of the San Bruno Municipal Code ("SBMC") provides that, within 30 days, "[a] person aggrieved by an administrative action taken by an officer, board, commission, or other body of the city may appeal from the action to the city council by filing a written notice of appeal with the city clerk." (SBMC § 1.32.020.)

Petitioners did not file an administrative appeal of the City Clerk's rejection of their Referendum Petition.[15] Instead, on Monday, May 23, 2016, Petitioners wrote to the City Clerk and City Attorney seeking further explanation. Later that week, before Respondents replied to the letter, Petitioners filed this suit

(2) The Superior Court Proceedings.

On May 27, 2016, the Petitioners filed a Petition for Writ of Mandate ("Petition") seeking to reverse the City's rejection of the Referendum Petition. We answered on June 17, 2016, denying their claims and alleging, *inter alia*, that claims failed because Petitioners had not (1) exhausted their administrative remedies by appealing the City Clerk's decision to the City Council and (2) named the Developers as Real Parties-in-Interest. The Petitioners filed a First Amended Petition for Writ of Mandate that merely added the developers as Real Parties-in-Interest.

Petitioners asserted that (1) the City had a mandatory duty to process the Petition and, if the Council did not rescind the Resolution, to put it on the ballot, and (2) the approval of the PSA was a legislative act because included policy decisions, including to whom the property would be sold, for how much, and for what purposes.[16]

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[15] The City Clerk serves as the City's elections officer. (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 127.

[16] Petitioners argued in the Superior Court that the PSA constituted a development agreement, and therefore was subject to referendum. This argument failed in the Superior Court, and the Petitioners abandoned it on appeal.

We also argued, however, briefly, that Petitioners' attachment of the draft PSA to the Referendum Petition did not comply with the "full text" requirement. Judge Miram did not reach this issue. We abandoned it on appeal, given the strength of our primary arguments, that the Referendum had attached the form of the PSA included in the Staff

The San Mateo Superior Court (Judge Miram) held a court trial/writ hearing on July 28, 2016. On August 26, 2016, the Court ruled for the City, holding that Petitioners' action was barred by their failure to exhaust administrative remedies, and (2) even if not barred, the City properly rejected the Referendum Petition because it concerned non-legislative action.[17]

The Petitioners appealed to the First District Court of Appeal.

b. In a Published Decision, the First District Held that the Resolution Approving the PSA Was an Administrative Act Not Subject to Referendum

On appeal, we argued the following primary points (each of which is discussed above, at pages 9-11):

1. Petitioners' action was barred by their failure to administratively appeal the City Clerk's rejection of their Referendum Petition to the City Council. (We were hoping to prevail on the merits, and not solely on this ground. But we believed in the correctness of this argument, which logically is the first argument to make, and a win is a win.)

2. The City properly rejected the Petition because the adoption of the Resolution approving the PSA was an administrative act not subject to referendum.

    a. Because the electorate does not have the right to vote on non-legislative acts, there is no presumption in favor of deferring a decision until after an election (unlike when the question is whether the initiative is substantively valid, in which case the public agency must make a "compelling showing" that the measure should be kept of the ballot).

    b. Whereas the approval of a Development Agreement, which freezes zoning, is legislative, the approval of a contract to sell real property for private development is administrative.

    c. The cases in which the courts have held that the approval of a contract is legislative is limited to two strands:

        i. Contracts for public services, e.g., waste hauling franchise agreements (*Lindelli v. Town of San Anselmo*; *Empire Waste Management v. Town of Windsor*); and

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Report, and that the Resolution had not expressly stated that the PSA was *incorporated* into the Resolution by the reference to it.

[17] In the Superior Court, Judge Miram did not rule on the "full text" argument.

ii. Contracts to acquire property for public uses, e.g., for a city hall (*Hopping v. City of Richmond*), public park (*Reagan v. City of Sausalito*), or jail (*Citizens Against a New Jail*).

d. To rule that the PSA were legislative could lead to absurd results.

i. For example, the approval of a contract to purchase paper from Dunder Mifflin, or any other contract, could be deemed a legislative act subject to referendum, which would be an absurd legal conclusion and could lead to unreasonable interference in basic governmental operations.

ii. Consider also that, in order to provide the electorate time to submit a referendum petition, a resolution approving most contracts, perhaps all contracts, would arguably not be effective for 30 days. In and of itself, the delay would interfere with basic governmental functions.

e. The adoption of the Resolution approving the PSA was a non-legislative act.

i. The City Council had previously made its legislative decisions, when it adopted and amended the Specific Plan (which is a legislative act as confirmed by case law) which in which made land use decisions regarding the site, e.g., the size of the hotel.

ii. The decision to sell the property to the Developers implements that prior legislative action, and it does not contain new land use or other legislative decisions regarding the development of the site.[18]

The First District Court of Appeal ruled for the City.

