SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CITY AND COUNTY OF SAN FRANCISO,

Plaintiff,

v.

ALL PERSONS INTERESTED IN THE MATTER OF Proposition G on the June 5, 2018 San Francisco ballot, a parcel tax for teacher salaries, teacher training, and other purposes of the San Francisco Unified School District, and all other matters and proceedings relating thereto,

Defendants.

Case No. CGC-18-569987

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On May 8, 2020, this matter came on regularly for hearing before the Court pursuant to the motion for summary judgment filed by Plaintiff City and County of San Francisco (the City) and the cross-motion for summary judgment filed by Defendant Wayne Nowak. Deputy City Attorney Wayne Snodgrass appeared for Plaintiff City and County of San Francisco, and Bradley R. Marsh and Colin W. Fraser of Greenberg Traurig, LLP appeared for Defendant Wayne Nowak. Having fully considered the papers filed in support of and in opposition to the cross-motions for summary judgment, and the arguments of counsel presented at the hearing, this Court rules as follows:

INTRODUCTION

The City brought this validation action following the June 5, 2018 Consolidated Statewide Primary Election to obtain a ruling concerning the validity of Proposition G, a voter initiative that appeared on the San Francisco ballot in that election. Proposition G, entitled "Parcel Tax for San Francisco Unified School District," proposed to authorize the City to collect an annual parcel tax of $298 per parcel of taxable property in the City. The revenues from the parcel tax would be transferred to the San Francisco Unified School District (the District) to use the funds for specified purposes, including increasing the salaries and benefits of teachers and para-educators and to increase staffing and funding at high-needs schools and at community schools. Proposition G received the affirmative votes of 60.76 % of the 238,133 City voters who voted on that measure. (Compl. ¶¶ 3, 4; Ans. ¶¶ 3, 4.)[1]

[1] The Court grants the City's unopposed request for judicial notice of the parties' pleadings and of various provisions of the San Francisco Charter and Municipal Elections Code, and Defendant's unopposed request for judicial notice of prior decisions by this and other superior courts. The Court denies Defendant's second request for judicial notice, filed with his reply, of the Legislative Analyst's analysis of a proposed initiative constitutional amendment that was never submitted to the voters, and of a City of Oakland ballot pamphlet for a November 2018 ballot measure, neither of which is relevant to the issues presented here. (Def. RJN, Exs. A, B.) (See *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [matter to be judicially noticed must be relevant to a material issue], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

Defendant Wayne Nowak filed an answer to the City's complaint. He makes the novel contentions that Proposition G was not a voter initiative because it was conceived and drafted by the District in coordination with United Educators of San Francisco (the Union), a union representing San Francisco teachers and para-educators, and that the three San Francisco citizens who signed the notice of intention to circulate the petitions for the initiative were not its proponents. He also contends that Proposition G imposed a special tax that required the approval of two-thirds of the voters under three different provisions of the California Constitution, and that having failed to achieve that supermajority, it was not validly enacted into law. Finally, Defendant contends that the San Francisco Charter requires a two-thirds vote on all special taxes, whether they are proposed by the Board of Supervisors or by voter initiative.

The material facts are undisputed. The Court's resolution of the parties' competing contentions turns largely on the language of key sections of the Elections Code and of the San Francisco Charter, the language and legislative history of the pertinent provisions of the California Constitution, appellate authority construing those provisions, and general principles concerning the people's initiative power. For the following reasons, the City's motion for summary judgment is granted, and Defendant's cross-motion is denied.[2]

I. DEFENDANT'S CONTENTION THAT PROPOSITION G IS NOT A VOTER INITIATIVE IS MERITLESS.

On December 8, 2017, three individuals—Jose Tengco, David Strother, and Catherine Sullivan—submitted to San Francisco's Department of Elections a Notice of Intention to Circulate

[2] The Court denies the application by the California Teachers Association, the American Federation of Teachers, AFL-CIO, the National Education Association, and affiliated organizations for leave to file an amici curiae brief in support of the City. That proposed brief addresses what its authors characterize as "the public policy arguments that support the need for Proposition G, which would provide critically important benefits to educators, students and parents in San Francisco." While the Court appreciates those parties' interest, those issues are beyond the scope of those presented for decision here. The validity of Proposition G does not turn on how beneficial or laudable its objectives may be. [See *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274 ["It is a general rule that an amicus curiae accepts a case as he or finds it."].)

