Propositions 26 and 218

IMPLEMENTATION GUIDE | MAY 2019

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ACKNOWLEDGEMENTS

The League of California Cities gratefully acknowledges the contributions of Propositions 26 and 218 Implementation Guide Committee for their hard work and dedication in drafting this guide:

Impletmentation Guide Committee

Michael G. Colantuono, Chair
Colantuono, Highsmith & Whatley, PC
City Attorney, Auburn and Grass Valley

John Bakker
Meyers, Nave, Riback, Silver & Wilson
City Attorney, City of Dublin

Buck Delventhal
Deputy City Attorney, City and County of San Francisco

Ryan Thomas Dunn
Colantuono, Highsmith & Whatley, PC

Ben Fay
Jarvis, Fay, Doporto & Gibson, LLP

Daniel S. Hentschke
Attorney at Law

Adam W. Hoffman
Hanson Bridgett, LLP

Mark E. Mandell
Mandell Municipal Consulting

Gabriel McWhirter
Jarvis, Fay, Doporto & Gibson, LLP

Trisha Ortiz
Richards, Watson & Gershon

Kelly J. Salt
Best, Best & Krieger, LLP

Kevin D. Siegel
Burke, Williams & Sorensen, LLP

Betsy Strauss
Special Counsel, League of California Cities

Sky Woodruff
Meyers, Nave, Riback, Silver & Wilson
City Attorney, El Cerrito and Larkspur

City Attorneys' Department Officer Liaison

Damien Brower, 2nd Vice President
City Attorney, City of Brentwood

League of California Cities' Staff

Patrick Whitnell, *General Counsel*

Corrie Manning, *Senior Deputy General Counsel*

Alison Leary, *Deputy General Counsel*

Janet Leonard, *Legal Services Manager*

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Chapter 1

Introduction

This guide is intended to provide city attorneys and other local government lawyers access to basic information regarding Constitutional limitations on taxes and other local government revenue measures, focusing particularly on the limitations imposed by initiatives starting with Proposition 13 in 1978, continuing with Proposition 218 in 1996, concluding with Proposition 26 in 2010. In addition to this introductory chapter, the guide includes the following chapters:

- Taxes
- Assessments
- Fees
- Initiatives & Referenda
- Litigation Issues

This introduction provides historical context for the discussions that follow.

I. The Power to Tax Generally

A local government's power to tax arises from the Constitution (for charter cities) or by statute (for counties, general law cities and special districts). (*Santa Clara Transportation Authority v. Guardino* (1995) 11 Cal. 4th 220, 247–249.) Under article XIII, section 24 of the California Constitution, the Legislature may not impose taxes for local purposes but may authorize local governments to do so. Charter cities receive power directly in the California Constitution limited by any provisions of their respective charters. (Cal. Const. art. XI, § 5; *West Coast Adver. Co. v. City and County of San Francisco* (1939) 14 Cal. 2d 516.) The Legislature has provided general law cities taxation power equivalent to that of a charter city. (Gov't C § 37100.5.) Counties derive their power to tax from a variety of statutes. (E.g., Gov. Code, § 29100 [property tax].) Special districts have varying taxing power and it should not be assumed that any particular special district has the power to tax without consulting its principal act and other statues which empower it. In particular, 1986's Proposition 62 provides that the general power to impose taxes conferred by Government Code sections 50075 et seq. shall not be construed to authorize taxes that an agency is not otherwise empowered to impose (Gov. Code, §53727, subd. (a); *Borikas v. Alameda Unified School District* (2014) 214 Cal.App.4th 135, 144.)

A. Property Taxes and Article XIII

Before the adoption of Proposition 13 in 1978, property taxation in California was governed solely by article XIII of the California Constitution and legislation. Cities, counties, and those special districts authorized to impose property taxes annually adopted and imposed local property tax rates. Unless limited by statute (in the case of special districts, for example), the sole limitation on local property taxes was that the tax rates be imposed ad valorem (in proportion to value) rather than in flat dollar amounts. (Cal. Const. art. XIII, § 1; Rev. & Tax Code § 201.)

B. Initiative/Referendum

The authority of the voters to affect public spending has been fiercely protected since the initiative power was added to the Constitution in 1911. In 1917, a measure was proposed to prohibit the use of the initiative, as well as the referendum, for tax and assessment legislation. (Sen. Const. Amend. No. 12 (1917 Reg. Sess.).) A group opposing the measure stated:

> [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.

(Hichborn, Story of the Session of the California Legislature of 1921 (1922), page 189.)

In 1919, Senate Constitutional Amendment No. 5 was introduced in the Legislature in an attempt to limit initiative tax measures by increasing the number of signatures required to qualify an initiative for the ballot. Opponents argued: "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." (*Id*. at page 190.)

Nevertheless, before Proposition 218's adoption of article XIII C, section 3, the courts had consistently held that the power of initiative and referendum did not extend to the repeal of local government revenues, citing Constitutional provisions establishing the referendum power to forbid referenda on tax (the current article II, section 9, subdivision (a)) and reading this restriction as implicit in authority for initiatives. (E.g., *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832 [refusing writ to compel election on measure to referend a County sales and use tax]; *Hunt v. Riverside* (1948) 31 Cal. 2d 619 [same as to charter city which adopted referendum power in form provided by general law]; *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864 [barring from ballot an initiative to cap sewer rates of dependent special district]; for a summary of these cases see *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400, 404–407 [barring initiative repeal of general law city's utility users tax].)[1]

1 However, city charters may expand the power of initiative and referendum to include measures affecting local revenues and other matters excluded by the Constitution or statute. (*Rossi v. Brown* (1995) 9 Cal. 4th 688.)

II. 1978's Proposition 13: Property Tax Limitation and Appropriations Limit

A. The History of Proposition 13

Following the OPEC oil embargo in 1974, America experienced very rapid inflation and economic stagnation — so called "stagflation." Residential property prices rose rapidly, as did assessed valuations for property tax purposes. Property tax bills began to outstrip mortgage payments. While the state was accumulating a huge surplus, the Legislature failed to craft a response, and local governments did not lower property tax rates quickly enough to address the issue. This was the climate in which Los Angeles apartment investor Howard Jarvis and Sacramento conservative activist Paul Gann persuaded California voters to approve Proposition 13, "the People's Initiative to Limit Taxation," in June 1978 by a 65 percent affirmative vote.

The purpose of Proposition 13's purpose was to ensure effective real property tax relief by 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 (Cal. Const. art. XIII A, § 3), and a restriction on local taxes (art. XIII A, § 4). The reduction of the property tax rate was the heart of Proposition 13. (*Amador Valley Joint Union High School Dist. v. State Board of Equalization* (1978) 22 Cal. 3d 208, 231.)

After its adoption, a broad attack on its constitutionality was promptly filed. In *Amador Valley Joint High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, the California Supreme Court exercised its original jurisdiction to uphold the measure.[2] Thus, Proposition 13 was approved in June 1978, upheld by the California Supreme Court in September and took effect as to local taxes July 1, 1979.

B. Property Tax Limitation

Proposition 13 converted hundreds of locally-imposed property tax rates of differing amounts to a statewide rate of 1 percent of the full cash value.

Two immediate consequences of these amendments to the Constitution occurred: property tax revenues were reduced by half statewide and the state Legislature gained control over the allocation of the property tax among local governments. (*Sasaki v. County of Los Angeles (1994) 23 Cal.App.4th 1442.)* The state responded to the first consequence by appropriating several billion dollars surplus funds accumulated in the state treasury to bail out local agencies. The state responded to the second in 1979 by adopting a formula for reallocating the 1 percent property tax in each county (AB 8) in proportion to the allocation of taxes in the three fiscal years before the adoption of Proposition 13. Despite many refinements and complications since, the AB 8 formula remains the essential basis of property tax allocations today.

C. Proposition 4 — The Gann Appropriation Limit

In November 1979, voters approved Proposition 4, a "Government Spending Limitation," to add article XIII B to the California Constitution. As described by one court:

> Article XIII B was adopted less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13," (art. XIII A). Article XIII A was generally aimed at controlling ad valorem property taxes and the imposition of new "special taxes." [Citations omitted.] The thrust of article XIII B, however, was toward placing certain limitations on the growth of appropriations at both the state and local governmental level; in particular, article XIII B places limits on the authorization to expend the "proceeds of taxes."

(*City Council v. South* (1983) 146 Cal. App. 3d 320, 333.)

2 The United States Supreme Court rejected a challenge to Proposition 13 on federal equal protection and right to travel grounds in *Nordlinger v. Hahn* (1992) 505 U.S. 1.

1. Appropriation Limitation

Proposition 4's general purpose was to limit appropriations of "proceeds of taxes" by state and local governments. (Cal. Const. art. XIII B, § 1, Cal. Const. art. XIII B, § 8, subd. (b).) "Proceeds of taxes" include revenues from taxes as well as from "regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by [the government entity] in providing the regulation, product, or service." (Cal. Const. art. XIII B, § 8, subd. (c).) The Gann limit is defined with respect to tax proceeds to a local government in the 1978–1979 fiscal year (*Id*., § 8, subd. (h)), before Proposition 13's significant cut in property tax proceeds. The limit is also adjusted annually for changes in population and inflation. (*Id*., § 1.) Should a local government receive proceeds of tax refunds in excess of its Gann limit, the excess must be returned to taxpayers unless voters temporarily authorize an override of the Gann limit. (*Id*., § 4 [voters may authorize override for up to four years].) Article XIII B is implemented by Government Code sections 7900 et seq.

Because most local governments receive far less property taxes as a result of Proposition 13, the Gann Limit was set too high to be meaningful for most agencies most of the time. A few agencies, such as those that converted volunteer fire departments into tax-supported, professional departments, require periodic approval of a Gann limit override. Most agencies merely perform the Gann Limit calculation annually and are otherwise unaffected by it.

2. Unfunded mandates

The Gann Initiative also requires the state to provide a subvention to local government, subject to certain exclusions, whenever the state mandates a new program or higher level of service. (Cal. Const. art. XIII B, § 6.) An elaborate body of administrative, statutory, and case law has grown up around this provision. (See generally, California Continuing Education of the Bar, Municipal Law Handbook § 5.12, 5.283–5.290.)

D. Special Taxes

In addition to limiting property taxes, Proposition 13 introduced a new concept: "special taxes." Section 4 of article XIII A provides:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

But, Proposition 13 did not define "special taxes." (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47 [defining "special tax" under Proposition 13 to mean a tax imposed for a specific purpose, as opposed to one that may be used for any purpose].)

In 1979, the Legislature added article 3.5 to division 1, title 5 of the Government Code, commencing with section 50075. This article was intended to provide all cities, counties, and districts with authority to impose special taxes, although 1986's Proposition 62 rescinded that authorization. (Cal. Gov. Code, § 53727, subd. (a).) The statute did not define "special tax," but section 50076 provided 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." The implication of this language and the definition of "proceeds of taxes" in article XIII B, section 8, subdivision (c) is that fees exceeding the "reasonable cost of providing the service" or that are "levied for general revenue purposes" are taxes. In evaluating whether fees met the reasonable cost of service standard, courts generally continued to apply the deferential "reasonableness" standard of review. (*Hansen v. City of San Buenaventura* (1986) 41 Cal.3d 1172 [water fees could provide reasonable rate of return to City general fund].)[3]

3 As detailed below, this case is no longer good authority as to the property related fees governed by California Constitution, article XIII D, § 6 [Proposition 218].

E. Judicial Interpretation of the New Limitations

Litigation following the adoption of Proposition 13 primarily involved three subjects — special assessments, special taxes, and levies to fund pre-Proposition 218 obligations.[4]

Shortly after approval of Proposition 13 in 1978, courts held that special assessments (i.e., levies on property based on special benefit to the property assessed) are not taxes subject to the 1 percent limitation of article XIII A, section 1 and do not require voter approval as "special taxes" under section 4. (E.g., *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974 [assessments under the Improvement Act of 1911 and Municipal Improvement Act of 1913]; *Solvang Municipal Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545 [ad valorem parking district special assessment[5]]; *American River Flood Control Dist. v. Sayre* (1982) 136 Cal.App.3d 347 [maintenance of flood control facilities]; *City Council of the City of San Jose v. South* (1983) 146 Cal.App.3d 320 [lighting and landscape maintenance].)

The California Supreme Court issued two opinions regarding special taxes in 1982. First, *Los Angeles County Transportation Comm'n v. Richmond* (1982) 31 Cal.3d 197, found a sales tax imposed by a County Transportation Commission was not a "special tax" because the Commission, created two years before Proposition 13 was approved, was not a "special district" within the meaning of article XIII A because Proposition 13 was not intended to apply to local agencies like the LA County Transportation Commission that never had power to levy property taxes.[6] Next, the Court issued *City & County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, which construed "special taxes" under article XIII A, section 4 to mean "taxes which are levied for a specific purpose rather than … a levy placed in the general fund to be utilized for general governmental purposes." (*Id*. at 57.) The "special purpose" rule for special taxes was made statutory by Proposition 62, an initiative statute, in 1986. (Gov. Code § 53721 ["Special taxes are taxes imposed for specific purposes"].) Adoption of Proposition 218 in 1996 finally resolved the meaning of "special tax" by adding article XIII C, § 1, subdivision (d) to define "special tax" as "any tax imposed for specific purposes including taxes imposed for specific purposes which are placed into a general fund." Proposition 218 precludes "special purpose" districts and agencies, including school districts, from levying general taxes. (Cal. Const. art. XIII C, § 2, subd. (a).)[7]

After the California Supreme Court's determination that a "special tax" requiring voter approval under Proposition 13 is one imposed for a "specific purpose," a definition of "general tax" was needed. (*City and County of San Francisco v. Farrell (1982) 32 Cal. 3d 47.)* Proposition 62 declared that all taxes are "either general or special" and defined a "general tax" to be a tax imposed for "general governmental purposes." (Gov. Code, § 53721.) The measure, statutory and therefore inapplicable to charter cities,[8] required majority voter approval to impose a general tax. (Gov. Code, § 53723.) In *Santa Clara Valley Transportation Agency v. Guardino (1995) 11 Cal.4th 220*, the Court held that requiring voter approval to levy a tax is not a referendum in violation of article II, section 9, subdivision (a) of the California Constitution. It reasoned that article XIII, section 24 of the Constitution, which permits

4 Regarding this last topic, Proposition 13's one-percent limitation on property taxes does not apply to taxes to pay the interest and redemption charges on any indebtedness approved by the voters before the 1978 adoption of that measure. (Cal. Const. art. XIIIA, § 1, subd. (b).) *Kern County Water Agency v. Board of Supervisors* (1979) 96 Cal. App. 3d 874, for example, applied this exemption to provisions of the Agency's state water project contract obliging it to levy taxes "in any year the Agency fails or is unable to raise sufficient funds by other means." Thus, property taxes that support "take or pay" obligations of state water project contactors are grandfathered by Proposition 218 as were pension obligations and many similar pre-Proposition 13 obligations of government. (E.g., *Howard Jarvis Taxpayers Association v. County of Orange* (2003) 110 Cal.App.4th 1375.)

5 *Solvang* suggested, "[o]rdinarily, levies to meet general expenses of the taxing entity and to construct facilities to serve the general public, such as fire stations, police stations, and schools, may not be transformed from general ad valorem taxes to special assessments by a mere change in the name of the levy." (112 Cal. App. 3d at p. 557.) This statement was later rejected as *dicta* in *City of San Diego v. Holodnak* (1984) 157 Cal. App. 3d 759 (approving a facilities benefit assessment program that funded, among other things, fire stations). (See also, *J.W. Jones Cos. v. City of San Diego* (1984) 157 Cal.App.3d 745 [upholding charter city assessment for infrastructure to serve development].)

6 *Richmond* was overruled by *Rider v. County of San Diego* (1991) 1 Cal.4th 1, which concluded that the San Diego County Regional Justice Facility Financing Agency was a "special district" and its sales tax was a "special tax" requiring two-thirds voter approval.

7 Cal. Const. art XIII C, § 1, subd. (c) defines "special district." There is no definition of "special purpose district or agency." This drafting error is critiqued in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1378 fn. 10.

8 *Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37.

the Legislature to authorize local governments to impose taxes for local purposes, impliedly grants it authority to condition the exercise of that power, as by the voter-approval requirement of Proposition 62. Although the general tax provisions were upheld, applicability of Proposition 62 to charter cities remained uncertain until 1993. (*Fisher v. County of Alameda (1993) 20 Cal.App.4th 120 [Prop. 62 ban on real property transfer taxes not applicable to charter city]; Fielder v. City of Los Angeles (1993) 14 Cal.App.4th 137 [same].)* Proposition 62's inapplicability to charter cities, and growing reliance on assessments and fees of various types gave impetus for Proposition 218. (*Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 803, 836.)

F. Increased Use of Other Revenue Sources Due to the Limitation on Property Taxes

1. Assessments

The limitation on property taxes ultimately led public agencies to rely on other sources of revenues, including assessments, which are not taxes, under pre-Proposition 13 statutory authority such as the Landscaping and Lighting Act of 1972 (Sts. & Hy. Code, § 22500 et seq.) or new authority such as the Benefit Assessment Act of 1982. (Gov. Code § 54702 et seq.)

2. Mello-Roos

Additional authority for financing of improvements and services, particularly to accommodate new development, was provided by the Mello-Roos Community Facilities Act of 1982 (Gov. Code § 53311 et seq.), which authorized imposition of special parcel taxes on a two-thirds vote of voters for inhabited districts and a two-thirds vote of landowners for uninhabited districts.

3. Parcel Taxes

A parcel tax is a tax collected on the property tax roll 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. (*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. (Cal. Const., art. XIIIA, § 1.) (See generally *City of Oakland v. Digre* (1988) 205 Cal. App.3d 99.) Section 3 of Article XIII D 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 XIII A (Proposition 13) and any special tax receiving a two-thirds vote pursuant to Section 4 of article XIII A. Accordingly, a parcel tax may be imposed only as a special tax. (*Nielson v. City of California City* (2006) 133 Cal.App.4th 1296.)

4. Police Power Fees

The authority to impose regulatory fees was well established when Proposition 13 was adopted in 1978. It derives from the "police power," the inherent power of government to subject individual rights to reasonable regulations for the general welfare. (Cal. Const. art. XI, § 7; *County of Plumas v. Wheeler (1906) 149 Cal. 758; Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633.)* Fees, charges, and rates must be reasonable, fair, and equitable in nature, and apportioned among those who pay them in a manner that is reasonably proportional to the costs incurred by the regulatory agency to serve each (*Associated Homebuilders of the Greater East Bay, Inc. v. City of Livermore (1961) 56 Cal.2d 847.)* As a result of the revenue loss Proposition 13 imposed, local government agencies sought to recover costs previously borne by property taxes from a variety of fees, such as increased fees for processing land use and building permits. Very shortly after Proposition 13 was adopted, these were determined to be legitimate regulatory fees and not special taxes so long as the fee was reasonably related to the cost of the regulatory activity and did not generate revenue for unrelated purposes. (*Mills v. County of Trinity* (1980) 108 Cal. App. 3d 656.)

What distinguishes regulatory fees from other fees and charges is that regulatory fees are imposed under the police power, rather than its taxing power, and are generally imposed on one who engages in a regulated activity. (*Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866, 875 [fee on lead-containing consumer products to fund health care services made necessary by environmental lead exposure); *Pennell v. City of San Jose* (1986) 42 Cal. 3d 365, 373 [rent control fees].) 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.) Cities and counties derive the full police power from the California Constitution subject only to preemption by state law. (Cal. Const., art. XI, § 7.) Shortly after Proposition 13 became law, courts treated fees imposed as a condition of development permits as "regulatory fees" imposed to defray all or part of the cost of public facilities related to a development project. The validity of such fees depended on a nexus between the burdens a project imposes on government and the amount of the fee, and the purposes for which the government would spend its proceeds. (Gov. Code §§ 66000(b), 66001[Mitigation Fee Act or "AB 1600"].)

The following general principles apply to regulatory fees under the law developed before the 2010 adoption of Proposition 26. The law as altered by that measure is discussed in Chapter 4 of this Guide.

- Fees charged for the costs of regulatory activities are not special taxes if they 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. (*Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866, 876.)
- A regulatory fee may be imposed under the police power in an amount necessary to achieve the purposes 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 [fee for air pollutant emission permit properly based on volume of emissions permitted].)
- Recoverable costs include all those incident to the issuance of the license or 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 [rent control fees].)
- 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,* 91 Cal.App.3d at p. 166.)

5. Enterprise and service fees

Authority to impose service fees was similarly well established in 1978 but, in addition to sometimes being grounded on the "police power," was often justified as incidental to the power to provide the service or an incident of the privilege of receiving the service. (*Carlton Santee Corp. v. Padre Dam Mun. Water Dist*. (1981) 120 Cal.App.3d 14, 24; *Durant v. Beverly Hills* (1940) 39 Cal.App.2d 133, 137; see also, Cal. Const. art. XI, § 9.) The principle that fees must reasonably relate to the cost of providing service also applied in these rate cases. (*Elliott v. City of Pacific Grove* (1975) 54 Cal.App.3d 53; *English Manor Corp. v. Vallejo Sanitation & Flood Control Dist*. (1974) 42 Cal.App.3d 996, 1004; *Boynton v. City of Lakeport Mun. Sewer Dist*. (1972) 28 Cal.App.3d 91, 96.) However, under Proposition 13, the courts continued to evaluate user fees under a reasonableness standard, going so far as to suggest that profit earned on an agency's utility enterprise was not a special tax. (*Hansen v. City of San Buenaventura* (1986) 41 Cal.3d 1172 [City could set water service to recoup reasonable return on its investment in the utility].)[9]

9 This is no longer the law for property related fees governed by Proposition 218's article XIII D. section 6. (*Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, 923-924 [payment in lieu of taxes upheld against Prop. 13 challenge in *Oneto v. City of Fresno* (1982) 136 Cal.App.3d 460 did not survive Prop. 218 because later measure limited water and sewer charges to demonstrated cost of service].)

6. Burden of proof for challenges to alternate revenue sources

Before Proposition 218, assessment challengers argued that such challenges should be reviewed under the standard articulated in *Beaumont Investors v. Beaumont-Cherry Valley Water District* (1985) 165 Cal.App.3d 227, which involved a review of water connection fees challenged as special taxes under Proposition 13.

The sole issue in *Beaumont Investors* 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 falls within the exclusion from the definition of "special taxes" provided by Government Code section 50076. (*Id.* at p. 234.) Because the respondent district claimed an exemption from the general restriction established by article XIII A, section 4 and Government Code section 50076 on the local agency taxing power, 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, *Beaumont Investors* compared the scant record of the agency's actions in setting the fees with the detailed record a city prepared to justify a facilities special benefit assessments in *J.W. Jones Companies v. City of San Diego* (1984) 157 Cal. App. 3d 745. *Beaumont Investors* emphasized the district's failure to produce any evidence from its record supporting the fee calculation and concluded, unsurprisingly, the district had failed to meet its burden.

Subsequent cases demonstrate courts' reliance on agencies' legislative records. 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.) The case is not, of course, citable authority, but it does help illuminate the historical development of this area of public finance law. (California Rules of Court, rule 8.1115(e).)

Bixel Associates v. City of Los Angeles (1989) 216 Cal.App.3d 1208 compared an imprecise basis for that city's fire hydrant fee on new development with the detailed methodology used to establish the transit fee challenged in *Russ Bldg. Partnership*, and the facilities benefit assessment challenged in *J.W. Jones Companies v. City of San Diego*. *Bixel* noted "the public agencies [in those earlier cases] 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 [im] 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 whether fee cases were subject to the relatively deferential "substantial evidence" review or some other standard. Deciding the question in the context of a school impact fee alleged to be an illegal special tax, that court reaffirmed that the legislative body must show on its legislative record that the fee reflected a reasonable relationship between the improvement to be funded and the benefit to the payor. Judicial review is limited to the legislative record and tests whether the agency's action is "arbitrary, capricious or entirely lacking in evidentiary support"— the usual, deferential standard of judicial review of legislation.

According to *Shapell Industries*, 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, supra*, 1 Cal.App.4th at p. 232; see also *Garrick Development Co. v. Hayward Unified School District* (1992) 3 Cal.App.4th 320, 328.)

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.

(1 Cal.App.4th at p. 232.)

Finally, *Knox v. City of Orland* (1992) 4 Cal.4th 132, 149, fn. 26 rejected application of *Beaumont Investors* to a special assessment. Instead the court applied the earlier *Dawson* test:

> 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.]

But *Knox* also established a more basic if short-lived rule, as we see below.

G. Knox v. Orland

Knox v. City of Orland challenged a citywide benefit assessment for park maintenance imposed under the Lighting and Landscaping Act of 1972, Streets & Highways Code section 22500 et seq. The plaintiffs contended that benefit assessments for park maintenance constituted an "end run" around article XIII A, and that special assessments were never appropriate to finance park maintenance because a park is not the type of improvement that can be viewed as conferring a special benefit upon real property. (*Knox v. City of Orland*, *supra,* 4 Cal. 4th at p. 143.) The Supreme Court distinguished taxes from assessments, noting:

> Therefore, while a special assessment may, like a special tax, be viewed in a sense as having been levied for a specific purpose, a critical distinction between the two public financing mechanisms is that a special assessment must confer a special benefit upon the property assessed beyond that conferred generally. Accordingly, if an assessment for park maintenance improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. If it does not, the assessment effectively amounts to a special tax upon the assessed property owners for the benefit of the general public.

(*Knox v. City of Orland*, *supra*, 4 Cal.4th at 142–143 footnote omitted.) Proposition 218 was intended to overturn Knox and other cases applying relatively deferential review to assessments.

III. Proposition 218 (1996)

A. Purpose & Intent

Proposition 218 is best understood in its historical context, beginning with Proposition 13. As discussed above, Proposition 13 was designed to cut property taxes. However, when called on to interpret Proposition 13, courts held that a special assessment is not a special tax and deferred to legislative determinations in upholding assessments and regulatory and user fees. In November 1996, in part to override these precedents, voters adopted Proposition 218, the "Right to Vote on Taxes Act." (Prop. 218, § 1, reprinted at Historical Notes, 2b West's Ann. Const. (2103) foll. art. XIII C, § 1, p. 363.) The proposition's uncodified section 2 read:

> Findings and Declarations. The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

(*Id.*) Section 5 of the proposition stated that it should be liberally construed "to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (*Id.*, § 5; *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal. App. 4th 679, 681–683.)

Thus, Proposition 218 focuses "on exactions, whether they are called taxes, fees, or charges, that are directly associated with property ownership." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830, 839.) Proposition 218 provides no new authority to impose taxes, assessments, or fees. (Cal. Const. art. XIII D, § 1.) Under Proposition 218, the only taxes, assessments, fees, or charges that local government may impose on a parcel or a person "as an incident of property ownership" are ad valorem property taxes, special taxes, assessments approved in the provisions of its article XIII D, section 4, and fees or charges for a property-related service consistent with its article XIII D, section 6. (Cal. Const. art. XIII D, § 3.)

Proposition 218 added articles XIII C ("Voter Approval for Local Levies")[10] and XIII D ("Assessment and Property Related Fee Reform")[11] to the California Constitution. It addressed four general subject matters, discussed fully in the following chapters of this guide.

B. Voter Approval of Taxes

Article XIIIC, section 2 provides that local government taxes are either general taxes or special taxes. General taxes may be imposed by a majority vote of registered voters. Except in the case of an emergency declared by a unanimous vote of the legislative body's members present, the election must be consolidated with a "regularly scheduled general election for members of the governing body of the local government." (Cal. Const. art. XIII C, § 2, subd. (b).) Special taxes require a two-thirds voter approval. (*Id.*, subd. (d).)

1. General Taxes

General taxes are defined as "any tax imposed for general governmental purposes." (Cal. Const. art. XIII C, § 1, subd. (a).)

2. Special Taxes

Special taxes are "any tax imposed for specific purposes, including a tax imposed for a specific purpose, which is placed into a general fund." (Cal. Const. art. XIII C, § 1, subd. (d).) "Special purpose districts" have no power to impose general taxes. (Cal. Const. art. XIII C, § 2, subd. (a).)

10 Proposition 218, section 3.

11 Proposition 218, section 4.

C. Assessment Law Changes

Proposition 218's changes to the law of special assessments[12] were more fundamental. Article XIII D, section 4 established new substantive and procedural requirements for special assessments. In addition, the proposition shifted to the local agency the burden of demonstrating that assessed properties receive special benefit and that the amount of an assessment is proportional to and no greater than the special benefit conferred. (Cal. Const. art. XIII D, § 4, subd. (f).)

D. Property Related Fees and Charges

Proposition 218 introduced a new category of fees, labelled "property related fees and charges."[13] A fee subject to article XIII D is one that is imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e).) A property related service is one "having a direct relationship to property ownership." (Cal. Const. art. XIII D, § 1, subd. (h).) Again, as in the case of assessments, the proposition shifted the burden to the local government to demonstrate compliance with its new substantive and procedural requirements. (Cal. Const. art. XIII D, § 6, subd. (b)(5).)

E. Power to Reduce Revenues Through Initiative

Last, Proposition 218 added a provision stating "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." (Cal. Const. art. XIII C, § 3.)

IV. Proposition 26 (2010)

As Proposition 218 was, in part, a response to judicial interpretation of Proposition 13, Proposition 26 was largely a response to *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866. *Sinclair Paint* involved a state fee imposed on makers of lead-containing consumer products to mitigate the environment and public health consequences of lead exposure. The fee required manufacturers to bear a fair share of the cost of mitigating the adverse health impacts resulting from use of their products. Fee proceeds funded evaluation, screening, and medically necessary follow-up services for children exposed to environmental lead.

The appellant paint manufacturer claimed the fee was a tax because it "neither reimburse[d] the state for special benefits conferred on manufacturers of lead-based products nor compensate[d] the state for governmental privileges granted to those manufacturers." (*Sinclair Paint, supra*, 15 Cal.4th at p. 875.)

The California Court of Appeal found the fee to be a tax because its proceeds were not used "to regulate Sinclair." The California Supreme Court concluded otherwise, noting such fees are imposed under a public agency's police power rather than its taxing power and reasoning that use of fee proceeds need not confer benefits or privileges on the fee payor provided the fee bears a reasonable relationship to the burden the fee payor imposes on society.[14] (*Id.* at 875–876.)

The paint manufacturer also disputed the state's authority to impose industry-wide "remediation fees" to compensate for the adverse societal effects generated by an industry's products. The California Supreme Court disagreed: "[T]he police power is broad enough to include mandatory remedial measures to mitigate the past, present, or future adverse impact of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects." (*Sinclair Paint*, *supra*, 15 Cal.4th at pp. at 877–878.)

12 Cal. Const. art. XIII D, § 2, subd. (b) states: "Assessment" means 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."

13 Article XIII D provides a single definition of both "fee" and "charge," and the terms appear to be synonymous for the purposes of Proposition 218. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 214, fn. 4.)

14 Development impact fees are a common type of "regulatory fee" in that they are imposed both to defray regulatory costs and to mitigate the impacts of a development project on a community. No service or product is provided to the developer because development in California is a "privilege" rather than a right. A fee imposed as a condition of development is exempt from Proposition 218 under article XIII D, section 1, subdivision (b) and from Proposition 26's the definition of "tax" by article XIII C, § 1, subdivision (e)(6).

Other cases had similarly defined a regulatory fee as an imposition that funds a regulatory program or that distributes the collective cost of a regulation and is "enacted for purposes broader than the privilege to use a service or to obtain a permit … . [T]he regulatory program is for the protection of the health and safety of the public." (*Calif. Ass'n of Prof'l Scientists v. Dept. of Fish & Game* (2000) 70 Cal. App. 4th 935, 952 [because cost of comprehensive environmental review far surpassed amount of fees generated for that purpose, charges were lawful regulatory fees].)

