PROPOSITION 218

Implementation Guide

2007 Edition

LEAGUE OF CALIFORNIA CITIES

PROPOSITION 218 IMPLEMENTATION GUIDE

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Table of Contents

Preface 3

I. Overview 5
- History of Voter-Approved Restrictions on Local Government Revenue-Raising 5
- Summary of Proposition 218 7

II. Taxes 9
- Introduction and Overview 9
- Key Changes Proposition 218 Makes to Tax Law 10
- Proposition 218's Substantive Effect on Taxes 10
- Proposition 218's Procedural Requirements for New or Increased Taxes 14
- Relationship Between Proposition 218 and Proposition 62 16
- Particular Types of Taxes 17
- Procedures for Challenging a Tax 18

III. Assessments 21
- Introduction and Overview 21
- Key Changes Proposition 218 Makes to Assessment Law 22
- Procedures for New Assessments 23
- Burden of Proof 36

IV. Property-Related Fees and Charges 49
- Introduction and Overview 49
- Key Changes Proposition 218 Makes to Fee and Charge Law 49
- Fees and Charges Subject to Article XIIID 50
- Fees and Charges Not Subject to Proposition 218 53
- Fees and Charges That Might Not Be Subject to Proposition 218 55
- Procedural Requirements 62
- Substantive Requirements 70

V. Initiatives to Reduce or Repeal Taxes, Assessments, and Fees 77
- Introduction and Overview 77

- Substantive Issues 78
- The Contract Clause of the U.S. Constitution and the Reduction of Taxes, Assessments, Fees and Charges 84
- Initiative Procedural Issues 88

VI. Assessment Ballot Proceedings 93
- Sample Resolution 93
- Sample Notice of Public Hearing 98

VII. All Mail Elections 99
- Introduction and Overview 99
- Sample Resolution Calling A Special Municipal Election 102
- Sample Resolution Establishing Drop Off Centers 104
- Sample Resolution Requesting County To Render Specified Services ... 106

VIII. Attachments 109
- Proposition 218 Text 111
- Ballot Materials (Title, Summary, Legislative Analyst's Analysis, Arguments) 119
- Howard Jarvis Taxpayers Association Annotated Version of Proposition 218 (December 6, 1996). 125
- Proposition 218: Right to Vote on Taxes Act Statement of Drafters' Intent (January 2, 1997) 141
- Legislative Analyst Post-Election Analysis on Proposition 218 161
- Proposition 218 Guidelines for Placing Flat Fees on the Secured Role, California State Association of County Auditors, April 1997 183
- Comment Form 191

Preface

On November 5, 1996, the California electorate approved Proposition 218, the self-titled "Right to Vote on Taxes Act." Proposition 218 adds articles XIIIC and XIIID to the California Constitution, and makes numerous changes to local government finance law. Proposition 218 was approved by a 56.6 percent to 43.4 percent vote.

This is the fourth edition of the League of California Cities' Proposition 218 Implementation Guide. On October 15, 1996, a number of public agency officials met at the League's annual conference to discuss an implementation program in the event of Proposition 218's passage. The first edition of this guide was the result of the planning that occurred at that meeting. The second edition, published in April 1998, updated the first edition.[1] The third edition, published in 2000, represented the League's continuing commitment to providing complete information and comprehensive analysis of the issues raised by Proposition 218, and was prepared under the auspices and review of the League's Proposition 218 Legal Issues Committee, a cross-department committee representing the city managers department, city attorneys' department and fiscal officers' department of the League. During the seven years between the third edition and the fourth edition, the California Supreme Court, and the Courts of Appeal, have answered many questions regarding the scope and application of Proposition 218. This fourth edition intends to bring the reader up to date and familiar with the courts' interpretation of these Constitutional provisions. This edition was prepared under the guidance of the League's City Attorneys' Department Proposition 218 Committee.[2] Many questions of interpretation have been answered since the third edition. However, as of the writing of the 2007 Edition, important questions relating to, for example, the process for determining "special benefit" under Article XIIID, section 4, Silicon Valley and the impact, if any, on Proposition 218's provisions relating to fees and charges on regulatory fees, remain pending in front of the California Supreme Court. *E.g. Bonander v. Town of Tiburon,* Sup. Ct. No. S151370; *Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150 Cal. App. 4th 1364, *pet. for review filed.*

Also included in this guide are sample ordinances adopting assessment ballot procedures and implementing all-mail ballot elections. Proposition 218 has imposed on public agencies increased requirements to conduct elections. A discussion of the law relating to public agency communications in elections is included.

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[1] The court in *McBrearty v. City of Brawley*, (1997) 59 Cal. App. 4th 1441 cited as authoritative the *Proposition 218 Implementation Guide* issued in January 1997. This will permit use of that document as authority in future cases involving Proposition 218.

[2] The material in this guide is offered for information only and should not be construed as legal advice. Public officials should always consult with their attorneys when confronted with issues relating to Proposition 218's interpretation or application to a given set of circumstances. This guide has not been reviewed by the League of California Cities' board of directors and does not represent an official position of the League on issues relating to Proposition 218. Statements made in this guide should not be represented to be the official position of the League in litigation or other contexts.

All of the questions concerning Proposition 218 may take yet more years to resolve. In the meantime, public officials are required to conduct the public's business in compliance with Proposition 218. This guide has been prepared to help organize a community's response to these changes and make decisions about future implementation.

I. Overview

History of Voter-Approved Restrictions on Local Government Revenue-Raising

Since 1978, the voters have approved three initiatives that limit the methods by which local governments raise local revenues. Proposition 218, The Right to Vote on Taxes Act, is the most recent attempt to constrain the authority of cities, counties, and special districts to raise revenue by requiring compliance with mandatory procedural and substantive requirements. Proposition 13 (1978) added Article XIIIA to the Constitution, which limited the property tax rate and required voter approval of "special taxes" imposed by cities, counties, and special districts. Proposition 62 (1984) eliminated the real property transfer tax and required voter approval of "general taxes" imposed by cities, counties, and special districts. Proposition 218 (1996) expanded restrictions on local government revenue-raising by adding Article XIIIC and XIIID to the Constitution, which allow the voters to repeal or reduce taxes, assessments, fees, and charges through the initiative process; reiterates the requirement for voter approval for both "special taxes" and "general taxes," and imposes procedural and substantive limitations on assessments of real property and on certain types of fees.

In 1979, on the heels of Proposition 13, the voters adopted another initiative, adding Article XIIIB to the Constitution. Article XIIIB governs government spending by establishing appropriation limits, as well as the requirement for reimbursement by the State for new mandates imposed on local governments. Although Article XIIIB affects government spending, it does not establish procedural or substantive requirements for imposition of taxes, assessments, fees, or charges, and is not discussed in this Guide.

The authority of the voters to affect public spending has been fiercely protected since the initiative power was added to the Constitution in 1911. A measure was proposed in 1917 to prohibit the use of the initiative as well as the referendum for tax and assessment legislation.[3] A group opposing the measure stated that it

> "takes away from the people the most important right of self-government which they possess, namely: the power of control over taxation. This strikes at the very root of popular self-government. Practically all historic struggles for liberty, including the English Revolution and our own American Revolution, have centered about the question of the people's control over taxation." [4]

In 1919, Senate Constitutional Amendment No. 5 was introduced in the Legislature in an attempt to limit use of the initiative for tax measures by increasing the number of signatures necessary to qualify an initiative petition. The opponents argued:

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[3] Senate Constitutional Amendment 12.
[4] Hitchborn, *Story of the Session of the California Legislature of 1921* (1922), page 189.

> "Again, if they can destroy the people's use of the initiative in the most important function, taxation, it will be the beginning of efforts which will lead to the destruction of the entire initiative power of the people."[5]

The purpose of Proposition 13 was to assure effective real property tax relief by means of an "interlocking 'package' " consisting of a real property tax rate limitation (art. XIII A, § 1), a real property assessment limitation (art. XIII A, § 2), a restriction on state taxes (art. XIII A, § 3), and a restriction on local taxes (art. XIII A, § 4).[6] The reduction of the property tax rate was the heart of Proposition 13. Prior to 1978, each city, county, and special district authorized to impose a property tax, annually adopted and imposed a property tax rate for its jurisdiction. Proposition 13 limited the property tax rate statewide to 1% of each $100 of assessed value. There were two immediate consequences of these amendments to the Constitution: property taxes were cut by one-half statewide; and the state Legislature gained control over the allocation of the property tax.[7] The State responded to the first consequence by returning several billion dollars accumulated in the State's surplus to local agencies. The State responded to the second consequence in 1979 by adopting a permanent formula for reallocating the property tax ("AB 8") which determined what portion of the 1% of each $100 of assessed value would be received by each agency which previously imposed its own property tax rate.

Proposition 62 followed shortly on the heels of the California Supreme Court's determination that the "special tax" that required voter approval by Proposition 13 is a tax imposed for a "specific purpose,"[8] thereby giving a more restrictive reading to the phrase "special tax" than the drafters of Proposition 13 had intended. A definition of "general tax" was needed. Proposition 62 declared that all taxes are "either general or special" and then defined "general tax" to be a tax imposed for "general governmental purposes."[9] Majority voter approval was required to impose a general tax. Although initially, Proposition 62 was declared to be an unconstitutional referendum requirement on the taxing power of local government,[10] ultimately this view was rejected by the California Supreme Court. In *Santa Clara Valley Transportation Agency v. Guardino*, the Court held that Article XIII, section 24 of the Constitution, which permits the Legislature to authorize local governments to impose taxes for local purposes, carries with it the authority to impose valid conditions on the exercise of that power, such as the voter approval requirement of Proposition 62.[11] Although the general tax provisions were upheld, it was ultimately determined that Proposition 62 did not apply to charter cities.[12] It was this latter determination, coupled with an interest in expanding procedural and substantive limitations to certain types of assessments and fees, that produced the impetus for Proposition 218.

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[5] *Id*. at page 190.
[6] *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 231.
[7] *Sasaki v. County of Los Angeles* (1994) 23 Cal.App.4th 1442.
[8] *City and County of San Francisco v. Farrell* (1982) 32 Cal. 3d 47
[9] Government Code Section 53721.
[10] City of Woodlake v. *Logan* (1991) 230 Cal.App.3d 1058.
[11] *Santa Clara Valley Transportation Authority v. Guardino* (1995) 11 Cal.4th 220 .
[12] *Fisher v. County of Alameda* (1993) 20 Cal.App.4th 120.

Although Proposition 218 amends the California Constitution, the rules of construction and interpretation that are applicable when considering statutes are equally applicable in interpreting constitutional provisions. *See Winchester v. Mabury* (1898) 122 Cal. 522, l527. In addition terms used in a constitutional amendment are normally construed in light of existing statutory definitions. *County of Fresno v. Malmstrom* (1979) 94 Cal. App. 3d 974; *Howard Jarvis Taxpayers Association v. City of Riverside* (1999) 73 Cal.App.4th 679.

Summary of Proposition 218

The Right to Vote on Taxes Act added two new articles to the California Constitution: article XIIIC, Voter Approval for Local Tax Levies; and article XIIID, Assessment and Property-related Fee Reform. Article XIIIC is divided into three sections:

- Section 1 includes definitions of "general tax," "special tax," "local government," and "special district."

- Section 2 characterizes all taxes as either special taxes or general taxes, requires a majority vote for general taxes at the same election as for members of the legislative body of the local government (except in cases of emergency), requires a 2/3 vote for special taxes, and makes all of the taxes of "special purpose" districts (including school districts) special taxes.

- Section 3 allows the voters to use the initiative process to reduce or repeal any local tax, assessment, fee or charge.

Article XIIID is divided into six sections:

- Section 1 exempts development fees and timber yield taxes from the property-related fee and assessment provisions.

- Section 2 includes definitions of "assessment," "fee" or "charge," "property-related service", service," "special benefit," and other terms relevant to the provisions of this article.

- Section 3 limits the categories of taxes, assessments, fees, or charges assessed on a parcel of property or as an incident of property ownership to an *ad valorem* property tax, any special tax, assessments in compliance with article XIIID, and fees or charges in compliance with article XIID.

- Section 4: Provides substantive and procedural requirements for assessments subject to Proposition 218.

- Section 5: Requires existing, new, or increased assessments to comply with Proposition 218 beginning July 1, 1997. Certain types of assessments are exempt from Section 4 unless and until they are increased.

- Section 6: Provides substantive and procedural requirements for property-related fees and charges.

The text of Proposition 218 also included certain findings that were adopted by the voters although not made a part of the Constitution:

- that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases;

- that local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that frustrate the purpose of the voter approval requirement and threaten the economic security of California; and

- that Proposition 218 protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

When interpreting Proposition 13, the courts were guided by the findings contained in that measure as a basis for their opinions, and the findings in Proposition 218 have likewise guided judicial interpretation of that measure[13]

A court will also interpret these provisions in accordance with well-recognized principles of constitutional interpretation. In a case about the assessment provisions of Proposition 218, the court observed that in construing a constitutional provision adopted by the voters, the court's primary task is to determine the voters' intent. In determining intent, the court will first look at the words of the proposition. When language is clear and unambiguous, there is no need for interpretation nor is it necessary to find information about the intent of the voters. Without ambiguity, it is assumed that the voters intended the meaning apparent on the face of the initiative measure and the court will not add to the provisions or rewrite them to conform to an assumed intent that is not apparent in the language.[14] Finally, a court may rely on the analysis and interpretation of Proposition 218 in the analysis by the Legislative Analyst that appeared in the Ballot Pamphlet for the election at which Proposition 218 was on the ballot.[15]

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[13][3] *Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal. 3d 208, (Proposition 13); *Ventura Group Ventures v. Ventura Port Dist.*, (2001) 24 Cal. 4th 1089, 1107-1108; *but see Apt. Ass'n of L.A. County v. City of L.A.*, (2001) 24 Cal. 4th 830, 844, ("As a rule, a command that a constitutional provision or a statute be liberally construed 'does not license either enlargement or restriction of its evident meaning.'").

[14]*Howard Jarvis Taxpayers Association v. City of San Diego*, (1999) 72 Cal. App. 4th 230, 235, 236.

[15] *Bighorn-Desert Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212.

II. Taxes

Introduction and Overview

> "The cases recognize that "tax" has no fixed meaning, and that the distinction between taxes and fees is frequently "blurred," taking on different meanings in different contexts. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted." *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866, 874; see also, *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240.

A tax is a monetary imposition of a governmental legislative body on persons or property subject to the jurisdiction of the governmental body, for the purpose of raising revenue to support its activities. *People v. McCreery* (1868) 34 Cal.432; *Taylor v. Palmer* (1866) 31 Cal.240. Because Proposition 218 affects taxes, as well as certain kinds of assessments, fees, and charges, it is important to understand the distinctions among these kinds of revenue devices.

Assessments differ from taxes because they are charges "for benefits conferred" (*County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal.App.3d 364, 379), while taxes are charges "imposed by or under the authority of the legislature, for public purposes." *Crawford v. Herringer* (1978) 85 Cal.App.3d 544, 548. Taxes are imposed to support the government; assessments to pay for improvements that provide a special benefit to particular properties. *Taylor v. Palmer* (1866) 31 Cal.240, 250. A charge that reimburses a public entity for a service rendered, in an amount limited to its expenses, and not levied on a regular or routine basis, is not a tax or assessment. *Crawford v. Herringer, supra*, 85 Cal.App.3d at 550 [charge for candidate's share of costs of printing election pamphlet].

In contrast to a tax, an assessment must be levied in proportion to the specific benefit to real property derived from the proceeds of the assessment. *See County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974. An assessment is levied typically on real property; the amount of the assessment may vary among assesees, depending upon the relative benefit of the assessed properties. *See City Council v. South* (1983) 146 Cal.App.3d 320; *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728. A tax is equal in its burdens and uniform in its operation. *San Francisco-Oakland T. Rys. v. Johnson* (1930) 210 Cal.138. It may be levied on either property or persons, although California Constitution article XIIIA, section 4 prohibits local governments from enacting special taxes that are *ad valorem*, or transaction or sales taxes on real property.

Much of the Proposition 13 and Proposition 218 case law has developed in response to a fee payer's challenge that the fee is actually a tax. A fee or charge is a monetary imposition for the use of a commodity or service, or to mitigate the impact of the fee payer's activities on the community. Proposition 218 created a sub-category of fees called "fees for property-related services. "These are fees "imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user charges for a property-related service." (Cal. Const., art. XIII D, § 2 (e).). Although a fee is generally distinguished from a tax based on the relationship

between the fee and the amount of revenue required to provide the service or facility for which the fee is imposed, the new substantive requirements of Article XIIID, Section 6 have created a slightly different way of distinguishing taxes from property-related fees.

Key Changes Proposition 218 Makes to Tax Law

Proposition 218 changed the law by adding article XIIIC to the California Constitution. It affects tax levies in these principle ways.

- **Charter Cities.** Charter cities must subject the imposition, extension or increase of general taxes, as well as special taxes, to the voters for approval.[16]

- **Election Timing.** General tax elections must be consolidated with a regularly scheduled general election for the members of the governing body proposing the tax, except in cases of an emergency declared by unanimous vote of the governing body.

- **Definitions.** Definitions of the terms "general taxes" and "special taxes" have been added to the state constitution.[17]

- **Window Period Taxes**. Local agencies that imposed, extended or increased general taxes without voter approval after January 1, 1995 but before November 6, 1996 were required to submit them for voter-approval by November 6, 1998 even if no changes were made to the rate or breadth of the tax.

This section of this guide examines the substantive and procedural effects of these changes, Proposition 218's relationship to Proposition 62, and its effects on particular types of taxes.

Proposition 218's Substantive Effect on Taxes

General and Special Taxes

Proposition 218 defines a "general tax" as any tax imposed for general government purposes. *See* Cal. Const., art. XIIIC, § 1(a). Proposition 218 defines "special tax" as any tax imposed for specific purposes including taxes imposed for specific purposes and placed into a general fund. *See* Cal. Const., art. XIIIC, § 1(d).

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[16] Charter cities are preempted from establishing different vote requirements than established by the Constitution. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374 [an initiative amendment to San Diego charter seeking to increase the vote necessary to enact general taxes from a simple majority to 2/3 vote was preempted by article XIII C § 2(b)'s majority vote requirement].

[17] The definitions of general and special taxes found in Article XIII C, § 1 supercede prior judicial definitions of the terms. (*Neilson v. City of California City* (2005) 133 Cal. App. 4th 1296, 1309.)

Practice Tip: Even though Proposition 218 defines the terms "assessments" and "fees and charges," it does not define the word "tax." Compare Cal. Const., art. XIIIC, § 1, with Cal. Const., art. XIIID, § 2. Therefore, look to previously existing law to determine the difference between a tax and a fee or assessment.

Practice Tip: Because of the definition of "special tax" in art. XIIIC, § 1(d) placing revenues from a tax in the general fund no longer renders the tax a "general tax" if the revenues are raised for a specific purpose.

The definition of special tax under Proposition 218 means that a tax with an identified purpose requires two-thirds vote (*See Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178. However, the use of an advisory measure expressing public desires regarding the application of general tax revenues pursuant to the opinion in *Coleman v. Santa Clara County* (1998) 64 Cal.App.4th 662, may remain a viable approach under Proposition 218. In that case, an appellate court allowed a local public agency to put a general tax on the ballot along with a non-binding, advisory measure stating voters' preferences on how the money raised by the general tax should be spent.

The court, without citing to Proposition 218 concluded the tax was a general tax noting that

- The proceeds of the tax were deposited in the local agency's **general fund**
- The measures were presented to the voters as **separate and distinct**
- The advisory measure **did not bind the local agency** in making decisions about how to spend the general tax

Coleman v. Santa Clara County was a challenge based upon the definition of "special tax" found in Proposition 13. Whether a tax is a "special tax" under Proposition 13 depends upon two factors: Are the revenues raised from the tax placed in the general fund? Are the funds legally earmarked for a specific purpose? *Coleman* noted that the revenues were placed in the general fund and the revenues were not legally earmarked for a specific purpose since Measure B on the ballot stating the voters' preferences on how the money should be used was only advisory. The definition of "special tax" may undercut the first factor: Article XIIIC, section 1(c) states that a "special tax" is a tax for a specific purpose whether the funds from the tax are deposited in the general fund or a special fund. *Coleman* has not been overruled or distinguished, but it is also not a Proposition 218 case.

Charter Cities

By its terms, Proposition 218 applies to counties, cities, cities and counties, including charter cities or counties, any special district, or other local or regional governmental entity. Cal. Const., art. XIIIC, § 1(b); art. XIIID, § 2(a).

Proposition 218's "window period" provisions suggest charter cities must follow the same rules with respect to imposing, extending or increasing a general tax after January 1, 1995. Cal. Const., art. XIIIC, § 2(c). Thus, if a charter city imposed, extended or increased a general tax after January 1, 1995, that tax is subject to Proposition 218's requirements that the action have been submitted to the voters on or before the general election in 1998.

Special Districts, School Districts and Redevelopment Agencies

A special district is defined as a "local government" subject to Proposition 218's tax provisions. *See* Cal. Const., art. XIIIC, § 1(b). School districts and redevelopment agencies are special districts within the meaning of Proposition 218. *See* Cal. Const., art. XIIIC, § 1(c).

Proposition 218 says that, to the extent they possess the power to tax, "special purpose districts or agencies, including school districts, shall have no power to levy general taxes." *See* Cal. Const., art. XIIIC, § 2(a). Any tax imposed by a special purpose district or agency, including school districts, is a special tax. This provision of Proposition 218 reflects the Court's decision in *Rider v. County of San Diego* (1992) 1 Cal. 4th 1, wherein the Court dubbed the formation of a special purpose district as an attempt to circumvent the 2/3 voter approval requirement for special taxes. "Special district" means "an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies." Cal. Const., art. XIIIC, § 1(c). Since Proposition 218 does not define what is meant by the phrase "special purpose districts or agencies," it is unclear whether it means all special districts, whether created by special act or under general law, or only those that have a very limited purpose, such as the agency in the *Rider* case.

Despite its mention of redevelopment agencies, school districts, and special purpose districts, Proposition 218 specifically says that it does not provide any new authority to any agency to impose a tax, assessment, fee or charge. Cal. Const., art. XIIID, § 1(a). Thus, while Proposition 218 limits local agencies' authority to impose fees, charges or assessments for general governmental services (including but not limited to police, fire, ambulance or library services), it also appears to preclude limited purpose districts from levying taxes for those purposes except for special taxes approved by a 2/3 vote.

Imposing, Increasing or Extending a Tax

Under Proposition 218, no local government may impose, extend, or increase any general tax until such tax is submitted to the electorate and approved. Cal. Const., art. XIIIC, § 2(b). "Imposing" a tax does not occur at a single point in time. Rather, a tax is imposed when the ordinance establishing the legal duty to pay, and when the tax is collected. *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809, 824. This means that each time a tax is collected, it is imposed anew. An agency may not be ordered to raise property taxes above the 1% limit, or raise taxes without voter approval, in order to satisfy a creditor. *Ventura Group Ventures, Inc. v. Ventura Port District* (2001) 24 Cal.4th 1089; see also *F & L Farm Co. v. City of Lindsay* (1995) 65 Cal.App.4th 1345.

The term "extend," when applied to an existing tax or fee or charge, means a decision by an agency to extend the stated effective period for the tax or fee or charge, including amendment or removal of a sunset provision or expiration date. Gov. Code, § 53750(e).

A general or special tax is increased when an agency either (1) increases the applicable rate used to calculate the tax; or (2) revises the methodology by which the tax is calculated if that revision results in an increased amount being levied on any person or parcel. "Methodology" has been defined as "a mathematical equation for calculating taxes that is officially sanctioned by a local taxing entity." *A.B. Cellular v. City of Los Angeles* (2007) 150 Cal.App.4th 747. A general tax or special tax is not "increased" if (1) it is imposed at a rate no higher than the maximum rate previously approved, or (2) it is adjusted in accordance with a schedule of adjustments, including a clearly defined formula for inflation that was adopted prior to November 6, 1996. Cal. Const., art. XIIIC, § 2(b) and (d); Gov. Code, § 53750(h)(2)(A).

The law distinguishes between a tax that states a range of rates or amounts and a tax that provides for an adjustment for inflation. If the voters approve the tax that states a range of rates or amounts, then adjustments can be made in accordance with that range without "increasing" the tax. However if the voters approve a tax that states it will be adjusted for "inflation," the tax may only be adjusted for inflation if the tax is not determined by using a percentage calculation. A tax which is calculated by using a percentage is "increased" when it is adjusted for inflation even if the voters approve the tax. Gov. Code, 53739.

> *<u>Practice Tip</u>: Public agencies may wish to evaluate including escalators and maximum rate provisions in tax ordinances presented for voter approval. This approach may obviate the need to go back to the voters as long as the public agency keeps its tax rates below voter-approved maximum rates. The best way to avoid "increasing" a tax is to include the actual amounts or percentages by which the tax will be adjusted in future years rather than simply providing for an inflation adjustment.*
>
> *<u>Practice Tip</u>: An agency may wish temporarily to collect a previously approved tax at a rate lower than was authorized by the voters. In the documentation lowering the rate, the agency should make it very clear that the rate is not being permanently lowered, but rather a portion of the rate is being "suspended" for a certain period of time. An agency that collects a previously approved tax at a rate lower than was authorized by the voters, without a statement clarifying the intent and purpose of the suspension, changes the methodology for calculating the tax when it begins collecting the tax at the previously approved rate. A.B. Cellular v. City of Los Angeles* (2007) 150 Cal.App.4th 747.

Note: If the base of a tax is broadened by extending the reach of the tax to taxpayers who previously did not pay the tax, the tax is not "increased." Rather, the tax is a new tax as to those taxpayers requires voter approval.

Window Period Taxes

Proposition 218 required that any general tax imposed, extended or increased between January 1, 1995 and November 6, 1996, without voter approval must have been submitted to the voters within two years, in order to continue imposing the general tax. Cal. Const., art. XIIIC, § 2(c).

> *Practice Tip: Proposition 218 says this election must be held "within two years of the effective date of this Article;" the effective date was November 6, 1996. See Cal. Const., art. XIIIC, § 2(c); Cal. Const., art. XVIII, § 4. Failure to hold the election before November 6, 1998 does not excuse compliance with this requirement.*
>
> *Practice Tip: The language of Proposition 218 is unclear whether only that portion of a tax which was increased or extended must have been submitted to the voters or the entire tax including the increase or extension. A reasonable interpretation would limit the election only to the increase or extension, but a future court may determine otherwise.*
>
> *It should be noted that at least one city has chosen to avoid the issue by enacting increases or expansions to the scope of existing taxes in the form of new taxes rather than as amendments to existing taxes. It may be an attractive consideration where a public agency cannot afford to risk its existing tax base and is, therefore, willing to undergo the resulting administrative burdens.*

Some attorneys believe Proposition 218's window period provisions may be subject to challenge on a theory similar to the one on which Proposition 62's window period provisions were successfully challenged. *See City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623 *rev. denied*; *Santa Clara County Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, *as modified on denial of rehearing* (distinguishing *Westminster* from *Woodlake* on that ground). Others believe this argument is weakened by the court's holding in *Rossi v. Brown* (1995) 9 Cal.4th 688.

Proposition 218's Procedural Requirements for New or Increased Taxes

General Taxes

Under Proposition 218, no local government may impose, extend, or increase any general tax until such tax is submitted to the electorate and approved. Cal. Const., art. XIIIC, § 2(b). The imposition, extension or increase of general taxes requires a **majority vote** of the electorate voting in an election on the tax. Cal. Const., art. XIIIC, § 2(b).