Petitions for a proposed initiative, which they signed as "Proponent[s]" of the initiative. (Arntz Decl. ¶ 5 & Ex. A.) They also submitted the proposed text of that initiative, which was entitled the "Living Wage for Educators Act of 2018." (*Id.* & Ex. B.) On December 26, 2017, the Department of Elections received proof of publication of the Notice of Intention to Circulate Petitions and the ballot title and summary for the proposed initiative. The text of the published notice identified Mr. Tengco, Mr. Strother, and Ms. Sullivan as the measure's proponents. (*Id.* ¶ 6 & Ex. C.) On January 31, 2018, Ms. Sullivan turned in to the Department initiative petitions signed by a reported 16,656 San Francisco voters. The Department's receipt identified Ms. Sullivan as one of the initiative's proponents. (*Id.* ¶ 7 & Ex. D.) After reviewing a random sampling of 500 signatures on those voter petitions, the Department certified in writing to Ms. Sullivan that they contained a sufficient number of valid voters' signatures to qualify the proposed initiative for the ballot. (*Id.* ¶ 8 & Ex. E.)

As Defendant acknowledges, this Court has previously held that provisions of the California Constitution which prohibit local governments from imposing special taxes unless they are approved by a two-thirds vote of the electorate do not limit voters' power to raise taxes by statutory initiative. (See Part II, *infra*.) In an apparent attempt to avoid the same ruling here, Defendant takes the position that Proposition G is not, in fact, a citizens' initiative. In particular, he points to evidence that the District and the Union coordinated to draft the parcel tax measure and place it on the ballot. Defendant contends that, as a result, Proposition G was not a "proposal by the voters" within the meaning of the San Francisco Charter, but was rather "the product of the [District]." He derides the three persons who signed the Petition as "ceremonious signatories to the work product of the [District] and [Union]," and contends they are not Proposition G's "proponents." Defendant goes so far as to accuse the District of "st[ealing] the people's power to propose initiatives and appropriat[ing] that power for itself." Defendant's arguments are irreconcilable with the plain language of the San Francisco Charter and Municipal Elections Code and the governing provisions of the state Elections Code.

The San Francisco Charter provides for two ways, and only two ways, by which a measure may be placed on the ballot: a measure proposed by the voters by initiative petition, and one proposed by a legislative body such as the San Francisco Board of Supervisors. As to voter initiatives, Article XIV of the Charter, entitled "Initiative, Referendum and Recall," declares that "the voters of the City and County shall have the power to enact initiatives . . . ." (S.F. Charter § 14.100.) The Charter provides that such an initiative "may be proposed by presenting to the Director of Elections a petition containing the initiative and signed by voters in a number equal to at least five percent of the votes cast for all candidates for mayor in the last preceding general municipal election for Mayor." (*Id.* § 14.101.) It is undisputed that is what happened here. Proposition G is a voter initiative within the plain meaning of the Charter.

Defendant's position that the three persons who signed the Notice of Intention to Circulate Petitions were not Proposition G's "proponents" is similarly groundless. The Legislature, "in adopting statutes to formalize and facilitate the initiative process, has enacted a number of provisions that explicitly identify who the official proponents of an initiative measure are and describe their authority and duties." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1141.) The state Elections Code, which governs the circulation and qualification of initiative petitions in San Francisco,[3] defines "proponent or proponents of an initiative or referendum measure" as "the person or persons who publish a notice or intention to circulate petitions." (Elec. Code § 342; see also *id.* § 9202.) Here, the record establishes beyond dispute that Proposition G had three individual proponents, who signed a notice of intention to circulate petitions for the proposed initiative, caused it to be submitted and published, and turned in initiative petitions containing the requisite number of voter signatures. (Arntz Decl. ¶¶ 5-8 & Exs. A-E.)

[3] "Except as otherwise provided by the Charter or this Municipal Elections Code, the circulation and qualification of initiative petitions and referenda is governed by California Elections Code Sections 100 and 101, and Section 9200 et seq." (S.F. Muni. Elec. Code § 310.)

When asked at the hearing to identify the initiative's "true" proponent(s), Defendant's counsel responded that they are "unknown," but "most likely" include the District. That ambivalent position is inconsistent with the plain statutory language. The Legislature intended the term "proponent(s)" to refer to "an identifiable group of individuals rather than to all those who advocate and support a particular measure." (*People v. Colver* (1980) 107 Cal.App.3d 277, 287-288.) That the proponents may not have themselves paid the $200 fee required by San Francisco Municipal Elections Code section 320 to defray the costs incurred by the City Attorney to prepare the required ballot title and summary is of no moment. Unlike Elections Code section 342, section 320 is not a definitional provision. Nor is there anything in the Elections Code or the City's Municipal Elections Code that requires that a proponent must *individually* pay the fee, deliver the notice, or cause it to be published, as opposed to delegating those ministerial tasks to a campaign consultant or attorney.

