Office of
The City Attorney
City of San Diego

MEMORANDUM

DATE: August 3, 2010

TO: Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Legal Issues Pertaining to Proposed Sales Tax Ordinance

---

INTRODUCTION

Conditioning implementation of a sales tax on separate reform measures to be adopted later by a City Council is unique in California. The Board of Equalization, the agency responsible for collecting sales taxes, does not have experience administering such conditional taxes. We have not found a case of a tax conditioned upon substantive reform measures and no appellate court decision evaluates the legal issues of these particular circumstances.

There cannot be a guarantee of an "iron clad" measure (as suggested by one Councilmember) because there is lack of legal precedent. Among the inherent risks of doing something that has not been previously reviewed by the appellate courts is the increased likelihood of litigation testing its legality. This is why we provided you a memo on July 29 outlining more conventional options.

QUESTIONS PRESENTED

1. Does the proposed measure violate the single-subject rule?

2. Does the measure improperly delegate legislative authority?

3. Are the conditions sufficiently certain to be enforceable?

SHORT ANSWERS

1. Although not entirely clear, we believe the better argument is that the ordinance complies with the single subject rule. All the conditions relate to the subject of fiscal reform and circumstances under which voters would allow a sales tax to become operative.

2. From a legal standpoint, the less risky approach is for the City Council to approve the operative date of the tax.

3. It is not possible to cover all material issues involved with every condition because they have not yet occurred. Whether the conditions are sufficiently certain could be tested by a petition for writ of mandate. We have tightened language to a point, but have not changed key language in the motion directing us to prepare the measure.

DISCUSSION

1. Single-Subject Rule

San Diego Charter section 275(b) provides:

> "All ordinances except annual appropriation ordinances and ordinances codifying or rearranging existing ordinances, shall be confined to one subject, and the subject or subjects of all ordinances shall be clearly expressed in the title."

A similar "single-subject" rule is required of all initiatives and state statutes under the California Constitution. *California Constitution Article II section 8(d); Article IV, section 9.*

The legal issue is whether the ten conditions are different subjects from the sales tax subject of the ordinance.

California courts have held that "an initiative measure does not violate the single-subject requirement 'if, despite its varied collateral effects, *all of its parts are "reasonably germane"* to each other,' and to the general purpose or object of the initiative." *Raven v. Deukmejian*, 52 Cal. 3d 336, 346 (1990). The single-subject rule is not to receive a narrow or technical construction, but it is to be liberally construed to uphold proper legislation and not used to invalidate legitimate legislation. *Evans v. Superior Court*, 215 Cal. 58, 62 (1932).

In *Brosnahan v. Brown,* 32 Cal. 3d 236, 248 (1982), the court discussed a two-step analysis. First identify a legislative "subject" of sufficient breadth that all provisions of the initiative are reasonably germane to it. Second, determine whether this subject is "so all encompassing, so multifaceted as to demand a conclusion of unconstitutionality." *Id.* at 252.

In *Brosnahan,* the court found that Proposition 8, "The Victims' Bill of Rights," did not violate the single subject rule. The measure included legislation on school safety, restitution, bail, diminished capacity, and other criminal law matters. The California Supreme Court concluded that the proposition met "the 'reasonably germane' standard" because "[e]ach of its several facets bears a common concern, 'general object' or 'general subject,'" promoting the rights of actual or potential crime victims and safety from crime to a particularly vulnerable group of victims.The "readily discernible common thread" uniting the initiative's provisions was the goal of protecting and enhancing the rights of crime victims.

In *Manduley v. Superior Court,* 27 Cal. 4th 537 (2002) , the Supreme Court upheld Proposition 21 against various claims that it violated the single subject rule. Its provisions related to the

"Three Strikes" law, criminal gang activity, and the juvenile justice system. *Id.* at 574–575. The court determined that "[t]he general object of the initiative is to address the problem of violent crime committed by juveniles and gangs." *Id.* at 573-581.

However, in *Californians for an Open Primary v. McPherson*, 38 Cal.4th 735 (2006), the Supreme Court concluded that a legislative measure which provided first, that a political party's top "vote-getter" in a primary election must be permitted to run in the ensuing general election and, second, that a new section be added to the state Constitution relating to state property and a new method for the state to pay bond obligations, was a violation of the constitutional separate vote rule (which they construed like the single subject rule) because the two changes were not germane to a common theme, purpose or subject.

In *Harbor v. Deukmejian,* 43 Cal. 3d 1078, 1100-1101 (1987), the California Supreme Court found that a trailer bill that amended, repealed or added approximately 150 sections to over 20 codes violated the single-subject rule. The single-subject of "fiscal affairs" or "statutory adjustments" was too broad to comply with the single-subject rule.