The Court of Appeal grounded its decision in the generally-applicable analytical framework provided in numerous precedents, e.g. that "[t]he power to be exercised is legislative in its nature *if it prescribes a new policy or plan*; whereas, it is administrative in its nature *if it merely pursues a plan already adopted* by the legislative body itself, or some power superior to it." (*San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 530 (citations and internal quotation marks omitted; italics in original).)

The Court rejected Petitioners' argument that the Resolution is necessarily

[18] The Developers' Brief, which the City joined, argued that to allow the Referendum to proceed to the ballot would interfere with essential governmental functions.

legislative because important decisions were made, such as the sales price and to whom to sell the site for hotel development. (*Id.* at 535-36.) The Court also distinguished the cases relied upon by Petitioners in which the public agency acquired property for public uses (e.g., *Hopping v. City of Richmond, Reagan v. City of Sausalito)* or entered into contracts for public services (e.g., *Lindelli v. Town of San Anslemo*). (*Id.* at 531-33.)

The Court held that the decision to sell the property to OTO was the final act in a long chain of decisions by the City, and thus not a legislative act. As the Court stated:

> We agree with the trial court that "[t]he power to sell property which implements prior legislative decisions regarding the development of property is an administrative, not legislative act." Resolution No. 2016-26 pursues an existing legislative plan. Long before the measure's adoption, the City Council took several legislative actions setting forth the manner in which The Crossing hotel site would be developed, including with respect to type of hotel, size, and room count, as well as selecting OTO as the developer after circulating an RFP. The City purchased the site in 2012, after already having decided to reduce the size of the potential hotel to 152 rooms. The City Council certified the SEIR and approved the Specific Plan amendment to conform to the potential hotel project. [Footnote.] These actions were legislative actions that set the stage for the PSA. That plaintiffs elected not to challenge these actions does not confer upon them the right to referendum now.

(*Id.* at 534.)

Finally, the Court concluded by commenting on the absence of authority favoring Petitioners' position, and declining to reach the remaining arguments (e.g., about exhaustion of administrative remedies and interference with essential governmental functions):

> Plaintiffs have not referred us to any authority for the proposition that a municipal contract to sell public land for private development constitutes a legislative act when the primary substantive decisions pertaining to the proposed development have already been made. We note Resolution No. 2016-26 itself does not include any new action to further amend the Specific Plan, adopt new legislation, or otherwise take legislative action. [Footnote.] Its essential purpose is to transfer the property to OTO in order to further already existing legislative policies put in place for the development of The Crossing hotel site. Accordingly, we conclude that the trial court properly declined to invalidate Bonner's refusal to process plaintiffs' referendum

petition. In light of our conclusions, we need not address the parties' remaining arguments.

(*Id.* at 536.)[19]

c. Conclusion.

This San Bruno decision is an important development in the law regarding when the electorate has the right to vote on resolutions approving contracts, particularly with respect to contracts to sell property. While we pushed for a decision that would provide a more defined set of rules to for cities to follow when presented with petitions seeking the electorate's approval regarding contracts and other presumably administrative matters, the decision does advance the law in this direction.

II. Referendum Processing Procedures – a Cheat Sheet

Set forth below are key rules governing referenda, including those set forth at Elections Code sections 9235-9247, which govern city referenda, and other Elections Code sections incorporated therein.

A. Process to Qualify Referendum Petition

1. Deadline for Submission. The petition must be submitted to the City's elections official, the City Clerk,[20] "during normal office hours, as posted, within 30 days of the date the adopted ordinance is attested by the city clerk or secretary to the legislative body."[21]

2. Form of the Petition.

   a. Identifying Information

      i. Title: Each page of the referendum petition shall state: "Referendum Against an Ordinance Passed by the City Council."[22]

[19] The Court also rejected Plaintiffs' reliance on cases describing the approval of a contract as legislative, in which the issue was whether the matter was reviewed as a traditional writ of mandate under Code of Civil Procedure section 1085, not whether the electorate had a right to vote on the issue. (*Id.* at 532 fn. 4.)