Contrary to what Defendant appears to believe, there is nothing remotely suspicious or sinister about the facts that the District initially planned to place the measure on the ballot itself; that the three proponents of Proposition G were "recruited" by the Union or were "known [Union] allies and members"; that the ballot measure was drafted by campaign consultants and attorneys; or that it was supported by the Union and the District.[4] To the contrary, such practices are commonplace and, while their political desirability may be open to debate, they are entirely unobjectionable on legal grounds. (See, e.g., *Chula Vista Citizens for Jobs and Fair Competition v. Norris* (9th Cir. 2015) 782 F.3d 520, 524 (en banc) [noting that ballot measure committee supporting local initiative prohibiting city from entering into project labor agreements asked two of

[4] Defendant makes no claim that the District violated *Stanson v. Mott* (1976) 17 Cal.3d 206 in connection with the June 2018 election. That decision stands for the proposition that while "a public agency may not expend public funds to promote a partisan position in an election campaign," it may disseminate information to the public relating to an election, so long as it provides a fair presentation of the relevant facts. (*Id.* at 209-210; accord, *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 36.) The Court observes that while District Deputy Superintendent Myong Leigh signed one of the ballot arguments in support of Proposition G, the pamphlet bore the disclaimer that he did so as an individual and not on behalf of the District. (Arntz Decl., Ex. F at 121.)

its members "to serve as proponents so that the measure might be accepted by the city clerk," but committee and its largest donor, an association of construction-related businesses, "paid for all of the expenses associated with qualifying the [citizens'] initiative for the municipal ballot"); *Costa v. Superior Court* (2006) 37 Cal.4th 986, 997-998 [statewide initiative was drafted by attorney, not proponent, and names of three additional persons were added as proponents of proposed initiative measure after it was submitted to the Attorney General].) Indeed, as the City points out, Defendant's contention that courts should second-guess whether the official proponents of a proposed voter initiative are its "true" proponents would run afoul of the well-accepted principle that the courts must "jealously guard" and liberally construe the people's reserved power of the initiative. (E.g., *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 821.)

Defendant's reliance on *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 is misplaced. In *Boling*, San Diego's mayor sponsored a citizens' initiative to eliminate pensions for new municipal employees and rebuffed union demands to meet and confer over the measure. The Supreme Court held that because the mayor was the city's designated bargaining agent and had lent official support to the citizens' initiative, the city was required to meet and confer with the union by the Meyers-Milias-Brown Act, Gov. Code § 3500 *et seq.* (*Id.* at 904, 919.) However, *Boling* did *not* hold or even suggest that the mayor's active involvement in the development and promotion of the ballot initiative transformed it from a voter initiative into a legislative initiative, or rendered the mayor its "proponent." To the contrary, the Court repeatedly referred as such to the "citizens' initiative" and to the measure's three "individual proponents" (who did not include the mayor). (See *id.* at 904, 907-909, 915-916, 919.)

In short, Proposition G is a valid citizens' initiative under the express terms of the San Francisco Charter and state law, and the three persons who signed the Notice of Intention to Circulate Petitions are its proponents.

II. THE CALIFORNIA CONSTITUTION DOES NOT REQUIRE A SUPERMAJORITY VOTE FOR SPECIAL TAXES PROPOSED BY CITIZENS' INITIATIVES.

Defendant argues that Proposition G is invalid because it was not approved by a two-thirds vote of the electorate, which he contends is required by three different provisions of the California Constitution. The Court disagrees, and reaffirms its prior ruling that the constitutional requirements of a supermajority vote for taxes proposed by local governments do not apply to taxes proposed by voter initiative, such as Proposition G. That ruling is based in large part on the people's reserved right of initiative and on our Supreme Court's decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 (*Upland*).[5]

A. *California Cannabis Coalition v. City of Upland*

"The California Constitution, as amended by a series of voter initiatives, places limitations on the authority of state and local governments to collect revenue through taxes, fees, charges, and other types of levies." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1195; see *Jacks v City of Santa Barbara* (2017) 3 Cal.5th 248, 258-260.) In *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, the Court recently addressed a broadly similar issue to that presented here: whether these provisions, which limit the ability of state and local *governments* to impose taxes, "also restrict[] the ability of *voters* to impose taxes via initiative." (*Id.* at 930.) A careful examination of the Court's analysis and reasoning in *Upland* is central to the resolution of the issues presented here.