The election to approve a general tax must be consolidated with a regularly scheduled general election for members of the governing body of the local government except in cases of emergency declared by a unanimous vote of the governing body. Cal. Const., art. XIIIC, § 2 (b).

Note that a 2/3 vote of the legislative body is required to submit an increase in the use tax to the voters – whether by general or special tax. Cal. Rev & Tax Code § 7285.9.

See California Government Code sections 53720 and following (Proposition 62) for other requirements to enact general taxes. Note that California Government Code section 54954.6

(Ralph M. Brown Act) has notice and hearing requirements for new or increased general taxes; however these provisions do **not** apply to voter-approved general taxes. *See* Gov. Code, § 54954.6(e); *see also*, Gov. Code, § 53753, which trumps these provisions as they apply to assessments. Thus, although they remain in statute, these Brown Act provisions have limited, if any, current application.

Special Taxes

As with general taxes, no local government may impose, extend, or increase any special tax until such tax is submitted to the electorate and approved. Cal. Const., art. XIIIC, § 2(b). But the imposition, extension or increase of special taxes requires a **two-thirds vote** of the electorate voting in an election on the tax. Cal. Const., art. XIIIC, § 2(d).

Unlike Proposition 218's requirements for general taxes, there are no timing restrictions on elections to approve special taxes. Similarly, Proposition 62's timing provisions for special taxes are not restrictive. *See* Gov. Code, § 53724 (c) and (d) (requiring consolidation with a statewide primary election, a statewide general election, or a regularly scheduled local election at which all of the electors of the jurisdiction are entitled to vote **or** any other date permitted by law, with the local jurisdiction bearing the costs of the election).

See California Government Code sections 53720 and following (Proposition 62) for other requirements to enact special taxes. Note the procedures and authorization for adopting a special tax included in Government Code sections 50075 and following, do not apply to a special tax adopted pursuant to article XIIIC. Note too that Proposition 218 does not affect specific statutory requirements for special tax elections, for example, provisions for elections in community facilities (Mello-Roos) districts. *See generally* Gov. Code, §§ 53311 *et seq.*

Application of voter-approval requirements to annexations

The Cortese-Knox Local Government Reorganization Act of 1985 provides for the establishment of a local agency formation commission ("LAFCO") in each county to encourage orderly growth and development and the assessment of local community service needs. The primary function of a LAFCO is "to review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization" of local agencies. *See* Gov. Code, § 56373.

In order to assure the fiscal feasibility of an annexation, a LAFCO may condition approval of a change of organization upon a requirement that the agency in question levy and collect a previously established and collected tax, benefit assessment or property-related fee or charge on parcels to be annexed to the agency. The Attorney General has concluded that the voter and landowner approval requirements in Proposition 218 do not apply to such taxes, assessments, fees or charges if imposed in pre-existing amounts. 82 Ops.Cal.Atty.Gen. (1999).

The Attorney General's conclusion is based upon the language of the Cortese-Knox Act that provides that any territory annexed to a city shall be subject to any previously authorized taxes, assessments, and fees or charges, Gov. Code, § 57330; the power of LAFCO to modify this

general rule, Gov. Code, § 56844; and the Cortese-Knox Act's own voter approval process that allows registered voters to reject an annexation, Gov. Code, §§ 50775- 50780. Those who would become subject to the established taxes, assessments, fees, and charges upon the change of organization have the opportunity to reject the imposition of the previously approved taxes, assessments, fees, and charges by rejecting the annexation proposal.

Finally, the Attorney General concludes that as a practical matter it would be virtually impossible to comply with the requirements of Proposition 218 in the context of a change of organization. The timing of the elections and the differing constituencies who would be voting on different measures with differing voter approval requirements "would present an administrative imbroglio."

Relationship between Proposition 218 and Proposition 62

The California Supreme Court in *Santa Clara County Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, upheld Proposition 62's requirements for general and special taxes. Although its application to charter cities is unclear, Proposition 62 clearly applies to general law cities. Thus at a minimum, general law cities must follow the provisions of **both** Propositions 62 and 218 in enacting taxes.

Proposition 62, a statewide statutory initiative, amended parts of the California Government Code. One of its provisions requires the enactment of general taxes to be proposed by a two-thirds vote of the legislative body, *see* Gov. Code, § 53724(b), and a majority vote of the electorate. Gov. Code, § 53723. Initially the courts found Proposition 62's voter approval requirement to be an unconstitutional referendum on a tax measure. *City of Woodlake v. Logan* 1991) 230 Cal.App.3d 1058. Ultimately, the California Supreme Court upheld the voter-approval requirement in 1995. During the period beginning with the adoption of Proposition 62 and continuing until the *Guardino* decision, a number of local governments enacted general taxes without voter approval.

Proposition 218 requires that general taxes enacted between January 1, 1995 and November 6, 1996, have been approved by the voters by November 6, 1998 to continue to be collected ("window period taxes"). There remained uncertainty, however, about the validity of general taxes enacted between the enactment of Proposition 62 (November 4, 1986) and January 1, 1995.

A challenge was brought in 1996 to the City of Brawley's utility users tax, adopted in 1991 prior to the Supreme Court's decision in *Guardino*. Although the court of appeal agreed that the city's reliance on pre-*Guardino* was "reasonable and justified," the court applied *Guardino* retroactively to the utility tax. The city was enjoined from collecting its utility users tax until it placed the tax on the ballot for voter approval. *See McBrearty v. City of Brawley* (1997) 59 Cal.App.4th 1441. The *City of Brawley* decision was superseded by the California Supreme Court's decision in *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809. In that case, the Court held that the plaintiffs may have been discouraged from challenging the City of La Habra's tax when it was adopted, they were in no manner precluded from bringing an action against the city at the time the ordinance was enacted. A holding to the contrary that

would allow a challenge to the tax beyond the limitations period would be inconsistent with the principle that a change in the substantive law governing a cause of action does not revive a claim otherwise barred by the statute of limitations.

A Proposition 62 challenge is pending as of the publication date of this Guide to the County of Los Angeles' utility users tax, which was imposed without voter approval during the period before *Guardino* when Proposition 62's requirement of voter-approval of general taxes was understood to be unenforceable. One of the primary issues in the case is whether a class can be certified to challenge a tax (cf. *Woosley v. State of California* (1992) 3 Cal.4th 758.

Particular Types of Taxes

Proposition 218 applies to all local taxes. Public agencies should review each tax to determine the extent to which it is exempt from Proposition 218's provisions as a pre-1995 tax and the procedures which would apply in the event the agency wishes to propose an increase. As previously discussed, "In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.]" *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874. However, a fee that exceeds the reasonable cost of providing the service or regulatory activity for which it is charged is not necessarily a tax. It may simply be an illegal fee. *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal. 4th 685, 700-701.

Practice Tip: Those agencies collecting a "business license fee" should make sure that it is in fact a regulatory fee for service, and not actually a tax that is called a fee. A "business license fee" that is in fact a tax, must comply with the provisions of Proposition 218 when it is imposed, increased, or extended. A "business license fee" cannot generate revenue in excess of the revenue required to support the regulatory program.

Parcel Taxes: A parcel tax is usually an annual tax which is based on either a flat per-parcel rate or a rate that varies based on other factors such as parcel size, use or other physical attributes other than value. *See Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481. Parcel taxes based upon the value of the property are invalid as a violation of Proposition 13's limits on *ad valorem* property taxes. *See* Cal. Const., art. XIIIA, § 1. *See generally City of Oakland v. Digre* (1988) 205 Cal.App.3d 99. Section 3 of Article XIIID limits the types of taxes that can be imposed upon a parcel of property to the ad valorem property tax imposed pursuant to Article XIII and Article XIIIA and any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIIIA. This means that a parcel tax may only be imposed as a special tax. *Nielson v. City of California City* (2006) 133 Cal.App.4th 1296. An agency proposing to levy a parcel tax should take note of the provisions of California Government Code section 53087.4 regarding mandatory collection of a parcel tax on the property tax bill.

Utility Users Taxes: In the face of changing technology in the telecommunications industry and deregulation in the areas of electricity and natural gas, many public agencies are considering amendments to their utility users taxes to expand the types of utilities upon which the tax could be collected. Such amendments would be considered a new tax, to which Proposition 218 would apply because the tax would be imposed on a new set of taxpayers or would increase the rate of the tax on existing taxpayers. See, generally Government Gov. Code, § 53750.

As of the publication date of this Guide, there are three issues relating to the impact of the federal law on utility users tax that should be considered. The first is the Internet Tax Freedom Act (ITFA) which places a moratorium on taxation of "Internet access." The second is legislation pending in the Congress which would place a moratorium on taxation of cell phones. The third is the elimination of the Federal Excise Tax on long distance calls that are not billed on both the bases of time and distance. (Distance is frequently excluded from nationwide "one-rate" plans). The FET was also eliminated on bundled charges for both taxable and non-taxable calls. The ITFA will expire on November 1, 2007, but legislation is pending in the Congress to extend the ban permanently. Several suits relating to the FET elimination are pending as of the publication date of this Guide challenging the utility users' taxes of the County of Los Angeles and the City of Long Beach: *Ardon et al. v. City of Los Angeles; McWilliams et al. v. City of Long Beach,* and *Granados et al. v. County of Los Angeles.* These cases should be followed both because of the impact generally on utility users taxes and because the plaintiffs in each of the cases have attempted to have a class certified to challenge a tax in contradiction to the holding in *Woosley v. State of California* (1992) 3 Cal.4th 758, which prohibits a class claim for a tax refund in the absence of explicit legislative authorization.

911 Emergency Fees: Several cities have imposed a non-voter approved fee on telephone bills to recover the cost of upgrades to, and the maintenance of, their 911 response system. Litigation, which has ensued against these cities, challenges the fee as a special tax or a property-related fee for which voter or property-owner approval is required; and whether the state 911 fee is preemptive as to some or all local governments. The case that may determine this issue is *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, which was returned to the trial court after the appellate court decided a procedural dispute.

Procedures for Challenging a Tax

Statute of Limitations. In the absence of any other specifically applicable statute of limitations, the provisions of Code of Civil Procedure § 338 (a) will apply to challenges to the legality of a tax. In *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809, the Court held that the three-year limitations period for actions on a liability created by statute (Code of Civil Procedure § 338) applies to declaratory relief actions seeking to invalidate a tax. It also held that the validity of a tax measure may be challenged within the statutory period after any collection, regardless of whether more than three years have passed since the measure was adopted. The Court responded to the City's argument that such a "rolling" statute of limitations imposed a financial hardship by reasoning that since this rule relates only to injuries occurring in the statutory three-year period before suit is brought and applies only to plaintiffs injured by tax

collections within that period, the legitimate public interest in stability of municipal finance is not imperiled.

Practice Tip: If faced with a challenge to the legality of a tax, or with a claim that an assessment or fee is an illegal tax, check first to determine if a specific statute of limitations may apply to the challenge. See, e.g., Gov. Code, § 53341 (Mello-Roos special tax); Gov. Code, § 66022 (certain fees and charges defined in the Mitigation Fee Act); Code Civ. Proc. § 338(m) (special parcel tax).

Claims for Refunds.

Refunds of overpaid taxes may be subject to different timing requirements, including a requirement for filing a claim if the city has adopted a local claim filing ordinance. Revenue and Taxation Code sections 5096-5149.5 establishes the procedures for refunds of taxes collected on the county tax roll. (*See* Ca. Rev. & Tax. Code §§ 136, 4801; *Hanjin International Corp. v. Los Angeles County Metropolitan Transportation Authority* (2003) 110 Cal.App.4th 1109.) The general procedure is as follows: (i) first pay the challenged charge; (ii) file a claim within four years after payment of the charge sought to be refunded (Rev. & Tax Code § 5097); and (iii) any lawsuit must be filed within six months after a claim is rejected (Rev. & Tax Code § 5141).

Generally, tax refund claims are exempt from the Government Claims Act if there is a specific state statute prescribing procedures for the refund. Gov. Code, § 905(a). If there is no specific statute governing the particular refund claim, e.g. for a tax not collected on the tax rolls, then the Act governs the refund claim proceeding. Cal. Gov. Code § 905(a); *Volkswagen Pacific, Inc. v City of Los Angeles* (1972) 7 Cal.3d 48, 61-63; *Bainbridge v. County of Riverside* (1959) 167 Cal.App.2d 418, 421; 57 Ops.Cal.Atty.Gen. 635 (1974). Refund claims under the Government Claims Act must be filed within one year from date of payment of the challenged charge. Gov. Code, § 911.2; *Bainbridge v. County of Riverside* (1959) 167 Cal.App.2d 418, 422. Lawsuits must be filed within six months from the claim rejection notice. Gov. Code, § 945.6.

A city may adopt an ordinance pursuant to Gov. Code, §§ 905(a) and 935 to require a claim for refund of a tax to be presented to the city, which gives the city a chance to consider the merits of the claim and also reduces the potential refund period to one year. Further, such an ordinance may bar class and representative claims. However, the provisions of such an ordinance should be reviewed in light of the court of appeal's opinion in *Andal v. City of Stockton* 137 Cal.App.4th 86 (2006). That court distinguished between a claim for refund of taxes to which such an ordinance clearly applies, and an action in declaratory relief which challenges the constitutionality of the tax but does not seek a refund. See also *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444; *Flying Dutchman Park, Inc. v. City and County of San Francisco* 93 Cal.App.4th 1129 (2001). The *Andal* court noted that although it is true but the doctrine of exhaustion of administrative remedies is often applied to tax proceedings, these tax proceedings, generally involve refunds, methods, classifications, assessments and the like. Further, it is also true the administrative exhaustion doctrine generally applies to actions raising constitutional issues. But if a tax ordinance or law provides the taxpayer with no mechanism for a constitutional challenge to the entire structure under which the ordinance or law operates, then the exhaustion doctrine [requirement to file a claim for refund]

does not apply. See also *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 639.

Exhaustion of Administrative Remedies

A city may choose to establish an administrative procedure for challenging taxes. Generally, where an administrative remedy is available, that remedy must be pursued before a lawsuit may be filed. *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424, 1428. However, if the action is solely one for declaratory relief, an injunction or a writ of mandate, to prevent the future collection of a tax, the exhaustion of administrative remedies generally is not required. *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809, 822; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 319-320; *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86; *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424; *Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal.App.4th 637, 639. However, in some cases even a declaratory relief action may be subject to the exhaustion requirement. *Flying Dutchman, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129; *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal. App.4th 475.

Standing. Cell phone companies have mounted challenges to utility users tax ordinances and to ordinances imposing a 911 fee. Their standing to sue was called into question because they collect but do not pay the challenged tax. In *Andal v. City of Stockton, supra,* the Court held that a cell phone company has standing to challenge an ordinance imposing a 911 fee based upon *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282 in which the Court held that a hotel owner had standing to challenge a transient occupancy tax even though the hotel owner only collected the tax finding the owner "vitally interested in the validity of the ordinance" in two respects. First, the owner's business operations were "inextricably interwoven into the operation of the ordinance"-under threat of various penalties, the owner had to collect, record, report and pay the tax to the tax collector. Second, the owner was engaged in a competitive business that could be adversely affected by the tax on customers. Under the 911 Fee ordinance the same could be said for the cell phone companies as for the hotel owner in *Gowens*.

Class Actions. Several lawsuits are pending as of the publication date of this Guide in which the plaintiffs have attempted to certify a class challenge to the tax. Each of these lawsuits have been subject to demurrer based upon the line of cases led by *Woosley v. State of California* (1992) 3 Cal.4th 758, which prohibits a class claim for a tax refund in the absence of explicit legislation authorization. Note that the lack of authority for a class claim to challenge a tax was one basis for the court's determination in *La Habra, supra,* that the legitimate public interest in the stability of municipal finances was not impaired by a statute of limitations that began each time the tax was collected.

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III. Assessments

Introduction and Overview

> ”... [A] special assessment, sometimes described as a local assessment, is a charge imposed on particular real property for a local public improvement of direct benefit to that property, as for example a street improvement, lighting improvement, irrigation improvement, sewer connection, drainage improvement, or flood control improvement. The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.” *Solvang Municipal Improvement District v. Board of Supervisors* (1980) 112 Cal.App.3d 545.

Proposition 218 defines “assessment” as “any levy or charge upon real property by an agency for a special benefit conferred upon the real property.” Cal. Const., art. XIIID, § 2(b). A special assessment, sometimes called a “benefit assessment,” is a charge generally levied upon parcels of real property to pay for benefits the parcels receive from local improvements. Special assessments are levied according to statutory authority granted by the Legislature or, in some instances, local charters. Distinguishing among taxes, fees and assessments can be difficult and often depends on the context in which the distinction is made. *See, e.g., Sinclair Paint Co. v. Bd. of Equal.* (1997)15 Cal. 4th 866, 874-875.) For example, taxes, assessments and property-related fees all may be imposed on property. Cal. Const., art. XIIID, § 3. The key feature that distinguishes an assessment from a tax, fee or charge is the existence of a special benefit to real property. Without identifying a special benefit, there can be no assessment. *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 420; *Ventura Group Ventures, Inc. v. Ventura Port Dist*. (2001) 24 Cal.4th 1089, 1106. Although assessments are often held to be an exercise of the sovereign’s power to tax, “a special assessment is not, in the constitutional sense, a tax at all." *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal.24, 29. Again, the existence of special benefit is what also distinguishes assessments from general and special taxes. *City Council of the City of San Jose v. South* (1983) 146 Cal. App. 3d 320, 332; *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980)112 Cal. App. 3d 545, 552-553; *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 984. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874.

Assessments that are subject to Proposition 218 are only those that are imposed on real property. Assessments imposed on businesses pursuant to the Parking and Business Improvement Law of 1989 are not imposed on real property and, therefore, are not subject to Proposition 218. *Howard Jarvis Taxpayers Association v. City of San Diego* (1999) 72 Cal.App.4th 230. Benefit assessments subject to Proposition 218 must also be distinguished from assessments that are in the nature of a charge for service imposed, for example, in a nuisance abatement or weed

abatement proceeding. An ordinance imposing an assessment does not create a contract between the local agency and the property owners that is subject to the constitutional proscription against the impairment of contractual obligations. *Consolidated Fire Protection District v. Howard Jarvis Taxpayers Association* (1998) 63 Cal.App.4th 211.

Section 5 of Article XIIID provides that, with the exception of certain "exempt" assessments, beginning July 1, 1997, all "existing, new, or increased" assessments are required to comply with this Article. An "existing" assessment is an assessment levied by the legislative body before November 6, 1996. Gov. Code, § 53753.5(c)(1). Any assessment imposed to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control is exempt from the procedures and approval process set forth in Section 4 of Article XIIID until the assessment is increased. Other exempt assessments are: those imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment was initially imposed until proposed for increase; an assessment the proceeds of which are exclusively used to repay bonded indebtedness; and any assessment which previously received majority voter approval until proposed for increase.

Key Changes Proposition 218 Makes to Assessment Law

Proposition 218 affects benefit assessments in four principal ways.

- **Repeal By Initiative.** It subjects assessments to repeal or reduction by initiative.
- **Procedural Requirements.** It establishes procedural and other requirements for the levy of assessments, including a requirement for property owner approval by a new mail ballot process.
- **Burden of Proof.** It alters the burden of proof in legal actions to contest the validity of an assessment.
- **Public Property Assessed.** It requires the assessment of publicly-owned property within the assessment district.

Proposition 218 makes these changes by adding article XIIID to the California Constitution.

Proposition 218 does not provide any new authority to local agencies to impose assessments. With the exception of the statutory notice, protest, and hearing requirements, local agencies must substantially comply with both existing statutes and the new constitutional requirements. Gov. Code, § 53753.[18]

[18] Legislation adopted in 2000 (2000 Stats., ch. 262 [S.B. 1334]) harmonized special assessment acts with Proposition 218. Similar legislation to harmonize statutes authorizing levy of standby charges has been introduced during the 2007 legislative session. (S.B. 444 [Committee on Local Government].)

Further, charter cities, in the adoption of local procedural ordinances relating to assessments, must now comply with the requirements of **both** Proposition 218 and Article 16, section 19 of the California Constitution. This latter provision of the constitution requires assessment ordinances in charter cities to contain procedural requirements substantially similar to certain provisions of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931. *See* Cal. Sts. & High. Code §§ 2800 *et seq.*

The following sections discuss Proposition 218's effects on the procedures for new assessments (including changes to majority protest procedures), what may be included in an assessment, distinguishing special from general benefits, assessment of public property, burden of proof, exemptions, standby charges, drainage, sewer or bridge and thoroughfare fees and the use of initiatives to repeal or reduce assessments.[19]

Procedures For New Assessments

General Procedures. The procedures and substantive requirements for assessments established by Proposition 218 are contained in article XIIID, section 4.[20] They are summarized in the following outline.

A. Identify all parcels which will have a special benefit conferred upon them, including property owned by federal, state or local governmental agencies.

(1) "Special benefit" means a "particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large."

(2) General enhancement of property value is **not** a "special benefit." The key word is "general." A special and particular enhancement of property value is a traditional measure of special benefit.

B. Determine the "proportionate special benefit" to each property in relationship to the entirety of cost of acquiring or constructing an improvement or of "maintaining and operating" such an improvement. The assessment on a parcel may not exceed the reasonable cost of the "proportional special benefit" conferred on such parcel. Apportioning special benefit does not require mathematical precision. So long as the apportionment is reasonable and is justified by the engineer's report, it should be upheld. (See discussion of burden of proof in following sections of this guide)

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[19][9] The assessment ballot procedures required by Proposition 218 do not constitute an unconstitutional referendum pursuant to article II, section 9 of the California Constitution. *Consolidated Fire Protection District v. Howard Jarvis Taxpayers Association*, (1998) 63 Cal. App. 4th 211

[20] The "procedures and approval process" set forth in section 4 means all of the requirements set forth in section 4 (both procedural and substantive). Gov. Code, § 53753.5(c)(2); *Keller v. Chowchilla Water District*, (2000) 80 Cal.App.4th 1006, (2000).1006.

C. Only “special benefits” are assessable. Prior to Proposition 218, only properties **receiving** special benefit were assessable, but the fact that some incidental general benefit also resulted from capital improvement or maintenance did not invalidate an assessment apportioning some or all of that general benefit to specially benefited properties within the district. Under article XIIID, costs associated with general benefit must be paid from other resources of the local agency.

D. Notice requirements.

(1) Proposition 218 requires 45 day mailed notice to record owner of each parcel. It eliminates the published notice option established in the Brown Act for assessment districts that are coterminous with local government boundaries or for assessment districts of 50,000 parcels or more. The record owner is the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll. Gov. Code, § 53752(j).

(2) Notice of hearings required by the statutory provisions under which the agency is levying the assessment must also be followed. In some instances this will require combined notices and multiple public hearings. The vote under Proposition 218 would occur at the last required public hearing.

(3) Contents of notice.

(a) total assessment for entire assessment district;
(b) assessment chargeable on owner’s parcel;
(c) duration of proposed assessment;
(d) reason for assessment;
(e) basis on which amount of proposed assessment was calculated;
(f) date, time and place of public hearing;
(h) summary of voting procedures and effect of majority protest.

E. Protest by ballot.

(1) Property owners may express their support or opposition to a proposed assessment by ballot that must accompany the notice.

(2) Ballots must be returned before the conclusion of the public hearing.

(3) Ballots may be tabulated at the public hearing.

(4) No assessment may be imposed if a “majority protest” exists. Proposition 218 overturns ability of legislative body in some assessment district proceedings to override a majority protest by a 4/5ths vote.

(5) "Majority protest" exists if ballots submitted in opposition exceed ballots submitted in favor of assessment.

(a) Vote is weighted according to proportional financial obligation of affected property.

(b) Modifies preexisting law that generally required owners of 50 percent or more of property proposed to be assessed (determined by acreage) to file a written protest in order to establish a majority protest.

Practice Tip: Proposition 218's notice, protest and hearing requirements do ***not*** *apply to annual assessments in subsequent fiscal years, when*

- *the agency has complied with Proposition 218's substantive and procedural requirements in originally adopting the assessment; or*
- *the original assessment is exempt from Proposition 218.*

Proposition 218's requirements apply when an agency increases the assessment beyond the formula or range originally approved in accordance with Proposition 218. See Gov. Code, § 53753.5(a).

Majority Protest Procedures. Article XIIID, section 4(c), (d) and (e) create a new requirement for a special mailed ballot procedure to determine a majority protest. This new requirement and the procedures adopted to implement it superseded the notice, protest and hearing requirements of the underlying assessment act.[21] *See* Gov. Code, §§ 53753, 53753.5, 53753(a).

The notice procedures also supersede the notice provisions of the Brown Act applicable to amendments. *See* Gov. Code, § 54954.6. Proposition 218 is perhaps best understood as a supplement to the assessment district formation process provided by various assessment statutes. It establishes the procedures that must be followed leading up to the levy of a "special assessment" or "benefit assessment." Cal. Const., art. XIII D, § 4; see also *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 418; *Bonander v. Town of Tiburon* (2007) 147 Cal.App.4th 116, *rev. granted.* Proposition 218 renders unconstitutional any contradictory procedure leading to the adoption or levy of an assessment falling within its ambit. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 818.)

Mailed Ballot Proceedings

Article XIIID, section 4(c) requires the notice and ballot be sent to "the record owner of each parcel." "Record owner" means the owner of a parcel whose name and address appears on the

[21] An exception is division 4.5 of section 3100 of the Streets and Highways Code.

last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency. Gov. Code, § 53750(j).

Unlike a property-related fee or charge, which may be imposed on persons, an assessment is imposed only on property. In most cases, a tenant is not directly liable to a public agency for payment of taxes or assessments. Therefore, absent special circumstances where an assessment might be imposed directly on a leasehold interest, neither Article XIIID nor the Proposition 218 Omnibus Implementation Act seem to require that notice be sent to a tenant of the real property. Article XIIID, section 2(g) defines "property ownership" to include "tenancies of real property" when the tenant is "directly liable" to pay an assessment. The controversy over the meaning of the term "directly liable" appears to arise most frequently in the context of property-related fees, not taxes or assessments imposed on property and collected by virtue of the tax roll. The ballot pamphlet is not helpful on this issue, inasmuch as it simply says "renters responsible for paying assessments" would vote. Tenants who are under a lease to pay taxes and assessments as part of rent would be indirectly liable to the public agency, and the public agency, lacking privity of contract with the tenant would have no basis for enforcing a payment obligation. Thus, the property owner remains directly liable to the public agency and, the new majority protest procedures in article XIIID vest the right to notice and to cast assessment ballots in the property owner.

Article XIIID, section 4(c) requires that the "record owner of each parcel" get notice of the assessment and a ballot. Article XIIID, section 4(g) states in part:

> Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment.

Unless the Legislature specifies to the contrary, it would appear that the right to receive notice and to vote on an assessment is limited to the record landowner. This appears to be consistent with existing law. *See Southern California Rapid Transit District v. Bolen*, 1 Cal.4th 654, *reh'g denied* (1992). However, some believe that Proposition 218's allocation of the protest voting power violates equal protection, particularly when it can be shown that assessments are the direct personal obligation of persons other than the landowner. Judicial challenges to the constitutionality of Proposition 218 on this ground may be filed. (*Cf. Nielson v. City of California City* 133 Cal.App.4th 1296 (2006), which held that registered voter elections for approval of taxes do not violate equal protection.)

Proposition 218 seems to have anticipated litigation on the "who-gets-to-vote" issues. It says that if a person brings a successful suit with respect to a specific assessment proceeding on the ground that the provisions of article XIIID preclude participation by tenants in violation of federal constitutional or statutory law, then public agencies must obtain approval of the assessment by **both** property owners and a two-thirds vote of the electorate in the district. Cal. Const., art. XIIID, § 4(g).

