

# **CALIFORNIA INITIATIVE REVIEW**

## **Proposition 91**

### **TRANSPORTATION FUNDS. INITIATIVE CONSTITUTIONAL AMENDMENT.**

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## I. Executive Summary

The Transportation Funding Protection Act of 2006, Proposition 91, is a proposed constitutional amendment that would change the way the legislature may borrow from the various state transportation funds. Secretary of State, *Official Voter Guide*, Proposition 91, [http://www.voterguide.sos.ca.gov/title\\_sum/prop\\_91\\_title\\_sum.html](http://www.voterguide.sos.ca.gov/title_sum/prop_91_title_sum.html) (accessed on January 13, 2008). However, due to poor timing and political compromising, much of Proposition 91 has already been accomplished. Prior to the passage of Proposition 1A in March, 2007, Proposition 91 would have significantly amend the California Constitution in the following ways:

- Repealed Article XIX Section 6 (a)-(b)
- Repealed Article XIX A Section 1 entirely
- Amended Section XIX B to require all outstanding balances borrowed from the transportation fund to be repaid no later than June 30, 2017.
- Added an Article XIX C to require funds borrowed under what remains in Article XIX, XIX A, and XIX B, to be repaid within the same fiscal year

Due to the passage of Proposition 1A, itself a compromise to the perceived strict terms of Proposition 91, most of the significant changes to the California Constitution have already taken place, making much of the substance of Proposition 91 insignificant.

As a result of the passage of Proposition 1A, many of the protections to the transportation funds are now in place, and Proposition 91's supporters are no longer supporting it.

## II. Current Law

The California budget for 2007 includes \$19.6 billion dollars for the Business, Transportation, and Housing Agency. California State Budget 2007-2008, available at [www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf](http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf) (last accessed Jan. 13, 2008). This Agency oversees programs that promote the state's transportation infrastructure, including the Department of Transportation (CalTrans). *Id.* For 2007, CalTrans received \$13.9 billion of the \$19.6 allotted to the Agency. *Id.*

Funding for the Agency is received from many sources including special funds, federal funds, and bonds. Legislative Analyst's Office, 2007 Transportation Overview, A-15, available at [www.lao.ca.gov/analysis\\_2007/transportation/trans\\_anl07.pdf](http://www.lao.ca.gov/analysis_2007/transportation/trans_anl07.pdf) (last accessed Jan. 13, 2008). California uses two special funds to finance the transportation programs; the State Highway Account (SHA), and the Public Transportation Account (PTA). *Id.* The SHA is funded by an 18 cent per gallon excise tax on motor fuels (commonly called the "gas tax"). *Id.* The gas tax raises about \$4.3 billion per year. Legislative Analyst's Office, *Proposition 1A*, [www.lao.ca.gov/ballot/2006/1A\\_11\\_2006.htm](http://www.lao.ca.gov/ballot/2006/1A_11_2006.htm) (last accessed Jan. 13, 2008). Similarly, the PTA is funded from sales tax on diesel fuel and a portion of the sales tax on gasoline. Legislative Analyst's Office, 2007 Transportation Overview, A-15. The sales taxes generate approximately \$2 billion per year. *Id.* However, the passage of Proposition 1B in March 2007 allowed the state to sell bonds to raise an additional \$20 billion in transportation funds. *Id.* at A-16. The legislature is allowed to appropriate the funds raised from the bond. *Id.*

If funds are acquired via the gas tax which fund the SHA and PTA, Proposition 42, which was

passed in March 2002, requires those funds to be transferred from the General Fund to transportation purposes. *Id.* at A-16. In March 2007, the voters passed Proposition 1A which amended the California State Constitution, limiting the circumstances under which the legislature could suspend the transfer of funds from the General Fund into transportation programs, and required the then outstanding balance borrowed from Proposition 42 funds be repaid by June 30, 2016.

The recently passed Proposition 1A is currently the law. Proposition 1A amended Article XIXB of the California Constitution to require the Governor to declare that a severe state fiscal hardship exists in order to transfer funds from the transportation budget into the General Fund. Cal. Const. art. XIX B, § 1(d)(1)(A). Additionally, funds earmarked for transportation may only be transferred to the general fund for two years out of every ten. Cal. Const., art. XIX B, § 1(d)(2)(A). Further, those funds must be repaid within three years with interest. Cal. Const., art. XIX B, § 1(d)(1)(C). In addition to repaying the then current outstanding balance, new funds may not be borrowed until all funds previously borrowed are paid back with interest. Cal. Const., art. XIX B, § 1(d)(2)(B).

