



City of Pomona

Impact Analysis of

“An Initiative Measure to Enact a Three-Quarter Percent (0.75%) Increase in the City’s Utility User Tax for a Period of Ten Years Unless Extended by the City Council, and Establish an Exemption of the Utility User Tax for Legally Handicapped Residential Rate Payers”

Pursuant to
Elections Code Section 9212

December 17, 2018

Elections Code Section 9212 Impact Report

Table of Contents

I.	Introduction	Page 2
II.	Overview of the Initiative	Page 3
III.	Legal Analysis	Page 3
IV.	Fiscal Analysis	Page 4
V.	Conclusion	Page 6

I. Introduction

This impact report is prepared jointly Michael Colantuono from law firm, Colantuono, Highsmith, Whatley, PC (CHW) and the Finance Department at the request of City Council at its November 19, 2018 Council Meeting to evaluate the impacts of a proposed initiative pursuant to Elections Code section 9212.

On August 28, 2018, the City of Pomona received an initiative petition entitled “An Initiative Measure to Enact a Three Quarter Percent (0.75%) Increase in the City’s Utility User Tax (UTT) for a Period of Ten Years Unless Extended by the City Council, and Establish an Exemption of the User Utility Tax for Legally Handicapped Residential Rate Payers” (the Initiative). The Initiative, if approved by voters, would amend the Pomona City Code. The Initiative imposes an (0.75%) increase to the City’s current UUT Tax of 9% and includes an exemption for any legally disabled residential rate payers.

At its meeting on November 19, 2018 the Pomona City Council considered three possible actions allowed under Election Code Section 9212: Adopt the ordinance outright, submit the ordinance to the voters at the next General Municipal Election, or to request an Impact Report on financial and other related impacts, to be completed and submitted to Council within thirty (30) days pursuant to Elections Code Section 9212. The Council chose to direct staff to prepare the report, which shall consider the following potential impacts of the initiative:

- 1) Legal Analysis
- 2) Fiscal Analysis

The report is being presented to Council at the December 17, 2018 City Council Meeting, at which point the Council will then have to decide whether to adopt the Initiative as written or place it on the next general ballot. These two options exist because the petition qualified to be placed on the ballot as it was ultimately determined that the petition received a sufficient number of signatures to be placed on the ballot. Due to legally required election timelines, the next general election at which this matter could be considered is November 3, 2020.

The City requested CHW’s assistance in preparing the legal analysis of this report and the Finance Department completed a fiscal analysis that includes the financial impact of a (0.75%) increase to the UUT and the potential impact of the exemption of UUT for legally handicapped residential rate payers. Finally, the Appendix to this report contains the memorandum from Michael Colantuono and a spreadsheet completed by the Finance Department summarizing the fiscal analysis.

II. Overview of the Initiative

“An Initiative Measure to Enact a Three Quarter Percent (0.75%) Increase in the City’s Utility User Tax (UTT) for a Period of Ten Years Unless Extended by the City Council, and Establish an Exemption of the User Utility Tax for Legally Handicapped Residential Rate Payers” (the Initiative) would amend the City’s Municipal Code Chapter 50, Article V, Section 50-203, Section 50-204, Section 20-205, Section 20-206, and Section 50-218.

The Initiative would add an additional three-quarter percent (0.75%) tax and shall be imposed upon both residential and commercial/industrial users, resulting in the rate of nine and three-quarter percent (9.75%). The tax rate shall remain at nine and three-quarter percent (9.75%) for a period of ten (10) years from the Effective Date. At the end of the ten (10) year period, the rate shall be suspended to nine percent (9%), unless the City Council overrides the suspension of majority vote. The rate of nine and three-quarter percent (9.75%) will be applied to the telecommunications services, electrical energy, gas, and water charges.

The Initiative also indicates that the tax imposed at the rate of nine and three-quarter percent (9.75%) shall not apply to any legally disabled persons with such utility accounts in his or her name. Legally disabled persons are defined as a person who meets the definition of blind or disabled as defined in Section 1614(a)(2) and/or (3) of Part A of Title XVI of the proof of qualifications for such exemptions on an annual basis.

