



LOCAL BALLOT INITIATIVES / REQUIREMENTS

Please confirm specific requirements for local ballot measures with your respective agency attorney.

The Proposed TFTA is Withdrawn: The initiative would have raised the approval threshold from 50% to two-thirds on all local tax-related measures and was withdrawn from the November 2018 ballot process minutes after Governor Brown signed AB 1838. AB 1838, until January 1, 2031, prohibits any local tax, fee, or other assessment on groceries and is retroactive to January 1, 2018. The Governor's signing message cites the far reaching proposed TFTA and that Mayors from across the state supported the compromise represented in AB 1838.

Can Locals Pull Ballot Measures and how Did this Happen? SB 1253 (2014) is the mechanism that allowed proponents to withdraw an initiative even after it has qualified for the ballot. A bill analysis shows support by the California Business Roundtable. Pending SB 1153 authorizes the proponent of a local initiative to withdraw the initiative at any time before the 88th day before the election.

What's Ahead: Shortly after the compromise solidified AB 1838, the California Medical Association and California Dental Association filed a proposed initiative for the 2020 ballot with the Attorney General's office for a statewide soda tax. The proposal includes a provision allowing for local taxes and well as pre-emption to AB 1838. Assembly Member Bloom also plans to re-introduce a "health impact fee" on sugary beverages when the Legislature returns in August.

Competing Ballot Measures/ 2% Cap: Some local agencies may be considering the option of proposing a local transactions and use tax (TUT) ballot measure and have raised questions regarding the requirements as well as those surrounding possible 'competing measures.'

Current law provides that the combined rate of all district taxes imposed in accordance with the TUT Law in any county may not exceed 2%. (R&TC Section 7251.) The 2% cap was implemented more than a decade ago, in 2003.

Since then several bills have gone through the Legislature to create individual exceptions to the cap.

CDTFA Recommendation on Competing Ballot Measures / Special Notice: We understand there are no formal cases / law that signals what happens if there are multiple ballot measures 'competing' for the remaining amount before a 'cap' is reached. This would be in situations without special legislation to exceed the cap.

The CDTFA in an email to MuniServices/ Avenu indicated that locals have reached out regarding competing measures. We were told the CDTFA's "standard suggestions" to locals has been "is for the two jurisdictions to either reduce their proposed rates so they both comply (i.e. are within statutory limits). Or seek legislative authority to exceed the statutory limit(s)." The CDTFA "would not determine who may or may not be 'priority' over the other... best to work out the details so there are no problems." Attached is the CDTFA's (BOE) Special Notice on this issue.

Legal Requirements for Local Tax Measures: The attached was prepared by MuniServices/ Avenu's Special Counsel Ben Fay on the legal requirements for municipal tax measures. This information was presented during the 2018 City Managers Conference. Ben presented on a panel with Fran Mancina (from MuniServices who moderated), Mike Madrid (from GrassRoots Lab who spoke on elections and strategy, and the proposed TFTA ballot measure) and Fran David (former City of Hayward City Manager who spoke on community engagement, and strategy).

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MEMORANDUM

DATE: July 11, 2018

TO: Brenda Narayan, Director of Government Relations
MuniServices, an Avenu company

FROM: Benjamin Fay and Christina Lawrence
Special Counsel

RE: Legal Requirements for Municipal Tax Measures

This memo is a summary of my presentation at the League of California Cities City Managers Department Conference on February 2, 2018 on the legal requirements for a city to place a tax measure on the ballot.

A. General tax or special tax?

The first important question is whether the proposed tax will be a general tax or a special tax. The distinction depends on whether the revenues from the tax are legally restricted to particular uses, or whether they can be spent on any legitimate municipal purpose. If the revenues can be spent on any municipal purpose, then the tax is a general tax. (Cal. Const. Art. XIII C, § 1(a).) On the other hand, if the revenues are legally limited to particular uses, then the tax is a special tax. (Cal. Const. Art. XIII C, § 1(d).) This limitation can be very narrow (for example, to purchase library books) or very broad (for example, to fund parks, police, fire, and libraries). (See, e.g., *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1182-87 [tax limited to “police, fire, parks and recreation or library services” is a special tax].)