### III. Proposition 91

#### A. Origins

The status of Proposition 91 is peculiar. In 2006, a group headed by James Earp sought to protect funds allocated by Proposition 42 from being diverted away from transportation spending. Cosmo Garvin, *The Ballot Measure That Wouldn't Die*, Capitol Weekly, (published March 28, 2007). This idea to protect funds would eventually spawn Proposition 1A. However, Earp's group, the California Alliance for Jobs, was unwilling to wait for the legislature to act. In 2006, Earp's group began circulating petitions and collecting signatures for what was titled the "Transportation Funding Protection Act." *Id.* However, after over 1 million signatures were collected, the legislature took notice and worked with the Governor to include a similar proposition package on the March 2007 ballot. *Id.* This legislative initiative became Proposition 1A. Although Earp was satisfied with Proposition 1A it was not as strict as his proposal, Earp and the CAJ did not want to completely abandon their effort. *Id.* As a result, Earp withheld approximately 300,000 signatures with the intention that if their proposition did not have enough signatures, it would still be in the pipeline to get certified for a future election. *Id.* Once Proposition 1A was placed on the ballot, Earp and the CAJ stopped supporting their initiative and turned all their efforts to supporting Proposition 1A. *Id.* In fact, Earp became the Chairman of the Yes on 1A-1E campaign. Press Release, Office of the Governor (Feb. 14, 2007) available at <http://gov.ca.gov/index.php?/press-release/5406/> (last accessed Jan. 13, 2008).

However, Earp underestimated himself. Although he had failed to submit all the signatures he had gathered, some districts in which he gathered signatures returned with surprisingly high numbers of valid signatures. Cosmo Garvin, *The Ballot Measure That Wouldn't Die*, *supra*. In some cases, the validity rates were as high as 70 percent. *Id.* The result was that the "Transportation Funding Protection Act" was properly qualified and placed on the June 2008 ballot. (The entire ballot was later moved ahead to February of 2008.) See <http://www.sos.ca.gov/>.

## B. Text of Proposition 91

Proposition 91 makes several large changes to the structure of the state constitution. First, Proposition 91 repeals subsection (a), (b), and part of (c) in Section 6 of Article XIX of the state Constitution. Those sections describe the circumstances when tax revenues may be loaned to the General Fund. However, due to the passage of Proposition 1A, the language to be repealed, no longer exists within the state constitution. Second, Proposition 91 would completely repeal Section 1 of Article XIXA of the state Constitution. These first two changes alter sections of the state constitution which described the conditions under which funds may be loaned to the General Fund from other funds, and from the PTA and STA accounts to the General Fund. These changes were left out of Proposition 1A so that the legislature would still have some flexibility to transfer money in case of a severe hardship. Before the passage of Proposition 1A, the legislature was required to repay the transferred money within the same fiscal year, or within three fiscal years if projected revenues are expected to be greater than the previous year's revenues. This rigid scheme was changed by Proposition 1A. To address the conditions for borrowing, Proposition 91 would add Section C to Article XIX which requires any loan to be repaid within the same fiscal year, or at most allows repayment to occur 30 days after the budget for the next fiscal year has been enacted.

Additionally, Proposition 91 requires that all outstanding balances borrowed from the transportation funds as of July 1, 2007 be repaid no later than June 30, 2017. Nearly identical language was included in Proposition 1A, except the repayment must occur by June 30, 2016.

Finally, Proposition 91 alters Section 1 of Article XIXB of the California Constitution. This is precisely the section Proposition 1A altered in the election in March 2007. In nearly identical language, Proposition 91 would make relatively minor changes to the same section that Proposition 1A dramatically changed just one year before. This can be viewed as a direct result of the Legislature taking notice to the efforts of Earp and the CAJ, and therefore resulting in very little change.

## C. Current Status of Proposition 91

After passage of Proposition 1A, many of the concerns the authors of Proposition 91 had were addressed. It became harder for the legislature and Governor to borrow from the transportation funds, timetables for repayment were established, and frequency of borrowing was also limited. Cal. Const., aArt. XIXB § 1(d). While not as strict as the language of Proposition 91, Proposition 1A seemingly addressed the concerns of the authors of Proposition 91 enough, such that the authors have abandoned their support and do not plan to support the initiative leading up to the February 2008 election. Michael Cabanatuan, *Backers Now Urge Voting Against Prop. 91*, San Francisco Chronicle, published Jan. 10, 2008 (available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/01/10/BAE2UC4G6.DTL> (last accessed Jan. 13, 2008)).

If passed, Proposition 91 would change the state constitution in only two practical ways. By deleting Article XIX Section 6(a)-(b), Article XIXA Section 1, and adding Article XIX Section C, borrowing from the Transportation funds would require repayment in the same fiscal year, instead of within three fiscal years as the law currently stands, and there would no longer be a requirement that the Governor declare the state to be in a severe state fiscal hardship. Proposition 91 <http://ag.ca.gov/initiatives/pdf/sa2005rf0123.pdf> (last accessed Jan. 13, 2008)).