In general, before the adoption of Proposition 26, courts upheld regulatory fees that:

- Are imposed in an amount necessary to carry out the purposes and provisions of the regulation;
- Do not exceed the reasonable cost of providing the services necessary to the activity on which the fees are based; and
- Are not levied for an unrelated revenue purpose.

Such fees requiring a fee payor to mitigate the impact in society of regulated activity are the primary targets of Proposition 26. Its "Findings and Declarations of Purpose" state the drafter's intent to reclassify as taxes many regulatory fees imposed to mitigate the adverse health, environmental, and other societal effects of regulated activity. Redefined as taxes, these charges are now subject to the voter approval requirements of article XIII C, section 2 and article XIII A, section 4.

Proposition 26 amends article XIII A, section 3 (adopted by Proposition 13 and relating to state taxes) and article XIII C, section 1 (adopted by Proposition 218 and relating to local taxes) to add new definitions of state and local "taxes," defining all revenue measures[15] imposed by the government as "taxes" unless within one of seven express exemptions for local government or five express exemptions for state government.

Thus, nearly 40 years of legal development since Proposition 13 in 1978 has transformed the law of local government revenues from one of presumed legislative authority and deferential review to a presumption that voter approval is required to fund government. Exceptions to the rule are policed under a non-deferential standard of judicial review with the burden of proof on government.

15 *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310 held a measure that required payments but did not raise revenue for government purposes could not be definition be deemed a "tax" under Proposition 26.

Chapter 2

Taxes

I. What is a Tax?

Before adoption of Proposition 26, "tax" had no fixed meaning, but was understood to include revenues raised through the exercise of a local agency's taxing power. "The taxing power resembles the power of eminent domain in that there is a taking of private property for a public purpose." (9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation § 1.) Unlike the exercise of a local agency's police power, which authorizes a local agency to impose a charge for a benefit conferred or privilege granted, the exercise of taxing power provides revenue without a specific and direct benefit to the payor. (See *Sinclair Paint Co. v. Bd. of Equalization* (1997) 15 Cal. 4th 866, 874; 9 *Witkin*, Summary of Cal. Law (10th ed. 2005) Taxation § 1.) Whether a local agency is exercising its taxing or its police power is determined by the purpose of the revenue-generating device rather than its label. (See, e.g., *Weekes v. City of Oakland* (1978) 21 Cal. 3d 386, 392.) The voters enacted Proposition 26 to define "tax" based on the purpose of a revenue-generating device. Under Proposition 26, all levies, charges, and exactions "imposed" by state or local governments are taxes, unless they fit into one of the seven stated exceptions for local government:[16]

1. "A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
2. A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
3. A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
4. A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
5. A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

16 The first five of these are substantively the same as those stated for State government in Article XIII A, section 3, subdivision (b), but there are some minor, potentially significant, differences between the two which bear attention which a particular exception is in issue. (Compare art. XIII B, § 3, subd. (b)(1) – (5) with art. XIII C, § 1, subd. (e)(1)–(5).)

6. A charge imposed as a condition of property development.
7. Assessments and property-related fees imposed in accordance with the provisions of Article XIII D."

(Cal. Const., art. XIII C, § 1, subd. (e).) A detailed analysis of these exceptions appears *infra*.

II. General Taxes and Special Taxes

"All taxes imposed by any local government shall be deemed to be either general taxes or special taxes." (Cal. Const., art. XIII C, § 2, subd. (a).) The distinction between special and general taxes hinges on whether the revenues from the tax are committed to a specific purpose or can be used for any governmental purpose. "'Special tax' means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (Cal. Const., art. XIII C, § 1, subd. (d).) "'General tax' means any tax imposed for general governmental purposes." (Cal. Const., art. XIII C, § 1, subd. (a).)

A special tax can have multiple purposes, and those purposes can be for broad government functions, such as police, fire, parks and recreation, and libraries. (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1310.) The key is that, for the tax to be a special rather than general tax, the use or uses of its proceeds must be restricted in some way. (*Ibid*.; cf. *Coleman v. County of Santa Clara* (1998) 64 Cal.App.4th 662, 670–671 [general tax measure did not become special tax because joined by advisory measure stating voters' preference that proceeds be used for transportation projects].)

While Proposition 13 limits ad valorem property taxes (i.e., those on the assessed value of property) to one percent of a property's value, with an exception for bonded indebtedness (Cal. Const., art. XIII A, § 1) thus preempting other ad valorem property taxes, a city may impose a non-ad valorem property tax (e.g., a parcel tax) as a special tax. (*Neilson v. City of California City* (2005) 133 Cal. App.4th 1296, 1308.)

A "special purpose district" may only levy a special tax. In *Rider v. County of San Diego* (1991) 1 Cal.4th 1, the California Supreme Court explained that because "a 'special tax' is one levied to fund a specific governmental project or program … *every* tax levied by a 'special purpose' district or agency would be deemed a 'special tax.'" (*Id.* at 15; original emphasis.) This restriction was included in Proposition 218, which states that "[s]pecial purpose districts or agencies, including school districts, shall have no power to levy general taxes." (Cal. Const., art. XIIIC, § 2.) However, Proposition 218 does not define "special purpose district" although it does define "special district" as "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. XIII C, § 1.) There is therefore a question as to whether a special district with multiple purposes is a "special purpose district" that can levy only a special tax, or whether such a district can levy a general tax. This uncertainty was noted by the Sixth District Court of Appeal in *Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1378 fn. 10.) Given the logic of *Rider*, however, a strong argument can be made that a multi-purpose agency may impose a general tax.

▶ PRACTICE TIP:

When a court determines that a challenged fee is unlawful, the fee is generally considered a tax. (See Cal. Const. Art. XIII C, § 1, subd. (e); *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686 [911 services fee was unlawful tax].) If so, it is important to clarify whether it is a general or special tax. A court may assume that a failed fee is a special tax, when in fact it would be general tax because its proceeds are placed in the general fund for general governmental purposes. This could occur with an invalidated transfer from a utility enterprise fund to a general fund or with an invalidated franchise fee dedicated to a general fund. It is important to clarify this with the court, in case the city wants to adopt the failed fee as a tax and would prefer the majority voting requirement of a general tax to the supermajority requirement for a special tax.

III. Voting Requirements for Special and General Taxes

Section 2 of Article XIII C provides that a local agency cannot "impose, extend or increase" any general tax unless and until that tax is submitted to the electorate and approved by a majority vote, nor any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. Similarly, Sections 54722 and 53723 of the California Government Code, which were enacted in 1986 by Proposition 62, a statutory initiative inapplicable to charter cities (*Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 49), require such approval to "impose" any general or special tax. The voter approval requirement for special taxes dates back to 1978's Proposition 13 in 1977, by which the voters enacted section 4 of article XIII A of the California Constitution to require two-thirds voter approval to "impose" any special tax.

Since the voters approved Proposition 218 in 1996, the California courts and the Proposition 218 Omnibus Implementation Act, Government Code sections 53750–53758, have supplied guidance on what it means to "impose, extend or increase" a tax.

A. Impose

"Impose means" a local agency's initial enactment of a tax. At least for purposes of determining the application of the statute of limitations of Code of Civil Procedure section 338, subdivision (a) [three years for liability arising from statute], "impose" also means "continue to impose" or the continued collection of a tax. (*Howard Jarvis Taxpayers v. La Habra* (2001) 25 Cal 4th 809, 823–824; but see *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 702–703 [time to challenge development impact fee under Gov. Code, § 66022 runs from adoption, not collection, of fee].) A local agency does not "impose" a tax within the meaning of Proposition 218 when it applies an existing tax to newly annexed territory, within which the tax did not previously apply. (*Citizens Assn. of Sunset Beach v. Orange County LAFCO* (2012) 209 Cal. App. 4th 1182, 1195 [Prop. 218 did not displace similar ruling of *Metropolitan Water District v. Dorff* (1979) 98 Cal.App.3d 109 under Prop. 13 because its provisions are silent as to annexation].) In contrast, a local agency does "impose" a tax within the meaning of Proposition 218 when it applies an existing tax to a new category of taxpayers who the local agency previously did not tax. (Gov. Code, § 53750, subd. (h)(1)(B) [Prop. 218 Omnibus Implementation Act of 1997].)

Some have also questioned whether a local government "imposes" a tax that originates from an initiative, rather than from a proposal of the local legislature. *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 936–945, held that Proposition 218's requirement that voters approve general taxes at regularly scheduled elections does not apply to citizen-sponsored tax initiatives, construing "local agency" as used in the measure to include only government officials. The court's analysis, however, can be read to suggest that such citizen-sponsored taxes are not "imposed" by local government at all and, as a result, arguably do not trigger any part of Proposition 218. (*id.* at pp. 939–940.) As a result, some commentators have suggested that citizens could, for example, sponsor a special tax without triggering the 2/3-vote requirement. Until some further decision by a California appellate court, however, the most conservative reading of *California Cannabis Coalition* is a narrow one, limited to the specific question it resolved.

B. Extend

Government Code section 53750, subdivision (e) provides that a tax has been extended if there is "a decision by an agency to extend the stated effective period of the tax …, including but not limited to, amendment or removal of a sunset provision or expiration date." Extending a sunset date or effective period for a tax requires voter approval under article XIII C, section 2, subdivision (c). (*White v. State of California* (2001) 88 Cal.App.4th 298, 316 ("[T]he prohibition against extending taxes without a vote means a prohibition against extending the imposition of a tax for a continued time period.").) However, application of taxes, assessments, and fees to newly annexed territory does not "extend" them within the meaning of Proposition 218. (*Citizens Assn. of Sunset Beach v. Orange County LAFCO* (2012) 209 Cal. App. 4th 1182, 1195 ["'[E]xtend' is normally thought of in terms of time, not geographic areas, particularly in the context of taxation."].)

C. Increase

Government Code section 53750, subdivision (h)(1) provides that a local government "increases" a tax when it does either of the following: "[i]ncreases any applicable rate used to calculate the tax … [or] [r]evises the methodology by which the tax … is calculated, if that revision results in an increased amount being levied on any person or parcel." "A tax is increased if the math behind it is altered so that either a larger tax rate or a larger tax base is part of the calculation." (*AB Cellular LA, LLC v City of Los Angeles* (2007) 150 Cal.App.4th 747, 763.) A "methodology, under section 53750, refers to a mathematical equation for calculating taxes that is officially sanctioned by a local taxing entity." (*Id*.) A local government increases a tax within the meaning of Proposition 218 if it revises its methodology due to external factors, such as a change in federal law. (See *id*. [federal statute eliminating Commerce Clause prohibition on taxing all cellular services did not authorize the city to tax cellular services not previously taxed without voter approval].)

A tax "shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved [by voters]." (Cal. Const., art XIII C, § 2, subd. (b).) Similarly, Government Code section 53750, subdivision (h)(2) provides that a tax is not "increased" if a local agency does either of the following: "[a]djusts the amount of a tax … in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996 [or] [i]mplements or collects a previously approved tax … so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel."

Government Code section 53739 authorizes a local agency to submit a tax measure to the voters to approve a range of rates or amounts and to approve a clearly identified formula for inflation adjustments of a tax. However, when a tax is measured as a percentage — such as a percentage of a utility charge or of a hotel room rent — it cannot include an inflation adjustment. For example, a business license tax imposed at a rate of 0.1 percent of gross receipts cannot include an inflation adjustment because it is imposed as a percentage. Such taxes are self-inflating as the tax base rises with inflation, so there is no need to inflate the tax rate, too. In contrast, a business license tax imposed at a flat rate of $20 per employee can include an inflation adjustment.

Subsequent increases in a tax in accordance with a voter-approved measure do not require further voter approval. (Gov. Code, § 53739, subd. (a).) In addition, a local agency "can enforce less of a local tax than is due under a voter approved methodology, or a grandfathered methodology, and later enforce the full amount of the local tax due under that methodology without transgressing Proposition 218." (*AB Cellular LA, LLC v City of Los Angeles* (2007) 150 Cal App. 4th 747, 764.)

> **▶ PRACTICE TIP:**
>
> If a local agency decides to collect a previously approved tax at a rate lower than was authorized by the voters, the documentation lowering the tax should be very clear that the reduction is temporary and that there is no "increase," which requires voter approval, when the rate is restored. This can be accomplished by adopting the tax reduction by a resolution that has a stated expiration date. The reduction can then expire without any further legislative action that can be characterized as a tax "increase." That expiration date can later be extended while still preserving this defense to a claim that the end of the tax reduction is an increase.

Finally, a local agency does not increase a tax if "higher payments are attributable to events other than an increased rate or revised methodology, such as a change in the density, intensity, or nature of the use of land." (Gov. Code, § 53750, subd. (h)(3).) Further, a local agency has not increased a tax by applying an existing tax to newly annexed territory (*Citizens Assn. of Sunset Beach v. Orange County LAFCO* (2012) 209 Cal. App. 4th 1182, 1195) or receiving increased rate revenue from wholesale customers and not retail rate payers (*Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 260). Nor does a transfer of funds previously collected that has no effect on rates constitute an increase. (*Id*. at 258-259.)

IV. The Electorate

Proposition 218 requires a local agency's voters to approve a special tax on hotels and the local agency cannot define the qualified voters to landowners and lessees subject to the tax, at least where the tax will apply to new hotels constructed in the future. (See *City of San Diego v. Shapiro* (2014) 228 Cal. App. 4th 756 (*Shapiro*); see also *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1313 ["we conclude that phrase 'qualified electors of such district' (art. XIIIA, § 4) means the registered voters of the City who voted in the election"]; but see, Gov. Code, § 53326, subd. (b) [allowing Mello-Roos Community Facilities District Special tax to be imposed by vote of landowners if district includes fewer than 12 voters].) In *Shapiro*, the Court of Appeal analyzed the "electorate" who might approve a special tax. San Diego adopted an ordinance comparable to the Mello-Roos Community Facilities District Act, Government Code sections 53311 et seq., pursuant to its charter city authority to establish a convention center facilities district and to impose a special tax on hotels existing and developed in the city in the future. The city defined the qualified voters as hotel property owners and lessees, because only the hotels would be subject to the tax. Over 92 percent of the hotel owners and lessees approved the tax and the city filed suit to validate it. The California Court of Appeal held that Proposition 218 requires registered voter approval and invalidated the tax. The Court of Appeal declined to consider whether landowner voting to impose special taxes under the Mello-Roos Act in territory that lacks sufficient registered voters to conduct an election among registered voters is valid. (*Id*. at p. 786, fn. 32.)

It may be that the Court of Appeal was unpersuaded that the tax fell on present hoteliers alone, as the ordinance provided that new hotels would pay it, too. Given that fact, the tax seems hard to distinguish from an ordinary transient occupancy tax that is required to be approved by voters. *Shapiro* might be limited to these unusual facts. Further litigation of the point is likely.

V. Advisory Measures Accompanying General Taxes

A general tax measure can be paired with a non-binding advisory measure asking voters to express a preference on how the revenues from the general tax, if passed, should be spent. Provided the advisory measure is not binding — does not commit the city to spending the revenues in a particular way — it does not transform the companion general tax into a special tax; both measures would need only simple majorities to pass. (*Coleman v. County of Santa Clara* (1998) 64 Cal.App.4th 662, 670–671.)

▶ PRACTICE TIP:

The wording of the advisory measure should be very clear that: (i) the measure is advisory only (as required by Elections Code section 9603), (ii) the measure is separate and distinct from the general tax measure, and (iii) the measure does not bind the local agency in making decisions about how to spend the general tax proceeds.

▶ PRACTICE TIP:

As to the tax measure of such a pair (sometimes called a "Measure A /Measure B" proposal), counsel should review the ballot label (i.e., the question printed on ballots), the resolution placing the matter before voters, the ordinance imposing the tax, and the impartial analysis to ensure all are consistent with the idea that the legislative body has discretion as to how to spend the proceeds of the tax.

VI. Procedures for Enacting and Imposing Taxes

A. Proposition 62's Special Procedural Requirements

Although Proposition 62 has been largely superseded by Proposition 218, it contains procedural requirements that are not found in Proposition 218 and which remain in effect as to general law cities.

Proposition 62 specifies that a new tax "shall be proposed by an ordinance or resolution of the legislative body of the local government or district." (Gov. Code, § 53724, subd. (a).) If a general tax is proposed, the ordinance or resolution must be approved by "a two-thirds vote of all members of the legislative body of the local government or district." (Gov. Code, § 53724 (b).) Because it requires "a two-thirds vote *of all members* of the legislative body," it probably requires two-thirds of the entire legislative body, not just two-thirds of the members present at the meeting. (Compare *Hopkins v. MacCulloch* (1939) 35 Cal.App.2d 442, 453 (requirement of a "full affirmative vote of all members" of the city council not satisfied by a unanimous vote with one member absent) with *Tidewater Southern Ry. Co. v. Jordan* (1912) 163 Cal. 105, 106 [requirement of "the unanimous vote of its board of directors or trustees" satisfied by unanimous vote of Board members present].)

The requirement of a two-thirds vote of a city council to put a general tax on the ballot does not apply to charter cities. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 49 (*Trader Sports*).) Proposition 62's other procedural requirements likely do not apply to charter cities under the logic of *Trader Sports*, but no case yet so holds.

An ordinance or resolution proposing a tax must state the type of tax, the tax rate, the method of collection, and the election date. (Gov. Code, § 53724, subd. (a).) If a special tax is proposed, the ordinance or resolution proposing the tax must state "the purpose or service for which its imposition is sought." (Gov. Code § 53724(a).) Additional procedural requirements for special taxes appear at Government Code sections 50075.1–50075.3, 50077.

B. Proposition 218's Special Procedural Requirements

Proposition 218 requires a general tax election to "be consolidated with a regularly scheduled general election for members of the governing body of the local government." (Cal. Const., art. XIII C, § 2, subd. (b).) Such an election includes a general election in counties and in cities with a primary-general election structure, even if no legislative seat remains unresolved after the primary. (*Silicon Valley Taxpayers' Association v. Garner* (2013) 216 Cal.App.4th 402.) Notably, this requirement applies only when a general tax is proposed by the local legislative body. It does not apply to general taxes proposed by local voters through a citizen-sponsored ballot initiative. (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 936–945.)

This requirement can also be abrogated in an emergency "declared by a unanimous vote of the governing body." (Cal. Const., art. XIII C, § 2, subd. (b).) Because this provision requires the unanimous vote "of the governing body" and not the unanimous vote "of all members of the governing body," the unanimous vote of the council members present is sufficient. (Compare *Tidewater Southern Ry. Co. v. Jordan* (1912) 163 Cal. 105, 106 (requirement of "the unanimous vote of its board of directors or trustees" satisfied by unanimous vote of members present) with *Hopkins v. MacCulloch* (1939) 35 Cal.App.2d 442, 453 [requirement of a "full affirmative vote of all members" not satisfied by unanimous vote with one absent member].)

Although no published decisions address what constitutes an "emergency" under article XIII C, section 2, cases reviewing urgency ordinances explain that, provided an ordinance recites facts that could reasonably be held to constitute an emergency, "the courts will not interfere, and they will not undertake to determine the truth of the recited facts." (*Crown Motors v. City of Redding* (1991) 232 Cal.App.3d 173, 179; *Northgate Partnership v. City of Sacramento* (1984) 155 Cal.App.3d 65, 69; compare *Sonoma County Organization of Public/Private Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 275–276 [court must ensure agency's factual declaration is sufficient].)

Because Proposition 218 provides no judicially applicable standards by which courts could establish the existence of an "emergency," substantial deference to this legislative determination is appropriate. However, it does seem reasonable to interpret "emergency" as used in article XIII C, section 2 in light of the consequences of an interpretation. An agency might need to wait

more than two years to place a measure before voters in the absence of an "emergency." (Cal. Const., art. XIII c, § 2, subd. (b) [general taxes must appear on general election ballots; Elec. Code, § 324 [general elections occur every two years].) Thus, an emergency ought to be such a state of affairs that could cause meaningful harm to the public good in that period of time. Proposition 218 should demand less than an emergency that justifies calling a Brown Act meeting without notice, given that a special meeting can be called under the Brown Act on 24 hours' notice. (Gov. Code, § 54956, subd. (a) [special meeting called on 24 hours" notice]; § 54956.6 [defining "emergency situation" under Brown Act].)

VII. Other Limitations on the Power to Tax

Analysis of a new tax must begin with the authority for it. Charter cities have broad constitutional power to tax and general law cities have comparable power by statute. (*West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516, 524 [charter cities derive the power to tax from California Constitution Article XI, section 5]; Gov. Code § 37100.5 [general law cities can impose any tax a charter city can impose].) Counties and special districts require further statutory authority to impose a tax. Although the Legislature granted broad power to impose special taxes on all local governments following the adoption of Proposition 13 in 1987 via Government Code sections 50075–50077.5, Proposition 62 repealed this authority in 1986:

> Neither this Article, nor Article XIII A of the California Constitution, nor Article 3.5 of Division 1 of Title 5 of the Government Code (commencing with Section 50075) shall be construed to authorize any local government or district to impose any general or special tax which it is not otherwise authorized to impose; provided, however, that any special tax imposed pursuant to Article 3.5 of Division 1 of Title 5 of the Government Code prior to August 1, 1985 shall not be affected by this section.

(Gov. Code, § 53727.)

Local power to levy a tax may be entirely or partly preempted by state or federal law. For example, the state has preempted the field of sales and use taxes, which can only be imposed pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law. (Rev. & Tax Code §§ 7200–7226.) Cities are prohibited from levying income taxes. (Rev. & Tax Code § 17041.5; but see *Coblentz, Patch, Duffy & Bass, LLP v. City and County of San Francisco* (2014) 233 Cal.App.4th 691 [payroll tax was not a preempted income tax even as applied to partnership distributions].) Access to the Internet cannot be taxed under the federal Internet Tax Freedom Act. (Pub.L. No. 105-277 (Oct. 21, 1998) 112 Stat. 2681, §§ 1100–1206*; J2 Global Communications, Inc. v. City of Los Angeles* (2013) 218 Cal.App.4th 328, 331 [service converting faxes to email was taxable telephony because it did not tax internet access per se].)

Statutes may constrain the formulation of the tax. For example, a library tax levied under Government Code section 53717 must "apply uniformly to all taxpayers or all real property within the city." (Cf. *Borikas v. Alameda Unified School District* (2013) 214 Cal.App.4th 135, 151 [school parcel tax under Government Code section 50079 must be uniform to all taxpayers and property, except for limited exceptions listed in the statute].) In contrast, a Mello-Roos Community Facilities District special parcel tax may "be on or based on a benefit received by parcels of real property, the cost of making facilities or authorized services available to each parcel, or some other reasonable basis as determined by the legislative body." (Gov. Code, § 53325.3) And a special tax for police or fire under Government Code section 53978 can be applied in zones and can vary based on the class of improvement on property or the use of property. (Gov. Code § 53978.) These restrictions, however, are primarily of interest to special districts and should not apply to cities since cities have constitutional tax power independent of this statutory authority. (*West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516, 524 [charter cities derive the power to tax from California Constitution Article XI, section 5]; Gov. Code § 37100.5 [general law cities can impose any tax a charter city can impose].)

There are also many statutory procedures that must be followed for certain taxes. (See, e.g., Mello-Roos Taxes, Gov. Code, § 53311 et seq.) A discussion of these various limitations is beyond the scope of this publication. For a more complete discussion, see *California Municipal Law Handbook* §§ 5.16–5.106.)

Chapter 3

Assessments

I. Distinguishing Assessments from Fees and Taxes

Proposition 218 defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." (Cal. Const., art. XIII D, § 2, subd. (b).)[17]

Thus, "special benefit to property" is essential to any assessment against real property. In contrast with a tax — which can be calculated on most any rational basis — or a property-related fee — which is calculated based on the proportional cost of providing a service to a parcel and other factors specified in article XIII D, section 6, subdivision (b) of the California Constitution — an assessment can be levied against a parcel only for the "the reasonable cost of the proportional special benefit conferred on that parcel." (Cal. Const., art. XIIID, § 2(b).)

> [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 Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545.)[18]

17 An assessment under Proposition 218 encompasses levies that are sometimes referred to as "special benefits" or "special assessments." Legal analysis turns not on the label, but the substance of a levy. (E.g., *California Taxpayers' Assn. v. Franchise Tax Bd.* (2010) 190 Cal.App.4th 667, 673 [labels not irrelevant in finance disputes, but not determinative either].)

18 While it is generally wise to cite pre-Proposition 218 assessment law with care, this language succinctly describes the historical (and continuing) rationale for assessments. Without identifying a special benefit, there can be no assessment. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420; *Ventura Group Ventures, Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1106.) Although assessments are an exercise of the taxing power, "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, special benefit distinguishes assessments from taxes. (*City Council 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 for a specific benefit conferred or privilege granted. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874.)

Only assessments on real property are subject to Proposition 218. Assessments imposed on businesses pursuant to the Parking and Business Improvement Law of 1989 are not. (*Howard Jarvis Taxpayers Assn. 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 nuisance or weed abatement proceedings. Assessments imposed under (or exempt from) Proposition 218 are exempt from the definition of taxes added by Proposition 26. (Cal. Const. art. XIII C, § 1, subd. (e)(7).)

II. Authority to Levy Property-Based Assessments

A number of statutes authorize local agencies to assess real property. These include the Municipal Improvement Act of 1913 (Sts. & Hy. Code § 10000 et. seq.) and the Landscaping and Lighting Act of 1972 (Sts. & Hy. Code § 22500 et. seq.). These statutes specify the agencies authorized to invoke them. Additionally, the principal acts of most special districts authorize them to use all or some assessment statutes. (*See, e.g.,* Gov. Code § 61122 [Community Services District Law authorizes assessments].)[19]

Unless prohibited from doing so by their charters, charter cities may adopt local procedural ordinances that grant and govern the authority to levy assessments as supplements to or substitutes for statutory authority to assess. (*Redwood City v. Moore (1965) 231 Cal.App.2d 563, 582.)* Such ordinances frequently incorporate state statutes, but revise some of their provisions to suit local needs. A charter city may also act under a state statute. Regardless of the source of its authority, a charter city must comply with Proposition 218. (Cal. Const., art. XIII D, § 2, subd. (b) ["Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority."].)

The statute or charter city ordinance authorizing assessments typically limits the improvements or services that may be funded and specifies the resolutions and ordinances that must be adopted to levy an assessment.

III. Proposition 218's Changes to Previous Assessment Methods

Many of the assessment statutes are quite old and many pre-date Propositions 13, 218, and 26.

The statutes permit an agency to construct and/or maintain a local improvement, such as a street, sewer, or parkway at the cost of those who benefit. Rather than fund the work with taxes collected from all of the agency's taxpayers, the specific properties "benefitting" from the improvement would fund them via an assessment. For example, the cost of a sewer extension might be assessed against parcels served by the extension or the cost of streetlights might be assessed against parcels on the street to be lit. Each procedural statute contained its own requirements for how an assessment could be spread among benefitting parcels, how that information was to be presented to assessees, and what level of property-owner approval (or right of protest) was required. In general, the statutes commonly provided that:

- The entirety of the cost of an improvement or service could be assessed against "benefiting" private parcels;
- The calculation of the assessment must be presented in an engineer's report; and
- An assessment could be imposed unless a majority of affected property owners provided timely, written protests to the agency.

Following the 1978 adoption of Proposition 13, which limited property taxes and required two-thirds voter approval to increase a special tax, agencies began to levy assessments to fund facilities and services previously funded by taxes. (*See, e.g. Knox v. City of Orland* (1992) 4 Cal.4th 132.)

19 These authorizations are generally contained in principal acts under the heading "Alternative Revenues" meaning alternative to property taxes.

Proposition 218 was adopted, in part, as a direct response to this growing use of assessment financing, which it sought to curb by overlaying a number of new requirements upon the existing statutory requirements:

- **Procedural Requirements:** Proposition 218 provided for a uniform method of notice, protest and hearing for assessments. (Cal. Const., art. XIII D, § 4, subds. (a), (c)–(e).)
- **Substantive Requirements:** Proposition 218 added several substantive requirements, limiting assessments to the "special benefit" received by the assessed properties and requiring exclusion of the "general benefit" arising from an assessment-funded program, requiring non-assessment funds for that portion of a project. Thus, Proposition 218 specifies that an assessment against any parcel may not exceed the reasonable cost of the proportional special benefit conferred on that parcel. (Cal. Const., art. XIII D, § 4, subd. (a).)
- **engineer's report and Burden of Proof:** Proposition 218 requires an assessment to be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California. (Cal. Const. art. XIII D, § 4, subd. (b).) Furthermore, it reduced judicial deference to agency benefit findings and provided that publicly owned parcels may not be exempt from assessment unless the agency demonstrates by clear and convincing evidence those parcels in fact receive no special benefit. (*Id*., subds. (a), (f).)

Each of these topics is detailed below.

IV. Proposition 218's Procedural Requirements for Assessments

A. Introduction

Proposition 218 does not confer any authority to impose assessments. (Cal. Const., art. XIII D, § 1, subd. (a).) Instead, it limits assessment authority granted by statutes such as the Municipal Improvement Act of 1913 (Sts. & Hy. Code § 10000) or municipal charters.

These sources of authority generally contain specific requirements for the levy of an assessment. For example, most assessment statutes require a local government adopt a resolution of intention before giving notice of a proposed assessment, and many statutes specify the contents of an engineer's report.

In general, a levying agency must comply with both the statutory (or charter) requirements to levy an assessment and with the requirements of Proposition 218's article XIII D, section 4 of the Constitution, as supplemented by the Proposition 218 Omnibus Implementation Act of 1997. (Gov. Code, § 53750 et seq.)

Agencies commonly adopt local procedures to supplement those of section 4 of article XIII D and the Proposition 218 Omnibus Implementation Act. Such local procedures cover matters such as:

- How ballots may be withdrawn;
- How duplicate ballots may be issued when a ballot is lost, spoiled or withdrawn;
- How proportional ballots may be cast, as when joint owners of a parcel wish to cast separate ballots; and
- The treatment of unsigned or incomplete ballots.

Such local procedures fill gaps in Proposition 218 and state law, so that the "rules of the road" for a ballot proceeding are established at the outset and there is no need to make rule determinations during proceedings as questions arise. The adoption of such procedures has been authorized by the Constitution and endorsed by the courts for property-related fee proceedings, though there is no specific grant of authority with respect to assessments. (Cf. Cal. Const., art. XIIID, § 6(c) (authorizing the adoption of local procedures for consideration of property-related fees); see also *Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 286 (local procedures may be adopted for property-related fees).) A model of such local procedures appears as Attachment C to this Guide.

B. Proposition 218's Requirements Overlap those of Statutes and Charters

To harmonize the new requirements of Proposition 218 with the preexisting requirements of assessment statutes and charter city ordinances, Government Code section 53753, subdivision (a) superseded statutory notice, protest, and hearing requirements existing on July 1, 1997.[20]

> **▶ PRACTICE TIP:**
>
> Most of these superseded requirements have since been removed from the statutes by the Legislature. However, it is always wise to confirm the requirements of both Proposition 218 and the applicable authorizing ordinance or statute when advising a client on an assessment.

Government Code section 54954.6, a provision of the Ralph M. Brown Act which requires a "public meeting" in addition to a "public hearing" and requires a mailed "joint notice," is also preempted by Government Code section 53753, subdivision (a). It is also made inapplicable as to an assessment subject to Proposition 218 by Government Code section 54954.6, subdivision (h), which exempts from its notice and hearing requirements any assessment imposed consistently with Proposition 218's requirements.

> **▶ PRACTICE TIP:**
>
> Division 4.5 of the Streets & Highways Code (section 3100 et seq.), governing recorded notices of assessments, recorded boundary maps, and related issues, is not superseded by the Proposition 218 Omnibus Implementation Act. (Gov. Code § 53753(a).) Thus compliance with this statute is required, too.

