

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 03/08/2022

TIME: 03:36:00 PM

DEPT: C-66

JUDICIAL OFFICER PRESIDING: Kenneth J Medel

CLERK: Bernice Orihuela

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2021-00024590-CU-MC-CTL** CASE INIT.DATE: 06/03/2021

CASE TITLE: **Alliance San Diego vs City of San Diego [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

APPEARANCES

The Court, having taken the above-entitled matter under submission on 3/4/2022 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

This is a consolidated "validation" action and "reverse-validation action" involving a City Council's April 6, 2021, Resolution (No. R-313485) that declared that a Measure C (involving an increased hotel tax for homelessness) was approved by a majority vote in the March 3, 2020, municipal election.

On June 3, 2021, Alliance San Diego filed its writ petition and reverse validation action, challenging the validity of the City Council's April 6, 2021, Resolution No. R-313485 purporting to declare that a citizens' initiative Measure C was approved by a majority vote in the March 3, 2020, municipal election. On the following day, June 4, 2021, the City filed its own validation action, seeking the Court's determination that Measure C was duly enacted by the voters of the City of San Diego, that Resolution R-313485 is legal, valid, and binding, and that the City therefore has the authority to impose and collect the transient occupancy tax authorized by Measure C, and to otherwise implement and enforce the measure.

The City's Complaint also seeks the Court's validation of the City Council's enactment of two additional resolutions passed on April 6, 2021 (Resolutions R-313486 and R-313487), which purport to authorize and approve the issuance and sale of Homelessness Program Bonds and Convention Center Modernization Bonds in accordance with Measure C.

An ultimate issue in these cases is whether the measure passed because it was just shy of a super-majority vote. The City acknowledges that there has been a split of legal authority in California as to whether a citizens' initiative of a special tax such as Measure C requires a simple majority vote or a two-thirds supermajority. (The Court notes that California Taxpayer Action Network argues that this measure is not a valid citizens' initiative, but for purposes of these motions, the petitions assume it is a citizens' initiative.)

Based on the City Clerk's Certification of the March 3, 2020 election results, Measure C failed to garner a two-thirds supermajority. (City Compl., ¶ 14; Alliance Compl., ¶ 18 & Exh. 3 [City Clerk's Certification],

p. 3.) In accordance with Elections Code section 10262 and San Diego Municipal Code section 27.0411, City Clerk Elizabeth Maland's Certificate explicitly stated that Measure C required "a two-thirds majority to be adopted by the voters" and duly certified that the measure had only received 239,024 "Yes" votes, or 65.24% of the vote total, thus falling short of the two-thirds supermajority threshold. (Ibid.)

On April 7, 2000, the City Council specifically struck language from the draft resolution prepared by its staff stating that Measure C "did not receive the affirmative vote of at least two-thirds of the qualified voters . . . and is hereby declared to have been defeated." (Id., ¶¶ 19-21 & Exh. 5 [Minutes of City Council's April 7, 2020, Meeting], p. 41.) In a Resolution, the Council recited the vote totals for and against Measure C. The Resolution then asserted that there is "a split of authority as to whether a majority vote or a supermajority is required for the passage of a special tax by citizens' initiative." The Resolution acknowledged that the City Attorney determined that Measure C requires a two-thirds vote for approval" and that "[t]his determination was reiterated in the ballot and ballot pamphlet." The Resolution then concluded: "[i]t is anticipated that the California Supreme Court will issue a final decision in the future resolving this ambiguity, and that their decision may impact this Measure." (Id., Exh. 4 [Resolution No. R-312901], p. 7.)

Subsequently, after several appellate cases were decided holding a simple majority was all that was required, the City Council took action in April, 2021 to declare that Measure C had passed.

Whether Judgment on the Pleadings is Appropriate

In opposition, the City argues that Judgment on the pleadings is not appropriate to resolve a validation action. Validation actions are set forth in Code of Civil Procedure sections 860---870 and are accelerated procedures for determining the validity of Council action, including bonds, assessments and other agreements entered into by public agencies." While the City acknowledges there is no authority specifically precluding the Court considering an MJOP, the City argues that MJOP is inconsistent with this statutory scheme.