Upland involved a voter initiative ordinance that would have required medical marijuana dispensaries to pay an annual $75,000 licensing and inspection fee. The City of Upland determined

[5] The principal issues addressed here are currently pending before the Courts of Appeal, including two appeals from prior rulings of this Court (*Howard Jarvis Taxpayers Assn. v. City and County of San Francisco*, No. A157983, and *City and County of San Francisco v. All Persons Interested in the Matter of Proposition C*, No. A158645), a third in the First Appellate District (*Jobs & Housing Coalition v. City of Oakland*, A158977), and two related appeals in the Fifth Appellate District (*City of Fresno v. Fresno Building Healthy Communities* and *Fresno Building Healthy Communities v. City of Fresno*, Nos. F080264 and F080265). Although the Court's initial inclination was to stay this case pending the disposition of those appeals, the parties pressed the Court to decide the case in light of an impending trial date and to expedite the appellate process.

that the fee was actually a general tax. Because article XIII C, section 2(b) of the California Constitution precludes local governments from imposing general taxes unless they are submitted to voters at a general election, Upland refused to call a special election for the proposed initiative, and instead ordered the initiative submitted to the voters at the next general election. The initiative proponents sued, alleging that the City had violated the Elections Code by failing to submit the initiative to the voters at a special election. They also argued that article XIII C, section 2 did not apply because the charge proposed by the initiative was not a tax, nor was it imposed by local government. The trial court denied the writ petition, the Court of Appeal reversed, and the California Supreme Court granted review and elected to hear the case, even though the initiative at issue was defeated at the November 8, 2016 ballot, because the case presented "important questions of continuing public interest." (3 Cal.5th at 933.)

The Court held that the requirement in article XIII C, section 2(b) that general taxes be submitted to voters at a general election did not apply to taxes proposed by voter initiative. (*Id.* at 943, 945.) Although the technical holding of the case thus was relatively narrow, the Court's analysis and reasoning extended far more broadly. The Court viewed the issue before it as involving "the interplay of two constitutional provisions": the provisions of article II of the state Constitution safeguarding the people's initiative power, and article XIII C's limitation on the ability of local governments to impose (or increase) general taxes. (*Id.* at 930.) Resting its holding on the importance of the people's initiative power, the plain language of article XIII C, the constitutional provision in question in that case, and other evidence of the purpose of that provision, the Court concluded that "article XIII C does not limit voters' 'power to raise taxes by statutory initiative.'" (*Id.* at 931, quoting *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 251.) As it explained,

> A contrary conclusion would require an unreasonably broad construction of the term "local government" at the expense of the people's constitutional right to direct democracy, undermining our longstanding and consistent view that courts should protect and liberally construe it. . . . Without a direct reference in the text of a provision—or a similarly clear, unambiguous indication that it was within the ambit of a provision's purpose to constrain

> the people's initiative power—we will not construe a provision as imposing such a limitation.

(*Id.*)

The Court began its analysis with the text of article XIII C, section 2, which applies only to actions taken by a "local government." (*Id.* at 936.) Article XIII C defines that term to mean "any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity." (Cal. Const., art. XIII C, § 1(b).) The Court rejected Upland's argument that this definition is broad enough to include the electorate. (3 Cal.5th at 937.) It reasoned that the common understanding of local government does not include the electorate; that the term "local government" was used in the findings and declarations of Proposition 218, by which article XIII C was enacted in 1996, to refer to municipalities, not their voters; and that standard canons of statutory interpretation would preclude such a reading. (*Id.* at 937-939; see also *id.* at 946-947 ["nothing in the text of article XIII C, or its context, supports the conclusion that the term 'local government' was meant to encompass the electorate."].)

Moreover, the Court emphasized, nothing in Proposition 218 showed any intent to burden voters' power to propose and adopt initiatives concerning taxation. Rather, the Court observed, the only portion of article XIII C that mentioned the voters' direct democracy rights appears in section 3, which suggests that section 2 was not intended to limit those rights. (See *id.* at 938-939.) Further, nothing in the ballot materials suggested that the voters intended to constrain the power of the initiative. "To the contrary: The crux of the concern repeatedly reflected in the ballot materials is with local governments and politicians—not the electorate—imposing taxes. Nowhere in the materials is there any suggestion that Proposition 218 would rescue voters from measures they might, through a majority vote, impose on themselves." (*Id.* at 940.) Significantly in light of the issues presented here, the Court found further support for that reading in the ballot materials for Proposition 13, which added article XIII A in 1978, and Proposition 26, which amended article XIII C in 2010. (*Id.* at 941.)

