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One Key Difference Between San Diego's Measure C and the Others Courts OK'd.

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The San Diego City Council this week took a monumental step that could forever change our understanding of municipal finance and what exactly can be achieved here with special tax increases.

The city's own words, though, may trip it up.

First, key background: The city decided to argue that Measure C, the initiative to raise the hotel room tax to fund an expansion of the Convention Center, homeless services and road repairs, actually passed when voters marked their ballots in March 2020.

While it did get more than 65 percent of the vote, it did not get two-thirds of the vote.

To raise taxes for special purposes, like expanding the Convention Center or building a stadium, cities have traditionally needed two-thirds of voter support. But a court ruling five years ago threw that all up in the air. It paved the way for a theory that citizens' initiatives do not ever need two-thirds of the vote to pass. Only tax increases put on the ballot by an actual government need two-thirds, the theory went.

Three tax increases since then have used this approach: Two in San Francisco and one in Fresno, were put on the ballot with special citizens' petitions and got more than half the vote but less than two-thirds. All three have since been validated by courts.

Supporters of San Diego's Measure C specifically, intentionally, set it up as a citizens' initiative precisely to take advantage of this legal ruling should it come up short of the two thirds.

What happened this week: The City Council decided to embrace that legal argument. The city had already decided not to take a stand on whether C had passed or failed at the ballot. But now, for the first time, the city will assert that the measure did pass even without winning two-thirds of the vote.

Critics of the move, though, have seized on one major inconvenience: The city itself told voters, in the official ballot summary, that the measure would require two-thirds of the vote to pass.

It didn't just say it once, either. It said it twice. At the top of the ballot summary, the city said this: "Passage of this measure requires the affirmative vote of two-thirds of those qualified electors voting on the matter."

Then, farther down, it says this: "The measure authorizes a special tax, meaning the additional revenue is designated for specific purposes, and thus requires a two-thirds vote for approval."

One thing San Francisco and Fresno did not do when they tried to pass these taxes without two-thirds of the vote is tell voters that the measures needed a two-thirds vote.

San Francisco's Measure C, in November 2018, told voters in the official summary that "This measure requires 50%+1 affirmative votes to pass." On another tax hike in June 2019, the city summarized the requirement the same way.

Fresno had a bit less moxie but gave itself wiggle room: "passage of this measure requires approval by two thirds (2/3) vote, unless otherwise required by law."

Councilwoman Vivian Moreno and other critics of the Measure C push seized on San Diego's own wording.

"The ballot materials informed the voters that passage of Measure C required a two-thirds vote and the voters depend on that information being accurate and reliable," she wrote.

All of that led to the question: Why?

Why did the city of San Diego describe it like this? Former Mayor Kevin Faulconer and the supporters of Measure C went through so many hoops and burned through more than \$2 million just to make sure it could take advantage of this historical legal loophole. How did they fail to convince City Attorney Mara Elliott to at least leave some room in how she described the measure to voters?

I asked Elliott's office if she had any perspective on it.

In a written statement, spokeswoman Hilary Nemchik said that legal thinkers across the state were genuinely split, for years, about how this would turn out. The city attorney's office asked the Supreme Court to clarify what it meant but it never did. And since then it has declined to consider challenges to the San Francisco and Fresno tax hikes that will now be implemented even without a two-thirds vote. So the city attorney "relied on traditional interpretations requiring a two-thirds vote."

Nemchik said the city preserved its ability to revisit the matter when it declined to decide one way or another whether Measure C had passed last year.

"No matter what language the City Clerk had used for Measure C, it is hard to imagine the issue was not going to be litigated post-election," she wrote.

Moreno's colleague, Councilman Sean Elo-Rivera, voted against declaring the measure passed, he said, because it wasn't the city's role. If it were truly a citizens' initiative, then the citizens behind the measure should have to get a court to force the city to implement it with this legal theory.

The mayor and most of the rest of the City Council were not moved by this point, further muddying the lines of where citizens' initiatives end and city initiatives begin. But the only thing really different about the Fresno and San Francisco measures that have now gotten the de facto OK from the courts to become real tax hikes and what San Diego is now trying to do is the city's own language.

What is certain is these tax increases via citizens' initiatives are only getting started. You can bet the city attorney will describe future ones differently.

Voice of San Diego

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April 9, 2021

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