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October 19, 2020

By email to cityclerk@sandiego.gov

San Diego City Council
c/o City Clerk Elizabeth Maland
202 C St., Second Floor
San Diego, CA 92101

Re: October 20, 2020 City Council Meeting
Closed Session Agenda Item CS-2

Dear City Council Members:

I am writing to you on behalf of Alliance San Diego, a nonprofit community empowerment organization working to ensure that all people can achieve their full potential in an environment of harmony, safety, equality, and justice. We have been informed that the City Council has scheduled a closed-session item on the October 20, 2020, City Council agenda to consider the initiation of litigation to change the vote threshold for the adoption of Measure C, which appeared on the March 3, 2020, primary election ballot and failed to receive the affirmative vote of two-thirds of the electorate.

Alliance San Diego takes no position as to whether, *on a prospective basis*, an initiative — like Measure C — that proposes to impose a special tax may lawfully be adopted by a majority vote of the people, or whether either article XIII A, section 4, or article XIII C, section 2, of the California Constitution applies and requires that such a measure be approved by a two-thirds vote. As the Council is aware, this issue is currently being litigated in the California courts. Although a division of the First District Court of Appeal in Northern California ruled earlier this year that a simple majority vote was sufficient (see *City and County of San Francisco v. All Persons Interested in the Matter of Proposition C* (June 30, 2020), 51 Cal.App.5th 703), there are two other cases that are currently pending in the courts of appeal on this same issue, and in both of those cases the superior courts ruled that a two-thirds affirmative vote was required for adoption of the initiatives. (See *Jobs & Housing Coalition v. City of Oakland* (1st DCA Case No. A158977); *City of Fresno vs. Fresno Building Healthy Communities* (5th DCA Case No. F080264).) Neither the California Supreme Court nor the Fourth District Court of Appeal, with jurisdiction over cases arising in San Diego, has yet to address and resolve the issue of whether a simple majority or a two-thirds vote requirement applies to an initiative like Measure C.

Alliance San Diego, however, strenuously objects to any suggestion that a determination could ***retroactively*** be made that a majority vote was sufficient to adopt Measure C in the March 3, 2020, election, or that the City could now initiate litigation — more than *six months* after the results of the election were certified — seeking to change the outcome of that election and to have Measure C declared adopted on that basis. The voters were explicitly told that a two-thirds vote was required for the passage of Measure C. For the City Council now to take the position — after the initiative failed to reach the two-thirds vote threshold — that Measure C nevertheless passed because it received a majority of the vote would upend voter expectations, violate voter trust, and undermine the will of the voters.

San Diego's voters were expressly told in the official ballot materials for Measure C that "[p]assage of this measure *requires the affirmative vote of two-thirds of those qualified electors* voting on the matter." Likewise, City Clerk Maland's April 2, 2020, official certification of the results of the March 3, 2020, election confirmed that "[t]his proposition requires a two-thirds majority to be adopted by the voters," and that Measure C fell short of that threshold by receiving the affirmative votes of only 65.24% of the electorate. Significantly, these critical facts distinguish Measure C from the very different circumstances confronting the court of appeal in the *San Francisco* litigation and instead bring the current situation within the established legal principles prohibiting the threshold for adopting a ballot measure to be changed from what the voters were told and months after the election has been completed.

In the San Francisco case, the City initiated litigation on January 28, 2019, seeking to validate the legality of Proposition C, an initiative proposing to impose an additional gross receipts tax to fund homeless services, which the City contended had been legally and validly adopted by San Francisco's voters in the November 2018 election because it received the affirmative votes of 61.34% of the voters who voted on the measure. Notably, in marked contradiction to what occurred here with respect to Measure C, the City of San Francisco had taken the position *prior to the election* that Proposition C only required a simple majority vote for passage, and the official Digest and Analysis in the Voter Information Pamphlet explicitly told the voters that "[t]his measure requires 50%+1 affirmative votes to pass." When Proposition C surpassed the 50%+1 threshold in the November election, the City certified that the measure had indeed been adopted, and its validation action filed shortly thereafter sought the court's approval of that determination, which both the trial court and the court of appeal provided over the objection of citizens' groups who argued that a two-thirds majority should have been required.

In both the Oakland and Fresno cases, by contrast — as here — the cities had taken the position prior to the election that the proposed initiatives imposing special taxes required a two-thirds vote for passage, and when the measures did not achieve that threshold, the superior courts ruled that they had failed to be enacted. Indeed, the Oakland case is very similar to the circumstance that the City Council is now apparently considering. In that case, the voters were told in the official ballot materials that Measure AA, an initiative proposing to impose a parcel tax to fund educational services, required a two-thirds vote for passage. The initiative only received the approval of 62.7% of the electorate, but the City Council nevertheless enacted a

resolution declaring that Measure AA had passed because it had received a majority vote. The City was then sued by a number of plaintiffs, who sought a declaration that Measure AA was unenforceable and an injunction prohibiting the City of Oakland from enforcing the measure, as well as a refund of any taxes collected pursuant to it. The Superior Court ruled in plaintiffs' favor, concluding that special taxes placed on the ballot by an initiative are governed by the state Constitution's two-thirds voting requirement.