C. Overview of the Proposition 218's Procedural Requirements for Assessments

Section 4 of article XIII D and the Proposition 218 Omnibus Implementation Act (Gov. Code § 53750 et seq.) set forth Proposition 218's procedural requirements.[21] The principal requirements are:

- An agency must provide 45 days' written notice of a public hearing, and mail ballots, to the owners of the parcels to be assessed;
- The notice must include specified information, including information regarding the assessments, the public hearing, and owners' right to cast votes weighted by each owner's assessment amount;
- An agency must hold a noticed public hearing and tally the results of the majority protest vote; and
- If a majority of the weighted votes does not oppose the assessments, the agency may vote to levy the assessment.

D. Preparation and Mailing Notice

1. Notice and ballot

The agency must provide mailed notice of a proposed assessment to the record owner of each parcel identified as being subject to the assessment. (Cal. Const., art. XIIID, § 4(c); Gov. Code § 53753(b).) The notice must be mailed at least 45 days before the public hearing on the assessment. An assessment ballot must be included. (Cal. Const., art. XIIID, § 4(d); Gov. Code § 53753(c).)

20 Furthermore, Proposition 218 renders unconstitutional *contradictory* "procedures or process leading to the adoption or levy of an assessment falling within its ambit." (See *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 818.)

21 The Proposition 218 Omnibus Implementation Act restates and supplements the procedural requirements of Article XIIID, section 4. (See Gov. Code § 53753; Cal. Const., art. XIII D, § 4.)

The envelope (or, less commonly, self-mailer) containing the notice and ballot and addressed to the record owner must include on its face, in at least 16-point bold font and in substantially the following form, the statement: "OFFICIAL BALLOT ENCLOSED." (Gov. Code § 53753(b).)[22] It is common for this outer envelope to be a window envelope, so that each record owner's mailing address (as printed on the ballot) is revealed to avoid the need to label the outer envelope.

2. Who gets notice?

Notices must be mailed to the owners of record of the parcels to be assessed as reflected in the last equalized assessment roll, or in the case of a public agency, to the public agency's known representative. (Gov. Code § 53750(j) ["'Record owner' means 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."].) The consensus of public lawyers is that separate notice need not be provided to tenants.[23] Because the assessment roll is often updated only annually, it is commonly out of date. Moreover no data set is perfect. Nevertheless, notice must be mailed to the addresses on the roll and doing so satisfies the statute. (Cf. *Griffith v. Pajaro Valley Water Management Agency,* 220 Cal.App.4th at 596 [notice of property related fee under art. XIII D, § 6 could be given to record owners when Agency knew tenants paid the fee], *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees].)

3. Contents of notice

The required elements of the notice (which are sometimes actually printed on the ballot, rather than the notice) are as follows:

Total proposed assessment for the entire district. The notice must state "the total amount [of the proposed assessment] chargeable to the entire district." (Cal. Const., art. XIII D, § 4, subd. (c).)

▶ PRACTICE TIP:

This is typically stated in a sentence such as "The total amount of the assessment against all parcels in the District is $_____." If the assessment is an annual assessment, it is a good practice to state that the amount is "$_____ per year." If it is a lump-sum assessment payable in installments, it is a good practice to list both the lump-sum and the annual installments, if possible. If the assessment will adjust over time, it is a good practice to state the tax year for which the dollar amount applies, and the basis on which it will adjust in the future.

The proposed assessment for the owner's parcel. The notice must state "the amount chargeable to the owner's particular parcel." (Cal. Const., art. XIII D, § 4, subd. (c).) The stated amount is the maximum amount that can be charged without holding an additional ballot proceeding.

22 This Section also explicitly authorizes states that "An agency may additionally place the phrase 'OFFICIAL BALLOT ENCLOSED' … in a language or languages other than English." Presumably, even if the phrase is printed in some language other than English, it must also be included in English.

23 Section 2 of Article XIIID defines "'property ownership' … to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (Cal. Const., art. XIIID, § 2(g).) However, Section 4(c) specifically provides that assessment notices be sent to the "record owner" of a parcel and Gov. Code § 53750(j) provides a definition of "Record Owner" that is based on the ownership information appearing on the property tax roll.

▶ PRACTICE TIP:

As with the total proposed assessment, it is a good practice to clearly state if the amount is per year and to specify the basis for any automatic adjustments.

Assessment Duration. The notice must state "the duration of the assessment." (Cal. Const., art. XIII D, § 4, subd. (c).)

▶ PRACTICE TIP:

This is typically done with a sentence such as: "If approved, this assessment will be collected annually, on the property tax roll, for a period of twenty years." For a maintenance or service assessment that continues indefinitely, this is typically stated in a form such as: "If approved, the assessment will be collected annually, until the City Council determines that the assessment is no longer necessary."

Reason. The notice must state the "reason for the assessment." (Cal. Const., art. XIII D, § 4, subd. (c).)

▶ PRACTICE TIP:

This is typically done by briefly identifying the improvements to be built or maintained or the services to be provided. The description should be broad enough to include all planned or possible uses for the assessment proceeds. Some agencies also explain why the improvements or services have been proposed (e.g., to replace failing infrastructure, to address deferred maintenance, to comply with new environmental standards, etc.) or why assessment funding is proposed (e.g., budget shortfalls, need for special infrastructure in one neighborhood, etc.).

Basis. The notice must state "the basis upon which the amount of the proposed assessment was calculated." (Cal. Const., art. XIII D, § 4, subd. (c).) No court has specifically interpreted this "basis" disclosure requirement in the context of assessments. However, an unpublished (and therefore unciteable)[24] opinion on a property related fee noted:

> the manifest intent of requiring the agency to disclose the "basis" for the charge is to include in the notice the method of calculation, meaning the unit by which, and the rate at which, the charge is determined. Thus a notice might state that the rate is $2 per foot of street frontage, that the addressee's parcel has 50 feet of street frontage, and that the amount of the charge on that parcel is thus $100 … . This enables the owner to ascertain, among other things, that the relevant characteristics of the parcel have been accurately measured by the agency.

(*Great Oaks Water Co. v. Santa Clara County Water Dist.* (2015) 242 Cal.App.4th 1187, 1221, review granted (Mar. 23, 2016, Case No. S231846).)

▶ PRACTICE TIP:

Agencies typically comply with this requirement by stating: (i) the formula used to calculate the assessment on each parcel (e.g., a rate table, if rates differ based on the use of land (residential, commercial, etc.), or a rate per acre or linear frontage foot) and (ii) the data specific to parcel use to calculate its assessment (i.e., the parcel's usage classification, square footage, or linear frontage, etc.).

24 California Rules of Court, rule 8.1115(a).

Public Hearing Date, Time, and Location. The notice must state "the date, time, and location of a public hearing on the proposed assessment." (Cal. Const., art. XIII D, § 4, subd. (c).)

Procedures Summary. The notice must include "a summary of the procedures applicable to the completion, return, and tabulation of the ballots." (Cal. Const., art. XIII D, § 4, subd. (c).) This information must be "in a conspicuous place" on the notice. (Gov. Code, § 53753, subd. (b).)

▶ PRACTICE TIP:

It is not clear what must be included in this "summary," but the address to which ballots may be returned should be included, as well as a statement that ballots may be submitted until the close of the public testimony at the public hearing. It is common practice to include a prominent statement such as, "Only ballots that are received at the address indicated prior to [date and time] or are hand-delivered at the public hearing will be tabulated. Ballots received after those deadlines, even if postmarked earlier, cannot be counted or accepted." It is also common practice to include information about how to replace a lost or spoiled ballot, and an instruction that the ballot must be signed and dated, and that either the "support" or "opposed" space on the ballot must be marked. A sample notice of proposed assessment is attached to this guide as Attachment D.

Protest Statement. The notice must include a "disclosure statement that the existence of a majority protest, as defined in subdivision (e) [of Cal. Const., art. XIIID, § 4], will result in the assessment not being imposed." (Cal. Const., art. XIII D, § 4, subd. (c).)

▶ PRACTICE TIP:

Most agencies include a statement such as: "The assessment shall not be imposed if the ballots submitted, and not withdrawn, in opposition to the assessment exceed the ballots submitted, and not withdrawn, in favor of the assessment, with ballots weighted according to the proportional financial obligation of the affected property."[25]

Other information often provided in a notice includes:

- **Reference to engineer's report.** It is common to state how a property owner can obtain a copy of the engineer's report for the assessment, e.g.: "Reference is made to the engineer's report, which is incorporated herein by reference, for a complete description of the improvements and the calculation of the assessment."
- **Incorporation of Ballot.** Often, some of the information required to be included in the notice is printed on the ballot instead. Proposition 218 refers to the notice as "containing" the ballot, implying that the ballot is part of the notice. (Cal. Const., art. XIIID, § 4(c).) Nonetheless, some agencies include a statement in the notice such as: "Enclosed you will find a ballot, which is incorporated into this notice by reference, on which you may indicate your support for or opposition to the proposed assessment."
- **Procedures.** If the agency has adopted local procedures for the completion, tabulation and return of ballots, it is common to reference how these procedures may be obtained. Some agencies mail the local procedures with the notice and ballot.

25 This language is based on Government Code section 53753, subdivision (e)(4).

- **Historical Information.** Some agencies include information about hearings, community forums, or other outreach efforts preceding an assessment proposal. It is also common to include a statement like: "On [date], by its adoption of Resolution No. [the Resolution of Intention], the City Council of the City of _____ proposed to establish [name of assessment district] pursuant to [procedural statute or ordinance] and to levy an assessment in connection with that district to fund [description of use of assessment]."
  - **Participation.** It is common to include a statement like: "You are invited, but not required, to attend the public hearing and to present oral or written testimony to the City Council. At the public hearing, the City will consider all objections or protests, if any, to the proposed assessment. The public hearing may be continued from time to time."[26]
  - **Public Record.** It is common to state ballots will not be opened or tabulated before the close of the public input portion of the public hearing, but that ballots will be public records during and after tabulation. Government Code section 53755, subdivision (e)(2) states:

    > During and after the tabulation, the assessment ballots and the information used to determine the weight of each ballot shall be treated as disclosable public records, as defined in [Gov. Code] Section 6252, and equally available for inspection by the proponents and the opponents of the proposed assessment. The ballots shall be preserved for a minimum of two years, after which they may be destroyed as provided in [Gov. Code] Sections 26202, 34090, and 60201.

  - **Recipient Information.** It is typical to include a statement that notice is provided to the recipient because he or she is the record owner of a parcel that will be subject to the assessment, if approved.
  - **Contacts and References.** Notices commonly include a contact person or department that can answer questions about the assessment and an internet address at which the Resolution of Intention, engineer's report, and other relevant documents can be found.

4. Content of ballot

Proposition 218 provides that:

> Each notice … shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(Cal. Const., art. XIII D, § 4, subd. (d).)

As a practical matter, agencies almost always print parcel identification (i.e., street address and/or Assessor's Parcel Number) on ballots before mailing them, along with the name of the record owner and the amount of the proposed assessment against the parcel.

Therefore, the items typically left for the property owner to complete the signature and date,[27] as well as spaces to be marked to indicate support or opposition to the assessment. No specific language for support or opposition is indicated in the text of Proposition 218, and the Election Code does not apply to assessment ballot proceedings. (Gov. Code, § 53753, subd. (e)(6).) The "yes" and "no" boxes often appear beside text like: "Yes, I support the proposed assessment against my property to fund [describe services and facilities to be funded]" and "No, I oppose the proposed assessment

26 This language tracks the hearing requirements of Government Code, section 53753, subdivision (d).

27 The signature is required by Government Code section 53753, subdivision (c). *Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 286 recognizes this statute requires ballots to be signed. Because these protest proceedings are called "elections," many expect the anonymity afforded voters at the polls and assessment procedures under Proposition 218 are commonly controversial. It is therefore helpful for agency officials to be able to identify the constitutional provision or statute requiring each.

… ." If a consultant has been engaged to tabulate the ballots, he or she will generally include a bar code (or other identifier) to facilitate tabulation.[28]

5. Form of ballot

The Proposition 218 Omnibus Implementation Act requires:

> Each assessment ballot shall be in a form that conceals its contents once it is sealed by the person submitting the assessment ballot. … An agency may provide an envelope for the return of the assessment ballot, provided that if the return envelope is opened by the agency prior to the tabulation of ballots … the enclosed assessment ballot shall remain sealed … .

(Gov. Code § 53753, subd. (c).)

▶ PRACTICE TIP:

Agencies commonly comply with this requirement by either: (i) designing ballots as a folding self-mailer, folded and sealed so the voting information is concealed, while the return address is visible or (ii) providing a pre-addressed return envelope. Typically, agencies pre-pay the postage on return envelopes or self-mailing ballots. It is a good idea, though not legally required, to state on the return envelope or self-mailing ballot: (i) a phrase such as "Assessment Ballot Enclosed," (ii) the name of the assessment district, and (iii) a statement such as "Do not open until close of public testimony portion of Public Hearing scheduled for [Date]." This allows agency staff to separate assessment ballots from other mail and to avoid inadvertently opening ballots before the hearing.

E. Handling of Ballots

The property owner ballot proceeding is not an election governed by the Elections Code. (Gov. Code § 53753, subd. (e)(6) ["The majority protest proceedings described in this subdivision shall not constitute an election or voting for purposes of Article II of the California Constitution or of the Elections Code"]; *Green, supra*, 49 Cal.4th at 293, 295, and fn. 7.) Thus, how the agency handles ballots, and whether they are secret, is governed by Proposition 218 and the Proposition 218 Omnibus Implementation Act, not elections law.

The Proposition 218 Omnibus Implementation Act requires that: "Assessment ballots shall remain sealed until the tabulation of ballots … commences, provided that 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 hearing." (Gov. Code, § 53753, subd. (c).)

28 The Proposition 218 Omnibus Implementation Act provides a ballot tabulator "may use technological methods of tabulating the assessment ballots, including, but not limited to, punchcard or optically readable (bar-coded) assessment ballots." (Gov. Code § 53753, subd. (e)(2).)

> **▶ PRACTICE TIP:**
>
> Before mailing notices, it is advisable to determine: (i) how ballots will be separated from other incoming mail; and (ii) where received ballots will be stored until the hearing. Since ballots can be delivered by hand, the office (often the City Clerk's office) that accepts ballots should be equipped with some sort of receptacle in which to deposit ballots. It is important to make sure that any persons who might handle ballots or staff the counter where they are returned be aware of the need to keep the ballots sealed and secure.[29] This can reduce controversy about the integrity of the protest proceeding, which residents perceive as an "election." The number of returned ballots may be very large, possibly more than all other mail an agency receives during the protest period. If so, it may be wise to use a dedicated Post Office box or mailing address for returned ballots, so ballot handling does not interfere with processing of other mail or invite controversy as to the integrity of the protest tally.

F. Public Hearing

The Proposition 218 Omnibus Implementation Act provides that:

> At the time, date, and place stated in the notice …, the agency shall conduct a public hearing upon the proposed assessment. At the public hearing, the agency shall consider all objections or protests, if any, to the proposed assessment. At the public hearing, any person shall be permitted to present written or oral testimony. The public hearing may be continued from time to time.

(Gov. Code, § 53753, subd. (d).)

> **▶ PRACTICE TIP:**
>
> Before closing public testimony, the officer presiding at the hearing should announce that once public testimony is closed, ballots will no longer be accepted. He or she should also announce a last opportunity to submit ballots.

G. Tabulation Procedure

The Proposition 218 Omnibus Implementation Act provides that, "At the conclusion of the public hearing …, an impartial person designated by the agency who does not have a vested interest in the outcome of the proposed assessment shall tabulate the assessment ballots … ." (Gov. Code, § 53753, subd. (e)(1).) The statute designates the clerk of the agency as "impartial." (*Ibid.*) However, others may be, too.

> At the conclusion of the public hearing …, an impartial person designated by the agency who does not have a vested interest in the outcome of the proposed assessment shall tabulate the assessment ballots … .

(Gov. Code, § 53753, subd. (e)(1).) The statute designates the clerk of the agency as "impartial." (*Ibid.*) However, others may be, too.

29 Ballots must remain sealed until the protest hearing. (Gov. Code, § 53753, subd. (c).) Once tallied, ballots are public records. (*Id.*, subd. (e)(2).) However, sealed envelopes containing ballots or self-mailing ballots are arguably public records even before tabulation. These often bear the address for the property owner and that information ca aid proponents and opponents of an assessment in measuring participation and determining whom to lobby for a "yes" or a "no" vote. Many property owners assume whether they have voted will be confidential. However, no provision of the Public Records Act or other law exempts the outside of the sealed ballots from disclosure. And while the Elections Code does not apply, it allows inspection of voter rosters while voting is in progress, even though how a person votes is confidential. Thus, since a property owner's vote on an assessment is ultimately public, it would seem that the fact that a property owner submitted a vote on an assessment may also be public. However, one could argue that disclosure would constitute an unwarranted invasion of privacy. An agency would do well to address this issue in any local policy governing assessment protest procedures.

If the ballots are tabulated by agency staff or by a vendor (or its "affiliates") who have "participated in the research, design, engineering, public education, or promotion of the assessment" then "the ballots shall be unsealed and tabulated in public view at the conclusion of the hearing so as to permit all interested persons to meaningfully monitor the accuracy of the tabulation process." (*Ibid*.)

"During and after the tabulation, the assessment ballots and the information used to determine the weight of each ballot must be treated as a disclosable public record, and equally available for inspection by the proponents and the opponents of the proposed assessment." (*Ibid*.) The governing body of the agency may, if necessary, continue the tabulation to a different time or location accessible to the public, provided the governing body announces the time and location at the hearing. (*Ibid*.)

> **▶ PRACTICE TIP:**
>
> Although the law does not require it in all circumstances, it is always wise to tally protests in public view and to do so within the agency's boundaries. A vector control district in suburban Sacramento allowed its assessment consultant to tally protests in Southern California, causing substantial controversy addressed by the legislation summarized here.

H. Determination of Protest

The ballots must be tabulated according to the proportional financial obligation of the affected properties. (Cal. Const., art. XIII D, § 4, subd. (e).) For example, the vote of a property owner assessed $100 will have 20 times the weight of the vote of a property owner assessed $5.

If more than one record owner submits a ballot for a parcel, the agency must apportion the votes according to their respective ownership interests, as reflected in the public record or as the owners demonstrate to the satisfaction of the agency. (Gov. Code § 53753, subd. (e)(3).)

A majority protest exists if the assessment ballots submitted, and not withdrawn, in opposition to the proposed assessment exceed the assessment ballots submitted, and not withdrawn, in its favor, weighting those assessment ballots as described above. (Gov. Code § 53753(e)(4).)

If there is a majority protest, the assessment cannot be imposed. If there is no majority protest, the city council (or agency board) may impose the assessment, but can also choose to not impose the assessment.

I. Recordkeeping

The ballots must be retained for at least two years after the vote. They may be destroyed thereafter. (Gov. Code § 53753(e)(2).)

II. Proposition 218's Substantive Requirements for Assessments

A. The Four Basic Requirements of Proposition 218 for an Assessment

Proposition 218 imposes these substantive requirements on assessments:

- **Identify all benefitted parcels.** All parcels that will have a special benefit conferred upon them and upon which an assessment will be imposed must be identified in the engineer's report and included in the assessment district. Parcels owned by the government cannot be excluded unless clear and convincing evidence demonstrates such a parcel receives no special benefit.
- **Distinguish general from special benefit.** The general benefits must be distinguished from the special benefits conferred on the parcels.
- **Proportionality.** The proportionate special benefit derived by each parcel must be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided.
- **Reasonable cost.** The assessment must be apportioned so that the amount assessed to a parcel does not exceed the reasonable cost of the proportional special benefit conferred on that parcel and does not include any costs attributable to general benefits. (*Ibid.*) Thus, the portion of a project cost associated with general benefit must be funded from non-assessment revenues, and an agency which lacks other funds will not be able to use assessment financing, as few cases sustain a conclusion a project has no general benefit.

(Cal. Const., art. XIII D, § 4, subd. (a).)

Several published opinions construe these requirements. Unfortunately, these opinions are highly fact specific, and it is difficult to usefully analyze these four substantive requirements through the lens of the case law. Indeed, the requirements are best understood as interrelated, and not as separate requirements. (*Beutz v. County of Riverside* (2010) 185 Cal.App.4th 1516, 1522.) Thus, the bulk of the discussion below summarizes the cases rather than summarizing the provisions of Proposition 218 they apply — those provisions, even augmented by the Omnibus Proposition 218 Implementation Act are terse but portentous.

Special and general benefit must be quantified and justified by an engineer's report for an assessment. (*Golden Hill Neighborhood Assn, Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 438–439 [invalidating a landscape and open space maintenance district for failure to quantify and distinguish general from special benefit]; *Beutz v. County of Riverside* (2010) 185 Cal.App.4th 1516, 1533, 1537 [invalidating park assessment in part because engineer's report failed to adequately account for general public's use of parks].)

Thus, a defensible assessment largely depends on a credible engineer's report. Ideally, an engineer's report should explain how each of the requirements has been met, and should include all information required by the statute or ordinance that is being utilized for the levy of the assessment.

> ▶ **PRACTICE TIP:**
>
> Assessing agencies benefit when engineer's reports reflect legal review. Thus, agencies should include in an engineer's scope of services time to provide a draft to counsel and to respond to counsel's comments. Counsel should ensure that draft reports satisfy the four substantive requirements of Proposition 218 discussed here and also keep abreast of developing case law. Until the law becomes more stable, legal review of assessment engineer's report is highly advisable.

The following checklist will aid that review:

1. Is it clear what parcels are included in the district and assessed? Is it clear why these parcels specially benefit from the funded facilities or services while parcels outside the district do not?
2. Does the report identify the special benefits to property from the facilities or services to be funded? Is each identified special benefit actually a special benefit to property rather than a benefit to the general public?
3. Are general benefits identified? Are the costs of the general benefits quantified and excluded from the total budget to be raised by the assessment? Is the allocation of project costs between general and special benefits credible? Some services (e.g., fire facilities) have obvious, significant general benefit components. Others (sewer line extensions) have less or, perhaps, none.
4. Is there a clear allocation of budget to assessed parcels individually or by class (e.g., residential, commercial, industrial, etc.)? Are the relative shares (often referred to as "equivalent benefit units") related to each of the identified special benefits? Is there a need to spread some costs by one method (because they relate to one special benefit) while spreading other costs by a different method (because they relate to a different special benefit)? For example, might park landscaping improvements more substantially relate to a parcel's view of or distance from a park and might park programming more substantially relate to the number of residents per dwelling?

B. Special and General Benefits

1. Constitutional definition of "special benefit"

Article XIII D, § 2, subdivision (b) defines an "assessment" as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property."

That subdivision defines "special benefit" as "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.'" (*Id.,* subd. (i).)

These definitions suggest several important characteristics of "special benefits:"

1. Special benefits are "particular and distinct" and "over and above" general benefits.
2. Special benefits exclude mere "general enhancement of property value."
3. Special benefits are "conferred on real property."

2. Constitutional definition of "general benefit"

Article XIII D does not directly define "general benefit."

However, in interpreting Article XIII D, § 2, subdivision (b), the California Supreme Court noted: "general benefits are not restricted to benefits conferred only on persons and property outside the assessment district, but can include benefits both 'conferred on real property located in the district or to the public at large.'" (*Silicon Valley Taxpayer's Ass'n, Inc. v. Santa Clara County Open Space Authority.* (2008) 44 Cal.4th 431, 455, citing Art. XIII D, § 2, subd. (i).) Furthermore, the Court found "public at large" means "all members of the public — including those who live, work, and shop within the district — and not simply transient visitors." (*Ibid*.)

These findings suggest at least two kinds of general benefits:

1. Those that accrue to individuals (i.e., members of the general public), rather than to real property; and
2. Those that accrue to property inside and outside of the district.

3. Identifying benefits

Before Proposition 218, assessment engineers commonly identified a long list of purported special benefits of a facility or service to be funded by assessment. This is no longer the best approach for two reasons:

1. Long lists often include benefits more appropriately classified as general benefits; and
2. It can be very difficult to quantify the relative benefit of many special benefits.

Often, the best approach is the simplest. For example, the special benefit to property of a sewer or water main extension is that such an extension gives each connected parcel access to sewer or water services. In such a case, there is likely no general benefits from the sewer or water main extension (unless, of course, an extension has been oversized for future service to other parcels or improves overall system reliability by looping services that previously terminated in cul-de-sacs). Benefits such as public health benefits or service reliability might best be seen as secondary or collateral benefits that derive from the primary special benefit to property of providing access to water or sewer service. (Cf. Gov. Code, § 53758, subd. (a) [defining "specific benefit" to exclude "incidental benefit" under Proposition 26].)

4. Leading Proposition 218 assessment cases

- ***Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority***

Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431 (*Silicon Valley*) involved a proposed assessment district to fund unspecified, future open space acquisitions throughout Santa Clara County. The engineer's report claimed properties subject to the assessment would receive these benefits:

1. Enhanced recreational activities and expanded access to recreational areas;
2. Protection of views, scenery, and other resources;
3. Increased economic activity;
4. Expanded employment opportunity;
5. Reduced costs of law enforcement, health care, fire prevention, and natural disaster response;
6. Enhanced quality of life and desirability of the area; and
7. Improved water quality, pollution reduction, and flood prevention.

(*Id.* at 453.) The court grouped these into three categories, concluding that each — at least as described in the engineer's report — was a general benefit, not a special benefit, and therefore could not be funded by an assessment.

First, the court noted some benefits were of benefit to all property in the assessment district, which result in "**all** properties receiving a derivative, indirect benefit." (*Silicon Valley, supra,* 44 Cal.4th at p. 453 (original emphasis).) Those benefits included enhancement of recreational opportunities and access to recreational areas; protection of views, scenery, and other resources; and enhancement of quality of life and the desirability of the area. (*Id.* at pp. 453–454.) The Court did not view such an indirect, derivate benefit to all properties in a district as a special benefit which could justify an assessment.

Second, the court considered other benefits to accrue to all properties within the assessment district equally and concluded the engineer's report had not made the required direct connection of special benefit to the assessed properties. Among those were protection of views, scenery, and other resources; increased economic activity; and expanded employment opportunity. (*Silicon Valley, supra,* 44 Cal.4th at pp. 453–454.) Although the described benefits might result from the acquisition and improvement of open space, because they were not shown to directly and specially benefit assessed properties, these benefits could not justify the assessment, either.

Finally, according to the engineer's report, each of the remaining benefits would reduce the costs of providing other services. Promoting good health and reducing crime and vandalism would reduce health care and law enforcement costs, respectively. On the theory that open space helps protect water quality and reduce flooding, the engineer's report

concluded that public utility costs would be reduced. The Court did not view any of those as constituting the special benefit Proposition 218 demands. (*Silicon Valley, supra,* 44 Cal.4th at p. 454.)

The decision includes a noteworthy footnote as to when a benefit provided equally to all assessed properties can be a special benefit. It acknowledges that in "a well-drawn district — limited to only parcels receiving special benefits from the improvement — every parcel within that district receives a shared special benefit." (*Silicon Valley, supra,* 44 Cal.4th at p. 452, fn. 8.) It notes such benefits are arguably not special because they are not "'particular and distinct' and 'over and above' the benefits received by other properties 'located in the district.'" (*Ibid.*) However, the Court concluded that as long as the district is "narrowly drawn to include only properties directly benefitting from an improvement," the equal distribution of benefit does not necessarily make the benefits general, rather than special. (*Ibid.*) "In that circumstance, the characterization of a benefit may depend on whether the parcel receives a direct advantage from the improvement (e.g., proximity to a park) or receives an indirect, derivative advantage resulting from the overall public benefits of the improvement (e.g., general enhancement of the district's property values)." (*Ibid.*) Thus, although the court invalidated the assessment in part because the benefits identified in the engineer's report would accrue to all properties in the district, a benefit received by all parcels within a district can be special under appropriate circumstances.

- ***Town of Tiburon v. Bonander***

  Town of Tiburon v. Bonander (2009) 180 Cal.App.4th 1057 (*Bonander*) involved a utility undergrounding district. The challengers contended the engineer's report was flawed because it ignored the general benefit the court determined the undergrounding project would yield. Under article XIII D, section 2, subdivision (i) the general enhancement of property value is defined not to be a special benefit, but an increase in property value attributable to a project that provides a direct advantage to a property — instead of an indirect or derivative benefit — is special rather than general. If an assessment district is narrowly drawn to include only properties directly benefitting from a project, the fact that a benefit is generally uniform throughout the district does not mean the benefit is not special. Thus, it is important that an engineer's report discuss whether a parcel receives a direct advantage from a project or receives an indirect, derivative advantage resulting from the project's overall public benefits.[30] Courts apply independent judgment review to assessment determinations of special benefit and proportional allocation among parcels and an engineer's conclusions on each point must be express, well supported logically, and consistent with evidence in the record on which the agency levies an assessment.

  As to apportionment of identified special benefit, *Bonander* stated the amount to be apportioned is generally the whole cost of the project less any amounts attributable to general benefits, if any. (Cf. Cal. Const., art. XIII D, § 4, subd. (a) ["The proportionate special benefit derived by each identified parcel shall be determined in relationship to **the entirety of the capital cost of a public improvement**, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided."].) *Bonander* also stated that the cost of the assessment program may be allocated in proportion to relative special benefit to each assessed parcel rather than a precise amount of special benefit calculated individually for each parcel. (*Bonander, supra,* 180 Cal. App.4th at 1081.) However, *Bonander* invalidated the assessment because the engineer's report, rather than determining special benefit based on the total project cost, apportioned based on differing construction costs in subzones the court found poorly drawn. *Bonander* emphasized that properties receiving the same proportionate special benefit must pay the same assessment, without regard to variations in the cost of construction among the properties. (*Id.* at pp. 1082–1083.) Finally, *Bonander* found some properties received special benefit but had been improperly excluded from the undergrounding district, which meant that the other properties in the district were effectively subsidizing the special benefit to the wrongly excluded properties. (*Id.* at pp. 1085–1086.) This court

30 General and special benefit are concepts used to apportion the cost of public improvements, facilities, and services through special assessments and do necessarily translate to other contexts. Thus, for example, *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202 found a determination in an engineer's report that a project to convert a private cul-de-sac into a public through-street lacked any general benefit did not negate a determination of public necessity in a resolution of necessity for purposes of eminent domain. This is one of the few cases to uphold a finding that an assessment-funded improvement had no general benefit.

used the independent judgment review required by Proposition 218 (Cal. Const., art. XIII D, § 4, subd. (f)) to make a very searching review of the fundamental architecture of the assessment district and to reject it. With such searching review, it is clear that engineer's reports must explain every choice made in framing the district and should be reviewed by an attorney before being made final.

- ***Dahms v. Downtown Pomona Property***

  Dahms v. Downtown Pomona Property (2010) 174 Cal.App.4th 708 (*Dahms*) involved an assessment to fund security, streetscape maintenance, marketing, promotion, and special events. The engineer's report used three factors to determine the assessment for each property: street frontage, lot size, and building size. The report also discounted assessments of nonprofit organizations.