The Court does not find the City's argument persuasive. Nothing in the statutory scheme precludes a Motion for Judgment on the Pleadings. Further, several appellate cases involving similar reverse validation challenges to initiatives proceeded by motions for judgment on the pleadings. (See e.g. Jobs & Housing Coalition v. City of Oakland (2021) 73 Cal.App.5th 505, 508; City of Fresno v. Fresno Building Healthy Communities (2020) 59 Cal.App.5th 220)

Alliance's Motion

The Writ of Mandate and "Reverse Validation Complaint" filed by Alliance argue, in part, that regardless of the voter threshold required for passage of citizens' initiative, the City's Resolution declaring victory for Measure based upon simple majority vote violated due process because the Ordinance placing the ballot measure on the ballot and the ballot materials themselves stated unequivocally that "[t]he measure authorizes a special tax, meaning the additional revenue is designated for specific purposes, and thus requires a two-thirds vote for approval."

As acknowledged in the City's Complaint, "the ballot and ballot pamphlet stated a two-thirds vote threshold for approval of Measure C (based on the City Attorney's Office's determination of the legal precedent and usual practice in California at the time of submittal of Measure C to the voters)." (City Compl., ¶ 16.)

Then – and this is the key point – when the City Council voted to submit Measure C to the City's voters in November 2019, it formally declared twice that the initiative required approval by a two-thirds majority for passage. (Alliance San Diego's Verified Petition for Writ of Mandate and Complaint for Reverse Validation and Injunctive and Declaratory Relief ("Alliance Compl."), Exh. 1 [Ordinance No. O-21143], at pp. 4 & 6.)

Ordinance No. O-21143 provides, in pertinent part:

BE IT ORDAINED; by the Council of the City of San Diego, that:

Section 1. One citizens' initiative measure titled "For A Better San Diego" is submitted to the qualified voters of the City of San Diego at the Municipal Special Election to be held on March 3, 2020; with the measure to read as follows:

....
Section 5. **Passage of this measure requires the affirmative vote of two-thirds of those qualified electors voting on the matter at the Municipal Special Election ..**

This is the law of the City.

As discussed above, on April 2, 2020, San Diego City Clerk Elizabeth Maland certified the results of the election to the City Council, explicitly stating that Measure C required "a two-thirds majority to be adopted by the voters" and that it had only received 239,024 "Yes" votes, or 65.24% of the vote total, thus falling short of the two-thirds supermajority threshold. (Alliance Compl., ¶ 18 & Exh. 3, p. 3.)

Both the City Council's April 7, 2020, and April 6, 2021, resolutions recite, "declaring the results of a municipal election as certified by the Registrar of Voters and the City Clerk is a *ministerial act* required by California Elections Code section 10263." (Id., Exh. 4, p. 3 & Exh. 6, p. 4 [emphasis added].)

The Clerk certified the election, indicating – as required under the Ordinance that put the measure on the ballot - that the initiative was defeated. Under Elections Code section 10262, "[t]he canvass shall be conducted by the elections official," and "[u]pon the completion of the canvass, the elections official shall certify the results to the governing body." For a consolidated election like the March 3, 2020, election on Measure C, the governing body then "shall meet at its usual place of meeting no later than the next regularly scheduled city council meeting following presentation of the 28-day canvass of the returns . . . to declare the results and to install the newly elected officers." (Elec. Code, § 10263, subd. (b).)

Contrary to its ministerial obligation, at its April 7, 2020, meeting, the City Council refused to "declare" the result of the election, specifically striking out the language in the draft resolution stating that Measure C "did not receive the affirmative vote of at least two-thirds of the qualified voters . . . and is hereby declared to have been defeated." (Id., ¶¶ 19-21 & Exh. 5, p. 41.) Instead, despite acknowledging that "the City Attorney determined that Measure C requires a two-thirds vote for approval" and that "[t]his determination was reiterated in the ballot and ballot pamphlet," the Council purported to hold the outcome of the election open indefinitely. (Id., Exh. 4, p. 7.) Then, almost a year to the day later, the City Council adopted Resolution No. R-313485, contravening the City Clerk's certification and purporting to "declare" that Measure C had "been approved in the Municipal Special Election held on March 3, 2020." (Id., ¶ 28 & Exh. 6, p. 4.)

The Council had no authority to delay its declaration of the result of the Measure C election or to

contradict the City Clerk's certified results in that declaration. The City council was *required* to declare what the city clerk certified. In effect, the Council in April, 2021 adopted a new rule and applied it retroactively to the election, effectively changing the outcome of the election. The later resolution of April, 2021 which changed the result is null and void as a matter of law.