[20] The City Clerk is the City's elections official. See Elec. Code § 320.

[21] Elec. Code § 9237.

[22] Elec. Code § 9238(a).

ii. Each "section"[23] of the referendum petition shall contain (1) "the identifying number ***or*** title" of the ordinance **and** (2) "the text of the ordinance ***or*** the portion of the ordinance that is the subject of the referendum."[24] As to the latter requirement, this includes any and all attachments to the ordinance.[25] The ordinance attached to the petition should mirror the ordinance (including attachments) that was attested to by the City Clerk.

b. Declaration of Circulator

i. "[E]ach section of the petition" shall have a declaration attached "signed by the circulator of the petition … setting forth, in the circulator's own hand" (1) his or her name, (2) residential street address, and (3) the dates between which the signatures were obtained.

ii. Each declaration (again, each section must be accompanied by a declaration) must also state (1) the circulator witnessed the appended signatures, (2) "according to [his or her] best information and belief," each signature is genuine, and (3) the circulator is at least 18 years old.

iii. The declaration must be signed under penalty of perjury under California law, with the date and place of execution.

iv. The declaration constitutes "prima facie evidence that the signatures are genuine and that the persons signing are qualified voters." The presumption may be rebutted by an official investigation after the petition is accepted for filing.[26]

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[23] The term "section" refers to an identical part of the petition (identifying information, signatures, etc.) and is sometimes called a copy of the petition. (See *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, 1335-36; see also http://www.sos.ca.gov/elections/ballot-measures/how-qualify-initiative/initiative-guide/, accessed 3/20/18.)

[24] Elec. Code § 9238(b), emphasis added. Note the disjunctive "or." If the petition includes both descriptors, an error regarding either one may render the petition invalid. (*Hebard,* 65 Cal.App.4th at 1238-39.)

[25] *Defend Bayview Hunters Point*, 167 Cal.App.4th at 848-49 (petition for referendum defective because it did not attach the 57-page redevelopment plan incorporated by reference into the ordinance).

[26] Elec. Code §§ 104, 9022, 9238.

3. Acceptance of Petition Based on Prima Facie Showing of Requisite Number of Signatures.

   a. At least 10% of the City's voters must have signed the petition.[27] At the time the proponents seek to file the petition, the City Clerk makes a preliminary determination about whether this threshold is satisfied (and shall return the petition to the circulator if not accepted), as follows:

      i. To determine the number of eligible voters, the City Clerk must refer to the County elections official's last report of registration to the Secretary of State.

      ii. When determining whether the 10% threshold is met, only a "prima facie" showing is required. In other words, the City Clerk does not at this time determine whether the signatures are valid (including whether the signers printed their names, are qualified voters, and submitted other requisite information, such as their residence).[28] Instead, all the City Clerk needs to do is make a quick count (for example, if there are 15 signatures per page, multiply the number of pages by 15 to come up with the initial total for this step).

   b. In addition, the entire petition (i.e., all sections) must be submitted at once. (Once filed, the proponents cannot add anything.)[29]

4. Signature Examination/Verification.

   a. After the petition is filed, the City Clerk must examine the petition and certify the results within 30 days, excluding Saturdays, Sundays and holidays.[30] The City Clerk determines whether the petition is signed by the requisite number of voters either by reviewing duplicate files of signatures or facsimiles of voter signatures. The City Clerk also determines whether the signers provided their printed name and residential address .[31]

   b. After examination, the City Clerk must:

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[27] Elec. Code § 9237.

[28] Elec. Code §§ 9022, 9210, 9238, 9239.

[29] Elec. Code §§ 9210, 9239.

[30] Elec. Code §§ 9114, 9240. There is an optional "sampling" methodology for signature verification set forth in section 9115. Please contact the City Attorney's office if you need clarification as to how that process works.