  The plaintiff alleged the nonprofit discount violated the requirement that assessments not exceed the proportional cost of the special benefit conferred, arguing most parcels were over-assessed so nonprofits could be under assessed — a so-called "cross-subsidy." (Cf. *Green Valley Landowners Association v. City of Vallejo* (2015) 241 Cal.App.4th 425, 439–440 [water rate challenged under art. XIII D, § 6 need not blend costs for low-cost urban system and higher-cost exurban system].) *Dahms* rejected this claim, noting that section 4, subdivision (a) only requires an assessment not exceed the reasonable cost of the proportional special benefit conferred on the assessed parcel. Thus, a local agency may reduce the assessments imposed on some parcels so long as those discounts do not cause the assessments imposed on the remaining parcels to exceed the reasonable cost of the proportional special benefit conferred on those parcels. (*Dahms, supra*, 174 Cal.App.4th at 716.) This analysis seems to assume the revenue foregone by discounts was covered by non-assessment revenues. A well drafted engineer's report will make that point clear.

  Like *Bonander*, *Dahms* upheld a determination that **all** of the benefit of the services would accrue as a special benefit to the assessed properties:

  > the services provided by the PBID (security services, streetscape maintenance, and marketing, promotion, and special events) are all special benefits conferred on the parcels within the PBID — they "affect the assessed property in a way that is particular and distinct from [their] effect on other parcels and that real property in general and the public at large do not share." (*SVTA, supra, 44 Cal.4th at p. 452.) Under article XIII D, therefore, the cap on the assessment for each parcel is the reasonable cost of the proportional special benefit conferred on that parcel. If the special benefits themselves produce certain general benefits, the value of those general benefits need not be deducted before the (caps on the) assessments are calculated.*

  (*Dahms, supra*, 174 Cal.App.4th at p. 723, citations omitted.) Few cases uphold assessments that treat all of the cost of an assessment program as attributable to special benefit; most assessments have at least some general benefit.

  In *Dahms*' view, the special benefits found insufficient in *Silicon Valley Taxpayers Association* were "effects" of the services to be funded by an assessment:

  > In contrast, the special benefits conferred by the PBID are not mere effects of the services funded by the assessments. Rather, the PBID's services themselves constitute special benefits to all of the assessed parcels. The assessments directly fund security services, streetscape maintenance services, and marketing and promotion services for the assessed parcels. *SVTA in no way suggests that those services are not special benefits.*

  (*Id.* at 725, original emphasis.) This is comparable to Government Code section 53758's discussion of "specific" benefit under Proposition 26's exception for some fees. (Cal. Const., art. XIII C, § 1, subd. (e)(1)–(2).)

- ***Beutz v. County of Riverside***

  Beutz v. County of Riverside (2010) 184 Cal.App.4th 1516 (*Beutz*) was a challenge to a park maintenance assessment. The county defended the assessment, arguing that any general benefits the public received from the parks were indirect results of the special benefits provided directly to owners of assessed property, and that no deduction of the value of general benefits was therefore required. The *Beutz* court disagreed, holding it was:

  > not a case in which services specifically intended for assessed parcels concomitantly confer collateral general benefits to surrounding properties. Rather, this case involves the failure to separate and quantify the general and special benefits that will accrue, respectively, to members of the general public and occupants of … residential properties [in the district] from their common use and enjoyment of the … parks.

  (*Id.* at p. 1537.)[31] The *Beutz* court apparently concluded that people throughout a community use public parks (*id*. at 1533) and was particularly critical of the engineer's report, which it characterized as "fail[ing] to explain the nature and extent of the general and special benefits of the parks or quantify both in relation to each other based on credible, solid evidence." (*Id*. at p. 1534.)

  Beutz illustrates two principles regarding special and general benefit. First, an engineer's report must analyze the quantity or extent of the reasonably expected use by or benefit from the improvements, facilities, or services to the general public and to occupants of assessed property. This is to say, it must identify and distinguish general from special benefit. Second, the report must allocate that special benefit among the parcels which receive it in some reasonable manner.

  > It is by no means clear from the Report that occupants of Wildomar residential properties will use or benefit from the parks in a different manner, or more intensively, than persons from other communities. Nor does the Report address whether Wildomar residents who live in close proximity to one or more of the parks may reasonably be expected to use those parks just as often, over time, as Wildomar residents who live several miles away from the same parks.

  (*Beutz, supra,* 184 Cal.App.4th at p. 1533.) The Court continued:

  > These deficiencies in the Report are of constitutional proportions. The Report does not satisfy the County's two-part constitutional burden of demonstrating that (1) the parks will confer special benefits on all Wildomar residential properties, and (2) the amount of the assessment on each Wildomar residential parcel is "proportional to, and no greater than," the special benefits conferred on that parcel. (Art. XIII D, § 4, subd. (f).)

  (*Id*. at pp. 1533–1534.)

▶ PRACTICE TIP:

Park assessments have often been litigated as *Beutz* and *Knox v. City of Orland* (1992) 4 Cal.4th 132 [upholding park assessment against Prop. 13 challenge] demonstrate. Accordingly, engineers' reports for park assessments are especially worthy of legal review and should recognize significant general benefit in most cases, as parks are typically widely used by society in general, not just by owners of neighboring property.

31 Helpfully, *Beutz* clarified that the county's capital contribution toward park land acquisition could be treated as payment for the general benefits arising from the parks, allowing all maintenance costs to be funded by assessment. (*Beutz, supra,* 184 Cal.App.4th at pp. 1531–1532.) It nevertheless held the county had not adequately apportioned special benefits among assessed parcels because the flat assessment applied throughout the district and failed to distinguish parcels adjacent to parks from those distant from them.

- ***Golden Hill Neighborhood Assn, Inc. v. City of San Diego***

Golden Hill Neighborhood Assn, Inc. v. City of San Diego (2011) 199 Cal.App.4th 416 (*Golden Hill*), applied *Beutz*'s analysis to a charter city's municipal improvement assessment district to fund maintenance services for street furniture, public spaces, etc. *Golden Hill* reiterated that general and special benefits must be identified and used to apportion the cost of a service or improvement between assessment funding and funding from non-assessment sources. It found the engineer's report had failed to include an adequate apportionment, but instead contained general statements such as:

> The proceeds from the District will be used to fund the installation, maintenance and servicing of improvements within the District that, in the absence of the District, otherwise would not be provided. Properties in the District directly and specifically benefit from the Services, while properties outside the District do not receive the benefit of the Services funded by the District. Therefore, the assessments provide special benefit to property in the various Districts over and above the general benefits conferred by the general facilities of the City, and the Services funded by the District are determined to be exclusively of distinct and special benefit to properties in the District.

(*Id.* at pp. 438–439.) *Golden Hill* found such a general statement does not satisfy Proposition 218 because it "does not establish that the assessments would not also provide general benefit in addition to special benefit." (*Id.* at p. 439.)

Thus, *Bonander* and *Dahms* involved assessment districts "narrowly drawn" to include only properties that "directly benefit" from a service or facility and thus "every parcel within the district receives a shared special benefit." (*Silicon Valley, supra,* 44 Cal.4th at p. 452, fn. 8.) *Beutz* and *Golden Hill*, on the other hand, represent a more typical scenario in which a public improvement, facility, or service benefits more than assessed property and therefore contains a general benefit component to be funded by non-assessment revenues.

It is notable that only *Dahms* upheld a challenged assessment. This poor success rate in the published cases may reflect only that the initial Proposition 218 disputes arose on older engineer's reports not informed by these cases and not reflecting the careful legal review recommended here. It is hoped that further cases will provide more guidance about how defensible assessments are to be crafted. In the meantime, caution is the order of the day, as is legal review of draft engineers' reports.

5. Assessments not imposed on real property

Article XIII C, section 1, subdivision (e)(7), excludes from the Proposition 26's definition of taxes requiring voter approved: "Assessments and property-related fees imposed in accordance with the provisions of article XIII D." However, some assessments, such as those imposed on businesses or other activities rather than on property ownership are not exempt from Proposition 26 under article XIII C, section 1, subdivision (e)(7). (See, e.g., *Evans v. City of San Jose* (1992) 3 Cal. App.4th 728 [assessments on business without respect to land tenure in a business improvement district are not special taxes].)

To escape the requirement for voter approval, such assessments must be justified under another Proposition 26 exception, such as that for a "charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." (Cal. Const., art. XIII C, § 1(e)(1).)

Government Code section 53758 defines "specific benefit" to exclude non-property assessments for this purpose:

> to clarify that business improvement district and tourism marketing district assessments are not taxes within the meaning of Article XIII C of the California Constitution merely because they might generate indirect, secondary benefits for nonpayors, provided that those indirect, secondary benefits occur incidentally and without cost to the payors of the assessment.

(Ch. 552, Stats. 2013, § 1, sub. (c).) The statute defines, "specific benefit" for purposes of Proposition 26 as:

> a benefit that is provided directly to a payor and is not provided to those not charged. A specific benefit is not excluded from classification as a "specific benefit" merely because an indirect benefit to a nonpayor occurs incidentally and without cost to the payor as a consequence of providing the specific benefit to the payor.

III. The Assessing Agency Bears the Burden to Prove Compliance with Proposition 218

A. Generally

Proposition 218 states:

> In any legal action contesting the validity of any assessment, the burden shall be on the agency 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.

(Cal. Const., art. XIII D, § 4, subd. (f).) This reverses the earlier standard governing judicial review of assessments.

Before Proposition 218, courts reviewed the formation of an assessment district and the imposition of an assessment, like other quasi-legislative decisions, under a "deferential abuse of discretion standard." (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 434.) Under that earlier standard:

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

(*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685; see also *Knox v. City of Orland* (1992) 4 Cal.4th 132, 147.)[32] As the California Supreme Court explained in *Silicon Valley* decision, "[t]he drafters of Proposition 218 specifically targeted this deferential standard of review for change." (*Silicon Valley*, *supra*, 44 Cal.4th at p. 444.)

Now, the administrative record must "contain affirmative evidence of the two substantive bases for the assessment"—the existence of a special benefit, and proportionality between the amount of the assessment and the special benefit received by the assessed property. (*Id.* at p. 446, citations and internal quotation omitted; Cal. Const. art. XIII D, § 4, subd. (a).) Moreover, rather than deferring to an assessing agency's findings by reviewing the record for substantial evidence, courts must "exercise their independent judgment in reviewing local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Proposition 218." (*Silicon Valley*, *supra*, 44 Cal.4th at 448.) This more searching review reflects that:

> a local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect[,]" and furthers Proposition 218's purposes of "limit[ing] government's power to exact revenue and … curtail[ing] the deference that had been traditionally accorded legislative enactments on … assessments … ."

(*Id.* at pp. 445, 448–449 [discussing ballot materials regarding Proposition 218].)

32 Even under the traditional standard of review governing quasi-legislative decisions, courts had power to overturn quasi-legislative decisions of agencies that "failed to follow the procedure and give the notices required by law." (See, e.g., *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 657–668, citations and internal quotation omitted.)

B. The Crucial Evidentiary Role of An engineer's report

Article XIII D, section 4, subdivision (b) of the California Constitution requires that "[a]ll assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California."[33]

An engineer's report is the most important element of the record of the formation of an assessment district and the imposition of an assessment. It is the primary document courts review to determine whether the agency separated general from special benefits and assessed solely for special benefits; whether assessments exceed the reasonable cost of the proportional special benefit conferred on parcels; and whether parcels are properly excluded because they receive no special benefit from the service or improvement to be funded by the assessment. Although courts will examine the entire administrative record to determine compliance with Proposition 218, the engineer's report is the heart of the matter. (See, e.g., *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 457 [invalidating assessment where engineer's report "fail[ed] to identify with sufficient specificity the 'permanent public improvement' that the assessment will finance, fail[ed] to estimate or calculate the cost of any such improvement, and fail[ed] to directly connect any proportionate costs of and benefits received from the 'permanent public improvement' to the specific assessed properties"]; *Golden Hill Neighborhood Ass'n, Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 438 [invalidating assessment because "the engineer's report … did not attempt to separate and quantify the general and special benefits that the proposed services and improvements would confer."].)

Most assessment statutes require an engineer's report (perhaps under another name, such as "district management plan") for formation of an assessment district or imposition of an assessment, and some of these statutes contain specific requirements for such reports. For instance, the Landscaping and Lighting Act of 1972 requires an engineer's report to be prepared each fiscal year and to contain, among other things, plans and specifications of existing and proposed improvements; the costs of proposed improvements, the amount of assessment funds carried over from the previous year, and contributions from non-assessment revenues; and a diagram of the district, including any zones within it. (Sts. & Hy. Code, §§ 22565–22574.)

> ▶ **PRACTICE TIP:**
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> It is important that the assessing agency review the authorizing assessment statute or charter city ordinance before finalizing an engineer's report to ensure the report complies with statutory requirements as well as those of Proposition 218.

C. Exclusion of Public Parcels Requires Clear and Convincing Evidence of No Special Benefit

Article XIIID, section 4, subdivision (a) states:

> Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

33 The certification and registration of professional engineers, including civil engineers, is currently governed by the Professional Engineers Act, Business and Professions Code sections 6700 et seq.

1. Burden of proof: clear and convincing evidence

The burden of proof is the obligation of a litigant to "establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code § 115.) Generally, the burden of proof requires proof by a "preponderance of the evidence," which means enough proof to convince the trier of fact "that the existence of a fact is more probable than its nonexistence … ." (*In re Angelica P.* (1981) 28 Cal.3d 908, 918, citations and internal quotation omitted.) In contrast, the "clear and convincing evidence" standard requires a party to produce evidence sufficient to convince the trier of fact there is a "high probability" the fact exists. (*Id.* at 919.)[34]

2. Property owned by state and local governments

Before Proposition 218, the California Supreme Court held:

> While publicly owned and used property is not exempt from special assessments under the Constitution or statutory law of this state, there is an implied exemption of such property from burdens of that nature.

(*City of Inglewood v. Los Angeles County* (1929) 207 Cal. 697, 703–704.) This exemption applied only when "the property of the governmental agency [was] devoted to a public use … ." (*Reclamation District No. 684 v. East Bay Municipal Utility District* (1928) 91 Cal.App. 143, 148.) The stated rationale for this implied exemption was "to prevent one tax-supported entity from siphoning tax money from another such entity; the end result of such a process could be unnecessary administrative costs and no actual gain in tax revenues." (*San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal.3d 154, 161.)

Because the exemption for publicly-owned property was implied, it could be overridden by "positive legislative authority" — i.e., a statutory or constitutional provision authorizing the assessment of public property. (*Inglewood*, *supra*, 207 Cal. at pp. 703–704.) A number of statutes authorize assessment of public property, overriding the implied exemption. For instance, the Municipal Improvement Acts of 1911 and 1913 state that, with certain exceptions, "[a]ll real property acquired by the State of California or any department thereof is property subject to assessment" under the Act. (Sts. & Hy. § 5321; see also, e.g., Water Code, § 51200 [Reclamation District Act].)

Article XIII D, section 4, subdivision (a) apparently revokes the implied exemption, except when clear and convincing evidence shows a public parcel "in fact receive[s] no special benefit." This view is supported by the Legislative Analyst Office's 1996 "Understanding Proposition 218" report, which states "[p]roperties owned by schools and other governmental agencies — previously exempt from some assessment charges — now must pay assessments." (See also *Golden Hill Neighborhood Ass'n, Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 434 n.17, emphasis omitted ["governmental real property is properly assessed for services and improvements that provide special benefit to the property regardless of the property's use or function."].) Some argue that Proposition 218 does not create power to assess government property, but merely prevents an assessing agency from recouping from assessed private property the cost to confer benefit on benefited public property.

On April 7, 2017, the Third District Court of Appeal rejected that argument in *Manteca Unified School District v. Reclamation District No. 17* (Case No. C077906) ___ Cal.App.5th ____. The Court found article XIII D, section 4, subdivision (a)'s provision forbidding the exclusion of public property from assessment absent clear and convincing evidence the property receives no benefit from the assessment district controls over article XIII D, section 1's statement that Proposition 218 confers no additional authority to levy taxes or impose assessments. Thus, the Court found a provision of the Water Code forbidding a reclamation district to assess schools and highways was vitiated by article XIII D, section 4, subdivision (a). It reversed a trial court judgment awarding a refund to the plaintiff school district. Although the case is not final as this Guide goes to press and may be the subject of a petition for review, for now, the law favors the power of

34 Although some older cases describe the clear and convincing evidence standard as requiring evidence that is "'so clear as to leave no substantial doubt'" or "'sufficiently strong as to command the unhesitating assent of every reasonable mind[,]'" others caution that this language overstates the burden, making it more akin to the "beyond a reasonable doubt" standard of criminal law. (See *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) 221 Cal.App.4th 102, 113–114.)

assessing agencies to assess public property benefited by an assessment district. This ruling, of course, is founded only on State law and will not overcome the federal government's immunity from state and local levies. Thus, post offices and other federal assets remain outside the reach of a local government's assessment power.

In *San Marcos Water District*, *supra*, 42 Cal.3d 154, the California Supreme Court held that a public utility's one-time capacity charge to fund capital improvements was substantively an assessment barred by inter-governmental property tax immunity, and that school districts were therefore not required to pay such charges. In response, the Legislature adopted the *San Marcos* legislation, Gov. Code §§ 54999 *et seq.*, authorizing public utilities to impose capital facilities fees, including capacity charges, on other public agencies, subject to limitations. (See Gov. Code, §§ 54999.2, 54999.3, 54999.35.) In the wake of Proposition 218, the limitations on this provision allowing the assessment of capital facilities fees on public schools and state agencies may no longer be valid, and public schools and state agencies may now be required to pay generally-applicable capital facilities fees. Again, the alternative reading maintains the limitation on assessment power, but requires an assessing agency to find other means to fund the portion of an assessment program attributed to immune property.

As a pre-Proposition 218 decision explained:

> Excluding public property simply because it is public property is strictly a policy decision and shifts to the remaining taxpayers within the assessment district the burden of paying the share of taxes which otherwise would have been charged against the city.

(*Todd v. City of Visalia* (1967) 254 Cal.App.2d 679, 687.) Proposition 218, of course, forbids such cost-shifting. (Cal. Const., art. XIII D, § 4, subd. (a).) This concern, however, is absent if a public parcel's share of the assessment is not passed on to assessees. Moreover, this interpretation would also prevent the implied repeal of existing statutory limitations on assessing public property while respecting Proposition 218's requirements.

Some assessment statutes authorizing exemption of public parcels require an assessing agency to include cost of public parcels' unpaid assessments in the amounts charged other parcels. (See Sts. & Hy. Code § 18014 ["If the lots or parcels of land, or any of them, are omitted from the assessment by the resolution, the total cost and expense of all work done shall be assessed on the remaining lots lying within the limits of the assessment district, without regard to the omitted lots or parcels of land."].) These statutes violate Proposition 218's proportionality requirement and are therefore unconstitutional.

Finally, statutes sometimes place significant limits on how assessments may be satisfied. Thus, the Landscape and Lighting Act of 1972 allows the assessment of public property if the "resolution of intention expressly provides" that such property must be assessed, but "the local agency conducting the [assessment] proceedings shall be liable for payment of all amounts so assessed." (Sts. & Hy. Code § 22663; see also *id.* §§ 5303, 10206.) General sovereign immunity rules also limit enforcement of assessments against public property. For instance, liens typically do not attach to public property used for a public purpose. (*Witter v. Mission School District* (1898) 121 Cal. 350, 351–352; but see Gov. Code § 53938.5 [pre-acquisition liens remain on property acquired by public agency].) These provisions and immunity rules do not appear to have been impacted by Proposition 218.

This is but a specific application of our general advice: assessment analysis turns not only on the requirements of Proposition 218, but also on the authorizing statute or charter city ordinance and close review of these requirements is necessary.

3. Assessing federal property

Under the doctrine of intergovernmental tax immunity, first established in *M'Culloch v. State of Maryland* (1819) 17 U.S. 316, the federal government enjoys "absolute … immunity from state taxation[,]" and state taxes may not be enforced against "the United States itself," or against "an agency or instrumentality so closely connected to the [g]overnment that the two cannot be realistically viewed as separate entities … ." (*United States v. New Mexico* (1982) 455 U.S. 720, 734–735; see also *Novato Fire Protection District v. United States* (9th Cir. 1999) 181 F.3d 1135, 1138–1139.) Assessments, which are considered an exercise of the power to tax (see *Community Facilities District No. 88-8 v. Harvill* (1999) 74 Cal. App.4th 876, 881), are subject to this immunity. Moreover, the Act of Congress admitting the State of California into the United States provides that "the people of said State, through their legislature or otherwise … [,] shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States …." (See *Palm Springs Spa, Inc. v. County of Riverside* (1971) 18 Cal.App.3d 372, 376, citing Act for the Admission of the State of California into the Union, 9 U.S. Stat. 452, ch. 50 (Sept. 9, 1850).) Thus, notwithstanding Proposition 218's statement that "[p]arcels within a district that are owned or used by … the United States shall not be exempt from assessment unless the agency can demonstrate … that those … parcels in fact receive no special benefit[,]" neither the State nor any local government can authorize the assessment of federally-owned property.

▶ PRACTICE TIP:

Federal agencies rarely consent to be assessed, but some will contract for services which they value, such as business improvement district-funded supplemental sanitation and security. It doesn't hurt to ask and it may not hurt to engage your Congressional delegation in the discussion.

IV. Managing Existing Assessments

A. Article XIII D, Section 5 Exempts Many Pre-Proposition 218 Assessments

Article XIII D, section 5 set July 1, 1997 as the compliance date for all existing, new, or increased assessments. However, assessments "existing" on November 6, 1996, the effective date of Proposition 218, which fall in one of the four exceptions identified in section 5 are exempt from "the procedures and approval process set forth in section 4." This 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, subd. (c)(2).) Proposition 26 excludes assessments imposed in accordance with article XIII D from its definition of taxes. (Cal. Const. art. XIII C, § 1, subd. (e)(7).) Whether or not grandfathered assessments fall within this exclusion, pre-Proposition 218 assessments are nevertheless excluded from Proposition 26's definition of taxes because Proposition 26 is not retroactive. (*Brookfields Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 CalApp.4th195 [Prop. 26 not retroactive as to local governments].)

Section 5's four "exceptions" are:

1. 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. XIII D, § 5, subd. (a).)
2. 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, subd. (b).)
3. 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. XIII D, § 5, subd. (c).)
4. 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. XIII D, § 5, subd. (d).)

> **▶ PRACTICE TIP:**
>
> Some public lawyers conclude an assessment agreed to by a property owner pursuant to a development agreement satisfies the petition exemption above. Even if it does not, such agreements can be enforced as knowing waivers of constitutional and statutory rights at least as to those in privity of contract with the parties to the agreement.

Howard Jarvis Taxpayers Association v. City of Riverside (1999) 73 Cal.App.4th 679 concluded streetlights are within the definition of "streets" for purposes of the grand-fathering exception of article XIII D, section 5, subdivision (a) for assessments imposed for "street" purposes.

Proposition 218 treats standby charges as assessments. (Cal. Const. art. XIII D § 6, subd. (b)(4); *Keller v. Chowchilla Water District* (2000) 80 Cal.App.4th 1006.) *Keller* found a water standby charge imposed before Proposition 218 exempted by section 5, subdivision (a) as an assessment imposed exclusively to finance the "capital costs or maintenance and operation expenses for … water" and that payments for the purchase of water constituted a "replacement" within the scope of the definition of "maintenance and operation expenses" found in section 2, subdivision (f).

> **▶ PRACTICE TIP:**
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> Post-Proposition 218 many agencies have routinely imposed standby charges, without increase, based on the section 5, subdivision (a) exemption. In 2007, the Legislature amended the Uniform Standby Charge Procedures Act to simplify the annual process. As amended, Government Code section 54984.7 allows an agency to adopt a resolution continuing a standby charge in successive years at the same rate, but new or increased charges must be imposed in accordance with Proposition 218's assessment notice, protest, and hearing procedures specified by section 53753.

B. Changes Trigger Proposition 218's Assessment Approval Requirements

Article XIII D, section 5's exemptions apply only to assessments existing on the effective date of Proposition 218 in 1996. Except for assessments levied to pay debt protected by the contracts clauses of the state and federal Constitutions, increases in any exempt assessment are subject to article XIII D, section 4. In 1999, the Attorney General opined a water district must comply with Proposition 218 when it imposes an increase in its standby charge, even though the increase was specified in an engineer's report adopted before Proposition 218. (82 Ops.Cal.Atty.Gen. 35 (1999).) This opinion is consistent with Government Code section 53753, subdivision (h)(2)(A), a provision of the Proposition 218 Omnibus Implementation Act defining the "increases" that trigger Proposition 218. That section, applicable to taxes and fees, but not assessments provides that an adjustment pursuant to an inflation adjustment formula adopted by the agency before the November 6, 1996 effective date of Proposition 218 is not an "increase" in the tax or fee sufficient to trigger the measure.

> **▶ PRACTICE TIP:**
>
> If additional improvements or new funds are required in an area subject to an exempt assessment, consider leaving the existing district in place and creating a new district overlying the grandfathered district.

C. Adjustments to Assessments Established Pursuant to Proposition 218

In addition to assessments to pay the capital cost of public improvements, article XIII D anticipates assessments to pay "maintenance and operation expenses" of public improvements, and "the cost of property-related services." (Cal. Const., art. XIIID, § 4, subd. (a).) The Constitution defines maintenance and operation expenses as "the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement."(Cal. Const., art. XIII D, § 2, subd. (f). Property-related service means a "public service having a direct relationship to property ownership."

Because section 4's requirements apply to new or increased assessments, it is necessary to determine the meaning of "increased" and whether inflationary or other automatic adjustments to assessments are authorized, particularly for maintenance and service assessment districts. Government Code section 53750, subdivision (h)(1), a provision of the Proposition 218 Omnibus Implementation Act defines "increased" as a "decision by an agency" that does either of the following:

- Increases any applicable rate used to calculate the assessment; or
- Revises the methodology by which the assessment is calculated, if that revision results in an increased amount being levied on any person or parcel.

This definition also applies to taxes and property-related fees and charges. Section 53750, subdivision (h)(2) also provides that a tax, fee, or charge will not be deemed "increased" if a change results from agency action pursuant to an adopted adjustment schedule or formula, but this exclusion does not specifically mention assessments. Assessments imposed to pay debt service may adjust according to a schedule corresponding to the debt service requirements. These adjustments are not "increases" that trigger a requirement for a new assessment proceeding. Despite the confusion caused by the negative implication of section 53750, subdivision (h)(2), most practitioners conclude an assessment formula may include automatic adjustments for inflation provided the adjustment method is clearly identified and justified in the engineer's report and included in the notice and ballot submitted to the property owners for the approval of the assessments.

▶ PRACTICE TIP:

Section 4 limits each property's assessment to proportional special benefit. It also requires, among other things, that the notice to property owners of the protest hearing include the total amount to be assessed to the whole district, the amount to be assessed to the owner's parcel, the duration of the assessments, and the basis upon which the amount of the proposed assessment was calculated. Therefore, an engineer's report should justify any proposed automatic adjustment formula in relationship to the costs and expenses of the district and demonstrate that adjustments will maintain the proportionality of special benefit.

▶ PRACTICE TIP:

Using a CPI or other similar formula may not correlate to actual costs. Consider establishing a fixed schedule of adjustments with flexibility to adjust assessments up to the cap established by the schedule based upon actual costs in a given year. Consider allowing reductions in assessments and carry-over of reserve funds from year-to-year so long as the maximum cumulative adjustment authorized by the approved schedule is not exceeded.

Chapter 4

Fees

Two sections of the Constitution apply to fees and charges: Subdivision (e) of section 1 of article XIII C (added by Proposition 26 and defining "tax") and section 6 of article XIII D (added by Proposition 218). This chapter covers both. Since Proposition 26 applies more broadly to all levies, this chapter discusses it first before turning to the "property-related" fees and charges subject to Proposition 218.

I. Article XIII C and Other Fees and Charges

A. Introduction and Overview

1. Proposition 26: A new definition of "tax"[35]

Proposition 26 added the following definition of "tax" to the Constitution, which expands the types of local government levies that require voter approval under article XIII C.

e. As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

1. A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
2. A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
3. A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
4. A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

35 This section discusses Proposition 62's new definition of "tax" applicable to local government levies, article XIII C, section 1 subdivision (e). The measure's new definition of "tax" applicable to state levies, article XIII A, section 3, subdivision (b) is substantively the same as the first five exemptions quoted above, with some minor language differences that may be meaningful in some cases. When determining the meaning of the first five exceptions it may be useful to consider any differences in the state and local versions of these rules.

5. A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
6. A charge imposed as a condition of property development.
7. Assessments and property-related fees imposed in accordance with the provisions of art. XIIID.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

(Art. XIII C, § 1, subd. (e).)

The earlier requirements of 1978's Proposition 13 (article XIII A, § 4) and 1996's Proposition 218 (article XIII C, § 2, subds. (b) & (d)) that voters approve "general taxes" and "special taxes" did not define "tax." Rather the Constitution and statutes described what type of levy was not a tax. For example, Government Code section 50076 provides that a fee that does not exceed the reasonable cost of providing a service and is not levied for general revenue purposes is not a "tax."36

After November 3, 2010, Proposition 26's effective date, a local government may not enact, increase, or extend any levy, charge, or exaction of any kind without voter approval unless one of seven enumerated exceptions (quoted above) or two implicit exemptions applies.[37]

2. A framework for applying Proposition 26

Questions under Proposition 26 can be analyzed in the following four steps:

1. Was the levy in question authorized before the effective date of Proposition 26 — November 3, 2010 for local government and January 1, 2010 for state government? If so, the levy may be implemented without voter approval until it is "increased" or "extended" within the meaning of Government Code § 53750(h). See below on the non-retroactivity of Proposition 26 as to local governments.
2. As to post-Proposition 26 levies, was the levy "imposed" so as to bring it within the reach of Proposition 26 because some local government force or authority obliges the payor to pay it? If not, Proposition 26 may not apply. See below, as to the meaning of "impose." This is the first of two implied exceptions to Proposition 26.
3. If a post-Proposition 26 levy is "imposed," does an exception apply? See below, discussing the seven express exceptions. Does the levy fund government? If not, it is outside the reach of Proposition 26 under the second implicit exception recognized in *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, in which the court held that a plastic-bag-ban ordinance requiring retailers to impose a $0.10 fee on papers bags was not a tax because retailers retained the fee and it did not fund government.
4. If a post-Proposition 26 fee is "imposed" and does not fall within one of the seven stated exceptions, it is a "tax" requiring voter approval.

36 The Gann Initiative defines "proceeds of taxes" as proceeds from "regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by [the government] in providing the regulation, product or service." (Art. XIII B, § 8, subd. (c).)

37 Most of this Guide is devoted to a discussion of levies included in those exceptions and, therefore, not taxes. Proposition 26 also amended the Constitution to require two-thirds approval of each chamber of the Legislature for any change in state statute that results in any taxpayer paying a higher tax. (Art. XIII A, § 3.) The application of Proposition 26 for state levies is largely beyond the scope of this Guide, although some very minor deviations between the language of the five exemptions for State revenues and the nearly identical exemptions for local revenues are mentioned, as they shed light on the meaning of the exemptions.

3. Is Proposition 26 retroactive?

An initiative measure will not be given retroactive effect unless it has an expressly retroactive provision or "it is very clear from extrinsic sources that the Legislature or the voters must have intended retroactive application." (*See Strauss v. Horton* (2009) 46 Cal. 4th 364, 470 [*citing Evangelatos v. Superior Ct.* (1988) 44 Cal.3d 1188, 1209].) Proposition 26 is expressly retroactive as to state measures adopted between January 1, 2010 and the measure's November 3, 2010 effective date. (*See* art. XIIIA, § 3, subd. (c).) No similar provision exists as to local levies. Thus, in *Brooktrails Township Community Services District v. Board of Supervisors* (2013) 218 Cal.App.4th 195, the Court of Appeal concluded that Proposition 26 does not apply retroactively to local government levies. Thus, even if a fee enacted before November 3, 2010 is not within any of Proposition 26's exceptions, it will remain valid provided that the legislation authorizing it is not amended so as to extend or increase the fee.