Current statutes relating to mailing of notices in assessment districts generally require mailing, postage prepaid, by United States first class mail. A record of mailing by the clerk is generally sufficient evidence of the fact of mailing. Proposition 218 requires that the notice include instructions for the completion and return of the ballot. The ballot must include the agency's address for receipt of the ballot once completed by the landowner.

The Proposition 218 Omnibus Implementation Act, Gov. Code, § 53750 et seq., requires that "[e]ach assessment ballot shall be in a form that conceals its contents once it is sealed by the person submitting the assessment ballot" and that "assessment ballots shall remain sealed until the tabulation of ballots." It also provides that "[d]uring and after the tabulation, the assessment ballots shall be treated as disclosable public records, as defined in Section 6252, and equally available for inspection by the proponents and the opponents of the proposed assessment." However, neither Proposition 218 nor the Government Code specifies whether the envelopes that contain the ballots must remain confidential prior to the tabulation of the ballots

Some public agencies find it desirable to require ballots to be submitted in agency-provided envelopes which identify the property for which the ballot was submitted on the outside of the envelope. This can assist in the setting aside of the ballot envelopes, prevent them from being opened, and allow the City Clerk to discard a ballot if a replacement ballot is submitted. Public review of agency-provided envelopes can disclose who voted. Even if agency-provided envelopes are not used, the envelope submitted by the property may include property-identifying information (e.g., a return address). While the Government Code protects the contents of the ballot from disclosure prior to the public hearing and tabulation, it does not specifically exempt the envelope from disclosure. Some attorneys argue that the envelope should remain confidential citing the intent of the law to retain the confidentiality of the ballot (including all information relating to that ballot) until tabulation begins. Other attorneys argue that the envelopes are public records under the Public Records Act which would provide an interested party with the right to inspect the ballot envelopes, learn who had voted, and participate in get-out-the-vote campaigns.[22]

<u>Practice Tips</u>:

- *There is no legal authority which would allow or disallow the characterization of envelopes as public records. Further, whether it is advisable officially to adopt or to announce that the ballot envelopes are open for inspection is a politically sensitive issue. For example, an announcement may lead to ballot envelope inspections, get-out-the-vote campaigns and upset property owners who may not want to be disturbed or who may believe their voting should be secret. On the other hand, not making an announcement*

[22] The Elections Code does not apply. (Gov. Code, §53753(e)(f).) Nonetheless, it is interesting to note that elections law is consistent with this get-out-the-vote campaign conclusion. For example, during a general election, "[a]ny person may inspect the roster while voting is in progress and while votes are being counted…." (Elec. Code, § 14223(b).) These rosters indicate who has voted. (Elec. Code, § 14109.) Pursuant thereto, during the voting the proponents (or opponents) of a certain candidate or issue can discover who has voted and pursue "get-out-the-vote" campaigns to lobby those yet to vote. (See also Elec. Code, § 3013; 76 Op.Atty.Gen. 235, 242 (1993) (any person may discover at any time who has requested an absentee ballot and may therefore lobby the expected absentee voters).)

may mean that only savvy property owners (e.g., those who have figured out that they should be able to inspect envelopes) will engage in get-out-the-vote campaigns which may also lead to charges of bias (e.g., if the proponents are the savvy ones who inspect the ballot envelopes with city permission). Alternatively, a city could treat ballot envelopes as non-disclosable public records. (See Gov. Code, § 6254(c) (protecting from disclosure documents which would lead to an "unwarranted invasion of personal privacy.") But this position appears to be the weaker legal conclusion under the Public Records Act.

- *Consider adopting a resolution that establishes the procedures the agency will use to comply with the requirements of Proposition 218. One provision of such a resolution should require use of the official agency-provided ballot and the statement that votes submitted on ballots that are not the agency-provided ballot will not be counted. An agency is not obligated to provide envelopes. (Gov. Code, §53753(c).) However, providing "security envelopes" and keeping the envelopes sealed until the tabulation begins may be the best way to maintain the required confidentiality of the ballots. Except as to ballots submitted at the public hearing, requiring ballots to be submitted in agency-provided "security envelopes" can make it easier to identify and set aside ballot envelopes as they are submitted (preventing premature and accidental opening) and can ensure that no one could see how a property owner voted prior to the tabulation).*

- *The agency's resolution adopting procedures for conducting mailed ballot proceedings should address whether someone other than the property owner may return the ballot. Existing mail ballot procedures of the Elections Code do not apply to the new assessment protest procedures under Proposition 218, therefore, the ballots are not required under state law to be returned either by mail, or by personal delivery from the voter or a statutorily designated person. See, e.g., Elec. Code, §§ 3017, 4100 et seq. The ballot must be signed and either mailed or "otherwise delivered to the address indicated on the assessment ballot." See Gov. Code, § 53753(c).*

Because ballots may either be mailed to the agency or submitted at the public hearing, tabulation of the ballots may not begin until the public hearing has been closed. Gov. Code, § 53753. The public hearing may be continued from time to time. *See* Gov. Code, § 53753(d). There is nothing in Proposition 218 prohibiting an agency from closing the public input portion of the public hearing and then continuing the hearing to permit the tabulation of ballots.

As discussed above, Proposition 218 specifically states that the ballots must be tabulated "at the public hearing." Whether this provision permits tabulation by public count without the presence of the legislative body remains to be determined. However, it would appear that the legislative body could delegate the responsibility for tabulating the ballots to an official such as the city or county clerk with the announcement of the results of that tabulation at a later date. This is commonly done under current assessment procedures for the tabulation of a majority protest.

Who gets to vote?

The agency should specify in the procedures it establishes for the return of the ballot who gets to vote if the owner of the property is a public agency, partnership, corporation, joint tenancy or tenancy in common. It would appear that the vote could be cast by any of the general partners, joint tenants or tenants in common. Corporations and public agencies would need to authorize a person to cast the vote and return the ballot. An assessing agency should establish procedures for authenticating the ballot and determine whether "split" voting will be accepted. *See, e.g.* Wat. Code, § 35003.1 (allowing split voting in cases of multiple ownership in water district landowner elections).

Votes are weighted based upon the amount of the assessment. The weight of a ballot is determined according to the proportional financial obligation of the property owner, a one dollar – one vote system instead of a one person – one vote system. The weighted vote method for approving assessments was upheld in *Not About Water Com v. Bd. of Supervisors* (2002) 95 Cal. App.4th 982, 1001. Prior to Proposition 218, the courts had found that apportioning the votes in an assessment district financing based upon the relative financial burden to the property subject to the assessment has a rational basis. *See Southern California Rapid Transit District v. Bolen* (1992) 1 Cal.4th 654, 677; *County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863, 876. In *Southern California Rapid Transit District v. Bolen,* an assessment vote was challenged on the ground that the failure to apportion voting power according to financial burden lacked a rational basis. Although Proposition 218 now requires that an assessment be approved by a majority vote based on special benefit, prior assessment law also apportioned the majority protest based on special benefit.

Practice Tip: The protest procedures of Article XIIID appear to apply only to the protest against the "assessment." Unless the Legislature eliminates existing protest rights, it would appear that property owners would continue to have the right to protest the proposed improvements or the extent of the district. Only the amount of the proposed assessment is subject to the assessment ballot proceedings. Likewise, it appears that the existing procedures for making changes in assessment districts (for example Streets and Highways Code sections 10350-10358) would not be affected by article XIIIC, section 4(c), (d) and (e).

Imposing/Increasing an Assessment

Any assessment for operations, improvements, or services must be based upon statutory authorization or local ordinance adopted by a charter city pursuant to its charter authority. Article XIIID specifically states that it does not create any new authority for an agency to levy an assessment. Cal. Const., art. XIIID, § 1(a). But, article XIIID anticipates assessments for capital costs of public improvements, maintenance and operation expenses of a public improvement, and the cost of property-related services may be provided through the assessment district. *See*, Cal. Const., art. XIIID, § 4.

An assessment is “increased” when the agency either increases the rate used to calculate the assessment or revises the methodology by which the rate is calculated which results in an increased amount. *See* Gov. Code, § 53750(h)(l). The provisions of the Proposition 218 Omnibus Implementation Act that apply to automatic annual increases to taxes, fees, and charges do not apply to assessments. A tax, fee, or charge is not “increased” if (1) it is adjusted in accordance with a schedule of adjustments (including inflation), adopted by the agency prior to November 6, 1996; or (2) it implements an increase – such as an inflation adjustment - previously approved by the voters *See* Gov. Code, § 53750(h)(2)(A). Note this element of statute only refers to taxes, fees and charges—but not assessments. The Attorney General has opined that even if future annual increases in an assessment were specified in a previously adopted engineer’s report, the requirements of Proposition 218 would be triggered by the annual legislative action of imposing an assessment as distinguished from simply the continued administrative collection of an existing assessment. (The assessment construed by the Attorney General was imposed pursuant to the Uniform Standby Charge Procedures Act, Gov. Code, §§ 54984 *et seq*., which requires annual action by an agency’s legislative body). 82 Ops.Cal.Atty.Gen. 35 (1998).

The Cortese-Knox Local Government Reorganization Act of 1985 provides for the establishment of a local agency formation commission (“LAFCO”) in each county to encourage orderly growth and development and the assessment of local community service needs. The primary function of a LAFCO is “to review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization” of local agencies. Gov. Code, § 56373. In order to assure the fiscal feasibility of an annexation, a LAFCO may condition approval of a change of organization upon a requirement that the subject agency levy and collect a previously established and collected tax, benefit assessment or property-related fee or charge on parcels to be annexed to the agency.

The Attorney General has concluded that the voter and landowner approval requirements set forth in Proposition 218 do not apply to such taxes, assessments, fees or charges if imposed in pre-existing amounts. 82 Ops.Cal.Atty.Gen. 180 (1999). The Attorney General's conclusion is based upon the language of the Act that provides that any territory annexed to a city shall be subject to any previously authorized taxes, assessments, and fees or charges, Cal. § 57330; the power of LAFCO to modify this general rule, Gov. Code, § 56844; and the Act's own voter approval process that allows registered voters to reject an annexation, Gov. Code, §§ 50775- 50780. Those who would become subject to the established taxes, assessments, fees, and charges upon the change of organization have the opportunity to reject the imposition of the previously approved taxes, assessments, fees, and charges by rejecting the annexation proposal.

Finally, the Attorney General concludes that as a practical matter it would be virtually impossible to comply with the requirements of Proposition 218 in the context of a change of organization. The timing of the elections and the differing constituencies who would be voting on different measures with differing voter approval requirements “would present an administrative imbroglio.”

Distinguishing General and Special Benefit

Proposition 218 added a set of procedures and requirements which a local government must follow to levy an assessment. In addition to notice, hearing and assessment ballot proceedings, Proposition 218 provides that "[o]nly special benefits are assessable" and requires a local government to "separate the general benefits from the special benefits conferred on a parcel." Cal. Const., art. XIIID, § 4 (a). In 1898 the Supreme Court of the United States first stated the rule:

> The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement . . .

Norwood v. Baker, (1898) 172 U.S. 269

The law has historically required a local government first to identify the benefit which the public improvement will render; next, to determine if the property owners will receive a benefit different from that of the general public; and finally, to ascertain if the formula on which the assessments are made is based on the benefit received. *Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852, 857. The purpose of this section is to explore the meaning of these particular requirements in order to determine what changes, if any, have been made to the law of benefit assessments that existed prior to November, 1996.

An annotation to section 4 provided by the Howard Jarvis Taxpayers Association states:

> These requirements for assessments are similar to those imposed by traditional assessment law. The overall purpose of this section is to permit assessments to be used, once again, as a legitimate financing mechanism for capital improvements and services that provides particular benefits to property and not just a means to impose flat rate parcel taxes . . .

The source material for this quote is included in the attachments.

"Traditional assessment law" says the following about special benefit and general benefit:

- The power to specially assess property to pay for public improvements is based upon existence of a special benefit to the assessed property. *Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852, 856.

- The return to the property owner by way of benefit is the basic foundation upon which this right to specially assess rests. *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal.24, 30.

- The compensating benefit to the property owner is the basis for the authority to impose the burden of a special assessment. *Spring Street Co. v. City of Los*

Angeles, supra,; *Safeway Stores v. City of Burlingame* (1959) 170 Cal.App.2d 637.

The foundation of the power to levy a special assessment is the benefit that the object of the assessment confers on the owner of the abutting property which is different from the general benefit that the owners enjoy in common with the other inhabitants of the local agency. 14 McQuillen *Municipal Corporations* § 38.02. The theory is that the general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public. *Roberts v. City of Los Angeles* (1936) 7 Cal.2d 487, 491; *Solvang Municipal Improvement District v. Board of Supervisors* (1980) 112 Cal. App.3d 545, 552; *Burnett v. City of Sacramento* (1859) 12 Cal.76, 83-84.

By its nature most every public improvement financed through an assessment district contains an element of public benefit. The test is: does there exist, with relation to the improvement, a special and peculiar benefit to the property to be assessed? *Lloyd v. City of Redondo Beach* (1932) 124 Cal.App.2d 541. The law requires that portion of the cost of the improvement which benefits the public generally, to be separated from that portion of the cost of the improvement which specially benefits the assessed properties.

Proposition 218 provides the following definition of "special benefit":

> 'Special benefit' means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute 'special benefit.'

Cal. Const., art. XIIID, § 2(i). This definition is not different from traditional assessment law.

General enhancement of property value has not historically constituted "special benefit." *Harrison v. Board of Supervisors* (197) 44 Cal.App.3d 852, 859. Increased property value is only one factor to consider in determining whether "special benefit" exists to support an assessment. *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal.24, 29. The property assessed must receive some substantial, direct benefit from the public improvement. *Lloyd v. City of Redondo Beach* (1932) 124 Cal.App.2d 537, 546; *Solvang Municipal Improvement District v. Board of Supervisors* 1980) 112 Cal.App.3d 545, 552. The California Supreme Court is considering, as of the publication date of the Guide, whether the acquisition and improvement of regional open space provides special benefit to private property sufficient to justify assessment financing. In *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority*, Case No. S136468, the Court is considering whether it is possible to calculate the proportionate benefit attributed to each property owner from the future acquisition of regional open-space. Also at issue in this case is the proper standard of review of a proceeding of this type. The Court will decide whether it has the authority to consider the arguments of the plaintiffs that were not presented to the public agency in the course of the public hearings on the assessment.

The engineer's report prepared by a registered professional engineer required by article XIIID, section 4(b) is where the documentation of special benefit is found.

Practice tip: It is very important to conduct a legal review of the assessment district engineer's report, beginning with the first draft of the report. The engineer's report will contain most of the evidence upon which to base the agency's findings of special benefit. For example, an agency which does not impose an assessment on publicly-owned property, must demonstrate "by clear and convincing evidence" that there is, in fact, no special benefit to the parcel. Article XIIID, section 4(a).

Although Proposition 218 may not have changed traditional assessment law regarding special and general benefit, it did make two important changes: public property must be assessed, and the change in the burden of proof modifies the near conclusive presumption in favor of the agency's determinations established by California Supreme Court in *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676.

Assessment of Public Property

Unless there is evidence that the publicly-owned parcels receive no special benefit. Article XIIID, section 4(a), states that parcels "owned or used" by the State and other public agencies "shall not be exempt from assessment . . ." It is unclear whether this provision creates a mandatory requirement to assess public agencies unless there is clear evidence that their property will not receive a special benefit from a particular improvement or property-related service, or whether it merely forbids the assessing agency from passing the portion of the assessable costs attributable to the public property on to the owner landowners.

Practice Tip: "Clear and convincing" evidence must support a determination that publicly-owned property will not receive a special benefit. "Clear and convincing evidence" refers to a higher than usual standard of evidence sufficient to establish a fact in an ordinary civil case, but not as high as the burden in a criminal case. (*See Broadman v. Commission on Judicial Performance,* (1998) 18 Cal.4th 1079, 1090.) *The phrase has been defined by courts in various ways, including evidence that is "clear, explicit and unequivocal," evidence "so clear as to leave no substantial doubt," and evidence "sufficiently strong to command the unhesitating assent of every reasonable mind. 1 Witkin, California Evidence, §160, p. 137 (3d ed. 1986).*

Notwithstanding Proposition 218, the federal government is exempt from assessment because of the supremacy clause of the United States Constitution and the Act for the Admission of California into the Union. The federal government may ignore an assessment levied without authorization by an act of Congress. *See Palm Springs Spa, Inc. v. County of Riverside* (1971) 18 Cal.App.3d 372, 376-377; *see also Novato Fire Protection District v. United States of America,* 181 F.3d 1135 (9th Cir. 1999).

Presumably, the "State of California" and the "United States" includes all departments and agencies of those entities. In June 2005, the California Department of General Services augmented the State Administrative Manual to provide this guidance for managers of State real estate assets on how to pay local government assessments pursuant to Proposition 218. Section 1310.5 of the Manual states:

> Upon receipt of an invoice, statement, tax bill or other notification with a line item assessment or information pertaining to the development of an Assessment District, all State agencies are required to review the information and obtain its legal council's (sic) opinion in determining if the Assessment District was constituted pursuant to the procedures prescribed by law and further evaluate whether or not the state property within the District receives a special benefit. Agencies receiving bills from Districts constituted prior to 1996 should verify that the Districts have gone back and followed the procedures established in current law which would allow the State's participation. If the validity test is met, then the state agency which owns or controls the property is required to promptly pay its share of the assessment.

Practice Tip: The assessing agency may pay the assessment otherwise levied on publicly-owned property since these are services and improvements of the assessing agency. Therefore, payment of those costs by an assessing agency would not constitute gifts of public funds, even if the payment relieves another agency of that expense. Under existing law, assessing agencies may make contributions to an assessment district and in some instances must make such contributions on behalf of other public agencies included in an assessment district. See, e.g. Cal. Sts. & High. Code §§ 5303, 10205, 22663.

Who pays the State's assessment may depend on the enabling statute. For example, under the Municipal Improvement Act of 1913, the state or any department thereof may be liable for the assessment, but only after the Legislature has appropriated the amount necessary to make payment. Prior to the appropriation, the levying agency must advance the amount of the assessment. *See* Cal. Sts. & High. Code §§ 5320-5325, 10206. If the State does not pay the assessment generally, public property used for public purposes may not be foreclosed for non-payment of an assessment. Instead, a mandamus action may be filed against an agency that chooses not to pay. A mandamus action is an action seeking an order of the court directing the agency to take a statutorily required action, such as paying an assessment. *See generally* Cal. Sts. & High. Code. §§ 5302.5, 10206.

Although Proposition 218 reverses the judicially-created implied exemption of public agencies from assessments, it does not appear to alter the Legislature's authority to establish requirements for assessments of publicly-owned property. Publicly-owned property has always been liable for special assessments when there is positive legislative authority to levy the particular assessment against public property. Some statutes currently authorize assessment of public property. *See, e.g.,* Cal. Sts. & High. Code §§ 5301-5303, 5320-5320, 10206 (1911 and 1913 Acts).

The 1972 Lighting and Landscaping Act authorizes assessment of property owned by a public agency but requires the assessing agency to pay the assessment, unless the assessed agency voluntarily pays the assessment amount. Cal. Sts. & High. Code § 22663. Until the Legislature adopts implementing legislation, it is unclear what the rules will be for assessing government property.

The federal government is, in effect, exempt from assessment. Because of the supremacy clause of the United States Constitution and the Act for the Admission of California into the Union, the federal government may ignore an assessment levied without authorization by an act of

Congress. *See Palm Springs Spa, Inc. v. County of Riverside* (1971) 18 Cal.App.3d 372, 376-377.

This conclusion is supported by the decision in *Novato Fire Protection District v. United States of America*, 181 F.3d 1135 (9th Cir. 1999). In that case, the court overturned the district's efforts to detach Hamilton Air Force Base from the district following the base's termination of a contract under which it paid fees in lieu of property taxes to the district. The court explained that the detachment was an attempt to compel the base to contract for the payment of taxes from which it was immune as a federal instrumentality.

If the federal government is not liable for the assessment and there is no state statutory authority directing otherwise, no one is required to pay the assessment of the federal property. But, of course, the agency will have to make up the shortfall in the project budget. Other property owners in the assessment district may not be assessed an additional amount to make up the shortfall caused by the failure of the federal government to pay its assessment. Such an additional assessment would be in violation of the provision of Proposition 218 that prohibits an agency from imposing an assessment that exceeds the reasonable cost of the proportional special benefit conferred on that parcel. *See* Cal. Const., art. XIIID, § 4(a).

One important instance where there is statutory authority directing otherwise is assessment proceedings taken under the Municipal Improvement Act of 1913. If the property of the United States of America or any department thereof is assessed, the agency levying the assessment must pay the assessment out of its general fund. Cal. Sts. & High. Code §§ 5303 and 10206.

Special rules apply to the assessment to defray the costs of future capital improvements from public agencies absent specific statutory authority. In *San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal.3d 154, the California Supreme Court confirmed a series of court of appeal decisions concluding that a local public agency cannot collect a fee designed to defray the costs of future capital improvements from public agencies absent specific statutory authority. The court stated that such charges were in the nature of special assessments regardless of whether the charge was assessed to all property owners in the district or was levied only on users.

The test formulated by the court for determining whether a charge is actually an assessment is whether the "purpose" of the fee is to defray the cost of capital improvements. If so, the fee will be deemed a special assessment regardless of the form of the fee for purposes of determining whether a public agency is exempt. After the *San Marcos* decision, the Legislature adopted Government Code sections 54999 through 54999.6.

<u>Practice Tip</u>: Review Government Code section 54999.1 and 54999.7 (amended and added by the Legislature in 2006 for authority to include a capital component within a fee for utility service imposed upon a public agency.

An assessing agency should look to the legislative body of the agency assessed for payment of the assessment. Notice of an assessment of local agency-owned property should be sent to the legislative body in care of its clerk.

Special note should be taken of publicly-owned property located within the boundaries of an assessment district which existed in November 1996. If the existing assessment district is exempt from the operation of Proposition 218 by virtue of article XIIID, section 5, the fact that un-assessed public agency property is within the boundaries of the district should not require any action so long as the assessment is not increased. If the existing assessment district is not exempt, then the special benefit, or lack thereof, to the public property would need to be addressed in the engineer's report in the same manner as for the initial formation of a district.

Increases of assessments in preexisting exempt districts containing public property pose a particularly difficult problem. A strict interpretation of subsections (a), (b) and (d) of article XIIID, section 5 could lead to a conclusion that only the increased portion of the assessment is subject to being re-spread to include public property. However, with respect particularly to maintenance assessments which are subject to an annual levy, it would appear that increasing the assessment could trigger a requirement to re-spread the entire assessment. The possibility of triggering this requirement could be lessened by establishing a second district with coterminous boundaries and submitting only the new assessment to the property owners. The original district would remain in place at the previous rates.

Burden Of Proof

Summary

Article XIIID, section 4(f) places the burden on the agency imposing the assessment to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question. The new standard modifies the near conclusive presumption in favor of the agency's determinations established by the California Supreme Court in *Dawson v. Town of Los Altos Hills* (1992) 16 Cal.3d 676, and reconfirmed in *Knox v. City of Orland* (1992) 4 Cal.4th 132. How extensive Proposition 218 modifies the burden of proof, and the related standard of review, should be answered in a case presently before the Supreme Court, *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2005) 130 Cal.App.4th 1295, review granted 2005, Case No. S136468.

Under the new law, the agency will be required to show, based upon the record created before the legislative body, that a valid method was used to identify the special benefit to be received from an improvement, that all parcels receiving a special benefit have been identified and included within the district, that the cost of the improvement has been reasonably apportioned among the benefited parcels according to special benefits, and that costs attributable to general benefits to the public at large are not paid from special assessments. *See* Cal. Const., art. XIIID, § 4(f). Proposition 218, while modifying the hearing and protest process, does not appear to change the legislative nature of hearings to establish special assessments. Thus, it follows that the burden placed on the agency to support its determination in assessment proceedings is one that must be met, and challenged, at the legislative hearing process. See *Not About Water Com.*

v. Board of Supervisors (2002) 95 Cal.App.4th 982, 994 and 1002-03; s*ee also Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576.) In *Western States*, the Supreme Court reconfirmed that judicial review of legislative actions must be made based upon the evidence established during the hearing of the legislative body and not extra-record evidence. In the subsequently decided *Not About Water* case, the First District Court of Appeal held that it would look to the record made before the water district to determine if it met its burden of proving a special benefit flowing to petitioners' property. *Silicon Valley Taxpayers' Association,Inc. v. Santa Clara County Open Space Authority* (2005) 130 Cal.App.4th 1295, review granted 2005, Case No. S136468.

Preparation and reliance upon the detailed engineer's report called for by article XIIID, section 4 (a) and (b), along with the record of the proceedings of the legislative body, should satisfy the agency's burden in most instances.

Detailed Discussion

Before Proposition 218, the standard for judicial review of assessments was as follows:

> A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties.

Dawson, 16 Cal.3d at 685.

In a court of appeal decision applying Proposition 218, the court restated the *Dawson* standard of review as follows:

> "A court 'will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed [, or that the agency has failed to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large].'" *Not About Water Com v. Bd. of Supervisors* (2002) 95 Cal.App.4th 982, 994..

The *Not About Water* court also said "we look to the record made before the water district to determine if it met its burden of proving the existence of a special benefit flowing to petitioners' properties by the formation of assessment district No. 1." *Id*. at 995.)[23]

[23] Note that the *Not About Water* court also left the door open for a petitioner to engage in discovery if she seeks to prove a fraud or conspiracy claim (e.g., because the record presumably would not include such evidence). (*Not About Water*, 95 Cal.App.4th at 1002-03.)

However, another court of appeal criticized the decision in *Not About Water Committee* as too deferential to the local agency. Instead it said,

> "We conclude that the City's determinations that the affected properties will receive special benefits and that the assessment is proportional to the benefits conferred on those properties must be affirmed if they are supported by substantial evidence. The substantial evidence standard is highly deferential and thus comports with the constitutional separation of powers and the legislative character of the determinations at issue. But the substantial evidence standard also conforms to Proposition 218's placement of the burden of proof on the City, because (1) the determinations at issue are factual, and (2) factual determinations are ordinarily reviewed under the substantial evidence standard on appeal regardless of which party bore the burden of proof in the trial court. [Citation omitted.]" *Dahms v. Downtown Pomona Property & Business Improvement Dist*. (2006) 138 Cal. App. 4th 115, 119, *rev. St'd.*

The Supreme Court denied review of the *Not About Water Committee* case, but granted review in the *Dahms* case, deferring further action "pending consideration and disposition of a related issue in *Silicon Valley Taxpayers' Assn. v. Santa Clara County Open Space Authority*, S136468." Thus, the standard of review remains an unsettled question pending the outcome of the *Silicon Valley* case. Accordingly, the discussion which follows discusses the history of the case law regarding the burden of proof and the standard of review.

Before Proposition 218, challengers of assessments suggested that standard applicable to assessment challenges should be the test articulated in *Beaumont Investors v. Beaumont-Cherry Valley Water District* (1985) 165 Cal.App.3d 227, which involved a review of fees that were challenged as illegal special taxes.

Because the proponents of Proposition 218 have indicated that the provisions of article XIIID, section 4(f) are consistent with existing law as stated by *Beaumont Investors*, it may be helpful to review that case and the cases subsequent to it in order to determine the nature of the new burden of proof for assessments under article XIIID.[24] *See* HJTA Annotated Version of Proposition 218, at 9 (included in attachments).