Significantly, the Superior Court in the Oakland case also ruled that "the City is barred from enforcing Measure AA because the ballot measures prepared by the City unambiguously advised voters that Measure AA would require two-thirds of the votes to pass. Allowing Measure AA to be enacted with less than two-thirds of the votes *would constitute 'a fraud on the voters*.'" (Order Granting Motion for Judgment on the Pleadings in *Jobs & Housing Coalition v. City of Oakland* (Oct. 15, 2019), 2019 WL 5405850, *2 [emphasis added].) In so ruling, the court relied upon established appellate cases such as *Hass v. City Council of City of Palm Springs* (1956) 139 Cal.App.2d 73, in which the court of appeal likewise rejected a city council's attempt to disregard the vote cast at an election by adopting a majority vote threshold that was different than the three-fourths majority requirement that was stated in the ballot materials. As the court stated in that case: "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. It may well be that many voters who were not entirely convinced as to the wisdom of adopting that ordinance were willing to agree to it in the event that 3/4ths of the voters desired to make that change." (*Id*. at p. 76.)

So too here, it would constitute "a fraud on the voters" to belatedly determine that Measure C was adopted by a majority vote when the voters were explicitly told in the ballot materials that Measure C required the affirmative vote of two-thirds of the electorate for passage. Both the campaigns for and against the initiative and the voters themselves are entitled to rely upon the official information that they are provided by the City prior to the election and to shape their conduct accordingly. Disregarding what the voters have been told and changing the vote threshold for Measure C after the election has been concluded will just breed more cynicism and disrespect for the City and the City Council, at a time when the voters' faith in our institutions of government is at an all-time low and needs to be renewed.

Moreover, even if there were some legal justification for challenging the stated two-thirds vote threshold for Measure C's passage, it is far too late to do so now. The law, particularly with regard to popular elections, demands finality. If the proponents of Measure C or anyone else believed that the initiative was subject to a simple majority vote requirement, they should have made that argument *prior to the election*, by challenging the statement in the ballot pamphlet informing voters that a two-thirds vote was required for passage. (See *McKinney v. Superior Court* (2004) 124 Cal.App.4th 951 [voter challenging San Diego mayoral runoff election on ground that write-in candidate was ineligible for office was required to bring his challenge before the election].) Alternatively, the proponents could perhaps have brought an election contest within 30 days of the declaration of the results of the election pursuant to Elections Code section 16100, subdivision (f), alleging that an error was made in canvassing the returns that was sufficient to change the outcome of the election. Or — as was done in the San Francisco,

Oakland, and Fresno cases — the City or some other persons or organizations could have brought a validation action (or a "reverse validation" action) within 60 days of the City Clerk's certification of the results of the election seeking a judicial determination that Measure C should have been subject to only a majority-vote, rather than a two-thirds-vote, requirement. (See, e.g., *McLeod v. Vista Unified School Dist*. (2008) 158 Cal.App.4th 1156, 1166 ["The validating statutes contain a 60–day statute of limitations to further the important public policy of speedy determination of the public agency's action. . . . [A]s to matters which have been or which could have been adjudicated in a validation action, such matters ... must be raised within the statutory limitations period in [CCP] section 860 et seq. or they are waived."] [citations omitted].) It has now been *more than six months* since the results of the March 3, 2020, primary election were certified by the City Clerk and Measure C was confirmed not to have achieved the two-thirds majority vote required for adoption. The statute of limitations has long since expired for the City to initiate any litigation seeking to validate the vote threshold for the Measure C election, much less to attempt to *change the outcome* of the March election.[1]

For all of the above reasons, Alliance San Diego strongly opposes any belated attempt by the City to retroactively change the two-thirds vote requirement for the adoption of Measure C, and we urge the City Council not to initiate any litigation towards that end. The voters were entitled to rely upon what they were told in that regard in the official ballot materials. If the City or the proponents of Measure C believe that the law now only requires a majority vote for passage of an initiative imposing a special tax, let them promote and adopt that position on a *prospective* basis and qualify another initiative for the ballot in which the voters are informed that a simple majority vote is all that is required for passage.

Sincerely,

Fredric D. Woocher

cc: City Attorney Mara W. Elliott
(by email to cityattorney@sandiego.gov)

[1] If the City were to seek to change the outcome of the Measure C election based upon the retroactive imposition of a majority vote requirement, what is to prevent it or another person from seeking to change the outcome of the many other elections that have occurred in recent years on initiatives purporting to require a two-thirds vote for passage?