In August 2017, the California Supreme Court decided California Cannabis Coal. v. City of Upland.[1] Upland addressed an expressly narrow issue, holding that local measures introduced by voter initiative were not required to be presented to the electorate in a general election and could be presented in a special election instead. Notwithstanding Upland’s narrow scope, the opinion sparked a much larger debate regarding whether local special taxes introduced by voter initiative are subject to the long-standing requirement in the California Constitution that local special taxes must be passed with a two-thirds supermajority vote by the electorate. What began as a theoretical debate quickly evolved into a practical issue for judicial clarification. In 2018, several local special tax measures introduced by voter initiatives passed with simple majority votes but not two-thirds supermajority votes. Litigation at the trial court level has already commenced regarding the validity of these local special taxes in the counties of San Francisco, Oakland and Fresno.

This article briefly recaps the pertinent Upland background, identifies the local special taxes currently at issue and discusses an important consideration courts will need to address when deciding these cases: the over 40-year history of California’s two-thirds supermajority voting requirement for the passage of local special taxes.

**Upland Opinion**
A local voter initiative in the city of Upland sought to impose a city fee on marijuana dispensaries.[2] The
proponents wanted the initiative to be considered by voters at a special election.\footnote{3} The city concluded that because the fee would exceed the regulatory costs, it constituted a general tax.\footnote{4} To the city, this meant that the initiative could not be voted on during a special election.\footnote{5} Instead, under California Constitution Article XIII C, Section 2(b), the city determined the measure had to be submitted to the voters at the next general election because it constituted a general tax.\footnote{6} The narrow question posed in Upland was whether Article XIII C, Section 2(b) applies to measures put on the ballot by voter initiative like it does for measures introduced by a mayor or board of supervisors. In a 5-2 vote, the California Supreme Court concluded that Article XIII C, Section 2(b), does not apply to voter initiatives.\footnote{7}

The Upland court interpreted the clause in Article XIII C, Section 2(b) “no local government may impose, extend, or increase any general tax” to exclude taxes emanating from voter initiative petitions.\footnote{8} The court supported its conclusion by noting the voters’ initiative power must be interpreted broadly, resolving “doubts about the scope of the initiative power in its favor whenever possible.”\footnote{9}

Importantly, the Upland court expressly referred to the supermajority voting requirement issue under Article XIII C, Section 2(d),\footnote{10} and drew a distinction between that provision and the election timing issue in Article XIII C, Section 2(b):

[W]hen an initiative’s intended purpose includes imposing requirements on voters, evidence of such purpose is clear. In article XIII C, section 2, subdivision (d), for example, the enactor adopted a requirement providing that, before a local government can impose, extend, or increase any special tax, voters must approve the tax by a two-thirds vote. That constitutes a higher vote requirement than would otherwise apply. [Citations omitted.] That the voters explicitly imposed a procedural two-thirds vote requirement on themselves in article XIII C, section 2, subdivision (d) is evidence that they did not implicitly impose a procedural timing requirement in subdivision (b).\footnote{11}

This language indicates that the court believes voters were capable of and effectively succeeded in imposing a supermajority requirement on themselves in relation to the passage of local special taxes.\footnote{12} This language also indicates that the court believes there is a difference between the timing for an election involving a voter initiative and the supermajority requirement needed to pass a voter initiative concerning local special taxes. The description of the two-thirds requirement as a procedural requirement voters imposed on themselves and the election timing requirement as also a procedural requirement supports a distinction between Section 2(d) and Section 2(b). Specifically, that Section 2(b) is a procedural rule that does not apply to voter initiatives (i.e., the holding in \textit{Upland}), whereas Section 2(d) is a procedural rule that does apply to voter initiatives (i.e., as a requirement the electorate imposed on itself).

**Local Special Tax Measures with \textit{Upland} Issue**

Following the \textit{Upland} opinion, on Oct. 17, 2017, the city attorney of San Francisco submitted a memorandum to the city’s director of elections concluding that the court’s analysis and reasoning in the
opinion also appear to apply to the two-thirds voting requirement for local special taxes, such that both special and general taxes proposed by voter initiative would now likely require only a majority vote of the electorate to pass.[13] In 2018, three special tax voter initiatives were passed without a two-thirds supermajority of San Francisco’s electorate.

**Proposition C (June 5, 2018 Ballot)**

The “Universal Childcare for San Francisco Families Initiative” passed with a 50.87 percent vote.