[24] Article XIIID, section 6 also places the burden on local agencies of proving compliance with the provisions of the Proposition 218 relating to fees and charges.

In *Beaumont Investors*, the court of appeal was faced with a challenge to a water service fee on the ground that it constituted a "special tax." The "sole issue" in that case was "whether the record demonstrates that the facilities fee sought to be imposed by defendant does or does not 'exceed the reasonable cost' of constructing the water system improvements contemplated by the District," and thus fit within the statutory exclusion from the definition of special taxes found in Government Code section 50076. *Beaumont Investors v. Beaumont Cherry Valley Water Dist.*, 165 Cal.App.3d at 234. Because the district was claiming an exemption from the general restriction established by article XIIIB and implementing legislation on the authority of a local agency to impose special taxes, the court determined "it rightfully follows that the local agency which seeks to avoid the general rule should have the burden of establishing that it fits the exception."

After holding that the agency had the burden of establishing the validity of the fee, the *Beaumont* court compared the scant record of the agency's actions in setting the fees with the detailed record which was prepared by the city in establishing its facilities benefit assessments that were sustained by a different division of the same appellate court in *J.W. Jones Companies v. City of San Diego* (1984) 157 Cal. App. 3d 745. The court emphasized the district's failure to produce any evidence from the record of the agency hearings supporting the fee calculation and concluded that the district failed to meet its burden.

Cases decided after *Beaumont* demonstrate the reliance the court places on the legislative record created by the agency. For example, in *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, *aff'd in part and rev'd in part*, 44 Cal.3d 839 (1988), the court relied on numerous studies and the record of public hearings at which the legislative body discussed and ultimately adopted a transit development charge to distinguish the *Beaumont* case and to find "whether we term the transit fee a special assessment or a development fee, as applied in this context, the charge levied is directly related and limited to the cost of increased municipal transportation services engendered by the particular development." *Id.* at 1506.

Later, in *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, the court of appeal compared the imprecise basis the city used for determining a fire hydrant fee on new development with the detailed methodology used for establishing the transit fee challenged in *Russ Bldg. Partnership*, and the facilities benefit assessment challenged in *J.W. Jones Companies v. City of San Diego*. The *Bixel* court noted for both the transit fee and the facilities benefit assessment, "the public agencies met their burden of showing that a valid method had been used for arriving at the fee in question, one which established a reasonable relationship between the fee charged and the burden posed by the development." *Bixel*, 216 Cal.App.3d at 1219. *Shapell Industries, Inc. v. Governing Board of Milpitas Unified School Dist.* (1991) 1 Cal.App.4th 218, addressed the question of whether the standard of judicial review applying the *Beaumont* case was the "substantial evidence test" or some other test. Deciding the question in the context of a school impact fee challenged on the ground that it was an illegal special tax, the court reaffirmed that the legislative body must show, through the record created before the legislative body, that a valid method was used for arriving at the fee in question, one which established a reasonable relationship between the improvement and the benefit. The court's review is limited to the record before the legislative body and the test is whether the agency's action is "arbitrary, capricious or entirely lacking in evidentiary support."

According to the court in *Shapell Industries*, the determination whether an agency's action is "arbitrary, capricious or entirely lacking in evidentiary support," is not the same as the substantial evidence test. "We cannot agree that local legislation, particularly that which results in the imposition of substantial fees on property owners as a condition of improving their property, should be virtually immune from effective judicial review. If courts shun evidentiary review as beyond their province, the reasonableness of the agency's action is relegated to the agencies themselves, whose primary interest is in financing their own projects. On the other hand, we do not advocate an approach which renders the two standards interchangeable, since there are sound policy reasons for the courts to exercise considerable deference to agencies acting under legislative mandate." *Shapell Industries, Inc. v. Governing Board*, 1 Cal.App.4th at 232. *See also Garrick Development Co. v. Hayward Unified School District* (1992) 3 Cal.App.4th 320, 328.

The Court in *Shapell Industries* stated the following test: "For our purposes we find useful the test articulated by our Supreme Court in *California Hotel & Motel Assn. v. Industrial Welfare Comm*., 25 Cal.3d 200: 'A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.'" *Shapell Industries, Inc. v. Governing Board*, 1 Cal.App.4th at 232

Article XIIID does not change the legislative character of special assessments. Thus, it follows that the burden placed on the agency to support its determination in assessment proceedings is one that must be met, and challenged, at the legislative hearing process. *In Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, the California Supreme Court has reiterated that quasi-legislative administrative decisions are subject to a more deferential degree of judicial review. Judicial review must be made based upon the evidence established during the hearing of the legislative body and not extra-record evidence. Extra-record evidence is admissible only in rare circumstances where

- The evidence existed before the agency made its decision and
- It was not possible in the exercise of reasonable diligence to present the evidence to the agency before the decision was made so that it would be considered and included in the legislative record.

Id. at 578. The factual bases of quasi-legislative administrative decision are entitled to the same deference as the factual determinations of trial court, that the substantiality of the evidence supporting such administrative decisions is a question of law. The court must determine whether the agency's decision was supported by substantial evidence in the record but must not re-weigh the evidence. *Id.* at 574.

This conclusion is consistent with assessment district cases decided prior to the adoption of Proposition 13. *See, e.g., Jeffery v. City of Salinas* (1965) 232 Cal.App.2d 29, 37-38. In *Jeffery*, the court applied the substantial evidence test and affirmed the trial court's judgment based on a city engineer's report and testimony, even in the face of contradictory evidence presented by plaintiffs. The court found the report and testimony constituted sufficient evidence to uphold the city's determination that plaintiffs' property would be specially benefited by parking improvements to be financed by an assessment district.

In *Jenner v. City Council of the City of Covina* (1958) 164 Cal.App.2d 490, 500, the court noted: "In the case at bar, the city council conducted hearings and heard testimony and then fixed the boundaries of the district and the apportionment of the assessment. To allow plaintiffs to introduce evidence in the trial court on this same question would clearly be within the prohibition of the *Fascination* [, *Inc. v. Hoover* (1952) 39 Cal.2d 260] decision."

In the cases in which courts have ruled that no special benefit would inure to those assessed, the courts found the administrative records absolutely devoid of evidence in support of the proposed assessments. *See, e.g., Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852 (assessment of uphill residents for a drainage project rejected where the record before the board contained no evidence that relief of flooding and occasional traffic congestion several blocks away would benefit uphill property); *Safeway Stores, Inc. v. City of Burlingame* (1959) 170 Cal.App.2d 637 (record demonstrated that the property already had more than enough parking for the current or any other potential property use, that other potentially benefited properties were gerrymandered out because they had protested, and that the proposed parking district would be detrimental to Safeway by benefiting its excluded competitors); *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal.24 (record demonstrated that "no effort at all was made by the council to assess in proportion to benefits.").

Finally, *Knox v. City of Orland* (1992) 4 Cal.4th 132, rejected application of *Beaumont Investors* in the context of assessments, the court instead looked to the traditional *Dawson* test. The court stated in footnote 26 at page 149, "Although the issue is not presently before us, we question whether a special assessment would be valid under *Dawson* if there exists evidence in the record which contradicts the local legislative body's benefit determination and indicated that such determination was arbitrary, capricious or entirely lacking in evidentiary support. [Citation omitted.]"

Not About Water v. Board of Supervisors (2002) 95 Cal.App.4th 982, also looked to *Dawson* to analyze the impact of the shift of the burden of proof. In *Dawson*, the Town of Los Altos Hills formed an assessment district for sanitation purposes and imposed assessments on the real property lying within it. Some landowners within the district sued for injunctive relief on the ground that the resolutions adopted by the town in connection with the formation of the district were tainted by fraud and thus void. Characterizing the plaintiffs' proceeding, the Supreme Court said that its

> "essential object ... is a declaration that the [assessment] district ... is without legal existence, and that all obligations and duties arising as a result of its formation are likewise of no legal effect. It is therefore an 'action or proceeding' contesting 'the validity

> of an assessment' [citations] and as such differs in no essential respect from other civil actions or special proceedings brought to test the validity of a special assessment. (*Id.* at p. 682.) As is manifest from this brief review, the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign. This was clearly recognized in early decisions of this court .... The scope of judicial review of such actions is accordingly quite narrow.... '[T]he court will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment ... is not proportional to the benefits, or that no benefits could accrue to the property assessed....' (*Dawson*, *supra*, 16 Cal.3d at pp. 682-684, fn. omitted.)

The *Not About Water* court concluded that the new provision of Article XIIID required it to restate the standard announced in *Dawson,* and reaffirmed by the Supreme Court in *Knox.* It adopted the following amended formulation of the standard of review: "A court will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed[, or that the agency has failed to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large]."

In summary, unless the Supreme Court rules differently in the pending *Silicon Valley* case, the applicable law can be summarized as follows: under article XIIID, persons challenging assessments should not be required to prove the complete lack of any foundation for the agency's determination. On the other hand the agency should be entitled to rely upon the record created during the required hearing process. Challengers should be required to present evidence contrary to the engineer's report during the hearing in order to permit the agency to make proper decisions based upon all of the evidence. The agency can meet its burden under article XIIID, section 4(f) by introducing a properly prepared engineer's report and the record of the assessment proceedings. Apportioning special benefit has never required mathematical precision. So long as the apportionment is reasonable and is justified by the engineer's report, it should be upheld, based on traditional principles underlying the substantial evidence test

Practice Tip: Code of Civil Procedure § 860 may be the exclusive procedure for challenging the validity of an assessment. See Not About Water Com. v. Board of Supervisors (2002) 95 Cal.App.4th 982, 986 and 992-93. If so, a 60-day statute of limitations would apply, Code Civ. Proc. § 863, unless the assessment statute being utilized specifies another time period. The courts have long considered that assessment proceedings are subject to complaints for validation (or invalidation via a "reverse validation action". See also City of Ontario v. Superior Court (1970) 2 Cal.3d 335, 344) Where a validation action under Code Civ. Proc., § 860 et seq. may be filed by a public agency, these statutes become the exclusive means for any challenge. Code Civ. Proc., §§860, 863, 869; City of Ontario v. Superior Court (1970) 2 Cal.3d 335, 341-42 and 344. Thus, even if the statute only provides that the agency has the right to pursue a validation action, this provision should operate with Code Civ. Proc. § 860 et seq. to require that a reverse validation action is the exclusive means, no matter the theory or claim. Friedland v. City of Long Beach (1998) 62 Cal.App.4th 835, 849; see also Embarcadero Mun. Improvement District v. County of Santa Barbara (2001) 88 Cal.App.4th 781, 789-93 (Validating Proceeding Statutes applied irrespective of the labels applied by appellants

to the lawsuit).) Thus, it is of no consequence whether the lawsuit presents a constitutional claim, Friedland, 62 Cal.App.4th at 846-47, a petition for writ of mandate, Millbrae School District v. Superior Court (1989) 209 Cal.App.3d 1494, or an action for declaratory relief, Embarcadero Mun. Improvement District, 88 Cal.App.4th 781.

Accordingly, counsel should check the applicable substantive statute (e.g., the Municipal Improvement Act of 1913) to see if it authorizes validation actions under Code Civ. Proc. § 860 et seq. The Supreme Court is currently reviewing Bonander v. Town of Tiburon(2007) 147 Cal.App.4th 1116, where the Court of Appeal ruled that Code Civ. Proc. § 860 et seq. applied notwithstanding in artful language in the Municipal Improvement Act of 1913 (Sts. & Hy. Code § 10601) about whether an interested person could file an action under Code Civ. Proc. § 860.

Exemptions

Assessments that were "existing" on November 6, 1996, the effective date of article XIIID, and which fall within one of the four exceptions identified in section 5 of article XIIID are exempt from the procedures and approval process in section 4. The "procedures and approval process set forth in section 4" means all of the requirements of section 4 including the requirement to separate general and special benefit and to assess publicly owned parcels. Gov. Code, § 53753.5(c)(2).

The four "exceptions" delineated in section 5 are as follows.

- Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Cal. Const., art. XIIID, § 5(a).

- Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Cal. Const., art. XIIID, § 5(b).

- Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States of America. Cal. Const., art. XIIID, § 5(c).

- Any assessment which previously received a majority vote approval from the voters voting in an election on the issue of the assessment. Cal. Const., art. XIIID, § 5(d).

<u>Practice Tip</u>: Some attorneys think that an assessment agreed to by a property owner in a development agreement satisfies the petition exemption above.

These exemptions apply only to assessments existing on the effective date of Proposition 218. Except for assessments levied to pay bonded debt, increases in any exempt assessment are subject to the procedures and approval process of article XIIID, section 4.

In *Howard Jarvis Taxpayers Association v. City of Riverside* (1999) 73 Cal.App.4th 679, the court of appeal concluded that streetlights fall within the definition of "streets" for purposes of article XIIID, section 5(a), which exempts an assessment imposed solely for "street" purposes.

For a discussion of the meaning of "capital costs or maintenance and operation expenses . . . of water . . ." as that phrase is used in article XIIID, section 5(a), *see Keller v. Chowchilla Water District* (2000) 80 Cal.App.4th 1006.

Will an existing assessment for landscape maintenance be exempt from the Procedural Requirements of article XIIID, section 4?

Landscape Maintenance It is not clear whether an "existing assessment" for landscape maintenance is exempt from the Procedural Requirements of article XIIID, section 4. The nature of the landscaping being maintained may answer this question. Existing assessments for median and parkway landscaping within street rights-of-way ("street landscaping") or within drainage channels ("drainage landscaping") are more likely to be found to be exempt than assessments for landscaping within parks, playing fields or around public buildings.

While street landscaping, like street lighting, is not expressly listed among the improvements in section 5(a), an argument can be made that such landscaping is an integral part of "streets" and, therefore, an existing assessment for the maintenance of such landscaping should be exempt from the July 1997 Compliance Requirements as an assessment for the maintenance and operation of streets. *See also Howard Jarvis Taxpayers Association v. City of Riverside* (1999) 73 Cal.App.4th 679.

First, the definition of "maintenance and operation expenses" contained in article XIIID, section 2(f) which includes "repair," "replacement," "rehabilitation" and "care" appears to be sufficiently expansive to include maintenance and operation of street landscaping.

Second, the Legislature has included "roadside planting and weed control" within the definition of "construction" of highways and streets. *See* Sts. & High. Code § 29. This statutory definition lends support to the argument that street landscaping is included in a "permanent public improvement" for a street.

Third, like street lighting, existing legislation supports an interpretation of the maintenance and operations of streets that would include the maintenance of street landscaping. State law defines "maintenance" when used in the general provisions of such code related to county and city highways to include the "preservation and keeping of . . . planting . . ." *See* Cal. Sts. & High. § 27. *See also* The Tree Planting Act of 1931defining "street" to include "the sidewalks, the center and sideplots") Cal. Sts. & High. Code § 22010).

If an existing assessment is levied to pay for the maintenance of vegetation within a public drainage or flood control facility, for example, a channel with rip-rap or concrete sides and a natural bottom where cost of the maintenance of the vegetation in the channel bottom is paid for from existing assessments, it can be argued that the maintenance of such vegetation is integral to the proper functioning of a permanent public improvement included within those improvements specified in section 5(a).

Again, while an argument can be made to support the conclusion that an existing assessment for the maintenance and operations of street landscaping or drainage landscaping is exempt under section 5(a), it remains uncertain that a reviewing court would necessarily reach the same conclusion. Additionally, the Howard Jarvis Taxpayers Association has stated that it did not intend to exempt existing assessments for landscaping maintenance and operation from the July 1997 Compliance Requirements. *But see Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 245.

Landscaping within parks, ball fields and around public buildings and maintenance of open space does not appear to be reasonably related to or incidental to any of the other improvements specified in section 5(a). Assessments for the maintenance of such landscaping or open space will not, therefore, be exempt from the July 1997 Compliance Requirements under section 5(a).

"Existing Assessment" and the impairment of contract exception. The language of section 5(c) limits this exception to existing assessments the proceeds of which "are exclusively used to repay bonded indebtedness." This exception would clearly apply to assessments securing bonds issued under either the Improvement Act of 1911 or the Improvement Bond Act of 1915. *See generally* Cal. Sts. & High. Code §§ 5000 *et seq.* (1911 Act); Cal. Sts. & High. Code §§ 8500 *et seq.* (1915 Act).

The Howard Jarvis Taxpayers Association has stated in an annotated version of Proposition 218 circulated prior to the election "in the hopes that the arguments being circulated by our opponents, which overstate the impact of the initiative, are adequately answered" that the section 5(c) exception can only be used for bonds "that are actually protected by the impairment clause" and that "Certificates of Participation and other creative debt instruments would not be protected."

The courts, as previously stated, will not take the intent of the Taxpayers Association into account in attempting to construe and interpret the provisions of Proposition 218 inasmuch as such intent was not manifest in the documents which the courts may consider in such an analysis (chiefly the ballot summary, arguments and analysis). *See Amador Valley Joint Union High School District v. State Board of Equalization*, (1978) 22 Cal.3d 208, 245.
While an agency's obligations represented by certificates of participation are not bonded indebtedness, they are obligations under contract. It should be noted that, if the agency validly contracted to levy assessments to support its contractual obligations, the United States Constitution's contract clause may protect certificates of participation despite the stated limitations in this provision of the California Constitution. Such assessments also may be exempt under one or more of the other provisions of section 5. *See generally*, Gov. Code, § 5854 (describing the relationship between bondholders and an initiative measure to reduce or repeal a tax, assessment, fee or charge).

Business Improvement Districts

Business improvement districts may be established either under the provisions of the Parking and Business Improvement Area Law of 1989, Sts. & Hy. Code §§ 36500 *et seq.* (the "1989 Act") or the Property and Business Improvement District Law of 1994, Cal. Sts. & Hy. Code §§ 36600 *et*

seq. (the "1994 Act"). Both statutory schemes permit the levy of assessments for both "improvements" and "activities," including promotion of public events and tourism, furnishing of music in public places, and other expenditures beneficial to businesses in the district.

Assessments in 1989 Act districts are levied on "businesses," are apportioned according to estimated benefit to businesses and property in the district, and are frequently collected as a surcharge on a business license tax. Assessments in a 1994 Act district are levied on real property, are apportioned according to estimated benefit to real property within the district, and may be collected in the same manner as *ad valorem* taxes.

1994 Act Levies

Districts formed and assessments levied under the 1994 Act are subject to Proposition 218's substantive and procedural requirements, including the requirement that assessments may only be levied for special benefits conferred on real property. The 1994 Act has been amended to incorporate Proposition 218's substantive and procedural requirements into the Act. *See* Chapter 871 of the 1999 Statutes (amending Sts. & Hy. Code §§ 36615, 36621, 36623, 36624, 36625, 36626, 36627, 36631, 36633, 36650, 36651 and repealing a number of sections). *See also* Cal. Const., art. XIIID, § 2(b). Proposition 218 defines "special benefits" as particular and distinct benefits over and above general benefits conferred on real property located in the district or provided to the public at large. *See* Cal. Const., art. XIIID, § 2(i). General enhancement of property value does not constitute a special benefit. *See* Cal. Const., art. XIIID, § 2(i).

1989 Act Levies

Howard Jarvis Taxpayers Association v. City of San Diego (1999) 72 Cal.App.4th 230, holds that assessments on business owners under the 1989 Business Improvement District Act are not subject to Proposition 218. Because Proposition 218 defines the assessments to which it applies as assessments "on property," the court concluded that the measure does not apply to 1989 Act districts which are assessments on business owners.

This decision is consistent with the decision in *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, in which the court determined that the 1989 Act assessments are "neither a true regulatory fee nor a true special assessment." *Id*. at 739. Unlike a true special assessment, that are not a charge on real property and their purpose is not to pay for permanent public improvements benefiting the assessed real property. *Id*. at 737.

Standby charges

Proposition 218 classifies standby charges as "assessments" which must be imposed in compliance with article XIIID, section 4.[25] A standby charge (sometimes called a standby fee) is a compulsory charge levied upon real property within a predetermined district to defray in whole or in part the expense of providing, operating or maintaining public improvements. The charge is "exacted for the benefit which accrues to property by virtue of having water [or other public

[25] Legislation to harmonize statutes authorizing levy of standby charges has been introduced was adopted during the 2007 legislative session. (2007 Stats., ch. 27 (S.B. 444 [Committee on Local Government]).)

improvement] available to it, even though the water might not be used at the present time." *Kennedy v. City of Ukiah*, (1977) 69 Cal.App.3d 545, 553.
Classifying standby charges as assessments is consistent with current law. *See San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal.3d 154, ; *Kern Co. Farm Bureau v. County of Kern* (1994) 19 Cal.App.4th 1416.

Standby charges must be treated as assessments beginning July 1, 1997. An assessment adopted after the effective date of Proposition 218 (November 6, 1996) but before July 1, 1997, is exempt as an assessment imposed exclusively to finance the "capital costs or maintenance and operation expenses for….water….." *Keller v. Chowchilla Water District* (2000) 80 Cal.App.4th 1006 . The farmers challenging the standby charge conceded that the assessment "existed" on the effective date of Proposition 218 and the court likewise so "assumed." Standby charges (which must be imposed on an annual basis) which are imposed after the effective date of Proposition 218, may not receive the benefit of the *Keller* decision as it relates to this question.

The Attorney General has opined that a water district must comply with Proposition 218 when it imposes an increase in its standby charge, even though the increase was specified in the engineer's report adopted prior to the effective date of Proposition 218. 82 Ops.Cal.Atty.Gen. 35 (1999). This opinion is consistent with Government Code section 53753(h)(2)(A), which provides that a tax or fee, but not an assessment, is not increased when a previously approved schedule of automatic adjustments is implemented.

Drainage, Sewer or Bridge and Thoroughfare Fees Imposed under the Subdivision Map Act

Although these types of fees that are levied pursuant to sections 66483 and 66484 have attributes of assessments, these fees are more properly characterized as fees or charges imposed as conditions of property development. Article XIIID, section 1 states in part: "Nothing in this article or Article XIIIC shall be construed to: . . (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development."

Government Code section 66483 authorizes a city, county or city and county to adopt a local ordinance imposing a requirement for the payment of fees for planned drainage or sewer facilities as a condition of subdividing property. Section 66484 authorizes a city, county or city and county to adopt a local ordinance requiring "the payment of a fee as a condition of approval of a final map or as a condition of issuing a building permit" to pay for bridges and major thoroughfares.

Although the substantive requirements of both sections and the procedural requirements of Section 66484 are similar to those applicable to assessments, a fundamental difference remains in that the payment of the fee is voluntary in nature (as a condition of development) as opposed to involuntary as is true of special assessments.

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IV. Property-Related Fees and Charges

Introduction and Overview

> Article XIII D defines "fee" or "charge" as "*including* a user fee or charge for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e), italics added.) The word "including" is "'ordinarily a term of enlargement.'" (citations omitted) …[D]omestic water delivery through a pipeline is a property-related service within the meaning of this definition. Accordingly, once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216-217.

> "A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection." *Richmond v. Shasta Community Services District Comm. Serv. Dist.* (2004) 32 Cal.4th 409, 427.

Generally speaking, a fee or charge is a monetary exaction to recover a public agency's cost of providing a particular service to the public or for mitigating the impacts of the fee payer's activities on the community. Proposition 218 creates a special subset of fees and charges for property-related services. It does so by defining the term fee or charge to mean a "levy . . . imposed on a parcel or upon a person as an incident of property ownership including a user fee or charge for a property-related service." Cal. Const.,, art. XIIID, § 2(e). This definition also provides that fees and charges are distinct from taxes or assessments. Proposition 218 prohibits a local agency from imposing taxes, assessments, fees or charges on parcels or on persons as an incident of property ownership except as provided in articles XIIIC or XIIID. Cal. Const.,, art. XIIIC, § 3. It then creates certain substantive and procedural requirements relating to property-related fees and charges. Cal. Const., art. XIIID, § 6.

Key Changes Proposition 218 Makes to Fee and Charge Law

In addition to creating this special subset of fees and charges, Proposition 218 imposes the following procedural and substantive requirements:

- **Notice and Hearing Requirements.** Proposition 218 imposes requirements for mailed notice to property owners of new or increased property-related fees and a mechanism for property owner rejection of such fees via a "majority protest" at a public hearing.

- **Voter-Approval.** Except for sewer, water and refuse collection services, fees subject to the requirements of article XIIID require a majority vote of property owners or, at the public agency's option, a two-thirds vote of the electorate, in addition to compliance with the majority protest proceedings.

- **Fees for General Governmental Services Prohibited.** Proposition 218 fees may not fund general governmental services, including but not limited to police, fire, ambulance or library services, which are available to the public at large in substantially the same manner as they are to property owners.

- **Fee for Service Provided Only**. Revenues derived from the fee may not be used for any purpose other than that for which the fee was imposed.

- **Fee not to Exceed Cost of Service**. Revenues derived from the fee may not exceed the funds required to provide the property related service.

- **Fee not to Exceed Proportional Cost**. The amount of the fee may not exceed the proportional cost of the service attributable to the parcel.

This section of the Guide examines these requirements by analyzing what kinds of fees are subject to Proposition 218's procedural and substantive requirements. The guide then discusses Proposition 218's substantive and procedural requirements, as well as timing issues.

Proposition 218 specifically excludes two kinds of fees from its provisions:

- Developer fees ("Nothing in this article or Article XIIIC shall be construed to . . . [a]ffect existing laws relating to the imposition of fees or charges as a condition of property development"), Cal. Const.,, art. XIIID, § 1(b); and

- Fees for the provision of electrical and gas service are excluded from the category of "charges or fees imposed as an incident of property ownership") Cal. Const., art. XIIID, § 3(b). (It is not clear whether fees for electrical or gas service imposed directly on parcels are subject to article XIII D.)

In addition, fees that do not bear any relationship to property ownership, such as facility user fees (for example, park admission, boat launching and ambulance transport fees), are not subject to Proposition 218.

Fees and Charges Subject to Article XIIID

Article XIIID, entitled "Assessment and Property Related Fee Reform" addresses levies – whether tax, assessment, fee or charge – on property. A levy "upon any parcel of property or upon any person as an incident of property ownership" is generally prohibited. There are four exceptions: (1) The *ad valorem* property tax; (2) A special tax; (3) Assessments imposed in accordance with Article XIIID; and (4) fees or charges for property-related services in

accordance with Article XIIID. Cal. Const., art. XIIID, § 3(a). This Chapter addresses the scope of Article XIIID as it relates to the fourth category: "fees or charges" for "property-related services." Each component of this exception requires explanation:

- "Fees or Charges"

Cities impose fees or charges for a variety of types of facilities and services. Not all of them are included in the subset of fees and charges to which Article XIIID applies. A "fee or charge" is only subject to Article XIIID if it is "a levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." Cal. Const., article XIIID, § 2(e). For example, a capacity charge imposed on persons who apply for a new water connection is not a "fee or charge" within the meaning of section 2(e) because its imposition is contingent on some voluntary action by the property owner. *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 424. The essence, then, of the fee or charge subject to Article XIIID, is upon what (a parcel) or upon whom (a person as an incident of property ownership) the fee or charge is imposed. Section 2(g) of Article XIIID defines "property ownership" to include tenancies if the tenant is directly liable for the payment of the fee. This means that either the property owner or a tenant may be "directly liable" to pay a fee or charge which is imposed on a "person as an incident of property ownership." If the fee is imposed upon a "person," the person can be either the property owner or the tenant. The purpose, in part, of the definition of "property ownership" seems to be to clarify that a fee or charge otherwise subject to Article XIIID remains subject to Article XIIID even though the tenant is paying the bill.