#### D. Possible Issues If Passed

If Proposition 91 is approved by the voters, the judiciary will be forced to address a couple of interesting questions. Because Proposition 91's text cannot be changed once it has been certified to be on the ballot, the text of Proposition 91 has become inconsistent with the current text of the Constitution because of the changes made by Proposition 1A. For instance, Proposition 91 states that it will amend certain language of the constitution that no longer reads as Proposition 91 alleges it does. *See* Article XIXB, Section 1. Additionally, Proposition 1A added sections, so Proposition 91 contains sections, and subsections, that propose to be added, but in fact already exist and require either amendment or repeal. *See e.g.* proposed changes to Section 1 of Article XIX B by Proposition 91. Most noticeable are the changes to Article XIX B, the only section Proposition 1A changed. For example, Proposition 91 alleges it would change Article XIX B, Section 1, subdivision (b)(1) to read "March 6, 2002," from its current language "the operative date of this article." However, as a result of Proposition 1A, the language already reads "March 6, 2002." Additional flaws in Article XIX B, include subdivision (d) which Proposition 91 hopes to modestly add "any fiscal year preceding the 2007-08," while keeping subdivisions (d)(1)-(2) unchanged. However, subdivisions (d)(1)-(2) were drastically changed by Proposition 1A from what they read in the proposed language of Proposition 91. Additionally, Proposition 91 seeks to add repayment terms in subdivisions (e)(1)-(2), but again, Proposition 1A has already created subdivision (e), which addresses amendments to the percentages of required repayment, and therefore such a proposal to add, not amend or repeal, would seem misleading to voters. If Proposition 91 is approved, the judiciary may be forced to address this unique situation.

#### E. Consequences of Voter Approval of Proposition 91

Although the situation is unique and may be one of first impression for the judiciary, there are principles that may guide Proposition 91's legality if passed. First, the rules of statutory construction are applicable whether applied to the California Constitution or a statutory provision, and the rules of interpretation should apply to initiative measures enacted as statutes. *People v. Bustamante*, 57 Cal.App.4th 693, 699 n. 5 (2d Dist. 1997), *see also People v. Rizo*, 22 Cal.4th 681, 685 (2000) (applying the same principles that govern statutory construction to a voter initiative). Second, because statutory construction rules are applicable to the California Constitution and voter initiatives, when interpreting Proposition 91's language, courts may not insert language that has been omitted, or ignore language that has been inserted. *Williams v. Superior Court*, 92 Cal.App.4th 612, 623 (2001). Third, it is generally presumed the electorate, by the initiative process, is deemed to be aware of laws in effect at the time they enact new laws, and have enacted the new laws in light of existing laws, and the direct effects on the existing laws. *Id.* at 625.

As mentioned, Proposition 91 now contains several drafting flaws that it did not contain before the passage of Proposition 1A. Although there exist established principles of statutory construction application of such may not lead to a conclusive result. Because the judiciary may not insert or ignore language, *Williams*, 92 Cal.App.4th 612 at 623, the initiative may have to stay in the form as proposed, replacing the changes made by Proposition 1A. As always, there would be the general presumption that the electorate was aware of what they were doing at the time of potential passage of Proposition 91, *Id.* at 625, which would likely lead a judicial decision to conclude Proposition 91 should be passed as written. Of course, the judiciary may draw distinctions from past precedent, and treat this situation as unique, enabling them to rewrite, or correct any issues that may occur. In this instance, the precedents are not helpful in predicting an outcome, due to the various novel and unique circumstances

surrounding Proposition 91.

A due process challenge under the California or United States Constitution is also unlikely. Given the fact that the proposition did not become misleading or confusing until after another proposition was passed, it is unlikely that it could be invalidated based on a due process violation such as that described in *Horwath v. City of East Palo Alto*, 212 Cal.App.3d 766 (1<sup>st</sup> Dist. 1989). Nevertheless, because of the uniqueness of the situation, the courts may decide this case is distinguishable from other contexts and formulate a new rule, or apply an existing rule differently in this context.

If Proposition 91 passes, a dangerous situation may be on the horizon if the judiciary decides to invalidate it based on the language now being misleading because of the changes made by Proposition 1A described above. If so invalidated, this situation has the potential for abuse. Should the legislature become aware of a proposition they are opposed to, the legislature could simply renumber, reorder, or quickly change provisions within the existing laws to effectively preempt passage of an initiative. This is a consideration the judiciary would have to analyze when formulating their opinion, should Proposition 91 be approved.

#### **IV. Conclusion**

Proposition 91 is the rare proposition that has no supporters. Due to political compromises, strange timing, and unusually high percentage of valid signatures, Proposition 91 found its way onto the ballot even after its supporters no longer needed it to pass to accomplish their goals. If passed, Proposition 91 would limit the ability for transportation funds to be transferred to the General Fund and require repayment of those funds within the same fiscal year.