This initiative authorizes a gross receipts tax on the lease of commercial property for landlords with annual gross receipts over $1 million. The tax imposes a 1 percent rate on gross receipts for warehouse space and 3.5 percent on gross receipts for other commercial properties to fund childcare and early education programs.

In August 2018, an action was filed with the San Francisco Superior Court to invalidate this tax by, among others, the Howard Jarvis Taxpayers Association.

**Proposition G (June 5, 2018 Ballot)**

A school parcel tax initiative also passed on the June 2018 Ballot, with a 60.76 percent vote.

This initiative authorizes an annual parcel tax of $298 per parcel of taxable real property in the city for 20 years to fund the San Francisco Unified School District’s educators’ salaries, staffing, professional development, technology, charter schools and oversight of funding.

In September 2018, the city and county of San Francisco filed a complaint for validation of the tax with the San Francisco Superior Court.

**Proposition C (November 6, 2018 Ballot)**

The “San Francisco Gross Receipts Tax for Homelessness Services Initiative” passed with a 61.34 percent vote.

This initiative authorizes a gross receipts tax on businesses’ San Francisco gross receipts above $50 million at rates between 0.175 percent to 0.69 percent (depending on the business activity type), or an annual homelessness administrative office tax on businesses with administrative offices in San Francisco, at least $1 billion in gross receipts, and at least 1,000 employees nationwide at a rate of 1.5 percent of payroll expenses. Revenue received by this tax would fund the “Our City, Our Home Fund” and be used for specified purposes dedicated to combatting homelessness in San Francisco.

On Dec. 11, 2018, the city passed legislation authorizing the city attorney to initiate a validation action[14] to have the courts sustain the enactment of the initiative. On Jan. 28, 2019, the city and county of San Francisco filed a complaint for validation with the San Francisco Superior Court seeking to validate the
San Francisco Controller Ben Rosenfield has notably frozen revenues received from this tax as a result of the legal dispute regarding the vote requirement for the measure’s passage. In response, and in an effort to be able to appropriate and spend these tax revenues as soon as possible, Mayor London Breed and Supervisor Vallie Brown introduced a proposed ordinance on Jan. 29, 2019. The proposed ordinance would add two provisions to San Francisco’s Business and Tax Regulations Code and would provide for an effective 10 percent tax credit in exchange for either a taxpayer’s irrevocable gift to the “Our City, Our Home Fund,” or a taxpayer’s irrevocable agreement not to seek refunds of the amounts remitted on the tax in the event it is later invalidated.

**Oakland’s Measure AA and Fresno’s Measure P**

On Feb. 1, 2019, actions were also filed in both Oakland and Fresno trial courts with respect to local voter initiative measures that passed in 2018 with majority but not two-thirds supermajority votes.

Oakland’s Measure AA is a parcel tax increase to fund early childhood education programs and passed with a 62.47 percent vote in November 2018. The tax imposes a $198 tax per parcel for 30 years. A group including homeowners and landlords filed suit arguing the certification of Measure AA by Oakland was illegal.

Fresno’s Measure P is a 0.375 percent sales tax increase for 30 years to fund city parks, recreation, streets and arts. It passed with 52.17 percent vote, but the city determined that because it was a special tax it did not pass. Fresno Building Healthy Communities filed suit against the city arguing a two-thirds supermajority vote was not required and the Fresno city attorney filed suit on the same day seeking a determination on the correct vote requirement for the measure.

**California’s Long-Standing Two-Thirds Requirement for Local Special Taxes**

As courts grapple with these several new cases concerning the validity of special local taxes, they will be considering whether to protect or limit an over-four-decade history of reiterated voter initiative intent to require a two-thirds supermajority vote for the passage of all local special taxes.

Before Proposition 13 was passed in 1978, localities were not prohibited by statewide authority (i.e., authority outside a particular locality’s own charter, ordinances, etc.) from raising or lowering local taxes without voter approval. Nor were there any statewide requirements imposed on localities specific to the passage of local special taxes. With the passage of Proposition 13 in 1978, the California Constitution was amended to, among other things, require localities to obtain approval from two-thirds of their respective electorates in order to levy a local special tax.[15] In the Proposition 13 voter’s pamphlet, the legislative analyst stated that the requirement “would restrict the ability of local governments to impose new taxes in order to replace the property tax revenue losses [resulting from other portions of Proposition 13].”
The passage of Proposition 13 was immediately confronted with various constitutional challenges, and the California Supreme Court addressed a number of these challenges in the seminal 1978 opinion Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization.[16] One such challenge was directed at the two-thirds voting requirement, arguing the requirement unduly discriminated 2 to 1 in favor of voters voting against new local special taxes.[17] The court quickly rejected this argument on the basis that because persons voting in favor of tax measures cannot “be deemed to represent a definite, identifiable class, equal protection principles do not forbid ‘debasing’ their vote by requiring a two-thirds approval of such measures.”[18]