- "Property-related Service"

Article XIIID defines "property-related service" as a "public service having a direct relationship to property ownership. Article XIIID, section 2(h). In turn, "property ownership" includes "tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." Article XIIID, § 2(g)).

As of the date of publication of this Guide, the Supreme Court has provided the following general direction about what types of fees and charges Article XIIID applies to:

1. A fee is imposed as an "incident of property ownership" if it "requires nothing more than the normal ownership and use of property." *Richmond v. Shasta Community Services District, supra.*

2. A fee is not imposed as an "incident of property ownership" when the property owner voluntarily chooses to utilize the service for which the fee is charged (e.g. fees for connecting to the utility system, as distinguished from ongoing fees for the use of the service). *Richmond v. Shasta Community Services District, supra.*

3. A fee is imposed as an "incident of property ownership" if the service provider "directs" the provision of a property-related service to property because then the service is

delivered first to property and then to "those living or working on the property." *Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal.App.4th 637, 645.

4. A user fee for on-going service delivery for a property-related service, following connection to the system, is imposed as an incident of ownership whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th at 216-217.

5. The factor to consider in deciding whether a fee is for a property-related service under article XIIID is whether the service is specifically mentioned in Section 6 (water, sewer, refuse). *Richmond v. Shasta Community Services District, supra at 428; Bighorn-Desert View Water Agency v. Verjil* 39 Cal.4th 205 (2006).

6. Another factor to consider in deciding whether a fee is subject to article XIIID is whether the fee is imposed in such a way that the agency can "identify the parcels" upon which the fee is imposed." *Richmond v. Shasta Community Services District, supra, at 126.*

Based upon the text of Article XIIID and court rulings as of the date of the publication of this Guide, the following fees are either definitively or most likely fees for a property-related service:

1. Utility services generally are property-related since article XIIID, section 3 excludes electrical and gas charges which impliedly includes other utility charges.

2. A volumetric-based user fee (e.g., for on-going water service) may still be "property-related" since the definition of "fee or charge" includes "user fees for a property-related service." *Bighorn-Desert View Water Agency v. Verjil, supra* (re: domestic water service).
3. Domestic water supply via a permanent connection is a property related service because it is (a) specifically referenced in Article XIIID, section 6; (b) indispensable to most uses of real property; (c) provided through pipes that are physically connected to the property; and because (d) the water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges. *Bighorn, supra,* 39 Cal.4th at 214-15*; see also Richmond v. Shasta Community Services District, supra,* 34 Cal.4th at 426-427. The Supreme Court noted that water is indispensable to most uses of real property; water is provided through pipes that are physically connected to the property; and, in some cases, a water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges.

4. Presumably, sewer charges, including volumetric-based sewer charges, are thus subject to Proposition 218. The same most likely applies to refuse fees imposed by an agency.[26]

[26] Whether refuse fees, particularly where the service is provided by a franchisee, are subject to Proposition 218 is discussed in detail below.

5. Water, sewer and refuse collection services are excluded from the voter approval requirements by specific reference in article XIIID, section 6 (c). By implication these fees are not excluded from any other requirement of Article XIIID.

6. Where each owner and occupier of a developed lot or parcel of real property is required to pay a fee for the management of storm water runoff from "impervious" areas of the parcel, such a storm water drainage fee is a fee for a property-related service and subject to Article XIIID. *Howard Jarvis Taxpayers Association v. City of Salinas* (1998) 98 Cal.App.4th 1351, 1355; 81 Ops.Cal.Atty.Gen.102 (1998).

7. An "in-lieu franchise fee" that is paid by the rate payers via the City's utility enterprise, not tied to the costs of service but treated by the City as a separate, independent fee for water, sewer, and refuse collection services, is a property-related fee that does not comply with Proposition 218. *Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal.App.4th 637, 645.

8. If a property owner can avoid payment of the fee or charge through a voluntary decision regarding the use of the property, the fee or charge is most likely not a property related fee subject to Proposition 218. For example, a fee imposed upon property owners in their capacity as landlords (e.g., fee to fund rental housing regulatory programs) are not property related fees subject to Proposition 218. *Apartment Assn. of Los Angeles County , Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830.

9. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of Article XIIID. Cal. Const., art XIIID, § 6(b)(5).

<u>Practice Tip</u>: In determining what types of fees are subject to Proposition 218, the Supreme Court has relied heavily on the statements of the Legislative Analyst in the ballot pamphlet for the election at which Article XIIID was adopted. In the ballot pamphlet, the Legislative Analyst stated that fees for water, sewer, and refuse collection service probably meet the measure's definition of property-related fee.

Fees and Charges Not Subject to Proposition 218

There are two categories of fees that are not subject to Section 6 of article XIIID: (1) user fees for services that are not property-related; and (2) fees for services that are property related but that are neither imposed on a parcel nor on a person as an incident of property ownership are not subject to Article XIIID.

- User fees for a service that is delivered to the user on property but is not property-related

Section 2(e) of article XIIID defines "fee" or "charge" as a levy "imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee for charge for

a property-related service." A fee which is not imposed upon a parcel, nor imposed upon a person as an incident of property ownership which is for a service that is not property-related, is not subject to article XIIID. For example, fees are imposed to receive cable television service but cable television service has none of the indicia of a property-related service: it is not indispensable to most uses of property; it is not provided through pipes that are physically connected to the property; it is not a utility service that is referred to in section 6 of article XIIID; the provider of cable television service cannot enforce payment for the service through a lien on the property.

- Fees for a property-related service that are not imposed on a parcel or on a person as an incident of property ownership

It is possible to impose a property-related fee neither on a person as an incident of property ownership or on a parcel. The Court in *Howard Jarvis Taxpayers Association v. City of Los Angeles* acknowledged this when it noted that an ordinance imposing rates for water service that did not require the person receiving the water to be either a tenant or a property owner, would not be incident to or directly related to property ownership. *Howard Jarvis Taxpayers Association v. City of Los Angeles* (2000) 85 Cal.App.4th 79. The *Roseville* court let this decision stand as did the Supreme Court in *Bighorn* (though it discredited the conclusion in *Howard Jarvis Taxpayers Association v. City of Los Angeles* that consumption based fees for water service were not imposed as an incident of property ownership and thus not covered by Proposition 218). *Bighorn Desert View Water Agency v. Verjil, supra,* 39 Cal.4th at 217, fn 5. An example of such a fee would be a fee for water delivered by truck for construction dust control.

The second example of a fee in this category is a fee with characteristics similar to the connection fee described in *Richmond v. Shasta Community Services District.* Although the connection fee is imposed to connect to a system that delivers a property-related service – water – the connection fee is not imposed on a person as an incident of property ownership nor is it a user fee for a property-related service. The court described the action of the fee payer as "voluntary" in that it was his choice to develop the property that triggered the requirement to pay a connection fee. It may be easier to analogize the connection fee to the inspection fee that was found not to be subject to Proposition 218 in *Apartment Association of Los Angeles v. City of Los Angeles* (2004) 24 Cal.4th 830. Development of property is an "incident of property ownership" just as the business activity of renting residential dwellings in the *Apartment Association* case is an "incident of property ownership." The fee is imposed on the "incident of property ownership" itself and not on the person who is exercising the incident of property ownership. Therefore, the fee is neither imposed on a parcel or on a person as an incident of property ownership, nor is it a user-fee for a property related service. There are impacts of renting residential dwellings and there are impacts of developing property that require mitigation. Mitigation requires revenues, and revenues are derived from fees which are not subject to article XIIID.

Fees and Charges That Might Not Be Subject to Proposition 218

Regulatory Fees

Most fees that could be described as "regulatory fees" do not seem to be subject to Proposition 218. This section will explain that conclusion. However, the section must begin with a cautionary note: The Court in *Apartment Association v. City of Los Angeles*, which concluded that the City's inspection fee was not property-related but rather regulatory, noted that "the mere fact that a levy is regulatory…or touches on business activities . . . is not enough, by itself, to remove it from article XIII D's scope." (24 *Apartment Association v. City of Los Angeles*, 34 Cal. 4th at 838).

A regulatory fee is one that is imposed, pursuant to the government's police power, to curtail the potential for adverse effects to the community of various activities. What distinguishes regulatory fees from other fees and charges is that regulatory fees are imposed under the state's police power, rather than its taxing power, and are generally imposed for engaging in a regulated activity. *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866, 875; *Pennell v. City of San Jose* (1986) 42 Cal. 3d 365, 373. The police power is the authority to enact laws to promote the public health, safety, morals and general welfare of the community. *Community Memorial Hospital of San Buena Ventura v. County of Ventura* (1996) 50 Cal.App. 4th 199, 206. The police power is a direct grant of authority to cities and counties by the constitution. *See* Cal. Const., art. XI, § 7.

Since the focus of Proposition 218 is tax relief (Proposition 218 declares that the purpose of the initiative is to prevent local governments from "frustrating the purposes of voter approval for tax increases" as set forth in Proposition 13), and since regulatory fees derive from the police power, not the taxing power, it would seem reasonable to conclude that regulatory fees are neither mentioned in nor affected by the provisions of Proposition 218. As the court noted in *Howard Jarvis Taxpayers Association v. City of San Diego*, (1999) 72 Cal.App.4th 230, a constitutional provision should not be interpreted to go beyond its words and its stated purpose. In this case, the stated purpose is to close perceived "loopholes" in Proposition 13, not to create new limits on a local agency's police power.

Typically, some fees may look as though they are pure user fees that provide public services in exchange for a fee to recover the costs of service. Looked at more closely, however, the fees may be related to a regulatory program that is imposed in other parts of the jurisdiction's municipal code. For example, a property owner charged for the cost of building inspection is not being charged a user fee but a regulatory fee since the inspection program is a key component of building regulation. *Apartment Association of Los Angeles v. City of Los Angeles, supra.* Similarly, the generation and disposal of refuse is usually heavily regulated. Certain types and quantities of refuse may be more disfavored and rates adjusted accordingly. Conversely, other refuse practices (e.g. separation of recyclables) may be more benign and thus the subject of rate incentives. Depending upon the integrated nature of the regulatory scheme, it may very well be that rates for the program's various service components may be priced higher or lower in order to deter or encourage the conduct in question. By analogy, a second building inspection fee when

compliance is not obtained on the first visit may have an escalator built in to encourage compliance in the first place. If looked at from the point of view of a user fee, both inspections should be charged at the same rate. Looked at from the point of view of regulation it makes complete policy sense to impose differential rates and create regulatory deterrents and incentives.

Thus it is important to look carefully at how the fee in question and the related public service fit into the jurisdiction's policy objectives and laws. Is the "service" really exclusively or predominantly the *delivery* of the service to the customer, or are their regulatory aspects included as part of the "service"?

Fees for refuse collection and domestic water supply often have more than one component of a service component and a regulatory component. The fee-payer pays the service component of a water charge in order to use the service (e.g. receive the water). The fee-payer pays the regulatory component of the water charge to mitigate the impacts of his activity on the quality or quantity of the water supply or for some other regulatory purpose related to water. Likewise, the fee payer pays the service component of a refuse collection charge in order to use the service (e.g. curbside collection of refuse). The fee-payer pays the regulatory component of a refuse collection charge to mitigate the impacts of their activity on the need to acquire, construct and operate a landfill, or for some other regulatory purpose related to the collection and disposal of refuse. The service component of a water charge is subject to Article XIIID. The regulatory component should not be.

Revenues derived from a fee subject to Proposition 218 may not exceed the funds required to provide the *property-related service*. The property-related service is the delivery of water for domestic use. Revenues from the fee may not be used, for example, to fund a water conservation program. However, a regulatory fee may fund a water conservation program. Therefore, it is necessary and instructive to understand the limits of an agency's authority to impose regulatory fees and to attempt to disentangle the service component from any regulatory component of a fee that is otherwise subject to Proposition 218.

A regulatory fee is imposed pursuant to a city's police power to mitigate the impacts of the fee payer's activity on the community. The police power is broad enough to include fees for "measures to mitigate the *past, present, or future* adverse impact of the fee payer's operations." *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866. The following general principles apply to regulatory fees:

- Fees charged for the associated costs of regulatory activities are not special taxes if the fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and they are not levied for unrelated revenue purposes.
- A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District* (1988) 203 Cal.App.3d 1132, 1146, fn. 18.
- Such costs include all those incident to the issuance of the license, permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165.

- Regulatory fees are valid despite the absence of any perceived benefit accruing to the fee payer. *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375.
- A local legislative body need only "apply sound judgment and consider probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." *United Business Com. v. City of San Diego, supra, page 166.*

<u>Practice Tip</u>: California Farm Bureau Federation v. California State Water Resources Board (No. S150518) was pending in the California Supreme Court when the 2007 edition of this Guide was published. In that case, a farm bureau federation, water associations, and individual fee payers asserted that annual fees imposed by the State Water Resources Control Board to fund its water rights program were actually taxes imposed in violation of Proposition 13 (Article XIIIA, section 3). The Board's water rights program is divided into three sections: licensing, permitting, and hearings and special projects. There are at least three types of water rights holders: riparian, pre-1914 appropriative, and post-1914 permit and license holders. The Court of Appeal determined that this regulatory fee was an unlawful tax because it failed to impose the fees on water rights holders in proportion to the burdens they placed on the program.

A case challenging the County of Alameda's voter-adopted measure adding the Alameda County Waste Reduction and Recycling Act of 1990 (Measure D) to the County charter illustrates how the regulatory component of a refuse collection fee can be imposed separately from the service component of a refuse collection fee. *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264. Measure D required the development of a comprehensive recycling plan that was to be paid for by a recycling fund created by a $6 per ton surcharge on materials dumped in the county landfills. Intended to carry out the purpose of the California Integrated Waste Management Act of 1989, the recycling plan was to include a countywide source reduction program to minimize the generation of refuse; residential and commercial recycling programs; and recycled product market development and purchase preference programs. The Court upheld the surcharge as a valid regulatory fee finding that (1) the amount of the fee did not exceed the reasonably necessary estimated costs of developing and implementing the recycling plan and its component parts; and (2) the fee was allocated in a manner that bore a fair and reasonable relationship to the activities of the fee payers which were related to the need for the recycling plan.

In upholding the fee, the Court first noted that special taxes must be distinguished from regulatory fees imposed under the police power, which are not subject to Proposition 13. *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 374-375. Special taxes do not encompass fees charged to particular individuals in connection with regulatory activities or services when those fees do not exceed the reasonably necessary costs of the programs it will fund. The reasonably necessary costs of the program include consideration of both the estimated costs of the programs and the basis for determining the apportionment of those costs. Assessment of the latter assures that the allowed charges bear a fair or reasonable relationship to the payer's burdens on or benefits from the regulatory activity. *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist., supra,* 203 Cal.App.3d at 1146; *Beaumont Investors v. Beaumont-*

Cherry Valley Water Dist. (1988) 165 Cal.App.3d 227, 234-235 In fact, the record need only demonstrate that the fees will generate substantially less than the estimated costs.

The Court next considered whether the allocation of the charges bore a fair or reasonable relationship to the payer's burdens on, or benefits from, the activity at issue. The overall goal of Measure D programs was reduction of the refuse land filled in the County. Whether or not that goal is accomplished will have effects on the maintenance, operation, and longevity of the existing landfills, as well as on the need to develop new sites. The Court determined that the surcharge was directly related to the burdens imposed by the payers on the landfills. The fee was imposed on waste haulers based on tonnage, and was passed on to those who generate the waste in the form of increased garbage collection rates. Thus the surcharge was intended to distribute the financial burden of source reduction in proportion to the contribution of each waste generator to the problem, and at the same time it provides incentives for the control and reduction of waste generation. That showing is adequate to establish the requisite reasonable relationship.

A regulatory fee may be unrelated to a property-related service and likewise not be subject to Proposition 218. For example, a city council, seeking to establish and fund a program to remedy substandard housing conditions, adopted an ordinance that required the owners of all residential rental properties subject to inspection under the program to pay a fee. The ordinance levies the fee only on property used for residential apartment rentals, and the money is used only to pay for regulating such rentals to insure, among other things, that they do not degenerate into what is commonly called "slum conditions." The fee is neither imposed on a parcel nor on a person as an incident of property ownership; nor is it a fee for a property-related service. Rather, it is a fee to regulate the business activity of renting residential dwellings separate and apart from property ownership and for purely regulatory purposes. (i.e. a "regulatory fee"). As the Supreme Court noted, in order for a service to be "property-related," it must have a "direct" relationship to property ownership. A regulatory fee to fund an inspection program does not have a direct relationship to property ownership but only has a direct relationship to the business conducted on the property owned. *Apartment Association of Los Angeles v. City of Los Angeles, supra,* 24 Cal.4th at 842.

<u>Property-related fees and Regulatory fees</u>

Apartment Association of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830 drew a distinction between a regulatory fee and a property-related fee. The California Supreme Court ruled that a fee imposed on landlords to fund housing code enforcement was not imposed as an "incident of property ownership" but on voluntary decisions to be in the rental housing business. The fee funded a housing inspection program that was required by the voluntary use of real property for multi-family dwellings. The fee was imposed to mitigate the impact of the rental housing business.

In *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal. App. 4th 1364, *rev. St'd* the Pajaro Valley Water Management Agency argued that its fee to fund a program of environmental regulation was similarly a regulatory fee, and therefore not subject to Proposition 218. The Pajaro Valley Water Management Agency regulates groundwater use in the agricultural region which includes Watsonville on the central coast of California. Over-pumping

of the groundwater basin was allowing salt water from the Pacific Ocean to invade the Valley's groundwater supplies, causing environmental damage that threatened the agricultural economy of the area. The Agency imposed a groundwater extraction charge to fund pipelines and water purchases to increase groundwater, the purchase of other supplies to eliminate the over-drafting of the basin, and efforts to address salt water intrusion. The Court concluded that the Agency's fee was a property-related fee. It noted the tension between the *Bighorn* ruling that water service charges are subject to Proposition 218 and the decision in *Apartment Association of Los Angeles County, Inc*. Was the Pajaro Valley fee more like a water service charge or more like a regulatory fee on those engaged in the extraction of groundwater in a manner that is causing harm to the environment? From the Court's perspective, the fee imposed on a rural well operator to extract water for its domestic or agricultural needs is not different than a fee imposed on an urban water user for water received through a system of pipes. The fee looked more like a fee for water delivery and use than a fee to fund a regulatory program required by overdraft of the groundwater basin. The Court noted that the fee might have not been property-related and exempt from Proposition 218 if it had a clearer regulatory purpose.

Practice Tip: An ordinance or resolution adopting a fee which funds a regulatory program, (1) should clearly identify the fee as a regulatory fee; (2) should make a strong connection between the behavior or activity upon which the fee is imposed and the regulatory program that the fee funds and (3) should be imposed on a regulated action (like pumping groundwater) not on property or a property owner solely due to property ownership. The record supporting the adoption of the fee must estimate the costs of the regulatory activity and the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens or benefits from the regulatory activity. (San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District (1988) 203 Cal App.3d 1132, 1146) cited in Collier v. City and County of San Francisco (2007) 151 Cal. App. 4th 1326 .

Practice Tip: The court have long recognized that pricing of a commodity such as water has an important correlation to management of water resources and is therefore a legitimate cost of providing water delivery services (Brydon v. East Bay Municipal. Util. Dist. (1994) 24 Cal. App. 4th 178, 202 - 204; Carlton Santee Corp. v. Padre Dam Muni. Water Dist. (1981) 120 Cal.App.3d 14, 26 – 28.) This regulatory aspect may not exempt user fees of the type discussed by the Supreme Court in Bighorn from the scope of article XIII D, but should be sufficient to justify compliance with the substantive requirements of article XIIID, § 6, particularly in light of Constitutional and statutory mandates to conserve water. Cal. Const., art. X, § 2; e.g.. Wat. Code, § 375.

Refuse Fees

There is considerable difference of opinion among attorneys regarding the relationship between Proposition 218 and fees and charges imposed on refuse collection and related services. Most attorneys agree that fees charged by an agency that provides refuse collection services with its own forces are subject to Proposition 218. The difference of opinion occurs when analyzing the application of Proposition 218 to refuse services provided by a franchisee.

Refuse service meets two of the tests for a property-related service articulated by the courts: It is indispensable – and sometimes mandatory – for most uses of property. And, refuse collection services, like water and sewer services, are excluded from the voter approval requirements, but not from any other requirement of Article XIIID. *Richmond v. Shasta Community Services District, supra,* 32 Cal.4th 409*; Bighorn-Desert View Water Agency v. Verjil, supra,* (2006) 39 Cal.4th 205. In addition, the Legislative Analyst, relied on by the *Bighorn* court, stated in the Proposition 218 ballot pamphlet, that "refuse" was probably a property-related fee. Refuse service is likely property-related, at least in some circumstances (e.g. where service is compelled and without an opt-out provision). However, even if refuse service is deemed property related, components of the fee may not be. For example, the fee for refuse service may be comprised of a component that pays for the actual provision of service and a component that pays for a regulatory program (e.g. recycling programs). If this anlaysis is correct, only that portion of the fee attributable to the property-related service should subject to Article XIIID. *See*, e.g., *City of Dublin v. County of Alameda, supra,* 14 Cal.App.4th 264.

Many agencies provide refuse services through a franchise agreement with a private hauler. Under such an arrangement, the question of the applicability of Proposition 218 is not determined by deciding if refuse services are property-related, but rather by deciding if the agency "imposes" the fee or charge. *Black's Law Dictionary* defines "impose" as "to levy or exact as by authority."

The arguments **in favor** of Proposition 218's application when the service is provided by a franchisee are:

- The trash company is providing a service which could be provided by the local agency, and the company could be construed to be an agent of the local agency.
- The local agency caps or regulates the amount of the fee, sets the maximum fee and receives a franchise fee.

The arguments **against** Proposition 218's application are:

- The fee's revenues are received and the services are provided by a private company, and the fee is not therefore imposed by a local agency (Proposition 218 only applies to levies by agencies).
- The service is not provided by an agency and thus the fee is not for a public service.
- The fee is collected and retained by the refuse collection company for the service that it is providing.

<u>Practice Tip</u>: Each refuse franchise is slightly different. Before concluding whether a refuse fee collected by a franchisee through a franchise agreement with an agency is

subject to Proposition 218, it is essential to review the terms of the franchise agreement and the agency's ordinance regulating refuse collection.

Practice Tip: When an agency grants a franchise for refuse service and takes the position that the fee is not imposed by the agency, the franchise agreement should require indemnification and defense of the agency in the event a challenge is brought on the fee and the application of Proposition 218.

Practice Tip: A public agency, and its franchisee, may wish to structure the franchise to allow customers to "opt out" of the service. For example, a trash hauling charge can include a provision permitting a customer to self-haul and decline the service. An "opt-out" provision provides an argument to both the public agency and the company that the charge imposed on the customers is a "fee for service" that is consensual in nature, rather than a "levy," and therefore Proposition 218 does not apply. See also City of Glendale v. Trondsen, (1957) 48 Cal. 2d 93 (finding a charge upon every occupied premise in city for rubbish collection services, whether or not in fact such services were used, was "valid either as a police power measure or as an excise tax . . .").

There may be bookkeeping and fiscal impacts that complicate the provision of such an exemption, however. Moreover, mandatory service has been adopted for important public policy reasons. The accumulation or improper disposal of solid waste presents real risks to public health. Therefore any proposal to weaken mandatory service requirements should also take into account these competing public policy issues.

Practice Tip: It is best not to retain traditional franchise language which authorizes the governing body to 'set' trash rates, as this undermines any claim that the rates are not set by an agency, but are set by a private company which is not subject to Proposition 218. The policy purpose behind such provisions can be retained by providing that the governing body may engage in rate control, as by setting a maximum amount for rates, leaving the hauler free to set rates under the legal ceiling. Under this language, the agency is arguably exercising its police power in a manner akin to rent control and not setting a government rate to which Proposition 218 might apply.

The Legislative Counsel considered a variety of questions relating to the application of Proposition 218 to waste disposal fees in its opinion No. 7359, April 28, 1997. A copy of this opinion is included in section VII (attachments) of this guide.

Recycling Fees

As a result of the enactment of the California Integrated Waste Management Act of 1989 (AB 939) the costs of recycling are now an integral part of refuse collection in California. The costs to agencies that do not recycle are higher through fees and penalties assessed or threatened to be assessed by the state. In addition, the cost for renting, leasing or transporting to landfills are high, as are taxes or charges imposed by agencies with landfills used by others.

Therefore, the cost of recycling that reduces overall refuse costs by reducing landfill use is arguably properly reflected in the overall refuse rate, rather than a separate charge based on the actual costs of recycling. This approach appears particularly applicable where the rates go up as the amount of garbage disposed of by a user increases. The inverted rate is in inverse proportion to participation in recycling. (The more garbage, the less recycling and the higher charge which is reflective of the cost of refuse service.) *See also Brydon v. East Bay Municipal Utility District* (1994) 24 Cal.App.4th 178 (an inclining block rate water fee structure was upheld as a valid component of a water conservation and drought management program in the face of a Proposition 13 challenge.)

A fee for recycling or otherwise for the purpose of reducing landfill disposal, is a regulatory fee which is not subject to Proposition 218.

Procedural Requirements

Article XIIID, section 6 imposes certain procedural requirements when property-related fees are imposed or increase. It takes a two-tiered approach. Fees for "sewer, water, and refuse collection services" are subject to the notice, hearing and majority protest procedures. Other fees for property-related services are subject to these same procedures plus they are subject to a voter-approval procedure. The substantive requirements apply to fees for all property-related services that are otherwise subject to section 6.

The procedures in Section 6(a) to impose or increase a "fee or charge" are as follows:

- ✓ Identify the parcels upon which a fee or charge is proposed for imposition.
- ✓ Calculate the amount of the fee proposed to be imposed on each parcel.
- ✓ Provide written notice by mail to the "record owner of each identified parcel."
- ✓ Conduct a public hearing on the proposed fee not less than 45 days after the mailing.
- ✓ Consider "all protests against the proposed fee or charge."
- ✓ If written protests against the fee are presented by a "majority of owners of the identified parcels," the fee cannot be imposed.

Practice Tip: Note that one factor in determining whether a fee is "property-related" is whether the parcels can be identified (Richmond v. Shasta Community Services District (2004) 32 Cal.4th 409, 420, fn. 2.)

Implementation of the procedural requirements outlined above requires consideration of several questions, particularly as to who must receive notice of the hearing, and who is entitled to protest the fee and how are protests counted.

Notifying the "record owner of each identified parcel"

Proposition 218 requires an agency to identify the parcels upon which a fee for a property-related service will be imposed, and then to send notice of its proposal to impose or increase a fee for a

property-related service to the "record owner of each parcel." The term "record owner," however, is not defined in Article XIIID. Under most circumstances "record owner" means the person who is listed as the owner of the property on the county assessor's rolls. However, some public lawyers maintain that this traditional definition of "record owner" is not sufficient in these particular circumstances because the property owner may not be the person who receives and pays for the service, and because Proposition 218 defines "property ownership" to include tenancies where the tenant is "directly liable" to pay the fee in question. The rights of a tenant to notice of a fee and to protest that fee have been the subject of much discussion. A bill pending in the Legislature as of the publication date of this Guide, AB 1260 (Caballero), provides that notice may be mailed to the billing address for the service rather than defining who is entitled to notice. The following is a summary of the sources that inform that discussion:

Legislative Analyst: In the Proposition 218 ballot pamphlet, the Legislative Analyst stated that "…the measure specifies that before adopting a new property-related fee (or increasing an existing one), local governments must: mail information about the fee to every *property owner*, reject the fee if a majority of *property owners* protest, in writing, and hold an election on the fee (unless it is for water, sewer, or refuse collection)" (emphasis added). According to the Legislative Analyst, the "record owner" is the "property owner."