III. Legal Analysis

The City has previously engaged Michael Colantuono for legal analysis of other General Fund Revenues and reached out to him again to review this Initiative. Michael Colantuono has specialized in municipal law since 1989. He is certified by the California State Bar’s board of Legal Specialization as a Specialist in Appellate Law and is also a member of the California Academy of Appellate Lawyers, an association of fewer than 100 of the most distinguished appellate lawyers in California. He has argued five cases in the California Supreme Court and appeared in all six of the California District Courts of Appeal.

Michael Colantuono provided the following observations:

1. If City voters adopt the measure, it is my opinion it will be enforceable. It complies with the laws governing taxes of this type. The law allows very deferential judicial review of exemptions from taxes, requiring only a rational basis. (E.g., *Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1032 fn. 7 [tax on cannabis commercial activity as a “sin tax” did not violate equal protection].)
2. The provisions “suspending” the 0.75% increase after 10 years, but empowering the Council to override them, are lawful. They have the same effect as the boilerplate of section 6 copied from earlier City measures allowing the Council to raise the tax to any level at or below the 9.75% ceiling set by voters. (Cf. Gov. Code, § 53750, subd. (h) [defining the tax “increases” which require voter approval under Proposition 218].)

4. The effective date of the tax will be triggered by a notice the City must give under Public Utilities Code section 799(a)(6). Utilities are permitted 90 days from that notice to begin collecting the tax. The City could give it as soon as the election results are certified.

5. Section 50-218(d)(1) of the ordinance could be read to limit the tax exemption to legally disabled people living in Pomona when the measure is approved — at their present and future addresses. However, the state and federal Constitutions will not allow the City to discriminate against newcomers in this way, so the measure will be read to extend the credit to all disabled residents of the City whether they live there when the measure is approved or arrive later. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069 [anti-camping ordinance did not violate the “right to travel”].)

6. The ordinance’s definition of “legally disabled” is drawn from the Social Security statute, so the City will be able to administer the exemption by requiring proof that applicants for the exemption receive Supplemental Social Security (SSI) benefits.

7. Section 50-218(e) of the ordinance has a terse provision regarding the mechanics of exemptions. Nothing in it is inconsistent with section 50-219 of the City’s existing ordinance, which provides detailed provisions regarding exemptions. Accordingly, those provisions apply to the proposed exemption just as they do to existing exemptions.

CHW’s Conclusion: Whether the ordinance is a good idea is a policy matter for the Council and voters. As to legal issues, the measure is — in my professional opinion — lawful and can be enforced if voters approve it.

IV. Financial Analysis

Using the UUT estimates included in the FY 2018/2019 City Budget as a baseline, passage of the initiative herein discussed is expected to generate approximately \$14,500,000 in total new revenue over ten years or \$1.45M annually. This represents an increase to the UUT during the ten-year period from 9% to 9.75%. It should be noted that this estimate does not consider reduced amounts resulting from low income or legally handicap exemptions to the UUT, future fluctuations in utility usage levels due to either climate or conservation, nor does it attempt to forecast any changes by individual utilities, some of which have been extremely volatile in recent years.

If 100% of disabled households applied for the exemption (based on the percentage of disabled households per www.disabledworld.com) the exemption amount could be as high as \$1.4M annually, which would ultimately make the net effect of the initiative \$0 to the General Fund. (See Table 1 on next page). In the past, up to 10% of low income households have actually come in to apply for the UUT exemption. If this same percentage were applied to calculate the possible exemption for disabled households, the amount could average around \$34K - \$56K annually.

FY 2018-2019 UUT Budget @ 9%	17,350,000.00
UUT Estimate at 9.75%	18,795,833.33
Projected Financial Impact of Initiative	1,445,833.33
<div style="border: 1px solid black; padding: 5px; text-align: center;"> If 100% of disabled households applied for exemption </div>	
Estimated exemptions based on statistics provided on www.DisabledWorld.com*	1,407,560.83
Estimated exemptions based on statistics provided on United State Sensus Bureau**	844,536.50
<small>*10% of Pomona Households are disabled per DisabledWorld.com **6% of Pomona Households are disabled per US Census Bureau</small>	