It must be a legal restriction. A general tax can have a non-binding companion measure that states the voters’ preference for the use of the tax proceeds, but if the companion measure is not binding, it does not turn the tax into a special tax. (*Coleman v. County of Santa Clara* (1998) 64 Cal.App.4th 662, 665-67, 670-71.)

The main consequence of whether a tax is general or special is the number of votes needed to adopt it. A general tax requires a simple majority vote to pass (Cal. Const. Art. XIII C, § 2(b)), while a special tax requires a two-thirds vote (Cal. Const. Art. XIII C, § 2(d)). But there are also procedural differences, which are explained in the next section.

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B. Getting the measure on the ballot

A city council can put a tax measure on the ballot by either resolution or ordinance. (Gov. Code § 53724(a).) If it is a general tax, the resolution or ordinance must be approved by two-thirds of the city council (Gov. Code § 53724(b)), but this requirement does not apply to charter cities. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37.)

A general tax can only be put on the ballot in a general election in which councilmembers are elected, unless the city council unanimously declares an emergency. (Cal. Const. Art. XIII C, § 2(b).) No reported cases have interpreted what qualifies as an emergency in this context; but in other situations, when a court has reviewed a city council's declaration of an emergency, the court has only looked to whether facts constituting an emergency are recited in the ordinance or resolution, and if they are, then the declaration is upheld. (*Northgate Partnership v. City of Sacramento* (1984) 155 Cal.App.3d 65, 69.) Facts explaining the emergency should therefore be stated in the ordinance or resolution declaring the emergency.

A proposed tax can also be put on the ballot by a voters' petition. The petition must be signed by 10% of the city's voters if the tax is proposed as an ordinance (Elec. Code § 9215) and 15% of the voters if it is proposed as a charter provision (Elec. Code § 9255).

The 2017 decision of the California Supreme Court in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 held that the procedural requirements of Proposition 218 do not apply to taxes put on a ballot by petition. The Court held that the requirement that a general tax be put on the ballot only in a general election in which councilmembers are elected did not apply to a tax proposed by voter petition. It is a matter of debate whether this applies to the two-thirds vote requirement in Proposition 218 for special taxes.

C. Election procedures

The election must be held at least 88 days after the city council calls the election. (Elec. Code § 9222.) If the election is consolidated with a statewide general election, the request to include the measure in the election must be filed with the county at least 88 days before the election. (Elec. Code § 10403.)

The ballot question, which is the question that is directly put to the voters on the actual ballot, must use the following specific language: "Shall the measure (stating the nature thereof) be adopted?" (Elec. Code § 13119(a).) It must also state the amount of revenue to be raised annually and the rate and duration of the tax. (Elec. Code § 13119(b).) It is limited to 75 words. (Elections Code §§ 9051, 13247). Proper names, even if multiple words, are generally considered single words.

Starting in 2018, the Elections Code provides that the ballot question "shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is

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neither argumentative nor likely to create prejudice for or against the measure.” (Elec. Code §13119(c).) It is not clear how much this provision will affect ballot questions.

The city attorney prepares the impartial analysis (unless the measure affects the organization or salaries of the city attorney’s office), which is published in the ballot pamphlet and is an important source of information for the voters. It must describe “the effect of the measure on the existing law and the operation of the measure.” (Elec. Code § 9280.) It is limited to 500 words. (*Ibid.*)

The city council may prepare a ballot argument for or against the measure, limited to 300 words. (Elec. Code § 9282.) The argument must be submitted within 14 days of the calling of the election. (Elec. Code § 9286.) If multiple arguments are submitted, priority is given to the city’s argument. (Elec. Code § 9287.) The city council can also submit a rebuttal argument, limited to 250 words. (Elec. Code § 9285.)