***Proposition 218 Omnibus Implementation Act*:** Government Code § 53750(j) defines "record owner" as "the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency." However, Government Code § 53750 (f) also defines "notice by mail" to include a notice given via a utility bill, which would often be addressed to a customer rather than a record owner of property.

Article XIIID, Section 4: Section 4 of Article XIIID sets forth the procedures and requirements for assessments on real property and uses phrases which are identical to those found in Section 6: "record owner" and "owners of the identified parcels." Section 4(c) requires notice to be given to the "record owner" of each parcel. Section 4(d) allows the "owners of identified parcels" to complete a ballot in support or opposition to the proposed assessment. When imposing an assessment an agency gives notice to the "record owner" as defined in Section 53750(j). Tenants do not receive notice even if tenants pay the assessments. However, assessments are imposed directly on property, and thus the direct payment relationship flows directly to the owner. Fees imposed on parcels have this attribute in common with assessments. Unlike fees, assessments cannot be imposed on persons. Agencies consider "owners of identified parcels" in the context of an assessment to be the same people as "record owners." Basic rules of statutory construction require identical phrases in the same Article to be interpreted the same way. Therefore, in order for "record owner" and "owners of identified parcels" to be interpreted differently for purposes of section 6, something must be found in that section that supports the different interpretation.

Definition of "property ownership" in Article XIIID, Section 2(g). Article XIIID, section 2(g) defines "property ownership" to "include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." The phrase "property ownership" is used in section 2(h) to define "property-related service:" as a public service having a direct

relationship to property ownership. "Property ownership" includes tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." The phrase "property ownership" is also used in section 2(e) to define "fee or charge:" "any levy…imposed by an agency upon a parcel or upon a person as an incident of property ownership…."

The Court in *Roseville* concluded that status of the user of the service as property owner or the tenant does not influence whether a service is "property-related." "Water, sewer, and refuse services delivered to a tenant are…property-related, that is directly tied to property ownership. Furthermore, …section 2(g) states that property ownership 'shall be deemed to include tenancies of real property where tenants are directly liable to pay' the fee or charge. *Howard Jarvis Taxpayers Association v. City of Roseville, supra*, 97 Cal.App.4th 637 at 644. The *Roseville* court uses the reference to "tenancies" in section 2(g) to help define what constitutes a property-related service not to help determine who receives notice under section 6.

There are two views of the import of this language. One is that this section simply means that property owners are entitled to receive notice and protest even where the fee is either passed on to or imposed directly on tenants because the fee still affects the property owner's ownership interest by burdening it with a fee. The other view is that this language creates a class of persons other than property owners – namely tenants – who are entitled to notice and a right to protest the fee, particularly when the fee is charged to a service customer.

The difficulty with the latter approach is that section 6 uses the term record owner. In order for the definition of "property ownership" to affect who gets notice under section 6(a), the phrases "record owner" (who gets notice) and "owners of the identified parcel" must be read to include the concept of "property ownership" as that phrase is defined in section 2(g). There is no rule of statutory construction that supports importing the definition of "property ownership" into the definition of "record owner" and "owners of the identified parcel." However, in some cases, the tenant is the person who is responsible to the agency for paying the utility bill. Some have argued that fairness dictates that tenants should be provided with notice and the right to protest. Others have argued that if both tenants and owners are included within the base upon which a "majority protest" must be calculated, any individual's vote will be significantly diluted. Thus fairness can be argued both ways and fairness depends on what the legislation was intended to accomplish. Also, the procedure in section 6(a) need not necessarily be fair. Some might cite the "liberal construction" clause in support of the fairness argument. "But "[l]iberal construction cannot overcome the plain language of Proposition 218 limiting [its] scope ... to [levies] based on real property." (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 237-238). As a rule, a command that a constitutional provision or a statute be liberally construed "does not license either enlargement or restriction of its evident meaning" (*People v. Cruz* (1974) 12 Cal.3d 562, 566 cited in *Apartment Association of Los Angeles v. City of Los Angeles, supra*).

In *Bighorn Desert Water Agency v. Verjil,* the Supreme Court reviewed the question of whether a water agency's charges for domestic water are subject to the voter initiative provisions of article XIIIC of the California Constitution. Article XIIIC provides that "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." The Court noted that although article XIIIC does not contain definitions of the

terms "fee" or "charge," those terms are defined in article XIIID. "Because article XIIIC and article XIIID were enacted together by Proposition 218, it seems unlikely that the terms 'fee' and 'charge' were meant to carry entirely different meanings in those two articles…."[27] The Court further looked to the definitions in article XIIID, section 2 to determine that water service fees are subject to the provisions of article XIIID, section 6.

The Court recognized that the definitions of article XIIID are critical to an understanding its application. Using the approach taken by the Supreme Court, inasmuch as article XIIID does not define the term "record owner," the other terms defined in article XIIID, section 2 and the other terms used in article XIIID, section 4 may be instructive in determining what is meant by the term "record owner" for purposes of providing written notice of a new or increase of a fee for a property-related service.

The Howard Jarvis Taxpayers Association argues that the "record owner" is the tenant under certain circumstances due to the language of article XIIID, section 2(g)'s definition of "property ownership." If the record owner is the tenant, then, under this theory, the agency must send notice to the tenant and afford the tenant the right to protest the fee. HJTA has taken two slightly different positions on the rights of a tenant based upon its different interpretations of "directly liable." On the annotated version of Proposition 218 that appears on their website (and prepared after the November 1996 election in which the initiative was adopted), under Section 2(g) (definition of "property ownership"), they say:

> Under this definition, if a tenant of real property is directly liable to pay an assessment, that tenant would have the right to protest and vote. This will depend on the terms of the lease. *"Direct pass-throughs" are more common in commercial leases than in residential leases*. Moreover, it would not be inappropriate for the Legislature to provide the specific guidelines with respect to the duties of the agency and property owners for the implementation of this provision" (emphasis added).

More recently, HJTA has suggested that a tenant is "directly liable" if the tenant is the party responsible for the bill and pays the bill directly to the City. "Owner" must be read as "tenant" in article XIIID, section 6 because the only purpose of the definition of "ownership" is to give tenants the right to notice and protest under Section 6. HJTA argues that under Proposition 218's Liberal Construction Clause, any doubt regarding the interpretation of section 6 must be resolved so as to give those obligated to pay the fee a voice in the process of enacting it.

The Majority Protest

As with the discussion on who receives notice, there is a difference of opinion about who gets to protest. Here is the range of options:

1. Both the tenant (if the tenant is "directly liable" for the bill) and the record owner get to protest. However, only the owner's protest counts. This interpretation is based on section 6(a)(2) which directs the agency to "consider all protests against the fee or

[27] *Bighorn* (2006) 39 Cal.4th at 213-214.

charge" but only if written protests are presented by a majority of the owners, must the process stop.

2. The record owner alone has the right to protest based upon section 6(a)(2) which states that "if written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." There is no reference to tenant, tenancy, or "property ownership."

3. The service customer alone receives notice and the service customer alone has the right to protest, regardless whether the service customer is the owner or the tenant. This interpretation is based on the fact that a property-related fee may be imposed on a parcel or it may be imposed on a person as an incident of property ownership. If a fee is imposed on a parcel, then the property-owner receives notice and the right to protest. If a fee is imposed on a person as an incident of property ownership, then whoever pays the bill receives the notice and has the right to protest. The section 6 procedures seem to apply to fees imposed "on a parcel" but not those that are imposed "on a person."

4. Both registered owners of property on the tax roll and tenants who are on the city's customer list may protest because each has some "property ownership" as Section 2(g) defines that term.

All of these readings are plausible. How persuasive one finds them turns on whether one reads section 2(g) as affecting only the definition of "fee or charge" or as affecting the definition of "property ownership" for purposes of notice and protest. The former group would argue that both #1 and #2 are consistent with the literal language of section 6 but that alternatives #3 and #4 requires the reader to read into the phrase "owner of the identified parcel," "tenant of the identified parcel." The latter group would argue that each is consistent with the literal language of section 6 because property owner includes tenant pursuant to section 2(g).

Article XIIID, section 6(a) provides that a fee may not be imposed or increased if protests against the imposition or increase are submitted by "a majority of the owners of the affected property." Because it is not possible for an agency to determine how many owners of property there are (e.g. community property, partnership property, trust property, etc.), most public lawyers who have studied this issue read "majority" to modify "property" rather than "owners" as in "protests by owners of a majority of the affected properties." In this construction, a protest is recorded for a property for any person who has an ownership interest in it, and only one protest is recorded even if multiple owners protest. This issue arises whether or not one views tenants as entitled to notice and protest rights, because there can be multiple persons listed on the assessment roll as owners of a parcel of property.

AB 1260 (Caballero)

AB 1260(Caballero), pending in the Legislature as of the publication date of this Guide, provides that the notice of a *new* fee or charge required by Section 6 of a new fee or charge may be mailed to the address at which the property-related service funded by the fee will be provided or may be included in the agency's regular billing statement for an existing property-related

service at that address. Notice of an *increase* in a fee or charge may be given by including it in the agency's regular billing statement for the fee or charge or in any other mailing to the address to which the agency customarily mails the billing statement for the fee or charge. However, if the agency desires to preserve any authority it may have to record or enforce a lien on the parcel to which the service is provided, the agency must also mail notice to the record owner's address shown on the last equalized assessment role (if different than the billing or service address).

One written protest per parcel whether filed by one of several owners or tenants of the parcel shall be counted in calculating a majority protest.

AB 1260 (Caballero) does not change the definition of "record owner" found in Section 53750(j). In fact it does not address who gets notice. The record owner continues to receive notice. The legislature is simply providing that the required notice may be mailed to the same address where the service is already billed. If an agency wishes to use AB 1260 (Caballero) , it is best not to state who is getting the notice, and in fact address it to both the owner and tenant. If the property tax rolls provide a different address for the owner of the parcel receiving the property-related service, the agency undertakes some risk if it fails to send the Section 6 notice to the "record owner" as defined by Section 53750(j). AB 1260 (Caballero) intentionally does not solve the problem of whether tenants are required to receive notice since some public lawyers believe that such a legislative clarification would not be constitutional unless limited to the conclusion that only record owners are required to receive notice because the Legislature has no power to rewrite Proposition 218. Because AB 1260 (Caballero) does not change the definition of "record owner," the debate will most likely continue between those who believe notice must be given to the "record owner" as defined in Section 53750(j) even if a tenant is receiving and paying for the service and those who believe the "record owner" is the tenant for purposes of the notice and protest provisions of Section 6(a).

It should be noted that public lawyers on both sides of this debate agree that nothing in Proposition 218 prevents or prohibits an agency from giving notice to tenants in addition to the "record owner."

Property-Related Fee Elections

New or increased fees and charges subject to Proposition 218, except for sewer, water and refuse collection services, must receive voter-approval. *See* Cal. Const., art. XIIID, § 6(c). The election must be conducted not less than 45 days after the public hearing. Cal. Const., art. XIIID, § 6(c).

> *Practice Tip: Public agencies may wish to evaluate including escalators and maximum fee amounts in ordinances presented for voter approval. This approach will obviate the need to go back to the voters as long as the public agency keeps its fee amounts below voter-approved maximum rates or in accordance with voter-approved escalator provisions. See Gov. Code, § 53739.*

Proposition 218 does not specify procedures for the conduct of property related fees and charges elections. However, the agency may adopt procedures that are similar to those required for

assessments. An all mail ballot election is authorized by Elections Code section 4000(c)(9). Cal. Const.,, art. XIIID, § 6(c); Cal. Const.,, art. XIIID, § 4.

At the option of the agency, the voters in the election may be either the property owners (requiring majority vote approval); or the electorate residing in the affected area (requiring two-thirds voter approval). Cal. Const.,, art. XIIID, § 6(c).

There is one ballot per parcel if an agency uses a property owner vote. Cal. Const.,, art. XIIID, § 4(d). The voters are the "owners of the property subject to the fee . . ." Cal. Const.,, art. XIIID, § 6(c).

Unlike the assessment procedure, there is no authority or requirement to weight the ballots according to the financial obligation of the affected property. *Compare* Cal. Const.,, art. XIIID, § 4(e) ("In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.") *with* Cal. Const.,, art. XIIID, § 6(c) (requiring a majority vote of the property owners of the property subject to the fee or charge).

Given the "one parcel, one vote" system for property owner elections on fees and charges, one may imagine scenarios where the election procedure could violate the equal protection rights of property owners. For example, numerous small parcels under common ownership would receive many votes while a larger undivided parcel would have only one vote. If the fee is based upon square footage of property, one might argue that the rights of the large property owner are harmed. Inasmuch as common charges such as water, sewer and refuse collection are apportioned based on use, this issue may be limited to fees that are apportioned according to characteristics of property.

Application of the Voting Rights Act of 1965 to Proposition 218 Elections

Congress enacted the Voting Rights Act of 1965, 42 U.S.C. § 1973, and following, under its authority to enforce the Fifteenth Amendment's proscription against voting discrimination. The Voting Rights Act contains generally applicable voting rights protections, but it also places special restrictions on voting activity within designated, or "covered," jurisdictions. Jurisdictions—states or political subdivisions— are selected for coverage if they meet specified criteria suggesting the presence of voting discrimination in the jurisdiction. The Act subjects covered jurisdictions to special restrictions on their voting laws. Section 203 requires preparation of multi-lingual election materials. Section 5 of the Act requires pre-approval ("pre-clearance") from the U.S. Department of Justice for any measure that departs from the voting scheme in place in the jurisdiction on a specified date. Federal pre-clearance is required "whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968." 42 U.S.C. § 1973c.

Section 5's review of changes in voting procedures is intended to prevent changes that disadvantage racial or ethnic minorities. In *Lopez v. Monterey County*, 525 U.S. 266 (1999), the United States Supreme Court held that pre-clearance was required for consolidation of Monterey's trial courts even though that change implemented a change required by state law. Arguably Proposition 218 is likewise a change in state law that implements a change in certain

voting procedures: voting in both assessment ballot proceedings and property-related fee elections is limited to property owners. In California, pre-clearance is required before changes in voting procedures may be implemented in Kings County, Merced County, Monterey County, and Yuba County.

Section 203 of the Act applies to all state and local governments and requires that ballots, absentee ballot applications, voter information pamphlets, and other "voting materials" be provided in any language that meets the following criteria:

1) more than five percent of citizens of voting age of the jurisdiction are limited in their English proficiency and speak that language; or

2) more than 10,000 of the citizens of voting age of the jurisdiction are limited in their English proficiency and speak that language; or

3) if the jurisdiction contains any part of an Indian reservation, and more than five percent of the American Indian citizen of voting age within the reservation are limited in their English proficiency and speak that language.

Section 203 defines "voting materials" as "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots."

"Elections" to which section 203 applies include primary, general or special elections. This includes elections of officers as well as "elections regarding such matters as bond issues, constitutional amendments, and referendums. Federal, state and local elections are covered as are elections of special districts. *See* 29 C.F.R. § 55.10. The definition of "elections" clearly includes matters submitted to the electorate under Proposition 218 such as taxes and property-related fees. Cal. Const., art. XIIID, § 6(c). It is less clear whether assessment protest proceedings or majority protest proceedings for property-related fees are "elections" within the meaning of section 203.[28]

Increasing a Fee

A fee is increased when an agency makes a decision that increases any applicable rate used to calculate the fee, or that revises the methodology by which the fee is calculated (if that revision results in an increased amount being levied). A fee is not increased when an agency makes a decision that adjusts the amount of a fee in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment adopted prior to November 6, 1996; or that implements a previously approved fee so long as the rate is not increased beyond the level previously approved. Gov. Code, § 53750(h)(2).

[28]California Elections Code section 4000(c)(9)(A) provides that the assessment proceedings under Proposition 218 shall be denominated an "assessment ballot proceeding" rather than an election.

Application of Property-Related Fees to Annexed Properties

The Cortese-Knox Local Government Reorganization Act of 1985 provides for the establishment of a local agency formation commission ("LAFCO") in each county to encourage orderly growth and development and the assessment of local community service needs. The primary function of a LAFCO is "to review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization" of local agencies. *See* § 56373. In order to assure the fiscal feasibility of an annexation, a LAFCO may condition approval of a change of organization upon a requirement that the subject agency levy and collect a previously established and collected tax, benefit assessment or property-related fee or charge on parcels to be annexed to the agency.

The Attorney General has concluded that the voter and landowner approval requirements set forth in Proposition 218 do not apply to such taxes, assessments, fees or charges. 82 Op.Cal.Atty.Gen. 180 (1999). The Attorney General's conclusion is based upon the language of the Act that provides any territory annexed to a city shall be subject to any previously authorized taxes, assessments, and fees or charges, *see* § 57330; the power of LAFCO to modify this general rule, *see* Gov. Code § 56844; and the Act's own voter approval process that allows registered voters to reject an annexation, *see* §§ 50775- 50780.

Those who would become subject to the established taxes, assessments, fees, and charges upon the change of organization have the opportunity to reject the imposition of the previously approved taxes, assessments, fees, and charges by rejecting the annexation proposal. Finally, the Attorney General concludes that as a practical matter it would be virtually impossible to comply with the requirements of Proposition 218 in the context of a change of organization. The timing of the elections and the differing constituencies who would be voting on different measures with differing voter approval requirements "would present an administrative imbroglio."

Substantive Requirements

Article XIIID, section 6 imposes five substantive requirements on fees for a property-related service that are imposed either on a parcel or on a person as an incident of property ownership, including a user-fee for a property-related service:

1. Revenues derived from the fee shall not be used for any purpose other than that for which the fee was imposed.

> *<u>Practice Tip</u>: Care should be taken when describing the purpose of a fee. In order to demonstrate that the proceeds generated from the fee or charge are not being used for other purposes, and that the cost of the service is dependent on and does not exceed the amount of funds generated by the fee or charge, an agency may find it helpful to deposit the fees or charges into a separate account or fund.*

2. Revenues derived from the fee shall not exceed the funds required to provide the property-related service.

<u>Practice Tip</u>: In determining the cost of or the funds required to provide the service, Proposition 218 does not define or identify the types of costs or expenses that may be included in the fee. California courts, however, have found that such costs typically include the expense of direct regulation as well as all incidental expenses, including administrative, inspection, maintenance and enforcement costs. See [United Business Commission v. City of San Diego,] (1979) 91 Cal. App. 3d 156, 166. Therefore, an argument exists that the costs required to provide the service include both direct and indirect costs incurred by a local government, including the costs of complying with Proposition 218. Preservation of scarce resources such as water has also been recognized as a legitimate cost of service that may be included as a factor in determining and apportioning fees. Brydon v. East Bay Municipal. Util. Dist. (1994) 24 Cal. App. 4th 178, 202 - 204; Carlton Santee Corp. v. Padre Dam Muni. Water Dist. (1981) 120 Cal. App. 3d14, 26 – 28.

3. The amount of a fee shall not exceed the proportional cost of the service attributable to the parcel.

5. No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Standby charges, whether characterized as charges or assessments, are classified as assessments for the purposes of complying with Article XIIID.

6. No fee or charge may be imposed for general governmental services including police, fire, ambulance or library service where the service is available to the public at large in substantially the same manner as it is to property owners.

Two issues require more detailed attention: transfers from utility accounts, and the meaning of "the proportional cost of the service."

Transfers from Utility Accounts

Because rates may not exceed the cost of providing the service and rate proceeds may be used only to provide the service, transfers from utility accounts into an agency's general fund now must be justified as repayment of a loan to the utility by the general fund or as reimbursement to the general fund of the cost of services provided to the utility. *Howard Jarvis Taxpayers Association v. Roseville* (2002) 97 Cal.App.4th 637 and *Howard Jarvis Taxpayers Association v. Fresno* (2005) 127 Cal.App.4th 914 (2005) suggest such charges might include the apportioned cost of administrative overhead, police and fire protection of utility property and the wear and tear on public streets attributable to utility operations. Under any set of circumstances, a transfer from a utility account into an agency's general fund must be accounted for with precision and must be based upon an identifiable financial transaction.

<u>Practice Tip</u>: To calculate an enterprise fund's fair share of city overhead expenses, some public agencies use an organization-wide cost allocation plan based on the federal Office of Management and Budget's A-87 standards. This document was originally

created in the 1960s to help local governments determine appropriate levels of reimbursement for indirect costs associated with administering federal grant programs.

Practice Tip: Fees and charges should not be apportioned to the general public based on use of street without careful review of County Sanit. Dist. No. 2 v. County of Kern (2005) 127 Cal. App. 4th 1544, which concluded that a hauling charge constituted an unlawful toll for the use of public streets.

The "Proportional Cost of the Service"

In order to understand how to structure a fee to comply with these requirements, we need to know:

- ✓ The purpose of the fee
- ✓ The cost of providing the property-related service
- ✓ The proportional cost of the service attributable to the parcel.

The first two tests are found in other statutes that apply to fees. The third is not, although a variation of the test applies to regulatory fees in general: The fee may not exceed the proportional impact of the fee-payer's activity on the need for the service or program that has been adopted to mitigate that impact. There is a dearth of authority analyzing the foregoing in the context of Proposition 218. Thus we turn to similar laws to help us understand the meaning of the article XIIID substantive requirements.

Using the Fee Cases Under Proposition 13 to Understand Proposition 218's Proportionality Requirement

Proposition 13, which added article XIIIA to the California Constitution, requires voter approval to impose a "special tax." But Proposition 13 neglected to define "special tax." The Legislature adopted Government Code 50076, which provides that a special tax shall not include any fee *which does not exceed the reasonable cost of providing the service* or regulatory activity for which the fee is charged and which is not levied for general revenue purposes. Likewise, revenues from a property-related fee may not exceed the funds necessary to provide the service.

In one such "special tax" case, the court held that to demonstrate that a facilities fee did not "exceed the reasonable cost" of constructing water system improvements, the District must provide evidence of the estimated construction costs of the proposed water system improvements and the basis for determining the amount of the fee allocated to the fee payer, i.e., the manner in which the District apportioned the contemplated construction costs among new users such that the charge to the fee payer bore a fair or reasonable relation to its burden on, and benefits from, the system. *Beaumont Investors v. Beaumont-Cherry Valley Water District* (1985) 165 Cal.App.3d 227, 234-235; see also *J.W. Jones Co. v. City of San Diego* (1984) 157 Cal.App.3d 745. This language seemed to equate the analysis required to the showing required for a development impact fee. The court did however stress that the costs of the program the fee is funding need not be "calculated with certainty...specificity is not required." Likewise, the court in *City of Dublin v. County of Alameda* held that the record need only demonstrate a reasonable

relationship between the fees to be charged and the *estimated* cost of the service or program to be provided; that requirement may be satisfied by evidence showing only that the fees will generate substantially less than the anticipated costs" (emphasis in original). *City of Dublin, supra,* (1993) 14 Cal.App.4th at 283.

The *Roseville* court echoes these cases:

> The theme of [Section 6(b)(1) and Section 6(b)(2)] is that the fee or charge revenues may not exceed what it costs to provide fee or charge services. Of course, what it costs to provide such services includes all the required costs of providing service, short-term and long-term including operation, maintenance, financial, and capital expenditures. The key is that the revenues derived from the fee or charge are required to provide the service and may be used only for the service. In short, the Section 6(b) fee or charge must reasonably represent the cost of providing service. *Howard Jarvis Taxpayers Association v. City of Roseville, supra,* 32 Cal. 4th at 647-648.

Before Proposition 218, a city did not need to be too precise in accounting for all of the costs of a utility enterprise since the city was permitted "to make a profit on its utility operations in any event and rates were permitted to reflect the value of the service, not just the cost of providing the service." Cities are still entitled to recover all of their costs for utility services through user fees, if they have complied with Proposition 218's procedural obligations (e.g., property owner protest procedure). The manner in which they do so is restricted by the requirement that the fee not exceed the proportional cost of service attributable to the parcel. This requires an agency to reasonably determine the unbudgeted costs of utility enterprises and that those costs are recovered through rates proportional to the cost of providing service to each parcel. *Howard Jarvis Taxpayers Association v. City of Fresno* (2005) 127 Cal.App.4th 914. Nothing in Proposition 218 prevents an agency from undertaking to establish the actual cost of services provided to a utility but not set forth in the enterprise fund budget for the utility such as the cost of such general fund services as police and fire protection of utility assets and utility impact on general fund assets.

Using the Regulatory Fee Cases to Understand Proportionality

The development impact fee is the classic "regulatory fee." The Legislature has stated that there must be a reasonable relationship between the amount of the developer fee and the cost of the public facility or portion of the facility attributable to the development on which the fee is imposed. Gov. Code, § 66001(b). However, site specific review is not required to establish the requisite proportionality. *Garrick Development Co. v. Hayward Unified School District* (1992) 3 Cal.App.4th 320, 333-334; *see Rincon Del Diablo Municipal Water Dist. v. San Diego County Water Authority* (2004) 121 Cal.App.4th 813, 824, upholding a volumetric flat rate charge.

In the case upholding the fee paid to the State Department of Fish and Game in connection with the processing of environmental impact reports and negative declarations that was required to be "proportional," the court discussed whether there must be a "direct correlation" between the amount of a fee imposed on a specific payer and the benefits received or burdens imposed by the payer's activity. In that case the court included that "as long as the cumulative amount of the fees does not surpass the cost of the regulatory program or service and the record discloses a

reasonable basis to justify distributing the cost among payers, a fee does not become a tax simply because each payer is required to pay a predetermined fixed amount." *California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 905.

"Proportionality" has also been explained as allocating charges to the fee payer so that they "bear a fair or reasonable relationship to the payer's burdens on or benefits from the activity" which is funded by the fee. *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 878. For example, apportionment based in part on the amount of emissions on the premise that the more emissions, the greater the regulatory job of the agency, is valid. *San Diego Gas and Electric Co. v. San Diego County Air Pollution Control District* (1988) 203 Cal.App.3d 1132, 1147-1148. Although the assessment of proportionality is necessarily "flexible," the "line can be crossed" when, in one case, services and benefits were being provided to all water rights holders by the State Water Resources Control Board but only a small number of those water rights holders were required to pay for the entire program. *California Farm Bureau Federation v. California State Water Control Board* (2007) 146 Cal.App.4th 1126 *rev. St'd.*

A property-related fee will probably not be proportional if two parcels are paying different amounts but the cost of service attributable to those parcels is the same. However, it may still be possible to distinguish between two such parcels if the basis for the distinction is a regulatory program.

In *Brydon v. East Bay Municipal Utility District*, (1994) 24 Cal.App.4th 178 the court upheld the District's "inclining block" water rate structure which charged high volume water users more than low volume water users to discourage the "profligate usage of water." As the court observed, "in the present context the constitutional mandate of water conservation contained in article X, section 2 of the California Constitution is at least as compelling as the objectives of article XIIIA, section 4." The inclining block rate structure is a "reasonable reflection of the fact that it is in part the profligate usage of water which compels the initiation of regulated conservation measures, including those public education programs designed to encourage conservation." The court concludes that "it is reasonable to allocate rate costs based on the premise that the more unreasonable the water use, the greater the regulatory job of the district."

Proposition 218 need not necessarily eliminate such a fee structure. However, it would most likely need to be divided into two parts: the property-related fee for the delivery of water and the regulatory fee to encourage conservation and fund public education programs, etc.