Finally, the Court adopted a "clear statement" rule in order to protect the initiative power, which is liberally construed. "Without an unambiguous indication that a provision's purpose was to constrain the initiative power, we will not construe it to impose such limitations. Such evidence might include an explicit reference to the initiative power in a provision's text, or sufficiently unambiguous statements regarding such a purpose in ballot materials." (*Id.* at 945-946.)

Two Justices dissented in part in *Upland*, disagreeing with the majority's core conclusion that "when article XIII C speaks of taxes imposed by local government, it means taxes enacted by the city council or other public officials; local taxes enacted by voter initiative are exempt." (*Id.* at 949 [conc. and dis. opn. of Kruger, J., joined by Liu, J.].) The dissenting Justices anticipated the very issue presented here, observing that because the language of article XIII C, section 2(b) is "essentially identical" to that of section 2(d), "from here on out, special taxes can be enacted by a simple majority of the electorate" rather than the two-thirds vote otherwise required for approval of a special tax. (*Id.* at 956.)

Here, the City informed voters in the Voter Information Pamphlet, and asserts again here, that Proposition G required only a majority vote to pass. (Arntz Decl., Ex. F at 118-119 ["This measure requires 50%+1 affirmative votes to pass."].)[6] Defendant disagrees. He bases his contention that Proposition G required a two-thirds or supermajority vote on three different provisions of the California Constitution: (1) article XIII C, section 2(d); (2) article XIII A, section 4; and (3) article XIII D, section 3(a)(2).[7] The Court addresses each in turn.

[6] In contrast, in the pending appeal involving Measure AA, a proposed parcel tax, the City of Oakland advised voters in the ballot pamphlet that a two-thirds vote would be required. (Def. RJN, Ex. B (*Jobs & Housing Coalition v. City of Oakland*, No. RG19005204).)

[7] The City does not dispute that Proposition G involves a "special tax" within the meaning of these provisions. (See Cal. Const., art. XIII C, § 1(d) [defining special tax as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund"]; *Jacks v. City of Santa Barbara*, 3 Cal.5th at 258-260.) Likewise, it is undisputed that Proposition G involves a parcel tax within the meaning of article XIII D.

B. Article XIII C, Section 2(d) (Proposition 218)

Article XIII C, section 2(d), which was added to the Constitution in 1996 by an initiative commonly known as Proposition 218, provides in pertinent part, "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." This provision is a different subdivision of the same provision, section 2 of article XIII C, that was at issue in *Upland*. In the Court's view, the analysis and reasoning in that case lead inescapably to the conclusion that the requirement in article XIII C, section 2(d) that a special tax must be adopted by a two-thirds vote does not apply to taxes proposed by voter initiative, such as Proposition G.

First, the two provisions employ parallel and nearly identical language. (Compare Cal. Const., art. XIII C, § 2(b) ["No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote."] with *id.*, § 2(d) ["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."]; see *Upland*, 3 Cal.5th at 956 ["The critical language we are construing here . . . appears in essentially identical form in article XIII C, section 2(d)"] [dis. opn. of Kruger, J.]; *id.* at n.7.) Critically, they share the common term "local government," which the Supreme Court squarely held is not "broad enough to include the electorate." (*Upland*, 3 Cal.5th at 937.)

Defendant contends that despite this holding, "local government" as that term is used in Section 2(d) nevertheless should be interpreted to include the electorate because "words can have different meanings in the same statute where necessary to effectuate the voters' intent." Defendant's argument is risible. Section 1(b) of article XIII C expressly defines "local government" to mean "any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity." As a matter of logic, that term—which is defined "[a]s used in this article," including *all* of Section 2—must be given the same meaning in both subdivisions.