D. Advocacy

Public resources can be used to educate the public about a ballot measure, but they cannot be used to advocate for or against a ballot measure. (Gov. Code § 54964.) “Public resources” include funds, staff time, materials, equipment, facilities, and communication channels (e.g., website, email, newsletters). (Gov. Code § 8314(b)(3).)

The restrictions on expending public resources on a measure are looser before the measure qualifies for the ballot. For example, a city can propose a ballot measure and use city staff to draft it. A city can hire a communications consultant or pollster to survey voter support for a proposed measure. These actions are similar to drafting legislation.

Once a measure is on the ballot, a city can take a public position for or against it. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 36.) It can have an opinion about a measure, but it cannot mount a campaign for or against it. (*Ibid.*) It can issue a report on the probable effects of a measure, and it can state what the city would do if the measure passes or fails. (*Id.* at 37-38.)

A city cannot produce communications that advocate for or against a measure. (*Id.* at 29-30.) In deciding whether a communication is advocacy, a court will look at the “style, tenor, and timing” of the communication. (*Id.* at 27.) A city cannot disseminate literature prepared by proponents or opponents of a measure. (*Id.* at 24-25.)

A neutral fact-based statement on a city’s website is not advocacy, and a city does not have to give opponents space on the city’s website. (*Id.* at 37.) A neutral fact-based article in a city’s newsletter is also not advocacy, provided it is a regular newsletter, the article is similar to the usual content of the newsletter, and it is mailed to the usual mailing list. (*Id.* at 38-39.) A city cannot distribute bumper stickers or posters or use billboards or television or radio spots that state support or opposition to a ballot measure. (*Id.* at 32-33.)



Special Notice

CALIFORNIA STATE BOARD
OF EQUALIZATION
450 N STREET
SACRAMENTO, CA 95814

Combined District Tax Rate Cap is Two Percent (2.00%)

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Currently, California's statewide sales and use tax rate is 7.50%. Additionally, cities, counties, and special purpose entities (like transportation authorities) may impose district taxes. The Board of Equalization (BOE) would like to remind all such jurisdictions that the combined rate of all district taxes imposed within any jurisdiction cannot exceed 2.00% unless specifically authorized by statute.

The BOE cannot administer a district tax that causes the combined rate in any part of a jurisdiction to exceed 2.00% unless the state legislature has already passed legislation authorizing an exception. For instance, if a county proposes a new tax that would cause the combined district tax rate in a single city within that county to exceed 2.00%, the BOE cannot administer the new county tax.

City And Countywide Tax Measures On The Same Ballot

If both a city and countywide tax are proposed on the same ballot, which together will cause the combined tax rate in the city to exceed 2.00%, the BOE will be unable to administer the new taxes and would seek an opinion from the Office of the Attorney General to determine which tax to implement.

The BOE therefore strongly encourages cities, counties, and special purpose entities not to propose new taxes that, in combination, would exceed the 2.00% cap or to work together to obtain statutory approval *before* such measures are placed on the ballot. In the event two jurisdictions do propose such competing taxes, the BOE also encourages the affected jurisdictions to request an opinion from the Office of the Attorney General prior to their approval to avoid unnecessary delay in implementation.

Statewide Rate Set To Decrease By 0.25%

The additional 0.25% statewide sales and use tax rate that was passed by voters in 2012 is set to expire on December 31, 2016, resulting in a decrease of the statewide sales and use tax rate from 7.50% to 7.25%. The decrease in the statewide sales and use tax rate will not affect the 2.00% cap for combined district taxes imposed in any jurisdiction.

Where Can I Obtain More Information?

For more information, see the BOE webpage *Guidance for Prospective Special Taxing Jurisdictions* at www.boe.ca.gov/sutax/newloctax.htm. You may also call the Local Revenue Branch at 1-916-324-3000 or email raadjuri@boe.ca.gov.