The official ballot materials also noticed to voters that a two-thirds majority would be required for passage. (Exh. 2 [Official Ballot Materials], p. 3.) As presented by Alliance, multiple press reports were fully consistent with these representations, confirming to San Diego voters that Measure C would only be approved upon a two-thirds majority vote.

In short, the resolution of April, 2021 improperly changed the rules of the process after the election. A fundamental principle of election law is that election outcomes must be decided by reference to previously-announced rules - the rules that were in effect at the time of the election and under which the election was held - and that changing those rules after the election has occurred renders the election fundamentally unfair and constitutes a violation of due process.

Alliance relies on the case of *Hass v. City Council of City of Palm Springs* (1956) 139 Cal.App.2d 73, 76 ("Hass"). In *Hass*, both the ballot and the proposed initiative ordinance stated that a three-fourths majority was required for passage of the measure. However, after the election was held and the measure won a majority vote but less than the three-fourths approval, the proponents of the initiative argued that the requirement for a three-fourths supermajority approval was unconstitutional, and that the ordinance should be deemed to have been duly adopted by the simple majority vote that it received. The trial court denied relief, and the court of appeal affirmed, holding that the vote threshold under which the election had been conducted could not lawfully be changed after the fact: "Whichever line of procedure is properly applicable, it would seem to follow logically and legally that the matter should be submitted to the voters on that basis, or at least that the voters should not be deceived or misled in that respect. After the election has been decided by the voters on the basis of the proposed ordinance submitted to them, the result should not be declared void by the body charged with the duty of canvassing the votes on the ground that a different rule should have been followed and a different proposition submitted." *Hass*, 139 Cal.App.2d at pp. 75-76)

The *Hass* Court recognized the fundamental unfairness and threat to the integrity of the election process in conducting an election under one set of rules and then changing those rules to reach a different outcome after the votes have been counted: "It would be a fraud on the voters to rule otherwise, after they have voted upon an ordinance submitted to them upon a definite condition . . . [The voters] were asked to vote on the basis that a 3/4ths vote was required, and the result of the election did not meet the requirement set forth in both the proposed ordinance and the ballot." *Id.* at p. 76.)

In opposition, the City relies on the recent case of *Jobs & Housing Coalition v. City of Oakland* (2021) 73 Cal.App.5th 505, decided by the First District Court of Appeal, that distinguished and disagreed with *Hass*, validating the passage of a special tax initiative by a simple majority vote despite the ballot materials stating that a two-thirds vote was required for passage. *Jobs & Housing Coalition* distinguished *Hass* on the ground that the voting threshold in that case "was in the text of the proposed ordinance and not just, as [in *Jobs & Housing Coalition*], in the ballot materials." Respondents focus on that distinction, contending that "The text of Measure C itself, unlike the initiative [in] *Hass*, contained no language regarding a voter threshold." (Opp., p. 18.)

This appears to be a distinction without a difference. As stated above, Ordinance No. 0-21143 was the official legislation that established the rules of the process. It governed the special election on Measure

C, explicitly "requir[ing] the affirmative vote of two-thirds of those qualified electors voting on the matter" for Measure C's passage. (Alliance Compl., Exh. 1, p. 6, § 5.) Thus, both in Hass and here, the applicable vote threshold was set forth in an official legislative action – "BE IT ORDAINED" - not just in the ballot materials as in Jobs & Housing Coalition.

The Court GRANTS Judgment on the Pleadings.

HJTA's Motion

On January 12, 2022, Defendant Howard Jarvis Taxpayers Association (HJTA) moved for judgment on the pleadings on the City's Complaint for a declaration of Measure C's validity, asserting that the Complaint "does not state facts sufficient to constitute a cause of action" against HJTA and its members. (Code Civ. Proc., § 438(c)(1)(B)(ii).) HJTA's motion contends that Measure C is unlawful and invalid on four legally independent grounds. (HJTA's Motion for Judgment on the Pleadings, p. 7.) HJTA's motion, however, only requests the Court's decision on one of those grounds - that Measure C violated Proposition 219. (The other grounds are raised merely to "preserve them for appeal.")

In light of the above analysis regarding Alliance's motion, any facial challenge to Measure C is not ripe. The Measure never passed. Thus, the Court does not rule on the substantive arguments raised by HJTA.

Motion to Quash Deposition Subpoenas

The City has served a motion quash related to deposition subpoenas served on city officials by CTAN. Because the Court finds that the Measure has not passed, the deposition subpoenas are now moot.

IT IS SO ORDERED.

Kenneth J. Medel

Judge Kenneth J Medel