Moreover, the balance of the Court's reasoning in *Upland* applies equally here, and supports the same conclusion. In its opinion, the Court repeatedly referred generally to article XIII C, and not merely to Section 2(b) of that article. (See, e.g., 3 Cal.5th at 930 ["The question before us is whether article XIII C also restricts the ability of *voters* to impose taxes via initiative"; "we agree with the Court of Appeal that article XIII C does not limit voters' 'power to raise taxes by statutory initiative'"]; *id.* at 940-941 [concluding that "article XIII C employs the term 'local government' as it is commonly understood and that the provision's intended purpose did not include limiting voters' 'power to raise taxes . . . by statutory initiative.'"]; *id.* at 946-947 ["nothing in the text of article XIII C, or its context, supports the conclusion that the term 'local government' was meant to encompass the electorate"].) The Court's reasoning related to Proposition 218, and its ballot materials, *as a whole*, and not merely to the particular subdivision of the provision before it. The Court concluded that neither Proposition 218 nor its ballot materials contained any "clear statement or equivalent evidence" that it was intended to constrain the people's power of initiative. (*Id.* at 946.) That conclusion applies equally here.[8]

Defendant relies heavily on a passage from the majority opinion:

> [W]hen an initiative's intended purpose includes imposing requirements on voters, evidence of such a purpose is clear. In article XIII C, section 2, subdivision (d), for example, the enactors 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. [Citation.] 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).

[8] Remarkably, at the hearing, Defendant's counsel asserted that the Supreme Court erred in its reading of Proposition 218's ballot materials. However, the Legislative Analyst's analysis to which Defendant refers makes no reference to whether the two-thirds vote requirement would apply to taxes imposed by voter initiative, but rather reiterates that the measure "would constrain *local governments'* ability to impose fees, assessments, and taxes." (Def. RJN, Ex. E at p. 73 (emphasis added).) In any event, of course, this Court is bound by *Upland*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

(*Id.* at 943.) Defendant highlights in particular the phrase, "the voters explicitly imposed a procedural two-thirds vote requirement *on themselves*," suggesting that the Court believed the two-thirds voting requirement in Section 2(d) would continue to apply to voter initiatives. However, the immediately preceding sentence refers to imposition of a tax by a local government, which as discussed does not include the electorate. Thus, this language appears to imply that the voters imposed the two-thirds voting requirement on themselves *only with respect to taxes placed on the ballot by local government* (e.g., in San Francisco, by the Board of Supervisors). It does not explicitly impose this heightened procedural burden on *all* special taxes voted on by the electorate, whatever their source. The Court cannot view this single sentence as requiring a different conclusion, particularly when the entire thrust of the analysis and reasoning of the Court's opinion points in the opposite direction. (See also *id.* at 956 n.7 [observing that the majority opinion contains language that "could be read to suggest that article XIII C, section 2(d) should be interpreted differently from section 2(b)," but expressing the view that "Sections 2(b) and 2(d) are, in all pertinent respects, indistinguishable" and there is no basis for construing them differently] [conc. and dis. opn. of Kruger, J.].)

Defendant also insists that Proposition 218 must be construed to apply to voter initiatives because in enacting it, the voters endorsed the "historical understanding," purportedly reflected in cases such as *Altadena Library Dist. v. Bloodgood* (1987) 192 Cal.App.3d 585 and *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, that local special taxes require a two-thirds vote of the electorate, even if the tax is proposed by initiative petition. However, neither case supports Defendant's position, much less rises to the level necessary to satisfy *Upland*'s clear statement rule. *City of Dublin* held that a surcharge on waste disposal imposed by a voter initiative was not a special tax within the meaning of Proposition 13, but rather was a valid regulatory fee. (14 Cal.App.4th at 280-285.) As a result, it did not reach the question whether the initiative required a two-thirds vote. And *Altadena Library Dist.* held only that a library district was a "special district" within the meaning of Proposition 13 (in addition to rejecting a novel claim that the supermajority

requirement triggered close scrutiny as a matter of equal protection). (*Id.* at 588.) It did not address the issue presented here (which was not raised): whether the two-thirds vote requirement of Proposition 13 applies to special taxes enacted by voter initiative. Neither case is authority for the proposition for which Defendant claims it stands. (See *People v. Brown* (2012) 54 Cal.4th 314, 330 [it is axiomatic that "cases are not authority for propositions not considered."].) In any event, of course, both cases long predated the Supreme Court's 2017 decision in *Upland*, which is binding on this Court. (See *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 41 [regardless of whether a recent California Supreme Court decision may be characterized as an intervening change in law, lower courts are bound to follow it].)

C. Article XIII A, Section 4 (Proposition 13)

Defendant also contends that Proposition G is invalid because article XIII A, section 4 of the California Constitution, which was enacted by Proposition 13 in 1978, required a two-thirds vote. Article XIII A, section 4 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." This provision, "although written in permissive terms, was intended to circumscribe the taxing power of local government." (*Rider v. County of San Diego* (1991) 1 Cal.4th 1, 6.) The same conclusion follows with regard to this provision as to article XIII C, section 2(d): it does not apply to taxes enacted by voter initiative.