Application of Proposition 218 to "Existing Fees"

The Court in *Howard Jarvis Taxpayers Association v. City of Fresno* (2005) 127 Cal.App.4th 914 clarified that Proposition 218 required all fees and charges in effect on November 6, 1996 that were subject to section 6 of article XIIID, must be brought into compliance with Proposition 218 by July 1, 1997. This view of the unambiguous language of <u>section 6</u>, subdivision (d) is supported by the Legislative Analyst's summary of Proposition 218 printed in the ballot pamphlet for the November 1996 general election. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 504-505 "Specifically, the measure states that *all* local property-related fees must comply by July 1, 1997 with the following restrictions: ...." (The pamphlet then summarizes the provisions of

section 6, subdivision (b)(1) through (5).) (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) analysis of Prop. 218 by Legislative Analyst, p. 73.) "By July 1, 1997, local governments would be required to reduce or repeal existing property-related fees and assessments that do not meet the measure's restrictions on (1) fee and assessment amounts or (2) the use of these revenues."

Statute of Limitations

The statute of limitations for challenging a fee or charge subject to Proposition 218 is not readily discernible. Under all circumstances, agencies are encouraged to adopt an ordinance or resolution pursuant to the authority of Government Code section 935. That section allows an agency to adopt a procedure governing claims for money or damages. The procedure may include that a claim be presented and acted upon as a prerequisite to a suit and that any action brought against the agency on the claim be brought within one year of the accrual of the cause of action. However, a section 935 procedure does not apply if the claim is "governed by any other statute or regulations expressly relating thereto. Other statutes that may govern when an action is brought challenging the adoption or imposition of a "fee" or "charge" subject to Proposition 218:

Revenue and Taxation Code § 5097, which provides for a four year statute of limitations for a claim of refund of a property tax measured from the date payment was made. Fees collected on the tax roll will often be subject to this statute.

Code of Civil Procedure § 338, which provides for a three year statute of limitations for (a) An action upon a liability created by statute, other than a penalty or forfeiture; and (m) An action challenging the validity of the levy upon a parcel of a special tax levied by a local agency on a per parcel basis.

Code of Civil Procedure § 337, which provides for a four year statute of limitations based upon the issuance of municipal bonds.

Government Code § 66022, which provides for a one-hundred-and-twenty day statute of limitations to challenge a capacity or connection charge. To the extent that a "fee" or "charge" includes a component for capital facilities, this section might apply.

A final note on the statute of limitations for challenging a fee or charge subject to article XIIID: One must consider whether the "theory of continual accrual" applies to the challenge to such a fee or charge. The Court in *Howard Jarvis Taxpayers Association v. City of La Habra,* (2001) 25 Cal. 4th 809 held that the statute of limitations for challenging a tax began running anew each time the tax was paid.

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V. Initiatives to Reduce or Repeal Taxes, Assessments and Fees

Introduction and Overview

> "We have concluded that under section 3 of California Constitution article XIIIC, local voters by initiative may reduce a public agency's water rate and other delivery charges, but also that section 3 of article XIIIC does not authorize an initiative to impose a requirement of voter approval for future rate increases or new charges for water delivery." *Bighorn-Desert Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220.

The "initiative" is the power of the electors to propose statues and amendments to the Constitution and to adopt or reject them. Cal. Const., art. II, § 8. The "referendum" is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statues calling elections, and statutes providing for tax levies or appropriations for usual and current expenses of the State. Cal. Const., art. II, § 9. Article II, section 11 grants the electors of each city or county the right to exercise initiative and referendum powers. Over the years, the courts have imposed certain limitations on this authority. Proposition 218 precludes a statutory prohibition of, or limitation on, the power of the electors to "propose statutes" in one particular subject area: measures that "affect local taxes, assessments, fees and charges."

Proposition 218 added the following language to the California Constitution, as section 3 of article XIII C

> SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges.
>
> Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives

The stated intent of Proposition 218's sponsors in adding language to the California Constitution relating to the electorate's initiative powers was to "constitutionalize" the California Supreme Court's holding in *Rossi v. Brown* (1995) 9 Cal. 4th 688. In *Rossi*, a challenge to an initiative repeal of San Francisco's utility users tax as a referendum on a tax forbidden by Article II, section 9 of the state Constitution, the court held the electorate had authority to repeal tax measures prospectively without offending constitutional provisions which exclude tax measures from the electorate's referendum powers. *See generally* Cal. Const., art. II, §§ 8, 9.

This section of the Guide examines what revenue sources are potentially affected by Proposition 218's initiative provisions, as well as the legal and procedural issues Proposition 218's initiative provisions create.

Substantive Issues

Pre-Proposition 218 Limitations on the Initiative Power

The electors' initiative power is:

> "not a right granted to the people but … a power reserved to them. Declaring it the duty of the courts to jealously guard this right of the people, the courts have described the initiative … as articulating one of the most precious rights of our democratic process. It has long been judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

Rossi v. Brown, supra, 9 Cal. 4th at page 695.

Despite this judicial policy of "liberal construction," prior to the adoption of Section 3 of Article XIIIC, the courts had placed the following limitations on the power of the voters to initiate legislation:

- Authority delegated specifically to a local legislative body ("city council" or "board of supervisors") by the Legislature may not be exercised by the electors by initiative. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491;

- The power of the initiative may not be exercised if it will cause the impairment of an essential government function. *City of Atascadero v. Daly* (1982)135 Cal.App.3d 466;

- An initiative may not enact a statute that is preempted as a matter of statewide concern. *DeVita v. County of Napa* (1995) 9 Cal.4th 763; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491;

- An initiative must undertake a legislative act, and may not undertake a quasi-judicial or administrative action. *DeVita v. County of Napa, supra*;

- An initiative may not direct a local government to take a legislative action, but must enact legislation in and of itself. *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504;

- An initiative is subject to constitutional limitations on legislative action by the local government itself, such as the requirement of equal protection for minimum rationality and an absence of invidious discrimination. *Arnel Development Co. v. City of Costa Mesa*

(1981)126 Cal.App.3d 330 (arbitrary and capricious land use measure); *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009 (unwarranted distinction between city and unincorporated voters).

The Scope of the Power of Initiatives To "Affect" Taxes, Assessments, Fees or Charges.

Authority delegated specifically to a local legislative body

Article XIIIC, section 3, declares that the "initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge" and that "[t]he power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments." The California Supreme Court in *Bighorn-Desert Water Agency* v. *Verjil* determined that the direct-delegation rule of *Committee of Seven Thousand* does not apply to an initiative to reduce or repeal taxes, assessments fees or charges. In response to the Agency's argument that the Legislature had granted the Agency's governing board exclusive authority to set the Agency's rates and other charges, the Court replied:

> "The Legislature is bound by the state Constitution, however, and the evident purpose of article XIIIC is to extend the local initiative power to fees and charges imposed by local public agencies. We need not determine whether the Legislature intended to preclude the use of the initiative to reduce the Agency's fees because even if it did so intend, the Legislature's authority in enacting the statutes under which the Agency operates must in this instance yield to constitutional command." *Bighorn-Desert View Water Agency v. Verjil, supra,* 39 Cal.4th at 217.

It is not clear, however, from this holding, how the courts will interpret the breadth of the initiative power under article XIIIC, section 3. In the same case, the California Supreme Court endorsed one "limitation" on the power and suggested that previously established limitations might have continued application. The initiative in *Bighorn-Desert Water Agency* both reduced water rates and required ⅔-voter approval for any new charge and any future increase in water rates. Although the Court held that the section 3 initiative power could be used to reduce a water utility rate, rejecting the argument that the Legislature had delegated exclusive authority to set rates to the district's governing board, the Court kept the Bighorn initiative off the ballot because "this new constitutional provision does not grant local voters a right to impose a voter-approval requirement on all future adjustments of water delivery charges…." *Bighorn-Desert View Water Agency v. Verjil, supra,*39 Cal.4th at 209. Thus, because article XIII D, section 6(c) does not require voter approval for water rate increases, the Court held that voters of the Bighorn District were powerless to establish such a requirement by local initiative. *Id.* at 217-19.

Impairment of an Essential Governmental Function

The Court of Appeal in the *Bighorn* case had applied existing precedent that limited the initiative power where the inevitable effect would be to eviscerate an essential government function. Although the Supreme Court reversed the Court of Appeal, the Supreme Court appeared to be

open to application of certain limitations on the exercise of the initiative power. The *Bighorn* Court made it clear that it was:

> "not holding that the authorized initiative power is free of all limitations. In particular, we are not determining whether the electorate's initiative power is subject to the statutory provision requiring that water service charges be set at a level that 'will pay the operating expenses of the agency, … provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due."

Bighorn-Desert View Water Agency v. Verjil, supra, 29 Cal.4th at 221 .

Thus, the *Bighorn* court left open the possibility that, for example, the initiative power to reduce water rates could not be used in such a way as to violate the requirement that water service charges be set at a level that will pay the operating expenses of the agency, provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it becomes due. This theory has not been conclusively addressed by the California Supreme Court either in the pre- or post-Proposition 218 world.

This theory was raised unsuccessfully in *Rossi v. Brown*, 9 Cal.4th at 713, n. 16 (refusing to consider whether courts have authority to restrict the exercise of initiative powers on an *ad hoc* basis on grounds that particular measure impermissibly interferes with legislative body's fiscal management authority). For the purposes of its analysis, the Court assumed the theory was valid, but concluded the facts in *Rossi* did not show the rule was violated. The court described how the San Francisco initiative operated only at the start of the next fiscal year and there was no argument by the city that there were no alternative sources of revenue to replace the utility tax repealed by the initiative. *Id.* at 710. The *Rossi* court also discussed how the initiative process itself gives the legislative body time to react to the potential loss of revenue due to the time it takes to circulate an initiative petition and to hold an election. *See id.* at 702-703, 710, and 712-713.

After *Rossi,* courts have continued to find that an adverse impact on government finances remains a substantial issue leading to a narrow application of the initiative power. *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1331. The application of this theory after *Bighorn* remains to be determined.

Even if the theory remains valid, it may be difficult to prove. In *Santa Clara County Transportation Authority v. Guardino*, (1995) 11 Cal.4th 220, 254 the court noted: "In order for the exception to apply the [fiscal] power must not only be 'essential,' [but] its serious impairment or wholesale destruction must also be 'inevitable.'"

The initiative repeal of the sole funding source for a special district that statutorily lacks the power to raise revenue in alternative ways might well meet this standard. It may be difficult to demonstrate that a general purpose government, such as a city or county, could ever show an impermissible impairment of its fiscal powers due to a measure affecting one or a few of the myriad revenue sources theoretically available to such governments. However, when the Legislature has specifically provided that an enterprise operation shall have rates sufficient to generate revenue necessary to pay the enterprise's expenses, proof of severe financial impairment may be easier.

"[R]educing or repealing any local tax, assessment, fee or charge."

The meaning of "any local tax, assessment, fee or charge" is not entirely clear. The *Bighorn* court held that all fees and charges subject to article XIIID – including water, sewer, and government solid waste service charges – may be reduced or repealed by initiative. *Bighorn-Desert View Water Agency v. Verji, supra,* 29 Cal.4th at 216. However, the court reserved for another day whether the fees and charges subject to repeal or reduction are limited to those governed by article XIIID. It leaned towards the view that the phrase "fee or charge" in article XIIIC includes more than just those fees governed by article XIIID. "Fee or charge" as defined in article XIIID has a narrower, more restrictive meaning since the phrase "property-related" limits the fees subject to that article, but that phrase does not appear in Article XIIIC. However, most likely the initiative power may not be used to repeal or reduce development impact and permit processing fees. Proposition 218 contains a provision that indicates it does not "affect existing laws relating to the imposition of fees or charges as a condition of property development." Cal. Const., art. XIIID, § 1(b)). Therefore even if the language of article XIIIC, section 3 is not restricted to property-related fees, article XIIID, section 1(b) clarifies that the provisions of article XIIIC are not intended to affect the imposition of fees as a condition of property development. Also, if the requirement to pay a development fee is contained in a development agreement with a property owner, or is part of some other contract, the constitutional impairment of contracts limitation could prevent initiative repeal of that fee as to the contracting parties. See discussion on impairment of contracts below.

Most public lawyers believe that all local taxes may be reduced or repealed by initiative. However, a question remains about what types of assessments can be reduced or repealed by initiative: all local assessments, or just those related to property and otherwise subject article XIIID. For example, business improvement districts may be established either under the provisions of the Parking and Business Improvement Area Law of 1989, Sts.& Hy. Code, §§ 36500 *et seq.* ("the 1989 Act") or the Property and Business Improvement District Law of 1994, Sts. & Hy.Code,§§ 36600 *et seq.* ("the 1994 Act") Both statutory schemes permit the levy of assessments for both "improvements" and "activities," including promotions of public events and tourism, furnishing of music in public places, and other expenditures beneficial to businesses in the district. Assessments in 1989 Act districts are levied on "businesses" rather than property, are apportioned according to the estimated benefit to businesses and property in the district, and are frequently collected as a surcharge on a business license tax. Assessments in a 1994 Act district are levied on real property, are apportioned according to estimated special benefit to real property within the district, and may be collected in the same manner as ad valorem taxes. 1989 Act assessments are not subject to article XIIID because they are not levied "on property".

Howard Jarvis Taxpayers Association v. City of San Diego (1999) 72 Cal.App.4th 230. 1994 Act assessments are subject to article XIIID. The *Bighorn* Court's analysis of the scope of the electorate's ability to reduce and repeal fees would apply equally to assessments.

"**The power of the initiative to affect local taxes, assessments, fees and charges….**"

In addition to uncertainty over the types of assessments, fees and charges subject to article XIIIC, there is some uncertainty over the actions that may be taken by an initiative. Article XIIIC, section 3 first states that "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing" taxes, assessments or fees. The next sentence states:

> The power of initiative to **affect** local taxes, assessments, fees and charges shall be applicable to all local governments and neither the legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives."

Cal. Const., art. XIIIC, § 3 (emphasis added).

By using the term "affect" instead of the more specific terms "reducing" and "repealing" used in the preceding sentence of this section, this provision is not clear if something more was intended. The California Supreme Court has held that the term "affect" only means reducing and repealing taxes, assessments, fees and charges:

> "Thus, analysis of the text of section 3 of article XIII C supports the conclusion that the initiative power granted by that section extends only to 'reducing or repealing' taxes, assessment, fees, and charges."

Bighorn Desert View Water Agency v. Verjil, supra, 39 Cal.4th at 218.

Presumably section 3 of article XIII C was not intended to alter the essential nature of the initiative power, but takes the nature of that power as a given. Instead it merely declares that article II, sections 8 and 9 and other exceptions from the initiative power cannot bar initiatives to reduce and repeal taxes, assessments, and fees (in other words, to "affect" them) and proclaims that this power extends "to all local governments," including special districts which lack the power to act by ordinance and therefore were previously exempt from the powers of initiative and referendum. This ensures the availability of this use of the initiative power in charter cities and any other local or regional governmental entities that already have the power to impose taxes, assessments or fees. *See* Cal. Const., art. XIIIC, § 1(b) (definition of "local governments").

This interpretation is supported by reading this sentence in conjunction with article XIII D section 1(a), which states that nothing in Proposition 218 must be construed to "provide any **new** authority to any agency" to impose a tax, assessment or fee. Conceivably, this latter provision would be violated if the word "affect" were interpreted broadly to add to local governments' revenue-raising authority by authorizing them to impose new taxes, assessments, or fees by initiative.

However, Proposition 218's use of the word "affect" could be interpreted to mean the initiative power extends to such matters as extending the life, increasing the amount, creating or deleting

exemptions, and modifying refund procedures for existing taxes, assessments and fees, as well as reducing and repealing them (but not imposing new taxes as prohibited by article XIIID section 1(a)). This interpretation is somewhat weakened by the fact that the initiative power arguably already can be used to make these sorts of changes to existing taxes, assessments and fees because such changes are legislative matters traditionally subject to initiatives. *See Dye v. City of Compton* (1947) 80 Cal. App. 2d 486 (allowing use of referendum under city charter to repeal part of a sales tax ordinance.). This interpretation would make this provision redundant, which undermines it as a likely intention of the voters.

Moreover, the *Bighorn* court expressly held that article XIIIC, section 3 is a one-way street in this regard – allowing initiatives to repeal, but not enact revenue measures. *Bighorn Desert View Water Agency v. Verjil, supra,* 39 Cal.4th at 218. The court did not consider whether such a content-based restriction on ballot access comports with the requirements of the 14th Amendment to the United States Constitution. *E.g., Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983) (discriminatory ballot access laws subject to strict constitutional scrutiny); *Burdick v. Takushi* 504 U.S. 428 (1992) (same).

The Requirement that Initiatives and Referenda be Limited to Legislative Acts

The establishment of a new local tax, assessment, fee or charge is considered legislative activity. (E.g. *McHenry v. Downer* (1887) 116 Cal.20, 24-25 (taxes); *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683-684 (assessments); *Brydon v. East Bay Muni. Util. Dist.* (1994) 24 Cal.App.4th 178, 196 (water rates); *Garrick Dev. Co. v. Hayward Unif. Sch. Dist.*(1992) 3 Cal.App.4th 320, 328.) This does not mean, however, that the initiative power under article XIIIC, section 3 extends beyond general reduction or repeal of local taxes, assessments, fee, or charges, to the imposition or reapportionment of such levies. A local government's power to tax comes with limitations imposed by general laws. *Cal Bldg. Industry Assn. v. Governing Board* (1988) 206 Cal.App.3d 212, 227-228. When the legislature has imposed procedural requirements or substantive limitations for local taxes, assessments or charges, those requirements or limitations cannot be avoided by initiative. *Id*. at 233-234. Article XIIID, section 4 establishes specific requirements for levy of assessments. Similarly, Article XIIID, section 6 establishes specific requirements for the levy of property related fees and charges. Other statues impose procedural or substantive requirements for the levy other fees and charges. See e.g. Gov. Code, §§ 65995, 66016. Thus, for example, while a local initiative might reduce the portion of the total of a facility or service to be funded by assessments, it could not reallocate that portion among specially benefited parcels because the allocation of benefit must occur through the process established by the constitution and statutes. Further, if an initiative measure alters the mechanics of an existing levy or the procedures by which the levy is administered, some consideration to whether the initiative takes unauthorized administrative action is appropriate.

Constitutional Limitations on Initiative Measures

As noted above, initiative legislation is subject to the same standards as other local legislation – it may not enter a field pre-empted by state or federal law, create a conflict with state or federal law, violate a federal or state constitutional standard, such as the procedural requirements of Article XIII D for the approval of taxes, assessments and property related fees and charges, or

violate the requirements of equal protection or the impairment of contracts clause. The last bears more detailed discussion.

The Contract Clause of the U.S. Constitution and the Reduction of Taxes, Assessments, Fees and Charges

Taxes, assessments, fees and charges pledged to debt prior to November 6, 1997.

Taxes, assessments, and fees and charges can be formally pledged to repay bonds or other debt. In general, bonds and other public securities constitute contracts that fall within the purview of state and federal constitutional prohibitions against impairing the obligations of contract. Cal. Const., art. I, § 9; U.S. Const., art. I, § 10.

As article XIIIC is itself a part of the California Constitution, the federal prohibition applies:

> It follows, accordingly, that even though a state may by constitutional amendment supersede its own constitutional protection for contracts, such modification and any law adopted pursuant thereto still must pass federal constitutional muster.

Allen v. Board of Administration (1983) 34 Cal. 3d 114.

The usual rule is that the law in effect at the time bonds or other public securities are issued becomes a part of the contract, the law cannot be changed afterward to the detriment of the bondholders' contractual rights without their consent. *County of San Bernardino v. Way* (1941) 18 Cal. 2d 647, 661; *Islais Co. v. Matheson* (1935) 3 Cal. 2d 657, 662-663. To constitute impairment, the change in the law must adversely affect the bondholder's rights "in a material degree." *County of San Bernardino v. Way,* 18 Cal.2d at 663. For example, a reduction in security pledged may not be material if that security had no actual value. *Id.* at 664.

Accordingly the two lines of argument are:

- Any initiative that would reduce pledged revenue impairs the security of the contract with bondholders. Thus, any proposed reduction, much less repeal, cannot be sanctioned.

- Since the law in effect at the time of debt issuance did not permit the initiative power to be used to repeal or reduce taxes, assessments, fees, or charges, Proposition 218 cannot be used to authorize repeal or reduction of taxes, assessments, fees, and charges that comprise the security for the indebtedness. (As to local taxes, this argument presupposes the debt was issued prior to *Rossi v. Brown* in 1995. As to fees, the argument assumes that the fees securing the debt could have been viewed as administrative in nature.)

However, not every impairment is unconstitutional. The right of the state to exercise its police powers is recognized by courts as an essential component of the impairment analysis. Where the

impairment is viewed as minor, greater latitude is given to the exercise of the police power, and an unconstitutional impairment may not be found. But where the impairment is substantial, the state's rationale for its law will be subject to greater scrutiny.

A state law may not be given effect if a more narrowly tailored law or action could have accomplished the state's purpose without impairing the contract:

> The United States Supreme Court has observed, 'Although the Contract Clause appears literally to proscribe 'any' impairment . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' [Citation.] Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution." (*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 21 [52 L. Ed. 2d 92, 109, 97 S. Ct. 1505].) An attempt must be made 'to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,'. . .' (*Ibid*.) For example, '[m]inimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.' *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245 [57 L. Ed. 2d 727, 737, 98 S. Ct. 2716], fn. omitted; accord *Valdes v. Cory* (1983) 139 Cal. App. 3d 773, 789 [189 Cal. Rptr. 212]. The high court also has expressed the relevant principles another way: The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their 'just and reasonable purport'; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. *City of El Paso v. Simmons* (1965) 379 U.S. 497, 508 . . .; *Home Building & Loan Assn. v. Blaisdell* [1934] 290 U.S. [398,] 428-429, 434-435 . . .) The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' (*City of El Paso v. Simmons, supra*, 379 U.S. at p. 515 . . .) Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.' (*Ibid*; see 70 Dick. L. Rev. 524-534 (1966); 56 Column L. Rev. 251-270 (1956).)" *Lyon v. Flournoy, supra*, 271 Cal. App. 2d at p. 782; accord *Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 596.

Allen v. Board of Administration (1983) 34 Cal.3d 114, 119-120.

Two United States Supreme Court cases cited by the Allen court further illustrate the analysis. In *Home Bldg. & Loan Assn. v. Blaisdell*, (1934) 290 U.S. 398, the Court upheld the constitutionality of a Minnesota statute extending the redemption period for mortgages after foreclosure. The subject statute had been enacted during the depression to provide relief to property owners. The Court found that the legislation was a valid exercise of the police power to

protect a basic societal interest, was narrowly tailored to the circumstances, and did not ultimately impair the integrity of the mortgagor's property interest.

On the other hand, the Court found an unconstitutional impairment to a public bond covenant in *United States Trust Co. of New York v. State of New Jersey*, (1977) 431 U.S. 1, In that case, the two states each repealed a bond covenant restricting the use of revenues pledged as security for port authority bonds. The justification was the need to use some of the restricted funds to finance mass transit improvements. The Court determined that the repeal eliminated an important security provision of the bonds and was neither reasonable nor necessary to achieve the states' goals.

In sum, in reviewing challenges based on the contract clause, courts look at:

- The contract language allegedly impaired—is there an impairment?
- The severity of the impairment—is it material or substantial?
- The nature and purpose of the legislation (or state constitutional provision) that impairs the contract.
- Whether an emergency situation exists requiring state action.
- Whether the legislation or constitutional provision is appropriately drawn to address the emergency, or whether it is overbroad.

Whether Proposition 218 will be challenged by bondholders is unknown. But if an initiative proposes to repeal or reduce local assessments, taxes, fees or charges that are pledged to repay bonded indebtedness, public agencies can anticipate bondholder interest in the matter. If a lawsuit is filed to keep the initiative from being placed on the ballot, or after the election, the facts relating to the wording of the bond covenants, the impact of the proposed reduction or repeal, and the purpose behind the initiative will be subject to scrutiny and balancing. There is no assurance that in every instance the courts will strike down the initiative measure.

The Proposition 218 Omnibus Implementation Act, was adopted immediately following the adoption of Prop. 218 as urgency legislation with the support of both local government and the Howard Jarvis Taxpayers Association. It directs the courts **not** to construe section 3 of article XIIIC of the California Constitution to mean that an owner of a municipal security, purchased before or after November 6, 1996 (the effective date of Prop. 218), assumes the risk of, or in any way consents to, an impairment of the owner's contractual rights by an initiative measure that are protected by section 10 of article I of the U.S. Constitution. Gov. Code, § 5854; *See also Consolidated Fire Protection District v. Howard Jarvis Taxpayers Association* (1998) 63 Cal. App. 4th 211 (discussing the impairment issue in context of an ordinance imposing an assessment prior to Proposition 218's passage).

The narrowest reading of the protection afforded by the Impairment of Contracts Clause is that contractual promises to impose taxes, assessments, fees and charges to repay debt (a common if not universal covenant in a revenue bond) would prevent initiative repeal of a bonded revenue

stream only if the bond covenant were entered into prior to the effective date of Prop. 218 on November 6, 1996. However, the Omnibus Act language and other arguments support a more expansive argument that, once a revenue stream is bonded, the initiative power cannot alter that revenue stream in a manner that impairs the bond covenant. For example, a water revenue bond typically includes a covenant to maintain water rates at a sufficient level to fund principal and interest payments on the debt as well as maintenance of utility infrastructure. The covenant thus protects part of the water rate, but not all of it, as the covenant does not require the rate to cover non-capital operating costs. While bonds that contain such a covenant are outstanding, it can be argued that the initiative power to affect water rates can be used to reduce water rates down to, but not below, the rate level necessary to comply with the covenant.

Taxes, assessments, and fees and charges pledged to repay debt after November 6, 1997.

There is an argument that the pledges described above would be protected just as are pledges made prior to the effective date of Prop. 218. The United States Constitution limits the ability of a legislative body – and arguably the citizens legislating via initiative – to repudiate debts or to impair security provided for such debt. Under the contract clause, a legislative body may not revoke a tax in violation of a contractual obligation. *See Carman v. Alvord* (1982) 31 Cal.3d 318, 332. The people, acting as the legislative body via initiative, are subject to these same federal constitutional limitations. *See Citizens Against Rent Control v. City of Berkeley* (1980) 27 Cal.3d 819.

The Howard Jarvis Taxpayers Association has taken the position that a reduction or repeal initiative cannot violate the terms of bond covenants. In the January 2, 1997 annotation of article XIIIC, section 3, HJTA concluded:

> [T]he initiative power could not be used to impair bonds that are already sold (even if they are sold after Proposition 218 becomes effective). The concern that the new provision will put bond holders 'on notice' that the revenue stream could be eliminated is not well-founded. The concerns expressed, in short, do not take into account the fact that the people's power of initiative is a co-extensive power with that of the legislative body. See e.g., *Carlson v. Cory* (1983) 139 Cal.App.3d 724 and *DeVita v. County of Napa* (1995) 9 Cal.4th 763. If the legislative body could be enjoined from impairing contractual rights, then so could the people.
>
> The above does not leave the taxpayers without remedy, however. If the taxpayers wish to preclude or limit future rate or tax increases via an initiative, they could do so prior to any valid, legally binding commitment being made by the legislative body with respect to a particular revenue stream.

At a minimum, public agencies should include a discussion of Proposition 218 and its initiative provisions in official statements for bond issues. The relative impact of a measure on a public agency's revenue stream should be discussed. In addition, should an initiative to repeal or reduce a local tax, assessment or fee qualify for the ballot, such event may require disclosure under the continuing disclosure rules.

An initiative is not one of the eleven events listed in Rule 15c2-12 that, if material, must be reported. However, a continuing disclosure undertaking executed by an issuer might include other events that must be reported, including qualification of an initiative for the ballot or an initiative's adoption.