[31] Elec. Code §§ 100, 9114, 9240.

i. Attach a certificate of the results of the examination to the petition.

ii. Notify the proponents of the results.

iii. If the petition is sufficient, certify the results to the City Council at the next regular meeting. If the petition is insufficient, no action must be taken.[32]

5. Effect on Ordinance. If a petition for a referendum is timely filed, it suspends the operation of the ordinance, and the Council must reconsider the ordinance.[33]

6. Action by Council.

a. The City Council may either repeal the ordinance or submit it to the voters at the next regular municipal election occurring not less than 88 days later, or at a special election called not less than 88 days later.[34]

b. The Elections Code does not dictate when the City Council must act to repeal the ordinance or place it on the ballot, i.e., whether it must be at the same meeting at which the City Clerk certifies the results.[35] However, it is clear that the Council has a mandatory duty to act in a timely fashion.[36]

c. If submitted to a vote, the ordinance does not become effective unless it obtains majority voter approval.[37]

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[32] Elec. Code §§ 100, 9114, 9115, 9240. Note that technical, nonsubstantive deficiencies do not render the referendum deficient. (*Hebard*, 65 Cal.App.4th at 1339.) The courts narrowly apply this rule, reasoning that most of the rules are substantive and important to the election process. (See *id.*)

[33] Elec. Code § 9237.

[34] Elec. Code §§ 9114, 9115, 9241.

[35] See Elec. Code §§ 9240, 9241. By contrast, when the City Clerk certifies that an initiative has qualified, the City Council must adopt the ordinance at that meeting or within 10 days, submit the ordinance to the electorate, or order a report pursuant to section 9212 and then take action within 10 days. (Elec. Code § 9215.) The referendum provisions neither include a similar requirement nor incorporate the foregoing requirements. (See Elec. Code § 9243 (incorporating the election procedures of sections 9217-9225, re: initiatives, but not section 9215, re: timing for Council action.)

[36] See *deBottari,* 171 Cal.App.3d 1204.

[37] Elec. Code §§ 9114, 9115, 9241.

d. If the ordinance is repealed by the Council or by the electorate, it shall not be reenacted for one year from the date of its repeal or voter disapproval.[38]

7. Election Schedule.

a. If a referendum qualifies for the ballot, the generally applicable rules for holding the election (e.g., re: impartial analysis and ballot arguments, and re: the election itself) apply.[39]

b. The ordinance cannot go into effect unless "a majority of the voters voting on the ordinance vote in favor of it."[40]

B. Election Process

As mentioned above, the rules regarding the ballot materials and the election apply. Thus, if the referendum qualifies for the ballot, the City Attorney will prepare an impartial analysis, and proponents and opponents may submit ballot arguments.[41] If any false or misleading information is submitted, the City or an interested voter may seek a writ of mandate or injunction to correct the material, based on clear and convincing evidence.[42]

The Elections Code describes the form of the ballot for referenda: "Shall the statute (or ordinance) (stating the nature thereof, including any identifying number or title) be adopted?" Opposite the statement of the statute or ordinance to be voted on and to its right, the words "Yes" and "no" must be printed on separate lines, with voting squares.[43]

C. Timeline Summary

- Petition shall be accepted for filing if based on a prima facie showing 10% of the City's voters have signed and the petitions include the proper declaration(s) of circulator(s).

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[38] Elec. Code §§ 9114, 9115, 9241.

[39] Elec. Code § 9237.5 ("The provisions of this code relating to the form of petitions, the duties of the county elections official, and the manner of holding elections shall govern the petition procedure and submission of the ordinance to the voters"); Elec. Code § 9243 ("Elections pursuant to this article shall be held in accordance with Sections 9217 to 9225, inclusive").

[40] Elec. Code § 9241.

[41] Elec. Code §§ 9280, 9282.

[42] Elec. Code § 9295. Note that tight timeliness apply.

[43] Elec. Code § 13120.

- Clerk determines validity of petition – 30 days after petition filed – *not counting Saturdays, Sundays, and holidays*.
- If the petition is sufficient, Clerk certifies the petition to the City Council – at the next Council meeting after validity determination made.
- City Council *either* repeals the ordinance *or* sets the matter for a public vote.
- Public votes on the ordinance – at *either* the next regular election not less than 88 days after the Council's order for a public vote *or* at a special election called for a date no sooner than 88 days after the Council's order.