First, article XIII A, section 4 employs closely similar language to that of Article XIII C, section 2(d). The latter, as we have seen, prohibits any "local government" from imposing a special tax without a two-thirds vote, and defines that term to mean "any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity." Article XIII A, section 4 similarly applies to "Cities, Counties and special districts"—all of which are public agencies specifically referred to in article XIII C's definition. As Defendant acknowledges, Proposition 218, the "Right to Vote on Taxes Act," "is Proposition

13's progeny. Accordingly, it must be construed in that context." (*Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838.) Thus, the analysis must be the same for these two similarly worded provisions.

Moreover, just as with Proposition 218, there is nothing in either the text of Proposition 13 itself or in the accompanying ballot materials that provides any "clear statement" of the voters' intent to constrain the people's initiative power. To the contrary, as the Supreme Court recognized in *Upland*, the ballot materials concerning Proposition 13 "similarly evince a specific concern with *politicians* and their imposition of taxes without voter approval. [Citations.] . . . All of this is more evidence that the drafters of these propositions [Propositions 13 and 26], like the drafters of Proposition 218, simply did not contemplate that they were affecting the power of voters to propose taxes via initiatives." (3 Cal.5th at 941;[9] see also *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249 ["Nothing in the official ballot pamphlet [of Proposition 13] supports the inference that the voters intended to limit their own power to raise taxes in the future by statutory initiative."].)

In short, the same conclusion follows under Proposition 13 as under Proposition 218: the supermajority vote requirement applies only to taxes imposed by local governments, not those enacted as a result of voter initiatives.

D. Article XIII D, Section 3(a)(2)

Finally, Defendant contends that a supermajority vote on Proposition G was required by article XIII D, section 3(a)(2) of the California Constitution. That provision, which was also added by Proposition 218 in 1996, states, "No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel or property or upon any person as an incident of property ownership except . . . (2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIIIA." (Cal. Const., art. XIII D, § 3(a)(2).) Defendant's position that this provision mandates a supermajority vote on Proposition G is flawed in at least two respects.

[9] Defendant's contention that *Upland* "did not address" Proposition 13 is simply wrong.

First, the provision was enacted in 1996 as part of Proposition 218, the same voter initiative by which article XIII C was enacted. In *Upland*, the Court explicitly observed that its interpretation of article XIII C was "consistent with article XIII D, which, like article XIII C, was added by Proposition 218." (3 Cal.5th at 939.) And it explicitly noted "the absence of text in articles XIII C *or D*" to support the view that the term "local government" encompasses the electorate, "thus burdening voters' power to propose and adopt initiatives concerning taxation." (*Id.* at 940 (emphasis added).) As discussed above, the Supreme Court rejected the notion that anything in Proposition 218 or its ballot materials contained any "clear statement or equivalent evidence" that it was intended to constrain the people's power of initiative, and held squarely that "article XIII C does not limit voters' 'power to raise taxes by statutory initiative.'" (*Id.* at 931, 946.) Defendant offers no evidence or reason to reach a different conclusion as to article XIII D merely because it is found in a different article of the same initiative. Such an inconsistent interpretation of a unitary initiative would run afoul of the standard rule that when two statutes or other provisions "touch upon a common subject, they are to be construed in reference to each other, so as to 'harmonize the two.'" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779.)

Second, article XIII D, section 3(a)(2) refers to taxes "assessed by any agency." The term "agency," in turn, is defined as "any local government as defined in subdivision (b) of Section 1 of Article XIII C." (Art. XIII D, § 2(a).) Thus, "agency" is synonymous with the term "local government"—the same term used in article XIII C, section 2, which the *Upland* Court found is not "broad enough to include the electorate." (*Upland*, 3 Cal.5th at 937.) Indeed, the *Upland* Court observed that interpreting "agency" to include voters "seems, at best, quite an improbable version of what was plausibly contemplated when this provision was enacted." (*Id.* at 939-940.) Thus, "Article XIII D addresses the imposition of assessments and property-related fees by local agencies," (*id.* at 939), not by the voters. (See also art. XIII D, § 2(b) [defining "assessment" as "any levy or charge upon real property *by an agency* for a special benefit conferred upon the real property" (emphasis added)].) As the Court's explicit reference to "imposition" of taxes makes

clear, Defendant's reliance on one narrow technical definition of the term "assess" is misplaced. *Upland* explicitly rejected a similar attempt to equate the term "impose" in article XIII C with "the collection of taxes by a local government," concluding that "impose" in this context means enacted. (3 Cal.5th at 944-945.)