As this guide is being written, the courts, in several cases, are considering whether Proposition 26 allows continued implementation of legislation allowing for fees that exceed costs that was adopted prior to Proposition 26 taking effect, for example like a general fund transfer from a municipal utility. Chief among these is *Citizens for Fair REU Rates v. City of Redding*, California Supreme Court Case No. S224779 (fully briefed as of July 21, 2015 and awaiting argument). The effect of Proposition 26 on extensions and increases of pre-Proposition 26 fees is discussed in the next section.

4. Does Proposition 26 apply to pre-Proposition 26 fees or charges when they are increased or extended?

The authors of this guide conclude Proposition 26 does not require voter approval for adjustments of local levies for inflation if the formula or schedule for changes was approved before the measure's effective date.[38] This conclusion is supported by the definition of "increased" in the Proposition 218 Omnibus Implementation Act, which excludes adjustments to taxes that are made in accordance with a schedule of adjustments. (Gov. Code § 53750, subd. (h)(2)(A); see also Gov. Code § 53756 [authorizing Prop. 218 fees to be increased for inflation for up to five years].)

Proposition 26 amends article XIII C, originally adopted by Proposition 218 in 1996 and clarified by the Omnibus Act.[39] The Omnibus Act includes definitions, which apply by their terms to art. XIII C (see Gov. Code § 53750) and the Supreme Court has found that statute to be good authority to construe the measure. (*Greene v. Marin County Flood Control and Water Conservation Dist*. (2010) 49 Cal.4th 277, 290–291.) Thus, absent indicia of contrary intent, the Omnibus Act's definitions, which existed at the time of Proposition 26's enactment, inform the guide's authors interpretation of the provisions of Proposition 26 under the rule of statutory construction identified by its Latin label "*in pari materia*." (*In re Wright's Estate, (1929) 98 Cal.App. 633, 635, ["[I]t is a settled rule that all statutes which relate to the same general subject-matter — briefly called statutes in pari materia — must be read and construed together, as one act, each referring to and supplementing the other, though they were passed at different times"]; see also Kahn v. Kahn (1977) 68 Cal.App.3d 372.)*

Thus, the Omnibus Act's pre-existing definitions govern construction of Proposition 26. Specifically, the Omnibus Act states a tax "is not deemed to be 'increased' by an agency action that" only adjusts "the amount of a tax … in accordance with a schedule of adjustments,[40] including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996." (Gov. Code § 53750, subd. (h)(2)(A).) Thus, increasing a tax (or a fee

38 The authors of this Guide use "adjustment" to include any method of increasing (or decreasing) the amount of a levy approved before Proposition 26's effective date. It encompasses, but is not limited to, automatic changes to account for inflation, a prescribed schedule of increases, adjustments under a maximum approved amount, and formulas to account for changes in population.

39 Since the 1996 adoption of Proposition 218, courts have provided guidance on the application of Articles XIII C and XIII D and this case law informs interpretation of Proposition 26. (*See Fields v. Eu*, (1976) 18 Cal.3d 322 ("It is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the constitution bearing on the same subject. The goal, of course is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole.").)

40 "Schedule of adjustments" is a broad phrase and readily encompasses a range of changes, including a series of increasing, specified amounts and an adjustment for inflation at regular intervals, such as at the beginning of each fiscal or calendar year.

made a tax by Proposition 26) according to a "schedule of adjustments" included in the levy before the effective date of Proposition 26 should not constitute an increase requiring voter approval.[41] The strength of this argument is uncertain due to the phrase "including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996." The mention of this specific date could limit the validity of existing inflationary adjustments to those in effect before the November 6, 1996 effective date of Proposition 218. On the other hand, this phrase begins with "including" and this illustrates, but does not limit the phrase which precedes it, suggesting a broader interpretation is appropriate.

The authors of this Guide conclude the better reading disfavors any retroactive application of either Proposition 218 or Proposition 26 as to such earlier-authorized adjustment mechanisms.

Further, the last clause of the definition — "including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996" — is an example of the types of permitted "schedules of adjustments," but does not limit the definition. That interpretation is consistent with the grammatical construction of the sentence.

5. What does "levy, charge or exaction of any kind" mean?

Proposition 26 defines any "levy, charge or exaction of any kind" as a tax unless it meets one of the seven exceptions. There are no meaningful distinctions among the terms "levy, charge or exaction of any kind." The first six of the seven exceptions that follow this introductory language use only the word "charge" (although the fifth refers to a "fine, penalty or other charge") and the seventh exception uses terms that do not appear in the introductory phrase: "assessments and property-related fees." Article XIIIC does not define these terms, while article XIIID, adopted along with art. XIIIC by Proposition 218 in 1996, defines "fee or charge" but does not define "levy" or "exaction." The Proposition 218 Omnibus Implementation Act is similarly silent as the meaning of these terms. (See Gov. Code § 53750 [definitions section of Omnibus Act].)

The authors of this Guide conclude the phrase "levy, charge or exaction of any kind" is merely intended to expansively include all revenue sources "imposed by a local government" (Cal. Const. art. XIIIC, § 1(e)) or the state (art. XIIIA, § 3(b)). In this regard, Proposition 26 is akin to Proposition 218, which uses the phrase "fee or charge" without intending any distinction between the two terms. As the California Supreme Court explained:

> Because article XIII D provides a single definition that includes both 'fee' and 'charge,' those terms appear to be synonymous in both article XIII D and article XIII C. This is an exception to the normal rule of construction that each word in a constitutional or statutory provision is assumed to have independent significance. (citation.) We use the terms interchangeably in this opinion.

(*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214, fn. 4.)

6. How do Proposition 26's provisions regarding state revenue measures affect interpretation of its provisions regarding local government revenues?

Three parts of Proposition 26 are relevant to this question:

- The amendment of Article XIIIA, § 3(a) to state that "[a]ny change in state statute which results in any taxpayer paying a higher tax" requires a two-thirds vote of each house of the Legislature. [Former law: "Any changes in state taxes enacted for the purpose of increasing revenues collected pursuant thereto" required such a two-thirds vote].
- Addition of § 3(b) to Article XIIIA to define state "tax."
- Addition of § 1(e) to Article XIIIC to define local government "tax."

41 The Omnibus Act's definition of "increase" is limited to "a tax, assessment, or property-related fee or charge." (Gov. Code § 53750, subd. (h)(1).) Thus, it would not apply to a non-property-related "fee" or "charge." This is of little practical importance, however, since a fee or charge that fits within one of the exemptions is not a tax and a fee that does not fit within one of the exemptions is a tax. Therefore, the fundamental question is whether a tax that includes a schedule of increases is "increased."

The second and third amendments are identical with the following exceptions:

- Article XIIIA, § 3(b)(3) compared to Article XIIIC, § 1(e)(3).

  Article XIIIA, § 3(b)(3) states an exception to the definition of state tax for:

A charge imposed for the reasonable regulatory costs to the State incident to issuing license and permits, performing investigations, inspections and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof. (Emphasis added.)

Article XIIIC, § 1(e)(3) uses this same language for local fees, except that "incident to" is replaced with "for."

These provisions are the exceptions for "reasonable regulatory costs." For purposes of Proposition 218, a property-related fee is one imposed as "an incident of property ownership" or for a "property-related service." (Art. XIIID, § 2(e).) The California Supreme Court has interpreted "an incident of" to mean "by virtue of." (*Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.)

Under this construction, the exception for state charges in this category could be read more broadly than the exception for local charges. The use of the word "for" implies a more direct connection between the charge and the activity: issuing licenses and permits, etc.

However, the balance of the text and legislative history of Proposition 26 indicates no intent to distinguish state and local government regulatory fees. Consequently, the courts are likely to conclude that the difference in language, "incident to" and "for" is immaterial.

- Article XIIIA, § 3(b)(4) compared to Article XIIIC, § 1(e)(4).

  Article XIIIA, § 3(b)(4) excludes from the definition of state taxes:

> A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI [i.e., the vehicle license fee]. (Emphasis added.)
>
> Article XIII C, § 1(e)(4) uses this same language, except that the trailing phrase emphasized above is omitted. Vehicle license fees (VLF) are a tax paid upon vehicle registration. VLF, although labeled a "fee," is a tax and is not a charge imposed for entrance to or use of state property, nor for the purchase, rental or lease of state property. This clause appears to reinforce this understanding and forestalls an argument the VLF is a charge for use of state highways.

- Article XIIIC, §§ 1(e)(6) and (7).

  Article XIII C, section 1, subdivisions (e)(6) and (7) state exceptions to Proposition 26's definition of "tax" applicable to local government but not the State:

  6. A charge imposed as a condition of property development.
  7. Assessments and property-related fees imposed in accordance with the provisions of Article XIII D [added to the Constitution by Proposition 218].

  These exceptions apply only to local governments because there are no similar charges imposed by the State — the State does not directly engage in land use regulation and Proposition 218 does not apply to the State.

B. Is the Fee "Imposed" by a Local Government?

By its terms, Proposition 26 applies only to fees that are "imposed" by a government. Fees imposed by private parties (like telephone charges and many solid waste collection fees) are not subject to Proposition 26. Moreover, local governments collect many fees they do not "impose" as where a local government collects a fee imposed by the state or a fee is paid voluntarily. Courts can be expected to rely, as they have in similar contexts, on the dictionary meaning of "impose," which is to establish or apply by authority or force. (*Ponderosa Homes, Inc. v. City of San Ramon (1994) 23 Cal.App.4th 1761, 1770 [citing Webster's Third Internat. Dict. (1970) to construe "impose" as used in the Mitigation Fee Act.]; City of Madera v. Black (1919) 181 Cal. 306, 314–315 [sewer rates are "imposed" because adopted without consent of payors and payment is compulsory]; Citizen Ass'n of Sunset Beach v. Orange County Local Agency Formation Com. (2012) 209 Cal.App.4th 1182, 1194, fn. 15 [citing Black's Law Dictionary and Oxford English Dictionary to construe Prop. 218].)* In *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 131, 1326–1327, for instance, the court noted that in ordinary usage, "tax" refers to a "compulsory payment" to a government. The case involved a challenge to a county ordinance barring plastic bags at retail and requiring retailers to charge $0.10 for paper bags. The Court concluded the ten-cent fee was not subject to Proposition 26 because it was not paid to the government, and therefore was not a "levy, charge, or exaction of any kind imposed by a local government." (*Id*., at p. 1329.)

Determining whether a charge is "imposed" will likely turn not only on the particular nature of the service, but also on such factors as:

- Whether the charge is in connection with a service that the agency is statutorily obligated to provide;
- Whether the charge is in connection with a service for which the local government is the exclusive provider within its service territory;
- Whether the charge is in connection with a service, product, or opportunity the local government provides in competition with others, particularly private enterprises; or
- Whether the charge is established by arm's-length, voluntary negotiations.

Thus, there likely is a class of payments to local governments that are not "imposed" and therefore are not taxes, despite not fitting within one of the seven enumerated exceptions. The following briefly discusses some potential candidates for inclusion in this class:

- **Franchise fees.** A franchise fee paid by a franchisee to a franchisor pursuant to an arm's length franchise agreement negotiated between a local government and a franchisee. Such fees may lack the coercive element connoted by Proposition 26's use of the term "impose."
- **Cable television public access fees.** Before 2007, cities and counties in California held the authority to award cable franchises. Local governments typically negotiated the terms of each franchise, including the required financial support for public access programming, with the prospective cable operator. In 2006, the Legislature passed the Digital Infrastructure and Video Competition Act ("DIVCA") to transfer franchising authority from local agencies to the state. DIVCA requires a franchise applicant to affirm it will pay a public access fee to local agencies and, in turn, authorizes local agencies to establish such fees by ordinance. The Attorney General concluded that, when a local government establishes such a fee, it does not "impose" the fee (for purposes of Proposition 26). Rather, the local government is making explicit the cable franchisee's obligation under DIVCA to fund public access programming. Put differently, the local government is simply enforcing a franchise obligation imposed by state — not local — law and therefore does not "impose" the fee. (99 Ops.Cal. Atty.Gen. 1 (2016).)
- **Wholesale electricity charges.** Some local governments generate surplus electricity in the operation of water or electric utilities. Traditionally, they have sold surplus electricity to other retail electric providers at whatever price the market will bear. (E.g., *City of Oakland v. Burns* (1956) 46 Cal.2d 401, 407 ["When a governmental entity is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person."].) In most cases, such transactions will lack the coercive element connoted by "impose." They are typically provided in competition with the same or similar services provided by others, and the buyers have meaningful choice.

In some cases, such sales benefit utility ratepayers, a class Proposition 218 and Proposition 26 are intended to protect. For instance, a water purveyor might have electricity to sell because it operates a reservoir suitable for a hydroelectric generation. Any revenues generated from electricity sales can be used to offset costs of the water utility. If Proposition 26 were interpreted to apply to wholesale charges in such contexts, it would have the perverse result of increasing fees and charges by preventing such a cost offset, undermining Proposition 26's stated intent.

- **Wholesale water charges.** Wholesale water sales can be similar to electricity wholesale sales where buyers have market power and alternative sources of supply. However, courts are likely to carefully evaluate whether the particular transaction has characteristics reflective of coercion, such as whether the buyer has meaningful alternatives, whether the seller offers the supply pursuant to a statutory purpose for which it is organized, or whether the seller is the exclusive provider of wholesale water in a relevant area. *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal. App.4th 1430 applied Proposition 26 to invalidate a wholesale water charge as lacking the proportionality required by article XIII C, section 1, subdivision (e)(2), although it appears that the wholesaler conceded application of Proposition 26.
- **Recycled water charges.** Wastewater treatment can generate recycled water sold for landscape and agricultural irrigation. In some cases, the costs associated with recycled water are blended into water rates, either because the recycled water is used for groundwater recharge or because it offsets more costly potable water usage. (*Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1502 [finding no Prop. 218 violation in this practice].) In other cases, however, recycled water is provided to a marketplace of customers that have other options for irrigation, such as potable water or groundwater. In those circumstances, a recycled water purveyor may be able to persuasively argue its lack of monopoly power, the existence of other options, the voluntariness of the transactions, and the fact that recycled water sales benefit sewer rate payers (much like wholesale electricity sales benefit ratepayers) makes the recycled water rates lack the coercive element necessary for the rates to be "imposed" so as to trigger Proposition 26.

C. Exceptions No. 1 & 2: Fees and Charges for Benefits Conferred and Privileges Granted, Services and Products Provided

Exception No. 1 from the Constitution's definition of "tax" is for:

> A charge imposed for a **specific benefit conferred or privilege granted** directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege. (Emphasis added).

Exception No. 2 from the Constitution's definition of "tax" is for:

> A charge imposed for a **specific government service or product provided** directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or the product. (Emphasis added).

Under both exceptions, the specific benefit conferred, privilege granted, or government service or product provided must:

- Be granted or provided **directly** to the payor;
- Not be provided to those not charged (i.e., no "free-riders"); and
- Not exceed the **reasonable costs** of providing the benefit, privilege, service or product.[42]

Therefore, although it is difficult to distinguish between a benefit conferred, privilege granted, and a service or product provided, there is no practical consequence of doing so as the Constitutional test is the same under the first two exceptions.

42 This limit applies in toto to the service fees collected from all customers. As to apportionment of fees among customers, the final, unnumbered paragraph of article XIII C, section 1, subdivision (e) controls. It is discussed further below.

1. What is a "specific benefit?"

The first exception requires that the fee be imposed for a "specific benefit." A "specific benefit" means a benefit that is provided directly to a payor and is not provided to those not charged. A specific benefit is not excluded from classification as a "specific benefit" merely because an indirect benefit to a non-payor occurs incidentally and without cost to the payor as a consequence of providing the specific benefit to the payor." (Gov. Code 53758(a).) Government Code section 53758, subdivision (a) recognizes that providing an indirect benefit to a non-payor does not convert a fee into a tax. For example, the existence of potable water service obviously contributes to public health for all who visit the place serviced, "benefiting" them. Yet, it is clear that Proposition 26 is not intended to make water fees taxes. "Specific benefit" does not mean "sole benefit." It does seem clear that "specific benefit" under article XIII C, section 1, subdivision (e)(1) is not the "special benefit" required of an assessment under Proposition 218's article XIII D, section 4. First, different language is used ("specific" vs. "special"). Second, Proposition 26 exempts assessments imposed under Proposition 218. (Cal. Const., art. XIII C, 1, subd. (e)(7).) This suggests these constitutional provisions address different matters.

2. What is a "specific government service?"

The second exception applies to a fee imposed for a "specific government service." A "specific government service" means a service that is provided by a local government directly to the payor and is not provided to those not charged. A specific government service is not excluded from classification as a "specific government service" merely because an indirect benefit to a nonpayor occurs incidentally and without cost to the payor as a consequence of providing the specific government service to the payor. "A 'specific government service' may include, but is not limited to, maintenance, landscaping, marketing, events, and promotions." (Gov. Code § 53758(b).)

Government Code § 53758(b) was enacted to recognize that providing a non payor of a government service with an indirect benefit does not convert a fee into a tax.

The most significant impact of the "specific service" requirement may be to require government to articulate the facilities or services that the fee will fund. Only if the government states what a fee is to fund can it demonstrate the fee does not do more than fund those activities, as Proposition 26 requires.

3. What does "directly to the payor" mean?

The first two exceptions require a charge to be imposed for a benefit, privilege, service, or product granted or provided "directly to the payor" and not "to those not charged." The phrase "directly to the payor" did not appear in revenue law before Proposition 26. The following sources are helpful in attempting a definition of this new phrase:

- A charge that is paid by a "discrete group that receives a benefit or a service or a permanent public improvement which inures to the benefit of that discrete group" is not a tax. The public may be incidentally benefitted, but the discrete group is specifically benefitted by the expenditure of the revenues from the fees. (*Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 738; see also Gov. Code § 53758 [defining "specific benefit" for purposes of Prop. 26].)
- User fees are "those which are charged only to the person actually using the service … . [A] user fee is a payment for a specific commodity purchased." (*Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 597.)
- The Legislative Analyst's Impartial Analysis of Proposition 26 states: "The change in the definition of taxes would not affect most user fees…. This is because these fees and charges generally comply with Proposition 26's requirements already," because they are paid by users of a service or a program that does not benefit the public broadly. (2010 Ballot Pamphlet at p. 58.)
- By contrast, a charge that does not inure to the benefit of any particular group, but benefits the public as a whole is a tax. (*Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 696 [a charge based not on actual or estimated use of emergency services, but on presence of a telephone line which could be used to

call the City's emergency communication system, is a tax]; see also *Newhall County Water District v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430.)

- A water agency violated the "directly to the payor" requirement when it included in its charge to its retail water purveyor customers a cost component that reflected customers' use of groundwater because the agency did not provide groundwater to those customers. (*Newhall County Water District v. Castaic Lake Water Agency (2016) 243 Cal.App.4th 1430.)*

From this summary, the authors of this Guide conclude "directly to the payor" means a specific and identifiable benefit, privilege, service, or product provided to a person who is charged, which has only incidental benefit to the public. (See also *Schmeer v. County of Los Angeles (2013) 213 Cal.App.4th 1310, 1327 fn. 5 [Prop. 26 concerned with funding services provided "directly" by government, not via its regulation of private retailers].)*

4. What are the "reasonable costs?"

The phrase "does not exceed the reasonable costs" reflects the apparent intention to maintain the Proposition 13 standard for service and regulatory fees established before Proposition 26 was drafted. The language is identical to statutory language distinguishing fees from the special taxes for which Proposition 13 requires two-thirds voter approval[43] and from the burden of proof provision of the unnumbered, final paragraph of article XIII C, section 1, subdivision (e) (discussed below). That provision imposes on local government the burden to prove, among other things, "that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." This language restates law first articulated in *Beaumont Investors v. Beaumont Cherry Valley Water District* (1985) 165 Cal.App.3d 227 [water fee must be shown not to exceed service cost, else it is a special tax requiring voter approval under Prop. 13], and cited in later "special tax" cases including *Sinclair Paint*. (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 878; *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146.)[44] In addition to the manner in which costs are allocated, the calculation of "reasonable costs" requires attention to the definition of the "product" or "service" which is provided. The definition of the "product" or "service" to be fee-funded is a legislative determination to be reviewed by judges only for reasonableness. Based upon this principle, the California Supreme Court allowed the State Water Resources Control Board to account for its eight water-quality programs collectively. See, *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal. 5th 1032.

Two courts have noted the language of the final paragraph of Article XIIIC, section 1, subdivision (e) tracks the language of Proposition 13 "special tax" cases "nearly verbatim." (*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996; *Southern California Edison Company v. Public Utilities Com.* (2014) 272 Cal.App.4th 172, 199.) They therefore freely cite pre-Proposition 26 "reasonable costs" cases to construe the more recent measure.

Numerous cases consider assertions that the state's and local government's fees are taxes. Summarizing them, the California Supreme Court noted that regulatory fees "need not be finely calibrated to the precise benefit each individual fee payor might derive." (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438). Proportionality is "measured collectively, not individually, "considering all ratepayers." (*Ibid; 616 Croft Ave, LLC v. City of West Hollywood* (2016) 3 Cal. App.5th 621). Proposition 26's cost-of-service rule is applied "flexibly," and does not require "a precise cost-fee ratio" because "regulatory fees…are often not easily correlated to a specific ascertainable cost." (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1052, citations omitted). Thus a fee is not a tax merely because some ratepayers pay a disproportionate amount. (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438; *616 Croft Ave, LLC v. City of West Hollywood* (2016) 3 Cal. App.5th 621).

43 Gov. Code § 50076 added in 1979 stating that fees are not special taxes if they do "not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged."

44 As *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322, Proposition 26 "was largely a response to *Sinclair Paint*."

Nonetheless, *California Farm Bureau* concluded by directing the trial court to determine the costs of the regulatory activity "keeping in mind that a government agency should be accorded some flexibility in calculating the amount and distribution of a regulatory fee" while ultimately determining whether the fee program "provide(s) a fair, reasonable, and substantially proportionate assessment of all costs related to the regulation of affected payors." (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 442).

Proposition 26 cases have generally upheld fees against this standard. A fee for residential rental unit inspections of $45 per property plus $20 per unit was upheld based on evidence suggesting the revenue generated would be equal to or less than that necessary to provide the inspections, and based on the reasonable relationship between the fee and the work required. (See *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 997 [noting that larger fees are imposed on those requiring more work].) Similarly, a California Public Utilities Commission surcharge collected from electric utility rate payers to fund public goods programs was upheld. (*Southern California Edison Company v. Public Utilities Com.* (2014) 272 Cal.App.4th 172.)

However, one recent case indicates that more precision is required when the payor group is smaller. In *Newhall County Water District v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, the court found that, for a wholesale water agency with only four customers,

> the only rational method of evaluating their burdens on, or benefits received from, the governmental activity, is individually, payor by payor. And that is particularly appropriate considering the nature of the Proposition 26 exemption in question: charges for a product or service that is (and is required to be) provided 'directly to the payor.' Under these circumstances, allocation of costs 'collectively,' when the product is provided directly to each of the four payors, cannot be, and is not, a "fair or reasonable" allocation method." (Art. XIII C, § 1, subd. (e), final par.)."[45]

(*Id.* at pp. 1443-44.)

▶ PRACTICE TIP:

The apportionment language of Proposition 26's article XIII C, section 1, subdivision (e) [final par.] ("fair or reasonable relationship") differs from the apportionment language of Proposition 218's article XIII D, section 6, subdivision (b)(3) ("proportional cost of the service attributable to the parcel"). Therefore, Proposition 218 authorities should be used cautiously as analogous authority for these issues under Proposition 26, and vice versa. The restrictions on property-related fees in Proposition 218 are different from those imposed on regulatory fees by Proposition 26. (*California Building Industry Association, v. State Water Resources Control Board* (2018) 4 Cal. 5th 1032, 1053). This point is discussed further below.

5. Specific applications

a. Gas and electric utility rates

Gas and electricity service charges are exempt from Proposition 218 (Article XIII D, § 3(b)), but not Proposition 26.

Proposition 218 prevents local government providers of water, sewer, and refuse collection services from transferring the proceeds of rates for those services to the local government's general fund without demonstrating that doing so is justified by costs borne by the general fund associated with the utility. (*Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914 [charter-authorized payment in lieu of taxes by water, sewer and trash utilities violated

45 The court of appeal distinguishes *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, p. 997, which had cited *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, p. 438. In both those cases, sufficiently large numbers of payors were involved to justify the administrative convenience of class-by-class (rather than customer-by-customer) rate-making.

Prop. 218 unless cost justified]; *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.3d 637 [same as to franchise fee charged to water, sewer and trash utilities].)

Accordingly, gas and electric service fees imposed by public utilities constitute taxes under Proposition 26 unless they:

- Are imposed pursuant to legislation which predates its adoption in 2010; or
- Comply with one of its exceptions, such as the exception of § 1(e)(2) for "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product."

Transferring funds from a gas or electric utility to a local government's general fund without a cost justification is evidence the fee exceeds the reasonable cost of providing the service and therefore constitutes a tax under Proposition 26. Accordingly, agencies that benefit from transfers from gas and electric utilities must rely on the fact that Proposition 26 is not retroactive, as discussed above, or demonstrate that those transfers are justified by costs borne by the general fund for the benefit of the utility.

These issues are before the California Supreme Court as this Guide is written in *Citizens for Fair REU Rates, et al. v. City of Redding, et al.,* Supreme Court Case No. S224779, reviewing the Court of Appeal decision previously published at 233 Cal. App.4th 402. The questions presented are:

- Is a payment in lieu of taxes (PILOT) transferred from the city utility to the city general fund a "tax" under Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (1)(e))?
- Does the exception for "reasonable costs to the local government of providing the service or product" apply to the PILOT (Cal. Const., art. XIII C, § 1, subd. (1)(e)(2))?
- Does the PILOT predate Proposition 26?

In addition to the arguments raised in the *Redding* litigation, some local agencies may defend their General Fund transfers because they were approved by the voters. Many city charters authorize transfers to general funds on various theories (in-lieu of property taxes, in-lieu of franchises, return on investment, profit). Since the charter provision requires voter approval, the city may argue that the levy complies with Proposition 26 because it received voter approval.

To prevail on such an argument, a local government would have to distinguish *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, or persuade an appellate court to decline to follow it.

b. Tipping Fees at local government-owned landfills

A tipping fee (sometimes referred to as a gate fee) is a charge levied upon waste received at a landfill or transfer station. In 1988, the Legislature adopted the Waste Management Act to reduce solid waste. Local agencies responsible for waste disposal in their boundaries were obliged to enact comprehensive waste management plans to eventually divert half of their trash from landfills to preserve landfill capacity in California. (*City of Alhambra v. P.J.B. Disposal Co. (1998) 61 Cal. App.4th 136, 138; Valley Vista Services, Inc. v. City of Monterey Park (2004) 118 Cal.App.4th 881; Public Resources Code § 40000(e).)*[46] The act allows local agencies to determine aspects of solid waste handling of local concern, including charges and fees. (Public Resources Code § 40059.) Local agencies typically charge "tipping fees" to fund waste diversion programs and other service costs.

For example, Alameda County adopted a Recycling Plan that included:

- A countywide source reduction program to minimize the generation of refuse, including residential and commercial recycling programs; and
- Recycled product market development and purchase preference programs.

(*City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.)

46 Other reasons cited for the reduction, recycling, or reuse requirement were conservation of water, energy, and other natural resources.

A $6 per ton "tipping fee" at county landfills funded the plan. The City of Dublin challenged the fee as a special tax. In upholding the fee, the court analyzed whether the charges "bear a fair or reasonable relationship to the payor's burdens on or benefits from the activity at issue."[47] The court noted the plan's goal was:

> reduction of the refuse landfilled 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 surcharge is directly related to the burdens imposed by the payors on the landfills; it is imposed on waste haulers based on tonnage, and will be passed on to those who generate the waste in the form of increased garbage collection rates. Thus the surcharge is 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.

(*City of Dublin v. County of Alameda, supra*, 14 Cal.App.4th at p. 285 (citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District (1988) 203 Cal.App.3d 1132.)*

The authors of this Guide conclude that the tipping fee described in *City of Dublin* is outside Proposition 26's definition of "tax" for three reasons:

1. Article XIII C, section 1, subdivision (e)(1) excepts "a charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." Lawfully operated landfill services provide a specific benefit to the payor of the tipping fee that is not provided to those not charged. A local government defending a tipping fee must demonstrate the amount is no more than necessary to cover the reasonable costs of operating the landfill lawfully.
2. Art. XIII C, section 1, subdivision (e)(4) excepts a charge imposed for entrance to or use of local government property. To the extent that the landfill is owned and operated by the local government, the "tipping fee" is a charge imposed to enter and use the property.
3. To the extent that a "tipping fee" is passed on to the customer who places refuse at the curb, the "tipping fee" is part of the refuse collection rate. To the extent they are imposed by a public agency, refuse collection rates may be property-related fees subject to Proposition 218 and would thus fall under the exception in Article XIIIC, section 1, subdivision (e)(7).[48]

c. Non-property-based business improvement districts

State law authorizes two kinds of business improvement district (BID) assessments — assessments on real property and assessments on businesses without respect to land ownership. Real property assessments must comply with Proposition 218 and, therefore, fall under the Proposition 26 exception in Article XIII C, section 1, subdivision (e)(7).

BID assessments against businesses, by contrast, are not levies or charges "upon real property … for a special benefit conferred upon the real property." (Cal. Const. art. XIII D, § 2, subd. (b)). Consequently, they are not subject to Proposition 218. (*Howard Jarvis Taxpayers Ass'n v. City of San Diego* (1999) 72 Cal.App.4th 230.)

Assessments against businesses are most often levied under the Parking & Business Improvement Area Law of 1989 (Streets & Highways Code § 36500 *et seq.*) ("the 1989 Act") or comparable charter city ordinances. These assessments fund a variety of services, including security programs, street and sidewalk cleaning, installation and maintenance of landscaping, banners and street furniture, street fairs, concerts and events, and advertising and marketing services. Under the 1989 Act, assessments must be levied on the basis of the estimated benefit to the businesses and property in a district. (Streets & Highways Code § 36536.)

47 Proposition 26 adopts this standard of review.

48 See discussion in Part II.A.6 of this Guide below regarding whether refuse collection rates are property-related fees subject to Proposition 218.

Under article XIII C, section 1, subdivision (e)(1), a BID assessment is not a tax if it is "a charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit. …"

Non-property assessments against business are based on the benefit to those businesses of activities funded by the assessments. Therefore, at least some assessments against businesses could fall within this exception. But the exception applies only if the "specific benefit" is conferred "directly" to the business being assessed and the benefit is "not provided to those not charged."

It is not clear how these requirements will be applied to an assessment on a business. An argument can be made that security patrols in the vicinity of assessed businesses are provided directly to the businesses and are only provided to those businesses being assessed. At least one appellate court accepted this reasoning in the property assessment context. (*Dahms v. Downtown Pomona Property Ass'n* (2009) 174 Cal.App.4th 708, 722.) That case did not apply Proposition 26's "specific benefit" standard, but rather applied Proposition 218's requirement that a "special benefit" must "affect the assessed property in a way that is particular and distinct from [its] effect on other parcels and that real property in general and the public at large do not share." (*Id.* (internal quotation omitted).)

A contrary argument can also be made that a service or program, such as street furniture or concerts, provided to an area, rather than directly to a business, is also "provided" to the general public. Therefore, the service or program is "provided" to those not charged and the assessment falls outside the protection of Proposition 26's first exception.