Table 1

There were numerous assumptions that had to be made to estimate the impact of the exemption proposed in this Initiative. Those assumptions include:

- The gross impact of \$1.45M was based solely on the FY 2019 budget it does not account for fluctuations with prevailing utility rates or usage levels.
- There are 28,503 water accounts Citywide, of which 4,772 (17%) are non-residential and would have no basis for exemption from the tax.
- The number of residential accounts is 23,731 (83%)
 - It should be noted; however, that the total number of residential water accounts is by nature under-represented, since many multi-family units are not metered on an individual basis. The impact of this could not be factored into the calculation for exemptions.
- While residences make up a theoretical 83% of all utility accounts in Pomona, assuming that the average business most likely has higher average bills would result in a diminished percentage of UUT attributable to residential accounts.
- If the assumption that the average business' total utility bills is twice as high as a residence, the share of the residential UUT drops to 67%; if the bills are only 150% of residence's total bills, the residential share of UUT is 75%.
- The projected annual UUT is \$18,795,833. If the residential share is 67% the residential UUT revenue subject to exemption is \$12.5M per year. If the residential share is 75% the residential UUT revenue subject to the exemption is \$14M per year.
- The website www.disabledworld.com provided statistics that indicated 10% of Pomona's population is disabled. If all 10% of Pomona's disabled population applied for an exemption, the UUT increase of \$1.4M would be offset by \$1.25M – \$1.4M in exemptions. Details of this calculation can be found on a spreadsheet provided in the Appendix.
- The website <https://www.census.gov/quickfacts/pomonacitycalifornia> provided statistics that indicated that 6% of Pomona's population is disabled. If all 6% of Pomona's population applied for an exemption, the UUT increase would be offset by \$750K - \$845K in exemptions. Details of this calculation can be found on a spreadsheet provided in the Appendix.

V. Conclusion

Based upon the foregoing analysis, we make the following conclusions about the Initiative.

- ☐ The Ordinance is lawful and can be enforced if the voters approve it.
- ☐ The estimated increase to UUT revenues is \$1.45M as a result of increasing the current UUT revenue from 9% to 9.75%.
- ☐ This estimate does not consider reduced amounts resulting from:
 - Low income or legally handicap exemptions
 - Future fluctuations in utility usage levels due to either climate or conservation
 - Changes by individual utilities, some of which have been extremely volatile in recent years.
- ☐ There is the possibility that residents view this Initiative as a tactic of the City to propose an additional tax on its residents in addition to the recent Measure PG and PC Ballot Measures.
- ☐ The increase in UUT will affect a broad base of businesses and residents but the Initiative allows for an exemption for certain households. The exemption amount could equal the amount of the proposed increase. This could be viewed as taxing one group of residents just to offer exemptions for another group of residents.
- ☐ If the UUT rate increases, the number of low income households that apply for the exemption could drastically increase with the publicity generated by the ballot measure. In the past, up to 10% of low income households have actually come in to apply for the UUT exemption.
- ☐ The wording in the ordinance indicates that the UUT will remain at 9.75% for a period of ten years; however, the exemption for legally handicap rate payers is expected to continue, even after the increased revenues have expired.
- ☐ The real financial outcome is immeasurable because there is no way of determining the number of households that will apply for an exemption and to account for possible fluctuations in future UUT revenue.
 - Factors that have caused UUT to fluctuate in the past include: State mandated conservation efforts, decrease usage of telephone landlines, lower and more competitive cell phone packages, any rate structure changes by the utility companies, and residents the increased use of Solar.

VI. APPENDIX

Memorandum from Michael Colantuono

Page 8

Fiscal Analysis Spreadsheet

Page 10

790 E. Colorado Boulevard, Suite 850
Pasadena, CA 91101-2109
Voice (213) 542-5700
Fax (213) 542-5710

COLANTUONO
HIGHSMITH
WHATLEY, PC

Michael G. Colantuono
(530) 432-7357
MColantuono@chwlaw.us

MEMORANDUM

TO: Onyx Jones, Finance Director
City of Pomona

FILE NO: 46024-0002

FROM: Michael G. Colantuono, Esq.