In 1986, Proposition 62 was passed to close perceived court-made “loopholes” localities were using.[19] Among other things, Proposition 62 added new California government code provisions including a reiteration of the requirement that a two-thirds supermajority voter approval was needed for the passage of any local special taxes.[20] Proposition 62 was addressed in depth by the California Supreme Court in its 1995 opinion Santa Clara County Local Transportation Authority v. Guardino.[21] The court in Guardino again upheld the two-thirds supermajority voting requirement against an argument that it was unconstitutionally discriminatory and also included a lengthy discussion of voter referendums and initiatives.[22]

In 1996, voters passed Proposition 218, another constitutional amendment sought to close Proposition 13 (and Proposition 62) loopholes being used by localities. Proposition 218 added Articles XIII C and XIII D to the California Constitution. This involved expressly reiterating (again) the two-thirds supermajority requirement for approval of local special taxes.[23] The voter’s pamphlet for Proposition 218 opened with a summary of four bullet points, this being the first bullet point:

Limits authority of local governments to impose taxes and property-related assessments, fees and charges. Requires majority of voters approve increases in general taxes and reiterates that two-thirds must approve special tax.

None of the Proposition 218 pamphlet materials gave any indication that the two-thirds voting requirement did not apply to voter initiatives, which is notable since the time seemed particularly ripe to address the issue if it needed to be addressed, for a number of reasons. First, the California Supreme Court had just analyzed the supermajority voting requirement in-depth in Guardino, including a lengthy discussion of voter referendums and initiatives. Second, Proposition 218 added a separate provision immediately following Section 2 (Section 3) which expressly addressed voter initiatives in the context of repealing or reducing taxes, nothing more. Third, the legislative analyst’s analysis of Proposition 218 addressed the separate voter initiative section as an “other provision,” but did not address voter initiatives in the context of the voting threshold requirements.
In 2010, Proposition 26 was passed to amend portions of California Constitution, Articles XIII A and C, which among other things refined the definition of a tax to again close perceived loopholes. The two-thirds requirement for local special taxes remained intact and unchanged, with no indication that the two-thirds requirement did not apply to voter initiatives.

In conclusion, it is noteworthy that no language was included in Proposition 13, the California government code provisions of Proposition 62, Proposition 218 or Proposition 26 that would suggest that the two-thirds supermajority requirement for local special taxes does not apply to voter initiatives. In determining how to apply Upland, courts will have to address California’s long-standing requirement of a supermajority vote for local special taxes and whether that requirement somehow does not apply to voter initiatives.


[2] *Upland*, 3 Cal.5th at 931.

[3] Id.


[5] Id.

[6] Id. Article XIII C, Section 2(b), was added to the Constitution in 1996 when the voters passed Proposition 218, and provides the following: “No local government may impose, extend, or increase any general tax unless and until the tax is submitted to the electorate and approved by a majority vote. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.”

[7] *Upland*, 3 Cal.5th at 948.


[9] Id., at 936.

[10] Article XIII C, Section 2(d) provides the following: “No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote…”


[12] Indeed, given this statement by the majority, it is at least arguable that all seven members of the Court agree that the two-thirds voting requirement for local special taxes applies to voter initiatives, especially in
light of the dissent’s statement that: “[I]t is unlikely that Proposition 218’s enactors, who deliberately chose a supermajority requirement for the imposition of special taxes, intended such a result.” *Upland*, 3 Cal.5th at 956 (Kruger, J., dissenting and concurring).

[13] The city attorney memorandum’s conclusion relies primarily on the Upland Court’s interpretation of “local government” to exclude matters emanating from the electorate by initiative. The memorandum does not address other considerations discussed in this article such as the longstanding history of the two-thirds supermajority requirement for the passage of local special taxes.

[14] Statutory guidance on validation actions can be found at California Code of Civil Procedure Sections 860, et seq.

[15] See Cal. Const., Art. XIII A, Section 4, which provides: “Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.”


[18] Id., at 237.


[20] See Cal. Gov. Code § 53722, which provides the following: “No local government or district may impose any special tax unless and until such special tax is submitted to the electorate of the local government, or district (sic) and approved by a two-thirds vote of the voters voting in an election on the issue.”