Another area of uncertainty concerns hotel and tourism BID assessments. These levy assessments against hotels (usually based on gross revenue or on occupied room nights) to fund marketing and similar services. Arguably, the benefits of marketing a community may extend beyond those hotels assessed, and therefore, those businesses not assessed may realize a benefit from the services funded. A "specific benefit" is not excluded from classification as such merely because an indirect benefit to a nonpayor occurs "incidentally and without cost to the payor as a consequence of providing the specific benefit to the payor." (Gov. Code § 53758(a).)

An argument might also be made that business assessments actually are service charges despite being cast in BID law, and in many local ordinances, as benefit assessments. Under this argument, the applicable exception would be that of article XIII C, section 1, subdivision (e)(2), which excepts charges "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product."

This argument could deflect a claim that while BID services are provided "directly" to business, they "benefit" the public. But it would also invite a new question — whether the services "are provided those not charged."

The Property and Business Improvement District Act of 1994 (Streets and Highways Code § 36600 *et seq.*) also permits business-based assessments, but is more commonly used for property-based assessments. Nevertheless, the 1994 Act was amended in 2014 to provide:

- Assessments for the purpose of conferring special benefit upon real property or businesses in a business district are not taxes even if property or persons not assessed receive incidental or collateral effects that benefit them (Sts. & Hy. Code § 36601(d)); and
- Activities undertaken for the purpose of conferring special benefits inherently produce incidental or collateral effects that should not be considered when determining whether only "specific benefits" are provided to the payor (Sts. & Hy. Code § 36601(h)(2).).

Business assessments have been litigated under Proposition 26 but, to date, no published appellate ruling has reached the merits of the issue. (*Inland Oversight Committee v. City of Ontario* (2015) 240 Cal.App.4th 1140, 1145 & fn. 4 [trial court rejected claim for lack of standing; Court of Appeal dismissed for untimely notice of appeal but noted in footnote it agreed with the trial court's standing ruling].)

d. Municipal bus, trolley, or other transportation services

There may be a reasonable argument that bus, trolley, or similar transportation fares are not "imposed" and thus outside the scope of Proposition 26 given there are competing sources of transportation service. However, in many jurisdictions, transportation services that meaningfully compete with public transit do not exist. Nevertheless, the authors of this Guide conclude such charges are not "imposed" as no one is compelled to use transit and, if they were, these charges are also exempt under article XIII C, section 1, subdivision (e)(2), which is subject to the reasonable cost-of-service test. It is also possible to argue transit charges are exempt under article XIII C, section 1, subdivision (e)(4) as charges imposed for use of government property (which exemption is not subject to a cost-of-service test). However, it may be difficult to persuasively argue a fee payor is meaningfully "using" property when they have no control over it. It seems more plausible that they are receiving a service: the distinction here is analogous to that between renting a car (use of property) and hailing a cab (a service). These issues may require further clarification by the courts. In any event, most transit fees are very heavily subsidized, making it unlikely that a plausible Proposition 26 challenge to such fees can be made.

e. Park and recreation service fees

For purposes of Proposition 26, park and recreation fees can be divided into two general categories — those best analyzed under article XIII C, section 1, subdivision (e)(2)'s exception for service fees, and those best analyzed under its section 1, subdivision (e)(4) exception for fees for the use of government property.

The service fee category includes those for lessons, transportation, child care, etc. This exception limits such fees to "the reasonable costs to the local government of providing the service" if they are "imposed" and fund government, which may rarely be the case. Most such fees are voluntary and some fund private concessionaires, not government.

The use-of-property category includes fees imposed for admission to parks, rental of government tangible property (like bikes, boats, and recreation equipment) and real property (like sport fields and meeting rooms) are best analyzed under § 1(e)(4).

Are charges for services offered in connection with recreational, cultural, educational, or other similar programs subject to Proposition 26?

Many local governments own and operate a wide variety of park, recreation, and cultural facilities. These may include tennis courts, golf courses, fitness centers, swimming pools, museums, interpretive centers, and other similar civic facilities. Agencies frequently provide classes, lessons, and other recreational, cultural, and educational programs at those facilities — often in competition with private enterprise. Additionally, agencies may sponsor running, cycling, or similar athletic events for which a participation fee is charged. Although admission charges are covered by article XIIIC, section 1, subdivision (e)(4)'s exception for charges "imposed for entrance to or use of local government property," there is a question whether charges for lessons, classes, or programs fall within the exception as a "use" of property, or whether the charges are "imposed" at all and, if not, excluded from the reach of Proposition 26's definition of "tax" for that reason.

There is a reasonable argument that charges for a lesson, class, program, and other participation are not "imposed" within the meaning of Proposition 26 because the participants have meaningful private market options and participation is meaningfully voluntary.

If such charges are "imposed" (which may rarely if ever be the case) and fund government (as *Schmeer v. County of Los Angeles* requires to trigger Proposition 26), Proposition 26's exceptions for conferring a benefit or privilege (article XIII C, § 1, subd. (e)(1)) or providing a service or product (article XIII C, § 1, subd. (e)(2)) would appear to apply as long as the cost-of-service test is met.

f. Booking fees: city and special district arrestees into county jails

A county may impose a fee upon a city, special district, school district, community college district, college, or university for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee of the entity paying the fee. (Gov. Code § 29550.) Such a fee may not exceed the actual administrative costs incurred in booking or otherwise processing arrested persons. (*Id*., subd. (a)(1).)

Booking fees may be exempt from the definition of "tax" under article XIII C, section 1, subdivision (e)(2) as imposed for a "specific government service" (booking or other processing of persons who have been arrested) if they do not exceed the actual administrative costs incurred in booking or otherwise processing arrestees. However, booking fees might not fall into the exception since they are charges for a service that is in fact provided to those not charged. For example, the California Highway Patrol is not charged to book or otherwise process those it arrests.

Before concluding that a booking fee is a "tax" under Proposition 26, consideration should be given to the following:

- What incidence is there, if any, of CHP bookings into county jails?
- Are there agencies other than the CHP that are not charged a booking fee but book arrested persons into the county jail? For example, does a warden of the State Fish and Game Department with the power to arrest and book persons into the county jail?
- Does sovereign immunity prevent imposing a fee on the state (CHP or Fish and Game Department), thereby negating the exception for providing a service for those not charged?
- Are these bookings funded by other funds such that the booking fees paid by local governments do not subsidize those services? Proposition 26 does not seem animated by a fear that government is charging some service recipients too little. Rather it reflects a concern that others not subsidize "free riders."

Even if a persuasive argument can be made that booking fees are taxes, Proposition 26 is not retroactive and counties may therefore maintain booking fees in place under local legislation that existed before November 3, 2010.

g. Groundwater Pumping Charges

Groundwater pumping charges imposed to fund a local agency's groundwater conservation and management services, such as replenishing groundwater stores and preventing the degradation of the groundwater supply, are not property-related service fees or charges. (*City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, 1207.) The California Supreme Court clarified the distinction between a fee imposed for a property-related service and other fees as follows:

> A fee is charged for a "property-related service," and is thus subject to article XIII D, if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property.

(*Id.* at 1208.) The Court noted that the water conservation district does not "deliver" water via "groundwater" to any particular parcel or set of parcels. Instead, it conserves and replenishes groundwater that flows through an interconnected series of underground basins, none of which corresponds with parcel boundaries. The basins are managed by the district for the benefit of the public that relies on the groundwater supplies, not just for the benefit of the owners of land on which wells are located. In particular, the Court highlighted that while some well operators extract water for use on their property, others extract water for sale and distribution elsewhere. Thus, when a local agency fulfills its obligation to manage the acquisition of water from the groundwater basin, it is not providing a service to a groundwater charge payor in his or her capacity as the owner of lands on which its groundwater wells are located, but

in his or her capacity as an extractor of groundwater from stores that are managed for the benefit of the public. As such, pumping charges are not imposed as an "incident of property ownership." *Id.* at pp. 1207-1208. Accordingly, such fees are analyzed under Proposition 26 rather than Proposition 218, as earlier cases have concluded.

To ensure that groundwater pumping charges are not taxes, a local agency must satisfy both Proposition 26's requirement that they be fixed in an amount that is "no more than necessary to cover the reasonable costs of the governmental activity" and the requirement that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (*Id.* at 1214, citing Cal. Const. art. XIIIC, § 1, subd. (e) [final par.].)

h. Low-income discounts and cross-subsidies

Under well-settled law predating Proposition 26, fees that exceed cost of service to fund discounts to other fee payors are taxes.[49] A Proposition 218 case renews the point. (*Green Valley Landowners Association v. City of Vallejo* (2015) 241 Cal.App.4th 425, 439 [City had no duty to blend costs of two water service systems to benefit those served by the more expensive system].) The "Findings and Declarations of Purpose" of Proposition 26 do not support a different interpretation. They focus on local governments having "disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements."

Proposition 26 does not permit a local agency to fund a low-income discount with revenue from fees charged to other customers since doing so would mean that the local agency would be requiring higher-income rate payers to subsidize lower-income customers. This would mean that the local agency was imposing fees that exceed the cost of providing the service to those customers.

D. Exception No. 3: Regulatory Fees and Charges

1. Introduction

In 1991, the Legislature enacted the Childhood Lead Poisoning Prevention Act of 1991. The new law provided evaluation, screening, and medically necessary follow-up services for children who had suffered lead poisoning. These services were entirely supported by fees imposed on manufacturers or other persons contributing to environmental lead contamination. Sinclair Paint Company argued the new fee was a "tax" because the revenues do not reimburse the State for special benefits conferred on manufacturers of lead-based products nor compensate it for government privileges or services to those manufacturers. The California Supreme Court rejected Sinclair Paint's argument, holding the challenged fee fell within a "third recognized category" of fee that did not depend on government conferred benefits or privileges: a *regulatory fee*. *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866. A regulatory fee requires the fee payor to bear a fair share of the cost of mitigating the adverse effects their products created in the community.[50]

Proposition 26 was enacted in response to *Sinclair Paint*. The Legislative Analyst's Impartial Analysis of the 2010 measure explained that local governments imposed two types of regulatory fees: fees to recover the cost of regulating a fee payor (such as fees on restaurants for health inspections); and fees to recover the cost of programs to achieve particular public goals or to offset the public or environmental impact of a fee payor's activities (such as an oil recycling fee, hazardous materials fee, and fees on alcohol retailers). Proposition 26 restricts the second category.

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49 For example, Government Code section 50076 provides that a "special tax [subject to two-thirds voter approval requirement of Proposition 13, Art. XIII A § 4] 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," And Article XIII B, § 8, subd. (c) of the California Constitution defines "proceeds of taxes" subject to the Gann limit to "include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from … regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service …."

50 A development impact fee imposed pursuant to Government Code section 66000 et seq. is a "regulatory fee" specifically excepted from the definition of "tax" added by Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)(6)).

Exception No. 3 from Proposition 26's definition of "tax" is:

> A charge imposed for the reasonable regulatory costs to a local government for[51] issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders,[52] and the administrative enforcement and adjudication thereof.[53]

2. What types of fees and charges are exempt as "regulatory fees?"

This exception will cover a wide range of local government fees that are imposed to pay for regulatory activity, such as: issuing building permits; conducting fire inspections; abating weeds on private property when the property owner fails to do so; performing sales tax audits; and conducting inspections of rental housing. The exception is for a charge imposed to pay for a program that regulates the activity or business of the fee payor. Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payer. *(California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438.)

The exception does not cover a levy imposed to pay to mitigate or offset the impacts of a fee payor's activities. Such a levy is a "tax" unless it is imposed as a condition of property development or falls within another exception to Proposition 26.

3. What did Proposition 26 leave unchanged?

Aside from converting some regulatory fees to taxes, Proposition 26 did not otherwise make significant changes to prior law:

- In 1988, the Court of Appeal held a "special tax" does not include fees charged in connection with regulatory activities that do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged, which are not levied for unrelated revenue purposes. "[T]o show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) 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 on or benefits from the regulatory activity." (*San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist. (1988) 203 Cal.App.3d 1132, 1145–1146.)* The second prong of this test is repeated verbatim in the final, unnumbered paragraph of article XIII C, section 1, subdivision (e) and the first prong is paraphrased there. Plainly, Proposition 26 was intended to maintain this earlier standard. Courts have so concluded: "This language repeats nearly verbatim the language of prior cases assessing whether a purported regulatory fee was indeed a fee or a special tax." (*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996; see also *Southern California Edison Company v. Public Utilities Commission* (2014) 227 Cal.App.4th 172, 199 [citing *Griffith*].)
- In 2001, the California Supreme Court upheld an inspection fee on private landlords against a challenge that the fee was a property-related fee under Proposition 218. The Court found the fee to be imposed "not because a person owns property but because the property is being rented." The fee is imposed only on those landowners who chose to engage in the residential rental business and only while they are operating the business. *(Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 (*Apartment Association*).)

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51 The version of this exception applicable to the State uses the phrase "incident to" rather than "for." (*Compare* Cal. Const. art. XIII A, § 3, subd. (b)(3) *with* art. XIII C, § 1, subd. (e)(3)This distinction is discussed above at section I.A.6 of this guide.

52 "Enforcing agricultural marketing orders" is found in the exception applicable to the State as well. *See* art. XIIIA, §3(b)(3). Including "enforcing agricultural marketing orders" in the local government provision of Proposition 26 appears to be in error, as local governments neither issue nor enforce agricultural marketing orders. Marketing Orders and Marketing Agreements are authorized by the California Marketing Act of 1937 (Division 21 of the California Food and Agricultural Code).

53 It is not entirely clear what "thereof" modifies, but the history of Proposition 26 suggests it should be read expansively to allow enforcement and adjudication of all of the other regulatory activities listed here – licensing, inspections, etc., an interpretation which is supported by ballot materials as discussed below.

- In 2011, the Supreme Court was asked to determine the validity of a fee the State Water Resources Control Board imposed on water appropriators. The Court analyzed the language quoted above from *San Diego Gas & Electric* and restated in Proposition 26. The Court concluded a fee charged in connection with regulatory activities that does not exceed the reasonable cost of providing services necessary for the activity for which the fee is charged and that is not levied for unrelated revenue purposes is not a tax. (*California Farm Bureau Federation v State Water Resources Control Board (2011) 51 Cal.4th 421.)* The relevant question was whether the State had produced evidence to show the estimated 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.

In light of this history, the first post-Proposition 26 regulatory fee case was not surprising in its conclusion to uphold a rent registration fee on landlords.[54] A residential landlord in the City of Santa Cruz challenged the city's fee for annual inspections of residential rental properties. The petitioner acknowledged *Apartment Association* but argued Proposition 26 was enacted to undermine that Proposition 218 ruling. The Court of Appeal noted the fee was imposed to cover the cost of inspections and is, therefore, expressly exempt from the Proposition 26 definition of "tax." (Cal. Const., art. XIII C, § 1, subd. (e)(3).) The city also offered evidence the amount collected is no more than necessary to cover the reasonable costs of the program, and that the manner in which those costs are allocated to the payor bear a fair or reasonable relationship to the payor's burdens on, or benefits from the governmental activity. *(Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982.) Notably, this evidence was not a comprehensive cost-of-service analysis prepared by an independent consultant, but rather a declaration of the department head responsible for the inspection program reciting the estimated costs, the predicted number of inspections, and the resulting average cost per inspection. (*Griffith, supra*, 207 Cal.App.4th at p. 997.) The case thus suggests that Proposition 26's cost of service requirement is no more demanding than earlier law.

4. What are reasonable regulatory costs?

Several recent court decisions have discussed how "reasonable costs" are measured and how those costs must be allocated to the payor to demonstrate that the costs bear a fair or reasonable relationship to the payor's burden on, or benefits from the program. The recent case law establishes the following principles:

- Costs need not be "finely calibrated to the precise benefit each individual fee payor might derive." (*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 997.)
- The payor's burden or benefit from the program is not measured on an individual basis. Rather, it is measured collectively, considering all fee payors. (*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982 but see *Newhall County Water District v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, pp. 1443–1444 [agency with just four customers had no administrative need to make rates by customer class and therefore must make rates customer-by-customer].) Further, the question of reasonableness is determined based upon whether the fees allocated to the affected payors were reasonable and substantially proportionate to all costs related to the regulation of those payors. If non-fee sources of funding are sufficient to cover the regulatory costs attributable to non-fee-paying persons who were covered by the regulatory program, it does not matter that those persons were not charged a fee. *Northern California Water Association v. State Water Resources Control Board* (2018) 20 Cal. App.5th 1204, 1219.
- A local government can only impose regulatory fees if it has the power to regulate. (*Newhall County Water District v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1449 [water importer could not base fees on customer's use of its groundwater rights, as the importer had no statutory power to regulate groundwater use].)
- Demonstrating that the amount collected is no more than is necessary to cover the reasonable costs of the program is satisfied by estimating the approximate cost of the activity and demonstrating that this cost is equal to or greater than the fee revenue to be received. (*Griffith*, *supra*, 207 Cal.App.4th at p. 997.)

54 All parties in *California Farm Bureau* agreed the fee was not challenged based upon Proposition 26. (51 Cal.4th at p. 428 fn. 2.)

- In evaluating the reasonableness of regulatory costs, the State Water Resources Control Board could account for its eight water-quality programs collectively. The definition of a "regulatory program" or a "service" to be fee-funded is a legislative determination to be reviewed by judges only for reasonableness. *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal. 5th 1032, 1051.

5. Do reasonable regulatory costs include the costs of rule-making?

The authors of this Guide conclude that, under Proposition 26, a fee can be used to pay for rule making for a regulatory program, rather than being restricted only to regulation per se — i.e., the implementation of such rules.

Section 1(e)(3)'s exception covers the range of activities that an agency would perform in order to regulate a business or activity. The enactment of regulations or rules is a necessary aspect of these activities. "[A]dministrative enforcement and adjudication thereof" implies the existence of rules to be applied or adjudicated.

Moreover, the ballot arguments in favor of Proposition 26 make it clear that the proposition was not intended to bar the use of fees to create regulations:

> PROPOSITION 26 PROTECTS ENVIRONMENTAL AND CONSUMER REGULATIONS AND FEES
> Don't be misled by opponents of Proposition 26. California has some of the strongest environmental and consumer protection laws in the country. Proposition 26 preserves those laws and PROTECTS LEGITIMATE FEES SUCH AS THOSE TO … FUND NECESSARY CONSUMER REGULATIONS.

This supports a conclusion that Proposition 26 was not intended to prohibit the use of a fee to fund regulatory rulemaking.

This conclusion is also consistent with the "Findings and Declarations of Purpose" in the uncodified § 1 of Proposition 26, which explains the purpose of Proposition 26 is to prohibit fees that "are not part of any licensing or permitting program." (Proposition 26, § 1, subd. (e).) Proposition 26's proponents sought to prohibit fees imposed on an industry to fund mitigation of conditions caused by that industry — such as levying a fee on paint manufacturers to pay for lead testing in children — but not to directly regulate that industry. This prohibition would not apply to the preparation of regulations that would be applied to that industry.

Moreover, cases construing Propositions 218 and 26 to date have allowed recovery of all the costs of a service or regulatory program from stranded debt, to general administration and overhead, to planning for future service delivery. (E.g., *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, 927 [under Proposition 218, City could recover cost of utility impacts on streets and public safety services only if cost justification provided]; *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 598 [Proposition 218 fee could recover debt service costs], *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees]; *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 369 ["Respondents may appropriately spend these [Prop. 218 sewer] fees on anything related to the maintenance and management of the sewer system. We consider 'all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures.'"] (citing *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 648); *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 987, 997 [upholding cost justification of housing inspection fee under Prop. 26].)

As it is not possible to regulate without regulations, preparing regulations is an appropriate cost of regulation and, in the judgment of the authors of this guide, within the exemption of article XIII C, section 1, subdivision (e)(3).

6. How does Proposition 26 affect regulatory fees and charges designated to protect the environment, public health, and quality of life?

Under Proposition 26's third exception for regulatory fees, a fee may be imposed to recover the reasonable regulatory costs of "issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof."

Because the history of this measure involves the proponents' dissatisfaction with *Sinclair Paint Co. v. State Board of Equalization*,[55] and because the ballot arguments support "legitimate fees such as those to … fund necessary consumer regulations," it may be helpful to review the difference between the Court of Appeal and Supreme Court opinions in *Sinclair*. The Court of Appeal opinion stated:

> [T]here is nothing on the face of the [Childhood Lead Poisoning Prevention] Act to show the fees collected are used to regulate Sinclair … . The Act does not require Sinclair to comply with any other conditions; it merely requires Sinclair to pay what the Department determines to be its share of the program cost.

(*Sinclair Paint Co. v. State Bd. of Equalization* (1996) 52 Cal.Rptr.2d 572, 578 depublished by grant of review.) The Supreme Court viewed it differently. That the fee was not part of the "regulatory program" did not mean the state could not require the mitigation of Sinclair's impacts on childhood health. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 877–878.) A local agency, therefore, should ask the following questions when determining whether its fee comes within this exception:

- Is the fee payor regulated?
- If so, what is the regulatory program?
- Does the program involve the issuance of a license or permit or authorize or require an investigation, inspection or audit?

The following hypothetical regulatory fees demonstrate the types of regulatory fees affected by article XIII C, section 1, subdivision (e)(3):

- A city imposes a business license fee on businesses that sell alcoholic beverages. The fee funds a program to address public nuisances associated with those sales that do not arise on or adjacent to the site of the beverage sales. Such a fee does not reflect a direct connection between the fee payer and the program that the fee funds.
- A city establishes regulations requiring businesses that operate surface parking lots to comply with best management practices to prevent storm water run-off. The city imposes an annual inspection fee on such businesses to ensure compliance with the regulations and to mitigate the adverse impacts of uncontained storm water runoff on groundwater. A portion of the fee is used to fund a storm water pollution education program in local schools.
- A city adopts a fee to be imposed on all persons who use grocery store carryout plastic and paper bags. The fee is imposed to mitigate the adverse impact of the fee payer's use of such materials on the district's landfill.

In each of these instances, at least some portion of the fee could be deemed to be a tax because it is imposed to recover costs other than the reasonable regulatory costs to the local agency for issuing licenses and permits, performing investigations, inspections, and audits, and the administrative enforcement of the regulations. Moreover, in each instance, because the local fee would be imposed for a specific purpose, it would be deemed to be a special tax requiring a 2/3 voter approval under art. XIII C, section 2, subdivision (d). More carefully drafted fees could likely fund most of what these agencies intend, however. (*Korean Am. Legal Advocacy Found. v. City of Los Angeles* (1994) 23 Cal.App.4th 376 [rejecting challenge to nuisance abatement program imposed on liquor outlets]; *California Building Industry Association v. State Water Resources Control Board*, Cal. S. Ct. Case No. S226753 (fully briefed as of Dec. 30, 2015) [Prop. 13 challenge to water quality inspection fees imposed under SWRCB's general construction permit]; *Schmeer v. County of Los Angeles*

55 See discussion of case above.

(2013) 213 Cal.App.4th 1310 [plastic-bag-ban ordinance imposing $0.10 fee on paper bags upheld against Prop. 26 challenge because fee did not fund government].)

An example follows of a regulatory fee within the exception of article XIII c, section 1, subdivision (e)(3), but designed to enforce a regulation established to mitigate the adverse impacts of a regulated activity:

- All restaurants and other food establishments must obtain a license from the county to operate. The county prohibits restaurants and other food establishments from using polystyrene (Styrofoam®) products in the distribution and sale of food products. The purpose of the regulation is to mitigate the adverse impacts that polystyrene has on the county's landfill. The county imposes a fee on all restaurants and other food establishments for the reasonable costs of issuing the license, performing investigations and inspections, and enforcement of the regulation.

In this instance, the purpose of the regulation is to mitigate the adverse impact of the fee payor's operations on the community. The fee, however, funds only those activities authorized by section 1, subdivision (e)(3). Accordingly, this hypothetical regulatory fee is not a tax under Proposition 26.

To fully understand the scope of the new definition of "tax" added by Proposition 26, the courts may need to reconcile the "Findings and Declaration of Purpose" with the proponents' ballot arguments in which they state:

- Proposition 26 protects environmental and consumer regulations and fees … .
- Proposition 26 … protects legitimate fees as those to clean up environmental or ocean damage … .
- Proposition 26 … won't eliminate or phase out any of California's environmental or consumer protection laws including Oil Spill Prevention and Response Act; Hazardous Substance Control Laws; California Clean Air Act; and California Water Quality Control Act.

Ballot arguments are, of course, extrinsic aids courts consider to determine the intent of an initiative. (*Calif. for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472.)

E. Exception No. 4: Use of Government Property

Article XIII C, section 1, subdivision (e)(4) excludes from the definition of "tax:" A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.[56]

1. What type of fees are implicated?

Notably, this exception does not include the "reasonable costs" limitation found in the first three exceptions. Nor is this exception limited to real property. If a local government makes personal property available for purchase or rental (like recreation equipment, for example), it can, it seems, charge what the market will bear. (*City of Oakland v. Burns* (1956) 46 Cal. 2d 401, 407 [power of the Port of Oakland to grant franchise for use of non-public road on airport at market rates].)[57] Among the fees protected by this exception are:

- Franchise fees for which rights to use rights-of-way or other government property are provided, like cable, gas, electric, and pipeline franchises;[58]

56 Vehicle Code section 9400.8 prohibits any local agency from imposing "a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989." However, this section does not prevent an agency from recouping via a service or regulatory fee the cost of maintain roads in light of demands on those roads arising from the service or regulatory program. (*Howard Jarvis Taxpayers Association v. City of Fresno* (2005) 127 Cal.App.4th 914, 927 [under Prop. 218, utilities fees could not be used for street maintenance absent cost justification].)

57 See the discussion below of the final, unnumbered paragraph of article XIII C, section 1, subdivision (e) assigning the burden of proof of cost justifications of fees.

58 Though not a Proposition 26 case, *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, discussed below, discusses franchise fees in the Proposition 218 context and holds a franchise fee is not a tax under Proposition 218 so long as it bears a reasonable relationship to the value of the property interest in the rights-of-way given in exchange for the fee. (*Id.* at p. 254.)

- Park and recreation entrance fees and equipment rental fees (but not necessarily fees for park and recreation services, like classes and programs, which are analyzed above;[59] and
- Leases of government property, such as a museum operated by a nonprofit organization.

It might be used to defend trench-cut fees imposed on those who cut pavement to maintain subsurface utilities and thereby protect such fees from the cost-recovery limit of the first three exceptions discussed above.

2. How does this exception affect franchise fees?[60]

Howard Jarvis Taxpayers Ass'n v. City of Roseville (2002) 97 Cal.App.4th 637 noted that "private utilities pay public authorities franchise fees to use government land such as streets, or for rights-of-way to provide utility services." This characterization supports the exception found in article XIII C, section 1, subdivision (e)(4) for fees imposed for "entrance to or use of local government property." *Roseville* stated the City of Roseville was free to impose franchise fees on private utilities on the basis of contractual negotiation rather than costs.[61]

Similarly, *Santa Barbara County Taxpayer Ass'n v. Board of Supervisors* (1989) 209 Cal.App.3d 94062 described a "franchise agreement" as granted by a governmental agency to enable an entity to provide vital public services with some degree of permanence and stability. A "franchise" is:

- "[A] grant of a possessory interest in public real property, similar to an easement;" and
- "[A] negotiated contract between a private enterprise and a governmental entity for the long term possession of land." (*Santa Barbara County Taxpayers Ass'n, supra*, 209 Cal.App.3d at 949.)

A "franchise fee" is:

- "[P]aid as compensation for the grant of a right of way, not for a license or tax nor for a regulatory program of supervision or inspection;" or
- "[P]aid for the governmental grant of a relatively long possessory right to use land, similar to an easement or a leasehold, to provide essential services to the general public. (*Santa Barbara County Taxpayers Ass'n, supra*, 209 Cal.App.3d at 949.)

Franchise fees that involve the right to access publicly-owned property are not taxes under Proposition 26 because they are imposed:

- By the State (see footnote 61); or
- For "entrance to or use of local government property." (Cal. Const. art. XIII C, § 1, subd. (e)(4).)

However, there are other types of franchises — most notably solid-waste franchises — that do not involve a grant of a possessory interest in real property. Nonetheless, as discussed above, fees collected by a local government pursuant to a contractual agreement (i.e., on a negotiated basis) with a private entity may not be "imposed" and therefore are not subject to Section 1(e). If that is the case, there is no need to rely upon the real property exception in Section 1(e)(4). Of course, it may be best to cite every applicable exception to preserve arguments for litigation.

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59 Government Code section 50402 limits fees general law cities may charge for park entry to "the cost of the service provided. To the extent feasible, charges for similar uses or services imposed by a governing body pursuant to this section shall be uniform throughout its area of jurisdiction."

60 A number of statutes govern particular franchises, including: Pub. Util. Code §§ 5800 et seq. (cable television franchises), 6001 et seq. (telephone and electricity franchises), 6231.5 (oil and pipeline franchises), 49200 (solid waste franchises); Veh. Code § 22671 (towing franchises).

61 In *Jacks v. City of Santa Barbara*, review granted June 10, 2015, California Supreme Court Case No. S225589, the Court of Appeal held that a one percent surcharge on electric utility bills collected by an electric utility pursuant to a franchise agreement, and remitted to the city for general revenue purposes, is a tax requiring voter approval. The Supreme Court's grant of review depublished the case. As this Guide is written, the case is fully briefed and awaiting argument in the Supreme Court which may occur in 2017.

62 The case considered whether franchise fees are "proceeds of taxes" under the Gann Appropriation limit of California Constitution article XIII B.

F. Exception No. 5: Fines and Penalties

Article XIII C, section 1(e)(5) excludes from Proposition 26's definition of "tax" "[a] fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law."

To date, no case analyzes this exception, but *Cal. Taxpayers Assn. v. Franchise Tax Bd*. (2010) 190 Cal. App. 4th 1139, a Proposition 13 case, provides guidance. There, the Third District Court of Appeal determined a penalty on corporations that understated their tax liability was not a tax requiring a two-thirds vote of the Legislature. As the court explained, penalties are distinguished from taxes in that they seek to regulate conduct rather than to generate revenue. (*See id.* at p. 1148.) The court also noted that a "tax raises revenue if it is obeyed," while "a penalty raises revenue only if some legal obligation is disobeyed." (*Ibid.*) It thus appears likely that, for purposes of Proposition 26, penalties will be those government charges that are imposed for a violation of a law that seeks to regulate conduct.

In addition to state statutes, penalties for the violation of local laws will also fall within this exception. The power to enact laws is granted to the Legislature pursuant to article IV, section 1. The Legislature may make no law except by statute. (Cal. Const., art. IV, § 8, subd. (b).) Cities are authorized to make and enforce within their limits local, police, sanitary, and other ordinances and regulations not in conflict with the general laws of the state. (Cal. Const., art. XI, § 7.) "An ordinance in its primary and usual sense means a local law. It prescribes a rule of conduct prospective in operation, applicable generally to persons and things subject to the jurisdiction of the city. 'Resolution' denotes something less formal. It is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides … ." (*Central Mfg. Dist., Inc. v. Bd. of Supervisors* (1960) 176 Cal.App.2d 850, 860.) A duly enacted local ordinance has the same binding force within its corporate limits as a statute of the Legislature. (See *Empire Fire & Marine Ins. Co. v. Bell* (1997) 55 Cal.App.4th 1410, 1419, 1422; *Evola v. Wendt Construction Co.* (1959) 170 Cal.App.2d 21, 24.)

Further, "law" generally has a broad and encompassing meaning and the framers of Proposition 26 could easily have used narrower terms like "statute," "ordinance," and "regulation," if they had intended this exception to apply more narrowly. Such more specific terms are used elsewhere in article XIII C.[63] Consequently, for purposes of article XIII C, section 1, subdivision (e)(5), violation of "law" includes violation of a city ordinance, such as parking fines, administrative penalties imposed in the code enforcement context, late payment fees, interest charges, and any "other monetary charge imposed by" a city "as a result of a violation of law," defining the last term broadly.