In *League of Women Voters v. Eu,* 7 Cal.App.4th 649 (1992), the court distinguished *Harbor v. Deukmejian* in rejecting a single-subject rule challenge to a proposed ballot initiative combining reductions to welfare benefits with other provisions that would increase the power of the Governor in fiscal crises. Reasoning that the object of the initiative was not simply "fiscal affairs" or "statutory adjustments," as in *Harbor*, the court concluded that the "overall theme and driving purpose" of the initiative was to obtain a balanced budget, and budget balancing was a sufficiently narrow single subject for purposes of the single-subject rule. *Id.* at 666.

In our circumstances, the sales tax ordinance would not become operative until ten conditions are met. Those conditions are not implemented as part of the ordinance, but are left to future decision-making.

On the one hand, it could be argued that the single-subject rule is violated by including the ten conditions as part of the ordinance because, the argument would state, each of the conditions is a different subject from each other and all are different subjects from adoption of a sales tax.

The counter-argument would be that the ten conditions are all germane to the sales tax because voters would only approve collection of the tax if the City takes these actions. The ballot measure pertains to the single subject of a sales tax.

We have found no case directly on point. We believe the better argument is that the ten conditions should all be viewed as germane to a sales tax and fiscal reform consistent with the court's analysis in *League of Women Voters v. Eu.*

2. Delegation

The Supreme Court explained the rule against the delegation of legislative power in the landmark case of *Kugler v. Yocum,* 69 Cal. 2d 371 at 375-377 (1968). "A municipal legislative body is constitutionally prohibited from delegating the formulation of legislative policy but may declare

a policy, fix a primary standard, and authorize executive or administrative officers to prescribe subsidiary rules and regulations that implement the policy and standard and to determine the application of the policy or standard to the facts of particular cases." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 127, 167, (citing *Kugler* at 375-376). "However, legislative guidance by way of policy and primary standards is not enough if the Legislature 'fail(s) to establish an effective mechanism to assure the proper implementation of its policy decisions' . . . 'The need is usually not for standards but for safeguards . . . .'" *Id.* at 169 (citing again to *Kugler* at 381.)

a. The Delegation of Authority to Public Officers or Entities.

In our July 30, 2010 response to the July 29, 2010 memorandum from Councilmembers Frye and Gloria, we explained that the City Council could possibly delegate authority to public officials without violating San Diego Charter § 11.1 (the express prohibition against delegation of legislative power to private entities or persons). The question of a public entity or board was not involved, but the rules are the same. There are several cases interpreting what a "public" entity is for purposes of Article IX, section 11a of the California Constitution and, by implication, for San Diego Charter section 11.1.

The courts use a test of public accountability to determine if those appointed to control such entities make those entities public or private. The electorate need not have a direct vote on the persons appointed. However, the public should have a voice in removing whoever made the appointment, in order to ensure public accountability in the appointment and removal process. In essence, courts may approve the public nature of the entity if it is created appropriately and its members are public officials or appointed by elected officials. *Howard Jarvis Taxpayers' Ass'n v. Fresno Metropolitan Projects Authority*, 40 Cal. App. 4th 1359, 1387-1389*(HGTA)* (majority of members of the Fresno Metropolitan Projects Authority appointed by private groups made it a private entity); see also *County of Riverside v. Superior Court,* 30 Cal. 4th 278, 283, 292-293 (2003)(state-created arbitration panel of private individuals was a private entity); *California Assn. of Retail Tobacconists v. State of California*, 109 Cal. App. 4th 792, 829 (2003) (*CART*) (county and statewide commissions created by Proposition 10, whose members are appointed by elected officials, are public agencies). The City Auditor is a public official. A group of private persons appointed by the Mayor and confirmed by the City Council to a commission established by the City Council might also qualify under this legal test.

b. Comparing the Legal Risks of Complete Delegation or no Delegation

The least risk arises where the Council retains final discretion to review and decide whether to make the sales tax operative after reviewing what others see as satisfaction of the conditions. The City Council would then take legislative action by majority vote. A resolution or ordinance, subject to mayoral approval or veto, would trigger the operative date of the tax. Then, the Board of Equalization would start collecting the tax in a timely manner according to its procedures.

The legal issues become more complicated when the City Council tries to dissociate itself completely from the final decision, delegating it to others. This is not like most other cases, where an ordinance or statutory scheme is actually *created* by legislative act, and a person or group of persons is chosen to administer it according to rules and standards. *See e.g. HJTA*, 40

Cal. App. 4th 1359 (creation of the Metropolitan Projects Authority); *CART,* 109 Cal. App. 4th 792 (county and statewide commissions created by Proposition 10); *Birkenfeld,* 17 Cal. 3d 127 (rent control process created by Charter amendment petition). Those cases involved fully operational and complex schemes, enacted by the legislative body or voter initiative, where *who* administers them and *how* they are to be administered become the primary legal issues.