III. PROPOSITION G IS NOT INVALID UNDER THE SAN FRANCISCO CHARTER.

Finally, Defendant contends that the San Francisco Charter required a two-thirds vote on Proposition G. That contention is based on the following reasoning: (1) article XVII of the Charter defines "initiative" to include "a proposal by the voters with respect to any ordinance, act or other measure which is within the powers conferred upon the Board of Supervisors to enact"; (2) the Board of Supervisors is not empowered to enact a special tax without the concurrences of two-thirds of the electors; (3) therefore, the voters' initiative power is similarly constrained.

This argument is foreclosed by a long line of California Supreme Court authority, which draws a critical distinction between *substantive* limitations on the Board of Supervisors' legislative authority and *procedural* requirements that the Board must follow to enact certain kinds of laws. While the Charter restricts the voters from using their reserved power of initiative to enact any measure that, because of its nature or subject matter, is *substantively* beyond the power of the Board of Supervisors to enact, the Charter does not require the voters, when they legislate by initiative, to follow the *procedures* the Board would have to follow in order to enact similar legislation. In other words, "*procedural* requirements imposed on the Legislature or local governments are presumed not to apply to the initiative power absent evidence that such was the intended purpose of the requirements." (*Upland*, 3 Cal.5th at 942.) There, the Court explained that "where legislative bodies retain lawmaking authority subject to procedural limitations, e.g., notice and hearing requirements [citation] or *two-thirds vote requirements* [citation], we presume such limitations do not apply to the initiative power absent evidence that such was the restrictions' intended purpose." (3 Cal.5th at 942 [emphasis added]; see also *Kennedy Wholesale*, 53 Cal.3d at

249 [reasoning that while "the voters' power is presumed to be coextensive with the Legislature's," that does not mean that "legislative *procedures*, such as voting requirements, apply to the electorate"].) It follows that the two-thirds vote requirement placed on the Board of Supervisors must be presumed not to apply to the electorate, absent evidence of a clear indication that it was intended to do so. Defendant points to no such evidence.

Indeed, in *Upland*, the City of Upland argued, in terms nearly identical to Defendant's position here, that "'statutory and constitutional limits on the power of local government apply equally to local initiatives.'" (*Id.*) The Court rejected that argument, underlining the distinction summarized above between limits on the substantive authority of the legislative body and procedural requirements governing its exercise of such power:

> When a local government lacks authority to legislate in an area, perhaps because the state has occupied the field [citation], that limitation also applies to the people's local initiative power. [Citation.] In contrast, where legislative bodies retain lawmaking authority subject to procedural limitations, e.g., notice and hearing requirements [citation] or *two-thirds vote requirements* [citation], we presume such limitations do not apply to the initiative power absent evidence that such was the restrictions' intended purpose.

(*Id.* [emphasis added].)[10]

In short, the procedural two-thirds vote requirement in the California Constitution that limit the Board of Supervisors' authority to impose new taxes does not apply to the voters' initiative power, either directly under those provisions or indirectly under the San Francisco Charter.

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[10] Numerous other cases reach the same conclusion. (See, e.g., *Kennedy Wholesale, Inc.*, 53 Cal.3d at 249 [while "the voters' power is presumed to be coextensive with the Legislature's," that does not mean that "legislative *procedures*, such as voting requirements, apply to the electorate"]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785 ["it is well established in our case law that the existence of procedural requirements for the adoptions of local ordinances generally does not imply a restriction of the power of initiative or referendum."]; *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 594 ["Procedural requirements which govern *council* action . . . generally do not apply to initiatives, any more than the provisions of the initiative law govern the enactment of ordinances in council."].)

CONCLUSION

For the foregoing reasons, the City's motion for summary judgment is granted, and Defendant Nowak's cross-motion for summary judgment is denied.

IT IS SO ORDERED.

Dated: May 11, 2020

ETHAN P. SCHULMAN
JUDGE OF THE SUPERIOR COURT

CGC-18-569987
CITY AND COUNTY OF SAN FRANCISCO VS. ALL PERSONS INTERESTED IN THE MATTER OF

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on May 11, 2020 I served the foregoing on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: May 11, 2020

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