Nor is this exception limited to cost recovery, as are the first three exceptions to Proposition 26. For example, the exceptions for public services and benefits are limited to those fees that are limited to "the reasonable costs to the local government of conferring the benefit. …" The penalty exception includes no such cost-restricted language, and the exclusion of that language should be construed to demonstrate voter intent.64 (*See Arbuckle-College City Fire Protection Dist. v. County of Colusa* (2003) 105 Cal.App.4th 1155, 1167 [applying canons of construction].)

> **▶ PRACTICE TIP:**
>
> Due process requires either a pre- or post-deprivation opportunity for hearing to contest penalties. (E.g., *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida* (1990) 496 U.S. 18, 36–39 [due process requires meaningful opportunity to challenge tax after payment].) Thus, an agency should establish an administrative procedure allowing individuals to challenge the imposition of any penalty. In circumstances where the impact of the penalty is especially burdensome (such as interfering with one's livelihood), it will be wise to allow that remedy pre-deprivation rather than after the fact.

63 For example, article XIII C, section 1, subdivision (c) defines "special district" as "an agency of the state, formed pursuant to general law or a special act" and article XIII C, section 3 refers to "any local government charter."

64 Some may respond that the unnumbered paragraph of Section 1(e), discussed further below, establishes a cost restriction for all Proposition 26's exceptions.

G. Exception No. 6: Fees and Charges Imposed as a Condition of Development

Article XIII C, section 1, subdivision (e)(6) excludes from the new definition of "tax:" A charge imposed as a condition of property development.

This language is substantially the same as Proposition 218's exception to its provisions for assessments and property-related fees. Article XIII D, section 1, subdivision (b) excludes from the reach of both articles XIII C and XIII D (apparently including Proposition 26, which amends article XIII C), "the imposition of fees or charges as a condition of property development." This broad language encompasses more than development impact fees under the Mitigation Fee Act (Gov. Code §§ 66000 *et seq*.) and extends to any fee or charge imposed "as a condition of property development," including permit and inspection fees, and fees to recover the cost of advance planning services such as a building permit surcharge to recover the cost of general and specific plans applicable to the project for which the building permit issues.

While the exception does not limit fees to cost, other law does. For example, the Mitigation Fee Act limits fees to the cost of providing the service for which the fees were collected. (Gov. Code, § 66005, subd. (a).) The U.S. Constitution also limits the power of government to exact money and property from those who develop property. (*E.g., Nollan v. California Coastal Commission* (1987) 483 U.S. 825 [there must be a "logical nexus" between the impacts of development and the use of land or money exacted from the developer to mitigate those impacts]; *Dolan v. City of Tigard* (1994) 512 U.S. 374 [exaction must be at least roughly proportionate to impacts of the development]. For a fuller discussion of these, consult The California Municipal Law Handbook (Cont.Ed.Bar 2016), §§10.223–10.227, 10.400–10.406.) In general, most fees currently imposed by local planning and building departments will be exempt from Proposition 26 under this sixth exception or the second and third exemptions for service and regulatory fees discussed above.

H. Exception No. 7: Property Related Fees and Charges and Assessments

The last enumerated exception, article XIII C, section 1, subdivision (e)(7), excludes from the definition of "tax" "[a]ssessments and property-related fees imposed in accordance with the provisions of art. XIIID."

This exception includes property-based assessments and property-related fees including retail fees for water, sewer, and trash services. Those are discussed in Chapter 3 of this guide above and part II of this chapter below.

1. Are assessments exempted from Proposition 218 by article XIII D, section 5 also exempt from Proposition 26?

Proposition 218 applies to, but exempts, assessments existing on the 1996 effective date of Article XIII D imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks and streets (i.e., street landscaping and lighting assessments). Subsequent **increases** in exempt assessments **are** subject to Article XIII D.

Some of those exempted, existing assessments must be annually imposed, and so long as a grandfathered assessment is not increased above the amount existing on Proposition 218's 1996 effective date, Proposition 218's procedures do not apply.

Are these grandfathered assessments "imposed in accordance with the provisions of article XIIID" even though they have never been subjected to a Proposition 218 assessment ballot? Proposition 26 does not specify that the article XIII C, section 1, subdivision (e)(7) exception is only available for assessments imposed in accordance with the procedural and substantive requirements of article XIII D's section 4. Therefore, the authors of this Guide conclude assessments imposed in accordance with article XIII D, section 5 are imposed "in accordance with the provisions of article XIII D" within the meaning of the seventh exception to Proposition 26.

This interpretation is consistent with the intent of Proposition 26. In *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, the Court of Appeal determined Proposition 218 was enacted to close a loophole in Proposition 13 whereby local governments imposed assessments to general governmental services. The Court concluded the exception of article XIII D, section 5 was intended to carve out traditionally appropriate, non-abusive, special assessments and that special assessments for street lighting are among these. Proposition 26's Findings and Declarations of Purpose states the purpose of Proposition 26 is to address the "recent phenomenon whereby … local governments have disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by [Proposition 13's and Proposition 218's] constitutional voting requirements." Since grandfathered assessments are not new, and since, under Proposition 218, they cannot be increased without a mailed ballot, Proposition 26's purpose does not seem to be advanced by making taxes requiring voter approval of assessments grandfathered by article XIII D, section 5.

I. Burden of Proof Provision of Final, Unnumbered Paragraph of Article XIII C, Section 1, Subdivision (e)

The final, unnumbered paragraph of article XIII C, section 1, subdivision (e) provides:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is not more than necessary to cover the reasonable costs of governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from the governmental activity.

It is not enough for a local agency to demonstrate that, in the aggregate, a levy, fee, or charge does not exceed the reasonable cost of the governmental activity for which it is imposed. Rather, a local agency must satisfy both the requirement that it be fixed in an amount that is "no more than necessary to cover the reasonable costs of the governmental activity" and the requirement that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (*City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, 1214, citing Cal. Const. art. XIIIC, § 1, subd. (e) [final par.].)

The language of this paragraph is confusing, and its interaction with the seven exceptions presents a difficult interpretative challenge.

While this provision is a change in the law, it may not be a significant change in how courts actually review such cases. First, in litigation, a local government will bear the burden to justify its fees. The government has long had some duty to justify its revenue measures. (*E.g. Beaumont Investors, LLC v. Beaumont-Cherry Valley Water District* (1985) 165 Cal.App.3d 227 (water district bore burden to produce a record on which to justify connection charge under Prop. 13); *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 560-563 (discussing burden of production and persuasion in challenge to development impact fee under Prop. 13); *California Farm Bureau Federation v. State Water Resources Bd.* (2011) 51 Cal.4th 421, 436–437 (same in context of fees imposed by state under Prop. 13).) Second, the lowest standard of evidence is required — a mere preponderance of evidence, as opposed to such higher standards as proof by "clear and convincing evidence" or "beyond a reasonable doubt."

Pending court construction, there is debate as to the implications of this final paragraph for the requirements of the seven exceptions that precede it. The trailing paragraph states a local government bears the burden of proving by a preponderance of the evidence:

- That a levy is not a tax;
- That the amount is not more than necessary to cover the reasonable costs of the governmental activity; and
- That the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from the governmental activity.

Three of the seven exceptions contain a "reasonable cost" requirement (article XIII C, § 1, subdivisions (e) (1)–(3)), while the other four exceptions do not. (*Id*., subds. (e)(4)-(7).) Does the final, unnumbered paragraph import a cost limitation into the four exceptions which do not state it?

The authors of this Guide conclude that the cost-limitation principle applies only to the three exceptions that mention it. Were the rule otherwise, the language of these three exceptions stating the cost limitation principle would be surplusage, violating a basic canon of statutory construction. First as demonstrated above, except as to fees to mitigate the impacts of economic activity like that in *Sinclair Paint*, Proposition 26 was intended merely to constitutionalize earlier "special tax" case law. *Griffith, supra,* 207 Cal.App.4th 982, 996 and *So. Cal. Edison, supra,* 272 Cal.App.4th 172, 199, both viewed the language of Proposition 26's trailing paragraph this way. The fact that much of its language was taken verbatim from earlier cases strongly suggests the trailing paragraph assigns the burden of proof of cost only when another rule (such as those of Proposition 26's first three exceptions) imposes a cost limit. In short, the final paragraph of article XII C, section 1, subdivision (e) is a procedural rule for litigation, not a substantive requirement for fees.

Second, the trailing paragraph's phrasing —"bears the burden of proving" rather than "must prove all of the following"— supports the view that it merely assigns the burden of proof without changing Proposition 26's substantive requirements for fees. This allows it to be reconciled with the fact that only some of the exceptions contain a "reasonable cost" requirement. As a matter of statutory construction, this gives significance to the presence and absence of the reasonable cost language in the seven exceptions.[65]

Thus, while a respondent local government always bears the burden to prove a measure is not a tax, only fees within the first three exceptions (benefit, service and regulatory fees) are subject to a cost-of-service limitation. And, logically, there is no need to justify a fee's cost allocation if the fee is not limited to cost at all.

Third, and perhaps most persuasively, it defies logical analysis to apply a reasonable cost standard to some levies Proposition 26 exempts from the definition of taxes, violating another canon of statutory construction that avoids constructions that make absurd policy. For example, would the State be limited to selling property it acquired at statehood at cost? (Cal. Const., art. XIII A, § 3, subd. (b)(4).) And, would fines and penalties (§ 1(e)(5)) be limited to costs, rather than to non-confiscatory amounts deemed necessary to deter unlawful conduct? (See, e.g., *Calif. Taxpayers Ass'n. v. Franchise Tax Bd.* (2010) 190 Cal.App.4th 1139, 1148.) Moreover, what costs does a fine or penalty recover? How would one demonstrate the cost allocation of a fine or penalty?

65 Using words in one part of a law but leaving them out of another part is generally treated as having significance under the doctrine of *expressio unius est exclusio alterius*. (*E.g., Arden Carmichael, Inc. v. County of Sacramento* (2001) 93 Cal.App.4th 507.) In this case, inclusion in some exceptions of a requirement that fees not exceed costs, coupled with the exclusion of that requirement from some other exceptions, suggests the requirement does not apply to those exceptions from which it was omitted. Additionally, the rules of statutory construction require every word in a statute or constitutional provision to be given meaning. If the trailing paragraph of art. XIIIC, § 1, subd. (e) imports a cost limitation on the seven exceptions, what meaning is left to the cost limitation language in the first three exceptions? Does it not become surplusage, violating this rule of statutory construction as well?

II. Article XIII D and Property Related Fees and Charges

A. Introduction and Overview

1996's Proposition 218 created a new category of fees and charges commonly referred to as "property related fees." It defines the fees or charges subject to article XIII D, section 6 as: "any 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., art. XIII D, § 2, subd. (e).) Thus, a fee or charge is subject to Proposition 218 if it is imposed: (a) on a parcel; or (b) on a person (1) as an incident of property ownership, or (2) as a user fee for a property-related service. The substantive and procedural requirements of article XIII D, section 6 apply to such property-related fees and charges.

1. What fees are excluded from Proposition 218?

Proposition 218 excludes two kinds of fees:

- **Land use 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." (3 Cal. Const., art. XIIID, § 3(b).) Such fees are, however, subject to Proposition 26, discussed above as there is no comparable exception in that measure.[66]

In addition, fees that bear no 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, though most are subject to Proposition 26, as discussed above. Finally, a fee imposed on a voluntary use of property not inextricably intertwined with property ownership alone is not "property related." This exclusion is discussed further below.[67]

2. Who is a property owner?

Section 2(g) of article XIIID defines "property ownership" to include tenancies if the tenant is directly liable for the payment of the fee. The purpose, in part, of the definition of "property ownership" seems to be to clarify that a fee or charge otherwise subject to article XIII D remains subject to the measure even if a tenant pays it.

To understand what fees are subject to Proposition 218, one must understand the meaning of "incident of property ownership" and "property-related service."

3. What is an "incident of property ownership?"

Local governments impose fees for a variety of types of facilities and services. Not all are subject to Proposition 218. A "fee or charge" is subject to Article XIII D only 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." 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, subdivision (e) because it is triggered by voluntary action of property owner to undertake development that triggers a need for a new connection. (*Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 424.)

Case law has shed some light on the meaning of "as an incident of property ownership":

1. If a property owner incurs a fee as a result of a voluntary decision regarding the property's use, rather than mere ownership or activities inextricably intertwined with property ownership, the fee is not imposed as an incident of property ownership. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830.)

66 A Proposition 26 challenge to a payment in lieu of taxes (or "PILOT") from an electric utility to a city's general fund in spending in the California Supreme Court as this Guide is written. (*Citizens for Fair REU Rates v. City of Redding*, review granted Apr. 29, 2015, California Supreme Court Case No. S224779.) The case was fully briefed as of July 21, 2015 and oral argument may therefore be likely in 2017.

67 For example, a fee imposed upon property owners in their capacity as business owners (landlords) is not property related because it is incident to a voluntary decision to put property to a particular use, not property ownership alone. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830.)

2. 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*.)
3. A fee is imposed as an "incident of property ownership" even if the fee is imposed for a service used by a tenant rather than the owner of the property. (*Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal.App.4th 637, 645.)
4. Article XIII D, section 3, subdivision (b) provides that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership." Article XIII d, section 6, subdivision (c) exempts from the election (but not the majority protest) requirements of Proposition 218 "fees or charges for sewer, water and refuse collection services." This partial exemption implies partial inclusion and, therefore, the Supreme Court has ruled that ordinary metered water service charges are subject to Proposition 218. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214.)
5. A storm drainage fee imposed on the basis of impervious coverage of improved property was found to be on an "incident of property ownership" because it "burden[s] landowners **as landowners**." (*Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1356.)[68]
6. A fee collected on the property tax roll to fund a program to accept household hazardous waste at County landfills and transfer stations was a property related fee because the waste-handling service was deemed "incident to property ownership." (*Crawley v. Alameda County Waste Management Authority* (2015) 243 Cal.Ap.4th 396, 196 Cal. Rptr.3d 365, 371–374.)
7. Groundwater pumping charges imposed to fund a local agency's groundwater conservation and management services, such as replenishing groundwater stores and preventing the degradation of the groundwater supply, are not imposed as an incident of property ownership. The agency provides no service to any particular parcels, and persons become liable for the charge only as a result of their choice to extract groundwater managed by the agency, not as a result of their ownership of property. (*City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal. 5th 1191, 1207-1208.)
8. 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 [water connection charge not property related because water district could not identify properties that might later develop so as to trigger the fee].)

4. What is a property-related service?

Proposition 218 defines "property-related service" as "a public service having a direct relationship to property ownership." (Cal. Const., art. 13 D, § 2, subd. (e).) Case law sheds light on the meaning of this phrase, too:

- Services specifically mentioned in section 6, subdivision (c) (i.e., water, sewer, and refuse collection services) are most often property-related services if provided by a local agency. (*Richmond v. Shasta Community Services District, supra at 428; Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. The Proposition 218 Omnibus Implementation Act defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source." (Gov. Code, § 53750, subd. (m).) Water from any source includes recycled water. (*Capistrano Taxpayers Association v. City of San Juan Capistrano* (2015) 235 Cal. App.4th 1493, 1502 [water is part of a holistic distribution system that does not distinguish between potable and nonpotable water].) Thus, an entity that produces, stores, supplies, treats, or distributes water necessarily provides water service. (*Griffith, supra*, 220 Cal.App.4th at p. 595.)
- Even though "supplying water" is a property related service, not all water service charges are subject to article XIIID. (See *Richmond v. Shasta Community Services District, supra, 34 Cal.4th 426-427)* "A fee is charged for a 'property-related service,' and is thus subject to article XIII D, if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to property." (*City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, 1208.)

68 After the *Salinas* decision, the Legislature enacted Gov. Code §§53750(k) and 53751 to define sewer service as including certain storm water management facilities and programs. Gov. Code § 53755(n) defines water to mean water from "any source."

Few other cases under Proposition 218 involve regulatory fees. The Courts of Appeal originally ruled that groundwater augmentation charges on pumpers were property related fees subject to Proposition 218, but the California Supreme Court disapproved that conclusion in *City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 ("*Ventura*"). An Attorney General's opinion concludes that business license fees on swap meet operators limited to the cost of regulation do not implicate Proposition 218 because they are imposed on businesses in their capacity as voluntary participants in a regulated marketplace, not due to property ownership or a service to property, citing *Apartment Association*. 86 Ops. Cal. Atty. Gen. 176 (2003).

5. Property-related fees and regulatory fees

Apartment Association of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, distinguished regulatory from property-related fees. The California Supreme Court ruled 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 leasing of real property as multi-family dwellings. The fee was imposed to mitigate impacts of the rental housing business.

In *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal. App.4th 1364, the Agency argued its fee on groundwater use to fund a program of environmental regulation was similarly a regulatory fee, and therefore not subject to Proposition 218. The Agency regulates groundwater use in the agricultural region that includes Watsonville on the central coast of California. Over-pumping of the groundwater basin was allowing sea water to invade groundwater supplies, threatening the agricultural economy of the area. The Agency imposed a groundwater extraction charge to fund pipelines and water purchases to augment groundwater, the purchase of other supplies to eliminate 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 *Bighorn's* ruling that water service charges are subject to Proposition 218 and *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 who pump groundwater to mitigate the impacts of that activity? From the Court's perspective, the fee imposed on a rural well operator to extract water for domestic needs is no different from a fee imposed on an urban water user for water delivered by 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. *Ventura* did not resolve this tension between *Apartment Association* and *Bighorn* or explore Proposition 218's implications for property related fees that serve regulatory purposes. The argument will continue to be asserted until the appellate courts address it.

6. Refuse fees

The application of Proposition 218 to fees for refuse collection and related services is uncertain. Fees a local government charges to provide refuse collection services with its own forces are subject to Proposition 218. (*Crawley v. Alameda County Waste Management Authority* (2015) 243 Cal.App.4th 396. However, it is not clear that fees charged by private refuse haulers that benefit from franchise agreements with local governments are within the reach of article XIII D, section 6.

Refuse service likely meets two of the tests for a property-related service articulated by the courts: It is often indispensable for most uses of property, in the sense that refuse collection is often made mandatory. And, local agency refuse collection services, like water and sewer services, are excluded from the voter approval requirements, but not from any other requirement of article XIII D by section 6, subdivision (c) of that article. (*Richmond v. Shasta Community Services District, supra,* 32 Cal.4th 409*; Bighorn-Desert View Water Agency v. Verjil, supra,* 39 Cal.4th 205.) In addition, the Legislative Analyst's impartial analysis of Proposition 218, cited by the *Bighorn* court, stated "refuse" was "probably" a property-related fee. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Proposition 218 by Legis. Analyst, p. 73 cited by *Bighorn-Desert View Water Agency v. Verjil, supra*, 39 Cal.4th at p. 214.) Refuse service is likely property-related, at least in some circumstances

(e.g. where service is compelled without an opt-out provision). But this leaves the question whether the fee for such service is "imposed" by an "agency." No case has resolved this issue but courts may look to these factors:

- Who provides the service a private party or a government?
- Who sets the fee, the hauler or the franchising agency?
- Does the agency regulate rates or set them?
- Who bills and collects the fee, the agency or the hauler?

The conservative approach will be to comply with Proposition 218 for mandatory trash services even if provided by a franchised hauler, especially as statute forbids an agency to require a hauler to indemnify it for the risk of non-compliance with Proposition 218. (Pub. Res. Code, § 40059.2.) However, if an agency is only a franchisor and dos not provide the service, set rates (as opposed to regulate them to protect consumers from the monopoly power of the franchisee), or collect the rates, a convincing argument may be made that the rates are not those of an "agency" and are, therefore, not subject to article XIII D, section 6.

Moreover, even if refuse service is property related, associated fees may not be. For example, the trash franchise may empower the hauler to charge for refuse service but also compel it to collect from customers and remit to the franchising agency additional sums to fund a regulatory program (e.g. recycling programs under 1989's AB 939) or a franchise fee for the use of government property in the private, for-profit business of the hauler (subject to Proposition 26's article XIII C, section 1, subdivision (e)(4).). Thus, the fee for refuse service is arguably subject to article XIIID. (*See*, e.g., *City of Dublin v. County of Alameda, supra,* 14 Cal.App.4th 264.)

▶ PRACTICE TIP:

Each refuse franchise is unique. Before concluding whether a refuse fee collected by a franchisee is subject to Proposition 218, it is essential to review the franchise agreement and the local government's ordinance regulating refuse collection.

▶ PRACTICE TIP:

Public Resources Code section 40059.2 limits a local government's authority to require a franchised hauler to defend and indemnify the franchising agency against a Proposition 218 challenge to a refuse fee. Accordingly, while such clauses were once common in franchise agreements, haulers frequently refuse to consent to them unless the agency complies with Proposition 218 with respect to refuse rates.

▶ PRACTICE TIP:

A local government may wish to allow customers to "opt out" of franchised trash service to support an argument the fees are voluntary rather than "imposed" so as to trigger Proposition 218. For example, a mandatory refuse ordinance can permit a customer to self-haul and to decline service. (See also *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93 [charge on every occupied premise 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 …"].) Such an exemption may have fiscal and accounting consequences, however. Moreover, agencies adopt mandatory service for important public policy reasons. The accumulation or improper disposal of solid waste presents real risks to public health.

▶ PRACTICE TIP:

It is best not to retain traditional franchise language that authorizes the governing body to 'set' trash rates, as this undermines any claim that the rates are not set by a local government, but are set by a private hauler not subject to Proposition 218. The policy purpose behind such provisions can be retained by authorizing the local agency to regulate rates, as by setting a rate ceiling. Under this language, the local government 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.

7. When is a fee or charge "increased?"

A fee is "increased" within the meaning of Proposition 218 when a local government acts to increase any applicable rate used to calculate the fee or to revise the methodology by which the fee is calculated (if that revision results in the levy of an increased amount). (Gov. Code, § 53750, subd. (h)(1); see also *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal. App.4th 747, 763 ["methodology" as used in section 53750 refers to a formula for calculating taxes officially sanctioned by a local agency].) A fee is not "increased" when a local government 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).)

A local government providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation if it complies with all of the following:

- It adopts a schedule of fees or charges for a period not to exceed five years;
- The schedule of fees or charges may include a schedule of adjustments, including a clearly-defined formula for adjusting for inflation;
- The schedule of fees may provide for automatic adjustments that pass through the adopted increases or decreases in the wholesale charges for water, sewage treatment, or wastewater treatment; and
- Notice of any adjustment must be given not less than 30 days before its effective date.

(Gov. Code §53756.)

8. 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. LAFCOs' primary function is "to review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization" of local governments. (Gov. Code, § 56373.) Unless the LAFCO conditions otherwise, previously approved fees, taxes, and assessments of the annexing city or district apply to annexed territory. (Gov. Code, §§ 57330, 57302.)

In *Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th 1182, the Court of Appeal held Proposition 218 does not require voter approval of an annexation that results in the residents and property owners in the annexed territory paying taxes of the annexing city that had not previously applied there. The court's rationale was that annexation does not result in a tax being "imposed," "extended," or "increased" under Article XIII D. It also found compelling the fact that there was no indication in the text or the ballot pamphlet that Proposition 218 was intended to apply to annexations. This holding should apply equally to property-related fees. Assessments, however, are structurally different in that, while they may apply agency-wide, they are imposed only

on identified parcels that specially benefit from the services or facilities they fund. Accordingly, assessments are not extended beyond their original district boundaries on annexation to the agency that levies them but must be extended by a new proceeding under the state assessment statute or charter city ordinance under which they were imposed. This will require an election under article XIII D, section 4 as discussed above in Chapter 3 of this Guide.

B. Procedural Requirements of Article XIII D, Section 6

Article XIII D, section 6 requires that a local government to comply with the following procedures before imposing or increasing property-related fees or charges:

- 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;" and
- If written protests against the fee are presented by a "majority of owners of the identified parcels," the fee cannot be imposed.

Substantive requirements apply to fees for all property-related services under article XIII D, section 6, subdivision (b). An election requirement applies to all property-related fees except those for sewer, water, and refuse collection services. (Cal. Const., art. XIII D, §6, subd. (c).)

Implementation of these procedural requirements requires consideration of several questions, particularly as to who must receive notice of the hearing, who may protest it, and how are protests counted.

1. Identifying the parcels

The first step in establishing a property-related fee under Proposition 218 is identifying the encumbered parcels. (Cal. Const., art. XIII D, § 6, subd. (a)(1).) This critical step informs both noticing and what constitutes a majority protest.

It is generally, but not always, uncontroversial. When the fee will be imposed on property owners in their capacity as record owners of encumbered property, the local government can merely determine the area subject to the fee and then identify all record parcels in that area. However, it becomes complicated when the fee is for a property-related service, such as water or garbage; where payors are charged for their use of the funded service as customers, rather than for the bare ownership of property; and when utility accounts do not match legal parcels, as where one legal parcel has multiple water meters or one meter serves multiple legal parcels. In many cases, agencies typically lack data to tie customers, accounts, or connections to legal or assessor's parcels. Proposition 218 does not define "parcel," and courts have yet to clarify how agencies should identify parcels.

Proposition 218 provides some limited support for treating separate, identifiable, fee-paying units as parcels for notice and protest rights. As described in Article XIII D, section 2, subdivision (e), a property related "'[f]ee' or 'charge'" 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., art. XIII D, § 2, subd. (e), emphasis added.) In turn, Proposition 218 defines "property ownership" "to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (Cal. Const., art. XIII D, § 2, subd. (g).) Proposition 218 also requires the agency to calculate the amount of the fee to be imposed on each parcel. (Cal. Const., art. XIII D, § 6, subd. (a)(1).) Reading these provisions together, "parcel" may be understood to refer to a unit of property subjected to the fee, and individual units of a larger parcel (i.e., separately metered apartments on one legal parcel) should be identified separately for purposes of Proposition 218 if customers will be individually liable for the fee.

However, different rules (detailed below) control who is entitled to notice of a fee and who may submit a valid protest. (See *Griffith v. Pajaro Valley Water Management District* (2013) 220 Cal.App.4th 586, 596 [notice to record owners only, and not to tenants, permitted by article XIII D, section 6, subd. (a)].) On the other hand, the safest course may be to identify both the recorded parcels by APN and the individual units or tenancies that are expected to incur the fee. (See Crawley v. Alameda County Waste Management Authority (2015) 243 Cal.App.4th 396, 375.) Guidance is also provided by Government Code section 53755 [notice may be given to customers only if agency disclaims right to enforce non-payment by liening property]. The constitutionality of that statute was litigated in *Goleta Ag Preservation v. Goleta Water District* (Cal. Ct. App., Jan. 28, 2019, No. 2D CIV. B277227) 2019 WL 337814, as modified on denial of reh'g (Feb. 20, 2019). The District there provided notice to active customers via bill insert and by mailing to addresses with inactive meters, but not to property owners at addresses on the property tax roll. An association of agricultural customers of the District challenged its rates, arguing Proposition 218 requires more than Government Code section 53755 allows — mailed notice to property owners whether or not they take water service. The Court of Appeal declined to decide the issue, ruling that farmers who got notice lacked standing to challenge non-notice to others. A request to publish that decision, helpful on other water-rate-making issues under Proposition 218 is pending in the Second District as of February 2019.

2. Calculating the amount of the fee

Next, the agency must calculate the amount of the fee to be imposed. (Cal. Const. art. XIII D, § 6, subd. (a)(1). Again, this is often a simple matter, such as where the fee is charged on a flat, per-parcel basis. When the Fee is established as a rate to be applied to the payor's consumption, it is sufficient to apprise the payor of the rate. (*Pajaro Valley Water Mgmt. Agency v. Amrhein (2007) 150 Cal.App.4th 1364, 1388*, fn. 15, *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees].)

3. Determining the record owner and providing notice

Article XIII D, section 6, subdivision (a) requires local governments to provide notice of a proposed, property-related fee to the "record owners" of parcels subject to the fee. That notice must include: (a) the amount of the fee; (b) the basis upon which it was calculated; (c) the reason for the fee; and (d) the date, time, and location of a public hearing on the charge. (Cal. Const., art. XIII D, § 6, subd. (a)(1).)

▶ PRACTICE TIP:

It is wise to define the reason for a fee broadly — e.g., water service — rather than to fund a particular set of improvements or costs that generate the need for a rate increase. The notice can explain the need for an increase in other ways. This is because article XIII D, section 6, subdivision (b)(2) limits the use of fee proceeds to the "purpose" for which a fee was imposed. The improvements or costs predicted by a rate study will often vary from the costs an agency actually experiences while a rate is in effect. Rate-making predictions, like others, rarely foresee the future with perfect accuracy.

Proposition 218 does not define the phrase "record owner." The Omnibus Act 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." (Gov. Code, § 53750, subd. (j).) However, if the service for which the fee is imposed or increased is currently being provided, the Omnibus Act authorizes the notice required to be given by including it in the regular billing statement for the fee or any other mailing which customarily includes the billing statement for the fee. (Gov. Code, § 53755.) If an agency desires to retain authority to record or enforce a lien on the parcel for non-payment of the fee, notice must be mailed to the record owner's address shown on the last equalized assessment roll if that address is different

than the billing or service address. (Gov. Code, Section 53755, subd. (a).) If the address on the assessment roll differs from the service address, the conservative course is to send the notice to both addresses.

> **NOTE:** It is common to rely on Government Code section 53755 and to provide notice of fees via a utility bill. This is inexpensive and efficient. However, the Second District declined to decide whether this complies with article XIII D, section 6, subdivision (a)(1)'s requirement for notice to the "record owner" in *Goleta Ag Preservation v. Goleta Water District* (Cal. Ct. App., Jan. 28, 2019, No. 2D CIV. B277227) 2019 WL 337814, as modified on denial of reh'g (Feb. 20, 2019). A request to publish that unpublished decision is pending as of February 2019.

As noted above, a local government may provide notice to non-record payors in utility bills. (Gov. Code, § 53755, subd. (a).) The effect of the provision of such notice on the calculation of the protest majority is unsettled. Some argue that by providing notice to payors, the agency increases the total number of identified "parcels" that are used to determine whether a majority of parcel owners have protested the proposed fee. Others argue that payors represent a separate set of parcel owners who are entitled to be treated as a block for purposes of determining a majority protest, even if no majority of record owners protest but this is almost certainly wrong in light of *Morgan v. Imperial Irrigation District* (2014) 223 Cal.Ap.4th 892, 905, which concludes that one common protest proceeding was sufficient even though the District imposed rates on multiple classes of customers. Thus, two courses of action appear likely to successfully resist challenge. The first is to provide notice only to property owners at the addresses shown on the property tax roll and provide no notice to payors. **(***Griffith v. Pajaro Valley Water Management District* Agency (2013) 220 Cal.App.4th 586, 596 [notice to record owners only, and not to tenants, permitted by article XIII D, subd. (a)], *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees].)

▶ PRACTICE TIP:

Majority protests are rare, but disputes over protest counting procedures are not. It is therefore wise to construe protest rights broadly to avoid a dispute that does not matter: if allowing the protest does not change the outcome, it is not worth the controversy.