If the City Council delegates its authority to make the final decision, the legislative scheme approved by the Council and Mayor, and voters, may never become operational based entirely on the delegate's decision. A court could consider this far closer to the actual exercise of control over legislative power and akin to a veto. In *Whitmire v. the City of Eureka*, 29 Cal. App. 3d 28 (1972), the court found the delegation of such authority without adequate controls to be "a 'total abdication' of the council's vested legislative power and therefore unconstitutional." *Id.* at 34.

Also, to the extent a court might consider this a de facto veto power, the action might also conflict with the San Diego Charter, which provides only the Mayor of the City with veto power over the acts of the City Council. San Diego Charter § 280; *also see* City Att'y Report 2006-20 (May 3, 2006) at 2-4. "[I]t is well settled that a charter city may not act in conflict with its charter" and that "[a]ny act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994).

A court may or may not agree that the City Council provided adequate standards to guide the delegate when it narrowed the conditions to be satisfied. A court might also find that the current plan creates no effective mechanism to assure the delegate properly implements what the City Council and voters had in mind. *See Birkenfeld,* 17 Cal. 3d at 169-172. The delegate could simply decline to act and the sales tax would never become operative, regardless of satisfaction of the conditions. Because situations like ours have not yet been addressed by the courts, it is difficult to predict how a court might act if the delegation is challenged.

We have provided the Council with alternative versions of the ordinance for review. One version is the safer, with the Council (and Mayor) retaining involvement in the final decision whether the conditions have been satisfied for the tax to become operative. The second, and potentially more risky option, delegates the Council's authority to the City Auditor to solely determine whether the conditions to make the tax operative are satisfied.

3. Certainty of Conditions

We have refined language in the conditions to improve clarity, but we have not changed key language in the directive motion. It is not possible to cover all material issues involved with every condition because they have not yet occurred. Whether the conditions are sufficiently certain could be tested by a petition for writ of mandate.

Citizens for Jobs & the Econ. v. County of Orange, 94 Cal. App. 4th 1311, 1335-1336 (2002) is an example of our own Fourth District Court of Appeal analyzing whether a ballot measure was sufficiently certain.

The court discussed its basis for finding Orange County's Measure F too vague:

> "In section 4 of Measure F, the County would be allowed to expend funds "as necessary for the planning of any project listed in Section Three and for the submission of an approved project to the voters for ratification as required herein, but only upon a vote of the Board of Supervisors after public hearing and only to the extent necessary (A) to define the project; (B) to prepare an environmental impact report, [etc.] . . . . The Board of Supervisors may expend no other funds for any other purposes relating to any such project, until and unless the act by the County to approve the project is ratified by the voters as required by Section Three." (Italics added.) Spending is also allowed "as may otherwise be required by state or federal law." These terms clearly circumscribe the discretion of the Board, but it is not possible to tell to what extent. Who is to decide what spending is necessary, or for what purposes that are sufficiently related to the project? [citation omitted]
>
> The voter approval provision that "[N]o act by the County of Orange to approve any new or expanded jail, hazardous waste landfill, or civilian airport project shall be valid and effective unless also subsequently ratified by a two-thirds vote of the voters voting at a County General Election," also contains vague terms, in that the term County General Election is not defined by the Election Code, and could be construed as occurring either every two or every four years. The County Counsel's impartial analysis stated that this was unclear at the time of the vote. It is still unclear. It also appears to be vague in the sense that it is not possible to determine from the language of the measure how many votes at general elections are required per project, since the term, "any act to approve by the board" is so broadly defined in section 6(A) of Measure F."

CONCLUSION

There cannot be a guarantee of an "iron clad" measure (as suggested by one Councilmember) because there is lack of legal precedent. Among the inherent risks of doing something that has not been previously reviewed by appellate courts is the increased likelihood of litigation testing its legality.

Although not entirely clear, we believe the better argument is that the ordinance complies with the single subject rule. All the conditions relate to the subject of fiscal reform and circumstances under which voters would allow a sales tax to become operative.

From a legal standpoint, the less risky approach is for the City Council to approve the operative date of the tax.

It is not possible to cover all material issues involved with every condition because they have not yet occurred. Whether the conditions are sufficiently certain could be tested by a petition for writ

of mandate. We have tightened language to a point, but have not changed key language in the motion directing us to prepare the measure.

JAN I. GOLDSMITH, City Attorney

By
Jan I. Goldsmith
City Attorney

By
Mary Jo Lanzafame
Assistant City Attorney

By
Catherine Bradley
Chief Deputy City Attorney

By
for Jo Kiernan
Deputy City Attorney

JG:cbs