Potential Federal Constitutional Challenges to the Use of the Initiative Power

There may be a scenario in which the use of the initiative power to reduce and repeal taxes, assessments and fees may be subject to legal challenge based on a violation of any applicable federal rights. Whether such a limitation would apply to a particular initiative would depend on the specific facts involved.

The exercise of the initiative power may not violate the equal protection clause or due process of law protections guaranteed by the United States Constitution. An example of an impermissible use of the initiative power would be to reduce part of a utility tax in such a way that the remaining tax only fell on persons of a particular race, religion or gender, created a preference for local business compared to interstate commerce that violated the Dormant Commerce Clause or the comparable protections of the California Constitution for inter-city commerce, or attempted to adjudicate the tax status of a taxpayer or taxed parcel via initiative.

Initiative Procedural Issues

Signature requirements

Article XIIIC, section 3 limits the required number of signatures that may be required by state statute or local charter to qualify a fiscal initiative to the number required for statewide statutory initiatives. At present, the requirement for statutory initiatives is five percent of the number of the votes for all candidates for governor at the last gubernatorial election. *See* Cal. Const., art. II, § 8(b); Cal. Elect. Code § 9035. As gubernatorial turnouts of late have been in the neighborhood of 40%, and 5% of 50% is 2% of all registered voters, this is a very low signature threshold; indeed well below the 10% of all registered voters required for other municipal initiatives in general law cities. *See*. Elec. Code, § 9215.

Proposition 218 will probably be interpreted to mean five percent of all the votes cast for all candidates for governor within the local government jurisdiction involved, rather than all such votes statewide. *See* Elec. Code, § 9118 (setting the number of required signatures for a county initiative petition at ten percent of the votes cast in the county for all candidates for governor.)

Holding an Election on an Initiative

Proposition 218 is silent as to when an election must be held if an initiative authorized under Proposition 218 qualifies for the ballot. For the usual initiative that qualifies with signatures of

at least ten percent of the registered voters, but not 15 percent, the initiative must go to the voters at the next municipal election.
If 15 percent or more signatures are obtained, the initiative must go to a specially called election within 103 days. Elec. Code, §§ 9215, 9214.

The low signature threshold of Prop. 218 does not apply to a fiscal initiative when the initiative petition seeks a special election date. A fiscal initiative under Proposition 218 is not required to be placed on the ballot at a special election unless the higher, 15% of all registered voters standard, is met. *See* 80 Ops.Cal.Atty.Gen. 151 (2002).

Voting on the Initiative

Although article XIIIC, section 3 provides that no constitutional provision shall limit the use of the initiative power to reduce or repeal a tax, assessment or fee, it does not discuss the procedure for exercising the initiative power.

The issue arises chiefly in connection with the use of the initiative power to reduce or repeal assessments and fees that apply to an area smaller than the city or county that imposed the measure, such as an assessment district or a Mello-Roos Community Facilities District. Given the absence of existing electoral mechanisms to conduct elections in an area established for fiscal, rather than electoral purposes, most agencies confronted with this question have interpreted the Elections Code to require an election in the entire community. There is support for this approach.

Article XIII C, § 2(b), (c) (referring to "the electorate" and "the voters") appears to require the entire electorate to vote on imposing taxes, so the entire electorate would participate in any initiative to reduce or repeal them. Proposition 62, a measure closely related to Proposition 218 and also sponsored by the Howard Jarvis Taxpayers Association, is more explicit requiring taxes to be "submitted to the electorate of the local government or district." Gov. Code, §§ 53722 (special tax) and 53723 (general tax).

Moreover, just as the Attorney General found the 15% signature rule of Elections Code § 9214 to apply for a request that a fiscal initiative be placed on a special election ballot (80 Ops.Cal.Atty.Gen. 151 (2002)), so too ought the other provisions of the Elections Code regarding the appropriate electorate to apply in the absence of any provision of Proposition 218 to the contrary. The only statute commonly applicable to local governments which authorizes an election in less than the entire area of that agency is the Mello-Roos Community Facilities Act. Gov. Code, § 53326(b).

However, as to assessments and property-related fees, a counter argument is plausible, too. Proposition 218 generally allows only the property owners who will pay assessments and fees to vote on their imposition. *See* Cal. Const., art. XIIID, § 4(a) through (e) (only property owners who would pay the assessment can vote), § 6(c) (majority vote of the property owners subject to the fee *or* two-thirds vote of the entire electorate). On balance, this counter argument is unpersuasive for the following reasons:

The Legislature has the power to establish initiative procedures that would be applicable to an initiative to reduce or repeal an assessment or fee or charge:

> "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. This section does not affect a city having a charter."

Cal. Const., art. II, § 11. Without Legislative action, it must be assumed that the entire local electorate has the authority to vote on an initiative to reduce or repeal an assessment, fee, or charge since principles of constitutional interpretation provide that where there is no ambiguity in the language, the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. *People ex rel. Lungren v. Superior Court*(1996)14 Cal.4th 294, 301. In order to reach the conclusion that only those allowed to vote to impose the assessment are authorized to initiate its repeal or reduction, it is necessary to add the provisions of article XIIID, section 5 (relating to the procedural requirements for assessments) to the provisions of article XIIIC, section 3 (relating to the availability of the initiative to repeal or reduce an assessment). Such a reading would be contrary to the acceptable principles of constitutional interpretation.

An alternative analysis of this issue is that nothing in Proposition 218 determines who can use this initiative power. In a sense, Proposition 218 is not self-executing concerning this question. Therefore, the power given to the Legislature by the state Constitution to establish the initiative and referendum procedures remains applicable. Article II, section 11 provides:

> "Initiative and referendum powers may be exercised by the electors of each city or county **under procedures that the Legislature shall provide**. This section does not affect a city having a charter." (Emphasis added).

The framers of Prop. 218 were plainly aware of this provision, as the initiative rule of Prop. 218 overrides Legislative control on the single issue of concern to those framers – signatures required to qualify a measure for the ballot. Cal. Const., art. XIII C, § 3. As those framers could have limited legislative power in other regards and did not, it is reasonable to assume they intended to retain the existing constitutional framework for the exercise of the initiative power.

Under this analysis, the Legislature has the authority to address this procedural question and determine the electorate for purposes of the fiscal initiative power under article XIIIC. Charter cities themselves would regulate this matter. Unless and until such legislation authorizes a less-then-the-entire-agency electorate in a setting other then the Mello-Roos Act, the better view is that such a reduced electorate is unauthorized.

An additional legal issue arises if it is concluded only property owners can exercise the Proposition 218 initiative power. This issue involves the constitutional right to equal protection of the law. *E.g., Nielson v. City of California City* (2005) 133 Cal.App.4th 1296 (Prop. 13's limitation of special parcel tax election to registered voters was required by one-person-one-vote rule of equal protection clause and did not violate rights of absentee land owner). Thus,

generally speaking, absent the unusual circumstances of a landowner voting district permitted under the federal Constitution, the exercise of the initiative may not be limited only to property owners. *See Reynolds v. Sims*, 377 U.S. 533 (1969) (one person one vote); *cf. Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973) (land owner voting does not offend one-person-one-vote rule as to a limited-purpose agency which provides services to property and funds those services via charges on property owners alone). For reasons similar to the landowner voting cases, Proposition 218's weighted voting for assessments has been upheld. *Not About Water v. Board of Supervisors* (2002) 95 Cal.App.4th 928.

In short, apart from initiatives to repeal Mello-Roos special taxes, there is no authority under current law to conduct an election on a fiscal or other initiative in an area smaller than the entire city or county that imposed the measure in question.

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VI. Assessment Ballot Proceedings

Sample Resolution

Proposition 218 includes new procedures and requirements for assessments. Although the legislation implementing Proposition 218 answered some questions relating to these procedures and requirements, other questions remain. Each city has the opportunity to answer some of these questions through the adoption of a resolution.

Resolution No. _____
A Resolution of the
City Council of *[Insert Public Agency Name]*
Adopting Proposition 218
Procedures for Assessment Ballot Proceedings

WHEREAS, Proposition 218 was adopted on November 6, 1996, adding Articles XIIIC and XIIID to the California Constitution; and

WHEREAS, Article XIIID of the California Constitution impose certain procedural and substantive requirements relating to assessments (as defined); and

WHEREAS, some of the requirements of Proposition 218 are unclear and require judicial interpretation or legislative implementation; and

WHEREAS, the city council believes it to be in the best interest of the community to record its decisions regarding implementation of the provisions of Proposition 218 relating to assessments and to provide the community with a guide to those decisions and how they have been made;

NOW, THEREFORE, the City Council of the *[insert public agency name]* does hereby resolve as follows:

SECTION 1. **Statement of Legislative Intent.** It is the city council's intent in adopting this resolution, to adopt assessment ballot proceedings that are consistent, and in compliance with, articles XIIIC and XIIID of the California Constitution and with the Proposition 218 Omnibus Implementation Act and the provisions of other statutes authorizing the levy of assessments. It is not the intent of the city council to vary in any way from the requirements of articles XIIIC and XIIID or the Proposition 218 Omnibus Implementation Act.

SECTION 2. **Definition of Assessment.** Proposition 218 defines "assessment" as any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax." This means that an assessment that is

not a charge upon real property for a special benefit conferred upon the real property is not an "assessment" for purposes of article XIIID, section 2(b) of the California Constitution.

SECTION 3. *[Insert Public Agency Name]* Assessments: The *[insert public agency name]* currently imposes the following assessments. The purpose of each of these assessments is controlled by the engineer's report that was adopted when the assessment was imposed and is noted here in summary form.

[list each assessment which is subject to Proposition 218 including those assessments which are "exempt" pursuant to article XIIID, section 5, the purpose of the assessment, and the enabling authority for levying the assessment.]

A.

B.

C.

D.

E.

SECTION 4. **Assessment Ballot Proceeding.** The following procedures shall be used in an assessment ballot proceeding required by article XIIID, section 4 of the California Constitution:

A. **Amount of Assessment.** Only special benefits are assessable. The amount of each assessment shall be each identified parcel's proportionate share of the public improvement or property related service based upon that parcel's special benefit from the improvement or service. The amount shall be proportional to and no greater than the special benefits conferred on the property.

B. **Special Benefit.** For purposes of determining the amount of the assessment:

1. Special benefit means a particular and distinct benefit over and above general benefits conferred on real property located in the assessment district or to the public at large;

2. Special benefits are those which the property assessed receives, due to the improvement or service, in excess of the general public benefit;

3. The fact that the other property within the city or within the area will be, to a greater or lesser extent, specially benefited by the improvement or service, will not have the effect of depriving assessed property of its character as specially benefited property;

4. Special benefit is immediate and of such a character as can be seen and traced. General benefits are remote and sometimes contingent.

C. **Engineer's Report.** The city council shall direct the filing of an engineer's report that shall comply with the applicable state statute authorizing the assessment and with article XIIID, section 4 of the California Constitution. The engineer's report shall identify the improvement or service to be funded by the assessment; its estimated cost, including all planning, administrative, and ancillary costs authorized by law to be funded by the assessment; the entire special benefit attributable to the improvement or service, which benefit shall be separated from the general benefit, if any. Each parcel assessed shall be specially benefited by the improvement or service. The engineer's report shall also provide the evidence upon which this council may find that a special benefit exists. The engineer's report shall apportion the assessment to each parcel in the district according to its respective special benefit.

D. **Notice.** The following guidelines shall apply to giving notice of an assessment.

1. The record owner(s) of each parcel to be assessed shall be determined from the last equalized property tax roll. If the property tax roll indicates more than one owner, each owner shall receive notice. Only property owners shall receive notice.

2. The form of notice is attached to this resolution as exhibit A.

3. The notice shall be sent at least forty-five (45) days prior to the date set for the public hearing on the assessment.

4. The notice provided by this section and in accordance with article XIIID, section 4 of the California Constitution, shall supersede and be in lieu of any other statutes requiring notice to levy or increase an assessment, including but not limited to the notice required by the state statute authorizing the assessment and Government Code section 54954.6.

5. Failure of any person to receive notice shall not invalidate the proceedings.

6. The cost of providing notice shall be included as a cost of the assessment district.

E. **Assessment Ballot.** The following guidelines shall apply to the assessment ballot:

1. The ballot required by article XIIID, section 4(d) of the California Constitution shall be mailed to all property owners of record within the assessment district at least forty-five (45) days prior to the date of the public hearing on the proposed assessment.

2. The form of the ballot is attached to this resolution as Exhibit B.

3. All ballots must be returned to the City Clerk by mail or in person, sealed in the envelope provided not later than the date for return of ballots stated on the notice described in section 4(D).

4. The envelopes shall be "security envelopes" which conceal the contents therein provided by the City. The envelopes shall denote the property to which the ballot applies.

5 A ballot must be signed under penalty of perjury. For properties with more than one owner of record, ballots will be accepted from each owner of record. Each owner of record is entitled to vote. If more than one owner of record votes, the city clerk shall apportion the voting rights between the owners based upon the respective record interests as the city clerk deems correct, proper, and appropriate. However, if only one owner of record votes, the city clerk shall tabulate that vote on behalf of the entire parcel.

6. Because assessments are levied on property and tenants are not directly liable to the city for payment of assessments, a tenant of real property shall not have the power or authority to submit an assessment ballot.

7. Only ballots with original signatures, not photocopies, will be accepted. Ballots will not be accepted via e-mail. Ballots not submitted in the security envelope provided by the City shall not be counted.

8. The City Clerk may issue a duplicate ballot to any property owner whose original ballot was lost or destroyed. Such ballots shall be clearly marked as duplicate ballots and shall be accompanied by sufficient information for the city clerk to verify the location and ownership of the property in question and the identity of the individual casting the ballot in order to verify its authenticity.

8. An assessment ballot proceeding is not an election.

9. Assessment ballots shall remain sealed until the tabulation of ballots commences at the conclusion of the public hearing. An assessment ballot may be submitted, or changed, or withdrawn by the person who submitted the ballot prior to the conclusion of the public testimony on the proposed assessment at the public hearing.

10. [*Consider adopting 10(a) and either of the 10(b) alternatives*:]

a. During and after the tabulation, the assessment ballots shall be treated as disclosable public records, as defined in Government Code section 6252, and equally available for inspection (e.g., by the proponents or the opponents of the proposed assessment), pursuant to Government Code section 53750(e)(1).

b. [*alternative one*] Prior to the public hearing, sealed assessment ballot envelopes received by the City Clerk shall be treated as disclosable public records, pursuant to Government Code section 6250 et seq.

[*alternative two*] Prior to the public hearing, neither the assessment ballot nor the envelope in which it is submitted shall be treated as a public record, pursuant to Government Code section 6254(c) and any other applicable law, in order to prevent potential unwarranted invasions of the submitter's privacy and to protect the integrity of the balloting process.

F. **Tabulating Ballots.** The following guidelines shall apply to tabulating assessment ballots:

1. The City Clerk shall determine the validity of all ballots. The City Clerk shall accept as valid all ballots except those in the following categories:

a) A photocopy of a ballot which does not contain an original signature;

b) An unsigned ballot;

c) A ballot which lacks an identifiable “yes” or “no” vote;

d) A ballot which appears to be tampered with or otherwise invalid based upon its appearance or method of delivery or other circumstances;

e) A ballot which is submitted on a form which is different than the form of ballot provided by the City;

f) A ballot submitted to the City via e-mail.

g) A ballot not returned in a city issued “security envelope.”

The city clerk’s decision, after consultation with the city attorney that a ballot is invalid, shall be final and may not be appealed to the city council.

2. An impartial person designated by the governing board who does not have a vested interest in the outcome of the proposed assessment shall tabulate the assessment ballots submitted, and not withdrawn, in support or opposition to the proposed assessment. The impartial person may include the city clerk. During and after the tabulation, the assessment ballots shall be treated as disclosable public records, as defined in the Public Records Act, and equally available for inspection by the proponents and the opponents of the proposed assessment.

3. A property owner who has submitted an assessment ballot may withdraw the ballot and submit a new or changed ballot at any time until the conclusion of the public hearing on the assessment.

4. A property owner's failure to receive an assessment ballot shall not invalidate the proceedings conducted under this section and section 4, article XIIID of the California Constitution.

G. **Public Hearing.**

1. At the public hearing, the city council shall hear all public testimony regarding the proposed assessment and accept ballots until the close of the public hearing which hearing may be continued from time to time.

2. The city council may impose reasonable time limits on both the length of the entire hearing and the length of each speaker's testimony.

3. At the conclusion of the hearing, the city clerk shall complete tabulation of the ballots, including those received during the public hearing.

4. If it is not possible to tabulate the ballots on the same day as the public hearing, or if additional time is necessary for public testimony, the City council may continue the public hearing to a later date to receive additional testimony, information or to finish tabulating the ballots; or may close the public hearing and continue the item to a future meeting to finish tabulating the ballots.

5. If according to the final tabulation of the ballots, ballots submitted against the assessment exceed the ballots submitted in favor of the assessment, weighted according to the proportional financial obligation of each affected property, a "majority protest" exists and the city council shall not impose or increase the assessment.

PASSED AND ADOPTED this _____ day of _____, 200__ by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST: _____
City Clerk

Attachments: Exhibit A: Form of Notice
Exhibit B: Form of Assessment Ballot

VII. All Mail Elections

Introduction and Overview

Elections Code section 4000(c)(9) allows any local, special, or consolidated election to be conducted wholly by mail if it is "an election or assessment ballot proceeding required or authorized by Article XIIIC or XIIID of the California Constitution." The elections required by article XIIIC are those required to impose, extend or increase a general tax or a special tax.[29] Cal. Const.,, Art. XIIIC, § 2. The elections required by article XIIID are those required to impose or increase a fee or charge imposed upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service ("property related fees and charges"). *See* Cal. Const.,, art. XIIID, § 6. Mail ballots may only be used on an established mailed ballot election date. Mailed ballot election dates are: the first Tuesday after the first Monday in May of each year; the first Tuesday after the first Monday in March of even-numbered year; and the last Tuesday in August of each year.

> *Practice tip: A proceeding conducted pursuant to Article XIIID, section 4, to ask for property owner approval of a benefit assessment is an "assessment ballot proceeding", not an "election" (Elections Code §4000(a)(9). Ballots must be called "assessment ballots." Because the proceeding is not an election, the dates established for mailed ballot elections do not apply.*

The following steps must be taken to enable an all-mail ballot election:

- **Step 1**: Adopt an ordinance authorizing mail ballot elections. A model ordinance is included at the end of this chapter.

  > *Practice tip: Adopting such an ordinance does not commit the city council to conducting every special tax, general tax, and property-related fee or charge election by mail. Authorization to conduct a specific election by mail must be given by resolution. (See Step 2).*

- **Step 2**: Adopt a resolution calling a special mail ballot election and submitting the ballot measure (special tax or property related fee or charge) to the voters. A model resolution is included at the end of this chapter. This resolution is adopted when the city council has decided to conduct a particular election as a mail ballot election and is required by Elections Code §4000(a).

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[29] Mail ballot elections are *not* available for general taxes because Proposition 218 requires an election on a general tax to be consolidated with the election for city council unless an "emergency" is declared by unanimous vote of the legislative body. *See* Cal. Const., art. XIIIC, § 2(b). Mail ballot elections are not available for city council elections in general law cities except as outlined in Elections Code § 4004 (cities with less than 100,000 population to fill a council vacancy).

- **Step 3**: Adopt a resolution establishing drop off centers for the in person return of mail ballots. A copy of this resolution is included at the end of this chapter.

  The Elections Code requires that the voter have the alternative of delivering, rather than mailing, the ballot. The county elections office is one of the drop off centers. These requirements are modeled from the absentee ballot voting procedures. *See* Cal. Elect. Code § 3018.

- **Step 4**: Adopt a resolution requesting the board of supervisors and its elections official to conduct certain election-related services. A copy of this resolution is included at the end of this chapter.

  This request is made historically in most cities that reimburse the county elections official for election-related services for municipal elections. *See* Cal. Elect. Code § 10002.

Agencies wishing to use all mail ballots must comply with the following procedures:

- Mail ballots not sooner than 29 days and not later than 10 days prior to, the election date. *See* Elec. Code § 4101.

- Include all voter information—instructions for voting, the ballot, the sample ballot and the return envelope—in a single envelope. *See* Elec. Code, § 3011.

- Print the voter's mailing address, the elections official's return address and a bar code on the envelope. The bar code is used to scan the envelope upon its return and credit the voter with voting. *See* Elec. Code, § 3011.

- Verify ballots by signature comparison immediately upon receipt. *See* Elec. Code, § 3019.

- Tallying of ballots may begin immediately upon receipt. Retain results in a secure location.

- Include a warning on the envelope informing the voter that the ballot will not be counted if the voter does not sign the envelope in his or her own handwriting**.**

<u>Practice Tip</u>: Agencies conducting ballot measure elections of any kind must pay special attention to the law relating to the improper use of public resources for political purposes. The following resources review this area of the law: *The City and Its Officials as Advocates -- Ballot Measures, Initiatives, Elections, and the Expenditure of Public Funds By John A. Ramirez, Partner, Rutan & Tucker, LLP (2005); Public Confidence and the Law By Betsy Strauss (2003); and Of Cookie Jars and Fish Bowls: A Public Official's Guide to Use of Public Resources by The Institute for Local Self-*

Government (2004). Each of these publications is available through the website of the League of California Cities – http://www.cacities.org.

The cities with the most experience conducting all-mail ballot elections cite the following advantages:

- Higher voter turnout: most cities have experienced from a 10 to 20 percent increase in voter turnout.

- Higher particular population voter turnout: mail ballot elections have been helpful to the elderly, disabled, homebound, those with job constraints, those with child care responsibilities, and students.

- Lower election costs: the costs of mailing (including return envelopes and return postage) are less than precinct costs.

- Fewer precinct workers needed: the increase in the number of elections in each county has caused a shortage in precinct workers.

- Purging the election rolls: in any mail ballot election, a certain number of ballots are returned undeliverable thereby purging stale and outdated election rolls.

- Results are posted earlier in the evening: vote tallying occurs as mail ballots are received.

Sample Resolution
Calling A Special Municipal Election

Resolution No. _____

A Resolution of the
City Council of [*Insert Public Agency Name*]
Calling a Special Municipal Election

WHEREAS, [*Insert explanation of the need for the special municipal election; for example, voter approval required to impose a special tax*]*;*

WHEREAS, [*Insert additional information about the ballot measure; for example, the city's utility user's tax which has been imposed since 1990 will sunset in the year 2000. It is necessary to submit the tax for voter approval in order to extend the tax beyond the year 2000*];

WHEREAS, [*Insert reference to municipal code section or ordinance number which authorizes an all mail ballot election*] authorizes the city council to conduct an all mail ballot election under the terms and conditions set forth therein.

NOW, THEREFORE, the City Council of the [*insert public agency name*] does hereby resolve, declare, determine and order as follows:

SECTION 1. A special municipal all mail ballot election is hereby called on [*insert date of election*].

SECTION 2. At the special municipal all mail ballot election called pursuant to section one of this resolution, the following question shall be submitted to the registered voters of the City of [*insert public agency name*];

[*Insert ballot measure question as it will appear on the ballot*]

SECTION 3. [*Optional*] The city council adopts the provisions of subdivision (a) of section 9285 of the Elections Code to permit rebuttal arguments, if arguments have been filed in favor of and against the measures which are being submitted to the voters of the city at this special municipal election. Rebuttal arguments shall be filed not later than 5:00 p.m. on [i*nsert date provided by county elections official*].[30].

[30] Based upon the time reasonably necessary to prepare and print the arguments and sample ballots and to permit the 10-day calendar public examination period, the Council must determine a reasonable date prior to the election after which no arguments for or against the measure may be submitted. *See* Cal. Elect. Code § 9286.

SECTION 4. The city clerk is hereby directed to transmit a copy of this resolution to the city attorney, who shall prepare an impartial analysis of the ballot measure. The city attorney is authorized to prepare the ballot title and a summary of the measure, if a summary is necessary.

PASSED AND ADOPTED this _____ day of _____, 200___ by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST: _____
City Clerk

Sample Resolution
Establishing Drop Off Centers

Resolution No. _____

A Resolution of the
City Council of [*Insert Public Agency Name*]
Establishing Drop Off Centers for the
Mail Ballot Election called by Resolution No. _____

WHEREAS, a special election to be held on [*Insert date of election*] has been called by Resolution No. _____ [*insert resolution number calling the election*]; and

WHEREAS, it is necessary to establish certain locations where a voter may return the mail ballot in person rather than returning the mail ballot by United States mail.

NOW, THEREFORE, the City Council of the [*insert public agency name*] does hereby resolve, declare, determine and order as follows:

SECTION 1. That for the purpose of holding the special election called by Resolution No. _____ [*insert resolution number calling the election*], there is established the following drop off centers in addition to the office of the County Elections Official.

Drop Off Center No. 1

[*Insert address and whether handicapped accessible*]

Drop Off Center No. 2

[*Insert address and whether handicapped accessible*]

[*Choose number and location of drop off centers as appropriate for population, size, and geographic environment of the public agency*].

SECTION 2. That the county elections office shall be available for voters to drop off voted ballots Monday-Friday, from 8 a.m. to 5 p.m.[31] [*The public agency should consult with the county elections office to confirm the appropriate hours and days of the week*].

[31] The public agency should consult with the county elections office to confirm the appropriate hours and days of the week. On election day in some counties, the county elections office may wish to conform its hours as a drop off location to the commonly used polling place hours (7 a.m. to 8 p.m.).

PASSED AND ADOPTED this _____ day of _____, 200___ by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST: _____
City Clerk

Sample Resolution
Requesting County to Render Specified Services

Resolution No. _____

A Resolution of the
City Council of the [*Insert Public Agency Name*]
Requesting the Board of Supervisors to Render Specified Services
to the City Relating to the Conduct of the Election
to be Held on [*Insert date of election*]

WHEREAS, a special election is to be held in [*insert public agency name*] on [*insert date of election*]; and

WHEREAS, in the course of conducting the special election it is necessary for the city to request services of the county; and

NOW, THEREFORE, the city council of the [*insert public agency name*] does hereby resolve, declare, determine and order as follows:

SECTION 1. That pursuant to the provisions of section 10002 of the Elections Code of the State of California, the Board of Supervisors of the County of [i*nsert name of County*] is hereby requested to permit the Registrar of Voters to render the following services to the City in connection with the conduct of the special election to be held on [i*nsert date of election*]:

- prepare and furnish to the city for use in conducting the election the computer record of the names and addresses of all eligible registered voters in the city; to assist the city clerk in conducting an all mail ballot election;

- tabulate and certify the results of the election pursuant to state law;

- make available to the city additional election equipment and assistance according to state law; print the official ballot;

- supervise and conduct the election;

- do all things necessary or incidental to the above functions as may be requested from time to time by the city clerk.

SECTION 2. That pursuant to Resolution No. _____ [i*nsert number of resolution calling the election*] the city council has directed that this election be conducted as an all mail ballot election.

SECTION 3. That the city shall reimburse the county for services performed when the work is completed and upon presentation to the city of a properly approved invoice.

SECTION 4. That the city clerk is directed to forward a certified copy of this resolution to the Clerk of the [i*nsert name of county*] Board of Supervisors and the Elections Department of the County of [i*nsert name of county*].

PASSED AND ADOPTED this _____ day of _____, 200___ by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST: _____
City Clerk

Attachments: Exhibit A: Form of Notice
Exhibit B: Form of Assessment Ballot

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VIII. ATTACHMENTS