DATE: November 30, 2018

RE: Proposed Initiative re City's Utility User's Tax

INTRODUCTION: As you asked, I have reviewed the initiative proposal to increase the City's utility user's tax by 0.75 percent and to exempt disabled city residents from the tax. I write to provide legal analysis of the measure to support a report the City Council has requested under Elections Code section 9212.

GENERAL COMMENTS: The measure includes what appear to be some unintended differences between the language of the Pomona Municipal Code regarding the existing tax and the proposed amendments. None seem to have substantive impact on the meaning of the amended ordinance, however. Sections 6 to 10 of the proposal copy standard legal language from other City fiscal ballot measures.

SPECIFIC OBSERVATIONS:

1. If City voters adopt the measure, it is my opinion it will be enforceable. It complies with the laws governing taxes of this type. The law allows very deferential judicial review of exemptions from taxes, requiring only a rational basis. (E.g., *Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1032 fn. 7 [tax on cannabis commercial activity as a "sin tax" did not violate equal protection].)

2. The provisions "suspending" the 0.75% increase after 10 years, but empowering the Council to override them, are lawful. They have the same effect as the boilerplate of section 6 copied from earlier City measures allowing the Council to raise the tax to any level at or below the 9.75% ceiling set by voters. (Cf. Gov. Code, § 53750, subd. (h) [defining the tax "increases" which require voter approval under Proposition 218].)

4. The effective date of the tax will be triggered by a notice the City must give under Public Utilities Code section 799(a)(6). Utilities are permitted 90 days from that notice to begin collecting the tax. The City could give it as soon as the election results are certified.

5. Section 50-218(d)(1) of the ordinance could be read to limit the tax exemption to legally disabled people living in Pomona when the measure is approved — at their present and future addresses. However, the state and federal Constitutions will not allow the City to discriminate against newcomers in this way, so the measure will be read to extend the credit to all disabled residents of the City whether they live there when the measure is approved or arrive later. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069 [anti-camping ordinance did not violate the “right to travel”].)

6. The ordinance’s definition of “legally disabled” is drawn from the Social Security statute, so the City will be able to administer the exemption by requiring proof that applicants for the exemption receive Supplemental Social Security (SSI) benefits.

7. Section 50-218(e) of the ordinance has a terse provision regarding the mechanics of exemptions. Nothing in it is inconsistent with section 50-219 of the City’s existing ordinance, which provides detailed provisions regarding exemptions. Accordingly, those provisions apply to the proposed exemption just as they do to existing exemptions.

CONCLUSION: Whether the ordinance is a good idea is a policy matter for the Council and voters. As to legal issues, the measure is — in my professional opinion — lawful and can be enforced if voters approve it.

CITY OF POMONA

UUT BALLOT INITIATIVE FISCAL ANALYSIS

	If 100% of disabled households applied for exemption	
FY 2018-2019 UUT Budget (9%)	17,350,000.00	
UUT Estimate at 9.75%	18,795,833.33	
Estimated UUT Increase	1,445,833.33	
Number of Residential Accounts	23,731	83%
Number of Commercial Accounts	4,772	17%
Total Accounts	28,503	
Average Annual UUT per Household	659.43	
UUT Breakdown if avg. Commercial utility bills are twice as high as residential		
Est. UUT @ 9.75% from Residential	12,502,200	67%
Est. UUT @ 9.75% from Commercial	6,293,633	33%
Total UUT Revenue at 9.75%	18,795,833	
Percentage of disabled population in Pomona is 10% per www.DisabledWorld.com	1,250,220	
Percentage of disabled population in Pomona is 6% per US Census Bureau (https://www.census.gov/quickfacts/pomonacitycalifornia)	750,132	
UUT Breakdown if avg. Commercial utility bills are 150% of residential bills		
Est. UUT @ 9.75% from Residential	14,075,608	75%
Est. UUT @ 9.75% from Commercial	4,720,225	25%
Total UUT Revenue at 9.75%	18,795,833	
Percentage of disabled population in Pomona is 10% per www.DisabledWorld.com	1,407,561	
Percentage of disabled population in Pomona is 6% per US Census Bureau (https://www.census.gov/quickfacts/pomonacitycalifornia)	844,536	