

MEMORANDUM

to: Keith Maddox
from: Stephen J. Kaufman 
George M. Yin 
re: Certification of Election Results
file no.: YSD3853.001
date: April 6, 2020

Introduction

On April 2, 2020, the City Clerk issued a certificate certifying the results of the canvass of votes cast in the Primary Election held on Tuesday, March 3, 2020, and placed an item on the Special Agenda of the Tuesday, April 7, 2020 San Diego City Council meeting, to present the certification to the Council. (“Item 626--Results of March 3, 2020 Municipal Primary Election and Municipal Special Election in the City of San Diego.”) This memorandum addresses the best practices approach that the City Council should take to accept the certified vote count for Measure C while recognizing the unsettled law regarding voter approval thresholds for special tax voter initiatives, which is currently being adjudicated in cases involving other cities. The best practice approach discussed below will avoid needlessly embroiling the City in costly litigation before those other cases bring clarity to the issue.

City Clerk Certification and Draft City Council Resolution

Included in the Certificate of City Clerk is a report on the number of votes cast for and against Measure C, also entitled, “Initiative Measure – Hotel Visitor Tax Increase for Convention Center Expansion, Homelessness Programs, Street Repairs.” The City Clerk reports that the total vote was 366,373, with 239,024 votes (65.24%) “for said proposition” and 137,349 (34.76%) “against said proposition.” However, with respect to Measure C, the City Clerk also included the following statement: “This proposition requires a two-thirds majority to be adopted by the voters.”

Similarly, the draft City Council resolution for Item 626, in addition to providing the vote totals for Measure C, contains the following statement: “This measure required a two-thirds vote for approval. Measure C did not receive the affirmative vote of at least two-thirds of the qualified voters voting on the measure and is hereby defeated.” (*See* Draft Resolution R-2020-442 at p. 7.) Neither of these statements as to the defeat of Measure C is required by the plain terms of the San Diego Municipal Code, nor are they a correct statement of the law as it currently stands due to a split authority by the courts -- the resolution of which is pending. Each of these points are addressed in brief, as follows.

Statement as to Measure C Being Defeated Is Not Necessary

The City Clerk and City Council must certify the “results” of the vote canvass. (*See* SDMC § 27.0411.) However, what the SDMC strictly requires in reporting “results,” is that the whole number of votes cast in the City and the number of votes cast for and against the ballot measure be certified. (*See* SDMC § 27.0411 (“Immediately after an election, the City Clerk shall cause a canvass of the election returns to be made, and shall certify the results of such canvass to the City Council, which shall have entered in its records the following: (a) ***The whole number of votes cast in the City***; (b) The names of the candidates and the office each sought; (c) ***The measure presented***; and (d) ***The number of votes cast*** for each candidate and ***for and against each measure***.” (Emphasis added).) Clearly, the certification and reporting of these vote totals need not contain a statement as to whether Measure C is defeated or approved.

Statement as to Measure C Being Defeated is Not an Accurate Reflection of the Law

In fact, as a result of a split in authority that is making its way through the Court of Appeals (and most likely California Supreme Court) a statement that Measure C is defeated cannot be truthfully made, and any definitive action by the City Council to adopt such a position not only opens the door to potential litigation against the City by the proponents of Measure C, but violates the City’s own laws.

SDMC § 27.1043 entitled “Voter Adoption of Initiated Legislative Act,” provides: “***Except as provided in the California Constitution or the San Diego City Charter, any legislative act proposed by an initiative petition or directly by the City Council shall be adopted by majority vote.***” (Emphasis added.) The City Clerk in her election certificate and City staff in the draft resolution included statements that Measure C required a 2/3 vote. However, there is a lack of clarity as to whether that is, in fact, the case, and as noted above, this statement is unnecessary since there is no requirement that any such statement be included in the resolution.

In 2017, the California Supreme Court, in California Cannabis Coalition v. City of Upland (2017) 3 Cal. 5th 924, interpreted the California Constitution and rendered a ruling that many jurisdictions and leading scholars view as confirming a majority vote threshold for approval of special taxes proposed by voter initiatives. Moreover, this precise issue is currently the subject of litigation in at least three separate Court of Appeals cases, including two cases in the 1st Appellate District, that is, Howard Jarvis Taxpayers Ass’n v. City and County of San Francisco (Case No. A157983) and City and County of San Francisco v. All Persons Interested in the Matter of Prop. C (Case Number A158645) and City of Fresno v. Fresno Building Healthy Communities in the 5th Appellate District (Case No. F080264). Previously, the lower courts within the 1st Appellate District both held that special tax voter initiatives are adopted by majority vote, whereas the lower court in the 5th Appellate District held in favor of 2/3 voter approval. Given the importance of this issue, it is likely that these cases will also be appealed to the California Supreme Court.

Best Practices for the City Council

Given the language of SDMC section 27.1043 in light of the unsettled nature of the law (which is making its way through the courts), the City Council (and the City Clerk) should not make a definitive statement that Measure C required a 2/3 vote. Such language would not be an accurate reflection of the law. Moreover, the language of SDMC section 27.0411 only requires a statement of the vote count, but does not mandate any statement that a measure is defeated.

Thus, best practices dictate that the City Council can and should adopt an amended version of the draft resolution, accepting the vote totals while taking out the language stating that Measure C is defeated, acknowledging that the issue of the correct voter approval threshold for special tax initiatives is currently under review by the Court of Appeals, leaving in the language that “[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 the Measure” (see Draft Resolution R-2020-442 at p. 7), and leaving the question of defeat or passage/implementation to clear judicial guidance in the near future. Indeed, not only will declaring Measure C defeated be contrary to the letter and spirit of the City’s own laws (see SDMC § 27.1043), but it will most likely mire the City in expensive litigation on the part of Measure C’s proponents and members of the public.