COLANTUONO HIGHSMITH WHATLEY, PC

CHW Bulletin: *Update on Public Law*

August 30, 2017

Upland Marijuana Tax Decision Causes Furor

By Michael G. Colantuono

On August 28, 2017, the California Supreme Court decided *California Cannabis Coalition v. City of Upland*, a case involving an initiative to legalize medical marijuana dispensaries and to impose a $75,000 per year "annual Licensing and Inspection fee," which the City of Upland concluded was a general tax. Although a careful reading reveals the decision to be narrow, some of its language led early commenters to predict that local special taxes might be allowed on a simple majority vote, rather than the two-thirds voter approval required by 1986's Proposition 62 (applicable to counties and general law cities) and 1978's Proposition 13 and 1996's Proposition 218 (both applicable to charter cities, too.)

We conclude the case leaves the two-thirds-voter-approval requirement for local taxes in place and makes only a very modest change to earlier understandings of Proposition 218 and the law of initiatives.

The details: Upland, like many cities, prohibits medical marijuana dispensaries. The California Cannabis Coalition circulated an initiative proposal to allow three dispensaries in the City. It collected signatures of more than 15% of City voters on a petition calling for a special election. As the Elections Code allows, the City Council deferred action on the initiative pending a City staff report on its effects.

The report concluded the City's cost to license and inspect a dispensary would be only $15,000 per year and that the $75,000 fee therefore included a $60,000 general tax — i.e., a tax to fund any lawful purpose of the City. Under a provision of Proposition 218 (article XIII C, § 2(b)), general taxes may only appear on general election ballots when city council seats are contested. The City Council therefore set the measure for the 2016 general election — two years later. The Coalition sued to compel an earlier, special election. The trial court agreed with the City that the measure imposed a general tax and could not be set for a special election.

The Court of Appeal reversed and — without deciding whether the measure imposed a tax — concluded Proposition 218's general-election rule for general taxes does not apply to initiatives. With pro bono representation by the Howard Jarvis Taxpayers Association, the City obtained Supreme Court review. While the case was pending in the Supreme Court, Upland voters defeated the Measure 64% to 26%.

The Supreme Court affirmed the Court of Appeal. It also did not decide whether the measure imposed a tax, but concludes it was not subject to the general-election rule even if it is a tax, because that rule applies only to taxes proposed by the City Council, not by initiative: "we conclude that the requirement in article XIII C, section 2, subdivision (b) — mandating that general taxes be submitted to the voters at a regularly scheduled general election — applies only to local governments and not to the electorate's initiative power … ." The Court's essential rationale is that limits on the initiative power are disfavored and must

be plainly stated and the general-election rule is a procedural requirement that applies when a government agency legislates, but not when voters act by initiative.

The Court goes on, however, to make clear the two-thirds-voter-approval requirement for special taxes — taxes which may be spent only for a stated purpose — **does** apply to initiatives: "In article XIII C, section 2, subdivision (d), for example, the enactors 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. ... That the voters explicitly imposed a procedural two-thirds vote requirement on themselves in article XIII C, section 2, subdivision (d) is evidence that they did not implicitly impose a procedural timing requirement in subdivision (b)."

"VOTERS EXPLICITLY IMPOSED A PROCEDURAL TWO-THIRDS VOTE REQUIREMENT ON THEMSELVES IN ARTICLE XIII C, SECTION 2, SUBDIVISION (D)."

However, language in the opinion leads some to argue the decision imperils the two-thirds rule for special taxes. First, two Justices who disagreed with the majority's reasoning 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 interpreted differently from section 2(b) [the general election rule]." 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 of which it is a part — article XIII C, section 2. That is unhelpfully ambiguous, as section 2 includes both the general election rule (2(b)) and the two-thirds vote requirement (2(d)). Moreover, the Court expressly leaves open the impact of its conclusion (that Proposition 218's procedural rules generally do not apply to voters acting by initiative) on the measure's 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, 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 or board of supervisors could adopt an initiative tax proposal without submitting it to voters at all — as is now common in land use disputes. We expect courts to conclude that 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 it seems governments cannot either. Further litigation may be needed to resolve the question.

The parties may seek rehearing to clarify some of the decision's ambiguities, but the central holding is clear — initiative petitions can force a special election on a general tax if they bear the signatures of 15% of voters of a jurisdiction. Also clear, in our judgment, is the Court's conclusion the two-thirds-voter-approval requirement for local special taxes remains in force.

A few observations: First, the initiative power holds a special place in California's democracy and courts are reluctant to limit

it: "we presume such limitations do not apply to the initiative power absent evidence that such was the restrictions' intended purpose." The concurring Justices aptly name this a "clear statement" rule — unless a restriction on initiatives is clearly stated, courts will not enforce it.

Second, while it is often sensible for a local government to refuse to proceed with a plainly unlawful initiative, courts would prefer they did not. Courts would rather local governments incur the legal fees necessary to let judges — not elected legislators — decide which initiatives are lawful. Judges view it as their duty to protect initiatives from hostile legislators.

Third, the decision reinforces a distinction between procedural rules for city councils and boards of supervisors and substantive rules intended to limit local government authority generally. The former will not apply to initiatives, the latter commonly will. The hard part, of course, is sorting out dispensable process from mandatory substance. And, the opinion treats the two-thirds rule as procedural, but nevertheless binding on voters acting by initiative given the apparent intent of Proposition 218 to impose the rule on voters.

Finally, the decision and the furor it provoked in the "Twitterverse" and elsewhere demonstrate how passionately Californians care about the initiative power, the power to tax, and who has the ultimate say as among voters, legislators and courts.

What next? Rehearing is possible and a petition is due by September 12th. There is also discussion of a constitutional amendment to reinforce the two-thirds rule. 2018 brings a hotly contested election to maintain (without the high voter turnout of Presidential elections) Democrats' legislative supermajorities and a contest for the House of Representatives fought in 7 Republican and 4 Democratic California seats. Such a ballot measure might be a useful tool to frame that larger contest.

We conclude that *Upland* is less than might appear on initial reading. Few taxes are proposed by initiative and fewer still get signatures of 15% of all votes to trigger a special election. Under Proposition 218, a tax measure qualifies for a general election if signed by about 2% of voters — a tiny number in most places.

The law continues to develop and this case, too. As always, we'll keep you posted!