4. Conducting the public hearing

Article XIII D, section 6 also requires the local government to provide notice at least 45 days before holding a hearing at which the proposed fee or charge will be considered. (Cal. Const., art. XIII D, § 6, subd. (a)(2).) The 45-day period is calculated in the same manner as periods are calculated in civil actions, pursuant to Code of Civil Procedure section 12, such that the date of mailing is excluded, and the day of the hearing is included. (*Dahms v. Downtown Pomona* (2009) 174 Cal.App.4th 708, 714–715 [notice of assessment ballot proceeding under article XIII D, § 4].) Thus, a hearing on the 45th day is acceptable. (*Ibid.*)

▶ PRACTICE TIP:

Notice is required only when a local government is considering a new fee or charge or when it may "increase" a fee or charge. The Omnibus Implementation Act defines an "increase" to include an increase of "any applicable rate used to calculate the … fee, or charge" or the revision of "the methodology by which the … fee, or charge is calculated, if that revision results in an increased amount being levied on any person or parcel." (Gov. Code, § 53750, subd. (h)(1).) A fee or charge is not "increased" when it is adjusted pursuant to a schedule of adjustments adopted through a Proposition 218 process or before its November 6, 1996 effective date. (See Gov. Code, §§ 53750, subd. (h)(2)(A), 53756.) A schedule for an inflation adjustment adopted after November 6, 1996 cannot exceed five years. (Gov. Code, § 53756, subd. (a).)

▶ PRACTICE TIP:

While the notice must identify the amount of the proposed fee or charge, local governments providing water, sewage, waste-water, or refuse services may provide notice of their intent to adopt a schedule of fees or charges that include automatic adjustments to pass through increases in the wholesale rates they pay for water, sewage treatment, or wastewater treatment. (Gov. Code, § 53756.)

5. The majority protest procedure

Unlike assessments, Proposition 218 provides little guidance and few requirements for the protest procedure. There appears to be no requirement that local governments notify prospective rate payers of their right to protest, nor are local governments required to develop formal processes for receiving and tabulating protests. (Compare Cal. Const., art. XIII D, § 4 [requiring local governments to adopt and provide notice of the procedures for the consideration of ballots relating to proposed assessments], with Cal. Const., art. XIII D, § 6, subd. (a)(2) [requiring only that the agency consider any written protests received].) So long as a local government provides adequate notice, as described above, and takes account of all written protests, Proposition 218 is satisfied.

▶ PRACTICE TIP:

As Proposition 218 and the Omnibus Implementation Act do not address many practical issues that will arise in a protest proceeding (who gets notice, can protests be withdrawn, etc.) it is wise to adopt a resolution of the rate-making agency to establish these rules before notice is given. Otherwise, the agency is in the unenviable position of appearing to make up the rules as it goes. A model of such a procedural resolution is attached here as Attachment E.

Some aspects of the protest procedure are prescribed. For example, a protest may be submitted by **either** a record owner or a tenant directly liable for the proposed fee or charge, but only one protest per parcel is counted. (Gov. Code, § 53755, subd. (b) ["One written protest per parcel, filed by an owner or tenant of the parcel, shall be counted in calculating a majority protest to a proposed new or increased fee or charge. …"].)

▶ PRACTICE TIP:

No case has yet explained how local agencies should calculate majority protests in light of the multiple notices permitted by Section 53755. Agencies may tabulate protests separately for owners and customers allowing a majority protest of either group. (*Crawley v. Alameda County Waste Management Authority* (2015) 243 Cal.App.4th 396, 401–402.) Agencies may also notify only property owners but must tally protests from tenants obligated to pay the fee, too. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220Cal.App.4th 586, 596.) It is common to rely on Government Code section 53755 to notify only customers via a bill, but to tally protests from either customers or property owners as required by subdivision (b) of that section. The Second District Court of Appeal declined to resolve that question in *Goleta Ag Preservation v. Goleta Water District* (Cal. Ct. App., Jan. 28, 2019, No. 2D CIV. B277227) 2019 WL 337814, as modified on denial of reh'g (Feb. 20, 2019). A request to publish that unpublished decision is pending as of February 2019.

In addition, local governments need not hold separate protest counts when adopting multiple rates. (*Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892; see also Gov. Code, § 53755, subd. (b).) In *Morgan*, an irrigation district set varying retail water rates dependent on customer uses, i.e., agricultural, municipal, industrial, or residential. (*Id.* at pp. 897–898.) Ratepayers and an agriculture industry group challenged the rates, in part, because the district did not tabulate protests separately for each customer class. (*Id.* at p. 905.) The court held that a single protest procedure for all rates was sufficient. (*Id.* at p. 910.)

C. Substantive Provisions of Article XIII D, Section 6, Subdivision (b)

The substantive provisions of Article XIII D appear in section 6, subdivisions (b)(1)–(5), which require, a property-related fee to satisfy these standards:

- Revenues derived from the fee or charge must not exceed the funds required to provide the property-related service;
- Revenues derived from the fee or charge must not be used for any purpose other than that for which the fee is imposed;
- The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership must not exceed the proportional cost of the service attributable to the parcel;
- The fee or charge may not be imposed for a service unless the service is actually used by, or immediately available to, the owner of the property subject to the fee or charge; fees or charges based on potential or future use of a service are not permitted, and stand-by charges must be classified as assessments subject to the ballot protest and proportionality requirements for assessments; and
- No fee or charge may be imposed for general governmental services, such as police, fire, ambulance, or libraries, where the service is available to the public in **substantially the same manner as it is to property owners**. (Emphasis added.)

1. Revenues shall not exceed the funds required to provide the service

Because rates for property-related fees or charges may not exceed the cost of the service, a local government must first ascertain the cost of service. *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637 and *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914 addressed what documentation is required to ensure compliance with Article XIII D, section 6, subdivision (b) when adopting fees and charges. In each case, the city had adopted an in lieu fee imposed upon its enterprise utilities to compensate the city for expenses related to the utilities.[69] These amounted to transfers to the cities' general funds of proceeds of utility rates, which were then used for general fund, rather than utility, purposes, raising question under the second of the five requirements set forth above.

In each case, the courts concluded the city could recover general fund costs attributable to its water, wastewater, and solid waste disposal utilities based upon an analysis of actual costs. However, in each case the court determined the fee violated Article XIII D, section 6, subdivision (b) because neither city had analyzed or documented the actual costs to be recovered by the general fund transfer. *Roseville* articulated the requirement as follows:

> The theme of these sections is that 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 that service. In short, the section 6(b) fee or charge must reasonably represent the cost of providing service.
>
> In line with this theme, Roseville may charge its water, sewer, and refuse utilities for the street, alley and

69 In *Roseville*, the city imposed an "in lieu fee franchise fee" on its municipal utilities. The amount of the fee was based on a flat percentage of the utilities' annual budgets, regardless of utilities' varying uses of city rights-of-way. (*Roseville*, 127 Cal.App.4th at 639, 647–648.) In *Fresno*, the city imposed a fee on its utilities in lieu of property taxes (PILOT) a private utility enterprise would pay. The amount of the fee was one percent of the assessed value of the fixed assets of the utility. (*Fresno*, 127 Cal.App.4th at 917.)

> right-of-way costs attributable to the utilities[70] and Roseville may transfer those revenues to its general fund to pay for such costs … . Here, however there has been no showing that the in lieu fee reasonably represents these costs.

(*Roseville*, 97 Cal.App.4th at pp. 647–648 (citations omitted).)

Fresno articulated the requirement as follows:

> Cities are entitled to recover all of their costs of utility services through user fees. The manner in which they do so, however, is restricted by another portion of Proposition 218: "The amount of the fee or charge imposed … shall not exceed the proportional cost of the service attributable to the parcel."
>
> Together, subdivision (b)(1) and (3) of article XIII D, section 6, make it necessary — if Fresno wishes to recover all of its utilities' costs from user fees — that it reasonably determine the unbudgeted costs of utilities enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel. Undoubtedly this is a more complex process than the assessment of the in lieu fee and the blending of that fee into the rate structure. Nevertheless, such a process is now required by the California Constitution.

(*Fresno*, 127 Cal.App.4th at pp. 922–923 (citations omitted).)

Most often the determination of what it costs to provide water service is determined by a cost of service analysis (COSA) prepared by a rate-making consultant. Local governments and their consultants are well advised to rely on industrywide ratemaking principles such as those developed by the American Water Works Association ("AWWA"). The AWWA's "Principles of Water Rates, Fees, and Charges: Manual of Water Supply Practices M1" (the "M1 Manual"), establishes commonly accepted professional standards for cost of service studies and has been expressly accepted by two Courts of Appeal as sufficient to satisfy Proposition 218's requirements. **(**See *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 600, *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees]; *Morgan v. Imperial Irrigation District (2014) 223 Cal.App.4th 892, 899-900; but see Capistrano Taxpayers Association v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493, 1514* [the M1 manual cannot trump the plain language of the California Constitution].) For sewer services, the most widely used ratemaking principles have been established by the Water Environment Federation through its "Financing and Charges for Wastewater Systems, WEF Manual of Practice No. 27" ("Manual No. 27") (2005). Other standards include those of the National Association of Regulatory Utility Commissioners (NARUC), the California Public Utilities Commission, and Raftelis, "Water and Wastewater Finance and Pricing: The Changing Landscape" (4th Ed. 2015). There is no industrywide publication used for establishing refuse collection service fees or charges, stormwater service fees or charges, or flood protection service fees or charges. But the approaches of these manuals are instructive for demonstrating a methodology commonly used to determine what the cost of service is for a utility.

Whether a local government uses the M1 Manual, Manual No. 27, or an alternative method for determining its rates for property-related fees, the process for complying with the provisions of section 6(b)(1) is a matter of balancing a local government's total costs of service with its total revenues. (*See Capistrano Taxpayers Association*, *supra*, 235 Cal.App.4th 1506.) In calculating the cost of service, there is no requirement that data be perfect. (*Morgan*, 223 Cal.App.4th at 915.) And in some instances, an informal process may be used, provided the fee or charge "reasonably represents the cost of providing service." (*Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368, 373; *Roseville*, 97 Cal.App.4th at 647-648; *but see Capistrano*, 235 Cal.App.4th at 380 [the M-1 Manual might show that a working backwards methodology in setting rates is reasonable, but it cannot excuse utilities from ascertaining cost of service].)

70 Public Utilities Code section 10101 grants cities, and other municipal corporations, a "state franchise" over public rights of way. So, *Roseville*'s suggestion that an agency can charge for "right of way costs" must be reconciled with the fact that the state has granted access to the right of way.

▶ PRACTICE TIP:

Occasionally, disputes arise about whether a particular cost is for providing the "service." In *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 597–598,[71] the plaintiff challenged inclusion in a cost of service analysis of debt service on facilities no longer in use ("stranded debt"). The Court of Appeal soundly rejected this view, noting that the agency's statutory authority allowed it to charge fees for the purpose of "paying the costs of purchasing, capturing, storing, and distributing supplemental water."

2. Revenues derived from the fee must not be used for any purpose other than that for which the fee is imposed

Article XIII D, section 6, subdivision (b)(2) forbids revenues from property-related fees and charges to be used for any purpose other than that for which they are imposed. In concert with subdivision (b)(1), it ensures the proceeds of property-related fees and charges are not transferred from a utility's account and used for non-utility purposes, such as general fund purposes of a city. Notwithstanding the forgoing, a general fund may be reimbursed for costs it incurs on behalf of the utility. Such costs might include administrative services and overhead provided to a utility not recovered via general cost allocation plan, police and fire protection of utility property, and wear and tear on public streets attributable to utility operations. Any transfer of revenues from a utility account into a general fund should be supported by a well-documented cost justification. (*Moore v. City of Lemon Grove*, *supra*, 237 Cal.App.4th at pp. 368, 373; *Roseville*, *supra*, 97 Cal.App.4th at pp. 647–648; *Fresno*, *supra*, 127 Cal.App.4th at pp. 922–923.)

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

Several recent cases have construed the phrase "the proportional cost of the service attributable to the parcel."[72] The earlier Proposition 218 proportionality cases focused on the transfer of revenues from a utility to a city's general fund. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 922–923.) More recent cases have focused on the proportionality requirement in evaluating water rate designs, including those structured to encourage conservation.

The cases reflect a diversity of views of the meaning of "the proportional cost of the service attributable to the parcel":

- A water agency that charges differential rates to different customer classes was required to demonstrate the differential costs of providing water service to the customer classes. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 925.)
- Groundwater augmentation charges may recover costs of supplying supplemental water because all groundwater users benefit from the agency's groundwater management activities, rejecting the view that a parcel-by-parcel analysis is required. (*Griffith v. Pajaro Valley Water Management Agency (2013)* 220 Cal.App.4th 586, 600-601, *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property-related service fees]; but see *Newhall County Water District v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430 [water wholesaler with just four customers could not justify making rates by customer class rather than by customer].)

71 *Griffith* was disapproved on other grounds by *City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees] but remains good law on the other points it addresses.

72 The proportionality requirement has some obvious similarities to the special tax test under Government Code section 50076 and Proposition 26. (See Cal. Const., art. XIII C, § 1, subd. (e) [stating the local government has the burden of demonstrating "that the manner in which [the] costs [of the governmental activity] are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity"].) However, the tests differ so caution is required when using authorities under Proposition 218's cost of service e requirement to construe Proposition 26's cost limit and vice versa. The Proposition 26 test is discussed in detail above.

- City's tiered water rates must be justified based on the incremental costs of providing service to each tier. (*Capistrano Taxpayers Association v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.) Note, however, that Capistrano disagrees with both *Griffith v. Pajaro, supra*, and conflicts with the analysis of *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363 and *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, allowing argument that courts should follow those other cases as more persuasive. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450 [Courts of Appeals not bound by Court of Appeal decisions, trial courts may choose among conflicting Court of Appeals decisions without respect to the districts which rendered them].) Moreover, the Supreme Court construed *Capistrano* very narrowly in *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1053, a Proposition 26 case:

  > Article XIII D provides that the amount of a property-related fee "shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) In *Capistrano*, the water district conceded that its tiered pricing did not reflect increased costs and that it "effectively used revenues from the top tiers to subsidize below-cost rates for the bottom tier." (*Capistrano, supra*, 235 Cal. App.4th at p. 1499, 186 Cal.Rptr.3d 362.) Under article XIII A, all that is required is that the record demonstrate a reasonable basis for the manner in which the fee is allocated among those who pay it. (*Equilon Enterprises, supra*, 189 Cal.App.4th at p. 870, 117 Cal.Rptr.3d 223.) The Court of Appeal's reasoning in *Capistrano* does not compel a different conclusion under article XIII A.

In *Palmdale*, the water district adopted allocation-based (also referred to as a "budget based") water rates.[73] The rates allocated to customers a "reasonable" amount of water for efficient water use based on a customer's needs and customer class. Residential customers received an indoor and outdoor allocation, commercial customers received a three-year average allocation, and irrigation customers received only an outdoor allocation. The court found the district's administrative record did not justify these differential rates between customer classes — i.e., the district failed to show that its cost of providing water service to irrigation customers was proportionately higher than its cost of providing water service to residential and commercial customers. (*Palmdale*, *supra*, 198 Cal.App.4th at p. 936.) "[W]ithout a corresponding showing in the record that such impact is justified," the court held the rates violated Article XIII D, section 6, subdivision (b)(3). (*Id*. at 937.)

In *Griffith,* the plaintiffs challenged the agency's groundwater augmentation charges, claiming, inter alia, the fees were not proportionate to the cost of the service. plaintiffs challenged the agency's groundwater augmentation charges, claiming, inter alia, the fees were not proportional to the cost of service. The Pajaro Valley Water Management Agency was created to manage the water resources of the Pajaro Valley Groundwater Basin. The Agency is authorized to levy groundwater augmentation charges on groundwater pumping "for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the" Agency's boundaries. (*Griffith*, supra, 220 Cal. App.4th at p. 591 (quoting *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal. App. 4th 1364, 1372).) The Agency's program included delivering supplemental water to some coastal well users to displace pumping and avoid seawater intrusion in the basin.[74] The court first determined that the groundwater augmentation charges are property related service fees subject to the substantive requirements of article XIIID, section 6, subdivision (b). While the California Supreme Court in *City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 later disapproved of this aspect of *Griffith*, the court of appeal's analysis continues to be authoritative and instructive as to how service

73 In 2008 the State Legislature conferred express authorization for allocation-based conservation pricing. Invoking California Constitution article X, section 2, the Legislature found "[t]he use of allocation-based conservation water pricing by entities that sell and distribute water is one effective means by which waste or unreasonable use of water can be prevented and water can be saved in the interest of the people and for the public welfare, within the contemplation of Section 2 of Article X of the California Constitution." (Water Code §§ 370–374.)

74 The groundwater management strategy is "to use recycled wastewater, supplemental wells, captured storm runoff, and a coastal distribution system." (*Griffith*, 220 Cal. App. 4th at 590.)

costs may be apportioned. (*City of San Buenaventura*, *supra*, 3 Cal.5th at 1209, fn. 6 [Supreme Court disapproved *Pajaro Valley Water Management Agency v. Amrhein* (2013) 150 Cal. App. 4th 1364 and *Griffith* to the extent they are inconsistent with the Court's ruling that groundwater pumping charges are not property related service fees].)

The plaintiff in *Griffith,* argued the fees imposed on his well use were disproportionate to the cost of service because his property did not receive any of the supplemental water piped to coastal farmers. Rejecting this argument, the court stated the plaintiff overlooked the fact that "'the management of the water resources … for agricultural, municipal, industrial, and other beneficial uses is in the public interest …' and [the Agency] was created to manage the resources 'for the common benefit of all water users.'" (*Id.* at 600.) The court therefore found the charges did not exceed the proportionate cost of service because all groundwater users benefit from the Agency's groundwater management activities, not just the coastal users receiving supplemental water. (*Id.* at 600, 602 [plaintiffs failed to acknowledge "the groundwater augmentation charge pays for the activities required to prepare or implement the groundwater management program for the common benefit of all well users."].)

The *Griffith* plaintiff acknowledged the Agency apportioned its costs among categories of users (e.g., properties with metered wells, unmetered wells, and wells within the zone served supplemental water) but argued *Palmdale* compelled the Agency to apportion the costs of service on a parcel-by-parcel, rather than customer class-by-class. (*Griffith*, *supra*, 220 Cal.App.4th at pp. 600–601.) The Court of Appeal rejected this argument, too, noting *Palmdale* did not hold parcel-by-parcel cost allocation is required. Rather, *Palmdale* held the water district there failed to carry its burden to justify its disparate treatment among customer classes on its rate-making record. (*Id.* at 601.) Citing the standard from the Supreme Court's leading special tax case, *Griffith* noted:

> Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than that the amount shall not exceed the proportional cost of the service attributable to the parcel, [the Agency's] method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render [the Agency's] method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

(*Id.* at 601 [quoting *Calif. Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438] (citations omitted); *see also Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 899–900, 915 ["some types of service require extra costs, and therefore the study allocated those costs only to the corresponding more expensive services" "municipal and industrial users create special costs so their charges are higher per acre-foot than agricultural users," "there is no requirement that the data be perfect"].)

Capistrano Taxpayers Association v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493 expressly disagrees with *Griffith* on how service costs must be apportioned. There, the City of San Juan Capistrano adopted allocation-based water rates with four tiers. The first two tiers were based on the amount of water the city concluded was required for reasonable indoor and outdoor water usage. The third and fourth tiers were based on what the city concluded to be excessive or overuse of water, respectively. (*Capistrano*, *supra,* 235 Cal.App.4th at p. 1499.) The Capistrano Taxpayers Association sued, claiming the city's rates were not proportional to the cost of providing service in violation of article XIII D, section 6, subdivisions (b)(1) and (3).

The Court of Appeal held the city's rates were not proportional to its cost of service because the city did not calculate the marginal (i.e., incremental) cost of providing water at the level of use represented by each tier. Specifically, the court criticized the city for not correlating its rates within each tier to the prices of water used in each tier. In interpreting article XIII D, section 6, subdivision (b)(3), the court noted "[i]f the phrase 'proportional cost of service attributable to the parcel' is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really is an ascertainable cost of service that can be attributed to a specific hence that little word 'the' parcel." (*Capistrano*, *supra*, 235 Cal.App.4th at p. 1505, original emphasis.)

The court stated that, in calculating the rates for each tier, the city

> had to do more than merely balance its total costs of service with its total revenues — that is already covered in subdivision (b)(1). To comply with subdivision (b)(3), [the city] also had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since [the city] did not try to calculate the actual costs of service for the various tiers, the trial court's ruling [against the city] on tiered pricing must be upheld simply on the basis of the constitutional text.

(*Id.* at p. 1506.)

Significantly, *Capistrano* acknowledged repeatedly that tiered water rates are "consonant" with and "not incompatible" with article XIII D, section 6, subdivision (b), provided the rates reasonably reflect the cost of service attributable each parcel. (*Id.* at pp. 1497–1498, 1499 n. 6, 1510–1511 ["nothing … prevents water agencies from passing on the incrementally higher costs of expensive water to incrementally higher users"], 1516 ["nothing in article XIII D, section 6, subdivision (b)(3) is incompatible with water agencies passing on the true marginal cost water to those consumers whose extra use of water forces water agencies to incur higher costs to supply that extra water"]; *see also City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936–937 ["California Constitution, article X, section 2 is not at odds with article XIII D so long as, for example, conservation is attained in manner that 'shall not exceed the proportional cost of the service attributable to the parcel.'"].)[75] However, *Capistrano* concluded that the administrative record justifying that city's rates did not contain any breakdown as to the relative cost of each source of supply[76] and therefore did not justify an cost attributable to specific parcels. (*Id.* at p. 1499.)

The authors of this guide conclude that Proposition 218's requirements are not as strict as *Capistrano* concluded and note that *Griffith*, *Morgan* and *Moore* hold that a range of rate structures are "proportional to the cost of service attributable to the parcel." Rate setting is a complex, legislative undertaking that must take into account the various types of costs of operating a system (fixed, customer-based, and variable) and the differential demands that various types of customers and classes of customers place on the systems. (*E.g., 20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216 [rate-making is a complex legislative task].) Rates must also be designed to ensure they are easy to administer and easily understood by ratepayers. The special tax cases discussed above acknowledge this complexity and recognize that proportionality is to be "measured collectively," not individually, "considering all ratepayers." (*See Griffith*, *supra*, 220 Cal.App.4th at p. 601.) Accordingly, the authors of this Guide find *Griffith*, *Morgan*, and *Moore* better reasoned in light of the long-standing judicial recognition of the complexity of rate-making and conclude Proposition 218's proportionality standard is not as strict as *Capistrano* suggests.

Because of the complexity of attributing utility service costs to individual customers, the authors of this guide conclude myriad rate designs are proportional to the cost of service **attributable** to the parcel, as Proposition 218 requires, without stating who must do the attribution and under what standard. (Cal. Const. art. XIII D, § 6, subd. (b)(3).) That silence, preserves

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75 *Brydon v. East Bay Municipal Utility District* (1994) 24 Cal.App.4th 178, a Proposition 13 case, upheld inclining-block conservation rates, citing California Constitution article X, section 2. *Brydon* recognized that Water Code section 375 permits water conservation programs to achieve article X, section 2's conservation requirements and authorizes ordinances to encourage water conservation through rate design. (*Id.* at pp. 193, 195.) The *Brydon* court deemed it appropriate to shift:

> the costs of environmental degradation from the general public to those most responsible … . The inclining block rate structure is a reasonable reflection of the fact that it is the profligate usage of water which compels the initiation of regulated conservation measures … . Intuitively, it can be seen that such measures are necessitated predominately by those citizens least inclined toward conservation. In [the court's] view it is reasonable to allocate costs based on the premise that the more unreasonable the water use, 'the greater the regulatory job of the district.'

(*Id.* at 193.) Stated another way, inclining-block rates reasonably reflect the proportionate cost of providing water service attributable to parcels that use the most water and thereby place proportionately greater demands and burdens on a water utility. (*Id.* at p. 202 ["To the extent that certain customers overutilize the resource, they contribute **disproportionately** to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water."] (emphasis added) (citation omitted).)

76 The city obtains its water from five sources of supply, including groundwater recovery plant, five local groundwater wells, imported water, recycled water, and another retail water agency.

earlier law which recognizes that rate-making is a complex legislative task. (*Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th 1182, 1197–1198 [Prop. 218 preserves prior case law that it does not expressly change].) Ultimately, how costs should be attributed to parcels is a subjective determination among competing options to be made by the legislative body. Courts have long held that rate design is both discretionary and legislative. (See *Pac. Tel. & Telegraph Co. v. Pub. Util. Com.* (1965) 62 Cal.2d 634, 655; *Brydo*n, *supra*, 24 Cal.App.4th at p. 196; *see also Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368 ["[C]ourts afford agencies a reasonable degree of flexibility 'to apportion costs of … programs in a variety of reasonable financing schemes."] (citation omitted).)

Arguably, when article XIII D, section 6, subdivision (b)(3) requires rates to be proportional to the cost of providing service attributable to a parcel, without specifying who should make that attribution or how, it preserves, at least to some extent, the legislative discretion afforded by earlier law to local governments to determine how to allocate costs of service, provided the allocation is reasonable and not so disproportionate that some customers are unfairly subsidizing others. This in not unlike what the California Supreme Court identified in *California Farm Bureau.* (*See California Farm Bureau Federation*, *supra,* 51 Cal.4th at 442.)

▶ PRACTICE TIP:

Because local governments bear the burden of demonstrating compliance with article XIII D, section 6, subdivision (b), a local government should clearly demonstrate through detailed data and computations and articulate through a comprehensive narrative explanation the methodology used and the justification for the allocation of costs among its various customer classes and within each customer class. Ultimately, the cost of service study is at the core of meeting this burden and should be reviewed by counsel before it is complete. But to assist courts in reaching a favorable outcome for a local government in any challenge to its rates, a local government should maintain as part of its administrative record any other relevant data and information used to derive its rates. While rate-making consultants tend to be strong on math and, occasionally, weak on other forms of expression, there are more English than Math majors on the bench. The record must speak in terms judges can understand and this will typically require more than just spreadsheets.

4. A fee or charge may not be imposed for a service unless the service is actually used by, or immediately available to, the owner of the property subject to the fee or charge

a. The "immediately available" requirement focuses on the agency's conduct, not the property owner's

Under article XIII D, section 6, subdivision (b)(4), a property related fee or charge may be imposed for a service the property owner or customer can, but does not, use. *Paland v. Brooktrails Township Community Services District Board of Directors* (2009) 179 Cal.App.4th 1358 held local governments may impose a minimum charge on parcels connected to utility systems for the basic cost of providing service, regardless of actual use.

In *Paland*, parcels connected to the district's water system were charged connection fees upon hookup, and thereafter a fixed monthly charge and a usage-based charge for water service. The plaintiff connected his parcel to the water system and paid the district's connection fees. In following decades, he periodically discontinued water service to his property, which was a second-home in a resort community. Beginning in 2003, after a connection moratorium imposed by health authorities, the district began imposing the fixed monthly charge on parcels with existing connections that were inactive because the parcels were unoccupied or because the owners had temporarily discontinued service. The plaintiff challenged the fixed monthly charge on his inactive connection, claiming that water service was not immediately available to him and that the charge was therefore in the nature of a standby fee to be approved as an assessment under article XIII D, section 4 as article XIII D, section 6, subdivision (b)(4) provides. (*Paland*, *supra*, 179 Cal.App.4th at pp. 1362–1363.)

The court concluded article XIII D, section 6, subdivision (b)(4)'s "immediately available" requirement focuses on the local government's conduct, not the property owner's voluntary decision to make use of his service connection:

> As long as the local government has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is 'immediately available' and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied).

(*Id.* at 1370.)

b. Property-related fees may be used to plan for future services

In *Griffith v. Pajaro Valley Water Management Agency* (2014) 220 Cal.App.4th 586, the plaintiffs claimed that the groundwater augmentation charges were being used to fund a service that is not "immediately available" to property owners because the ordinance adopting the fees provided the charge could fund efforts to identify and design future supplemental water projects. The court dismissed this argument and held that identifying and determining the future needs of the agency is part of the agency's present-day services. The costs of planning for such future needs therefore may be recovered from charges imposed on current users. *(Griffith,* 220 Cal.App.4th at 602*, disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees].)

c. Property owners and customers who benefit from a program or services of a utility must share in the cost of the program or services provided

The *Griffith* plaintiffs also argued the groundwater augmentation charges challenged there violated article XIII D, section 6, subdivision (b)(4), because they did not use any of the services for which the groundwater augmentation charges were imposed, namely they did not directly receive supplemental water. Rejecting this argument, the court noted the plaintiffs overlooked that "'the management of the water resources … for agricultural, municipal, industrial, and other beneficial uses is in the public interest …' and [the Agency] was created to manage the resources 'for the common benefit of all water users.'" (*Id.* at pp. 600, 602, *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees].)

Capistrano Taxpayers Association v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493 came to a similar conclusion as to recycled water funded by potable water rates. There, the city was constructing a recycled water treatment plant, funded in part by potable water charges. (*Id.* at pp. 1501–1502.) The Capistrano Taxpayers Association claimed that, because some potable water customers could not receive recycled water due to the lack of a delivery system, charging them for the cost of recycled water facilities amounted to charging for a service that is not "immediately available" to them in violation of article XIII D, section 6, subdivision (b)(4).

The court, however, found that providing recycled water is not fundamentally different than providing potable water. Referencing the Proposition 218 Omnibus Implementation Act's definition of "water" (Government Code section 53750, subdivision (m)), the court noted the city operates "a holistic distribution system that does not distinguish between potable and non-potable water." The court explained:

> Nonpotable water for some customers frees up potable water for others.[77] And since water service is already immediately available to all customers of [the city], there is no contravention of subdivision (b)(4) in including charges to construct and provide recycled water to some customers.

(*Id.* at p. 1502.)

77 The court went on to question, however, whether it was appropriate under Article XIII D, section 6(b)(3) for residential customers with lower than average water consumption to pay for recycled water facilities that are necessitated by those customers whose water use is above-average. (*Capistrano Taxpayers Association*, 235 Cal.App.4th at p. 1503.) Although the court remanded for consideration of that issue (*ibid.*), the case settled and no further trial occurred.

▶ PRACTICE TIP:

The "immediate availability" language of article XIII D, section 6, subdivision (b)(4) is misleadingly broad. What is in issue here is standby charges — charges on undeveloped property for the value they gain by the availability of utility services to which they could connect, but have not. Once a connection is made, this subdivision is no longer pertinent to the charges a property owner must pay.

5. No fee or charge may be imposed for general governmental services where the service is available to the public in substantially the same manner as it is to property owners

Article XIII D, section 6, subdivision (b)(5), is intended to ensure local governments do not impose parcel charges to fund general governmental services available to property owners and others "in substantially the same manner" — these should be funded by taxes and other general fund revenues. This does not mean, however, that if everyone within a local government's jurisdictional boundaries benefits from services provided by a local government, that a fee or charge for those services is imposed for general governmental services. This largely depends on the nature of the service for which the fee or charge is imposed, and how it is imposed. For example, in *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 603, the plaintiffs argued that because the groundwater augmentation charges benefitted everyone in the groundwater basin, the charges were imposed for general governmental services. The court rejected this argument, finding that the charges are imposed for water service. "The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for that service." (*Id.* (quoting *Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal.App.4th 637, 648).)[78]

The Third District Court of Appeal concluded in a since-depublished case that Proposition 218 prohibits any fee assessments for fire suppression services, because they are necessarily provided to the general public. The Supreme Court granted review, depublishing the case, but later dismissed review as moot. (*Concerned Citizens for Responsible Government v. West Point Fire Protection District* (Case No. S195152) (dismissed Nov. 28, 2012.) Taxpayer advocates wish to regain that victory and are litigating a Fire Suppression Benefit Assessment in Mariposa County. Judgement was entered for the County and an appeal to the 5th District is pending as this Guide goes to publication. (*Citizens for Constitutional Government et al. v. Board of County Supervisors of the County of Mariposa*, 5th DCA Case No. F074986 [appeal filed January 4, 2017].)

78 *Griffith* was disapproved on other grounds by *City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees].

D. Voter Approval Requirements

1. Introduction

In addition to the majority-protest requirement detailed above, a property-related fee — other than a fee for sewer, water, or refuse collection services provided by local government — cannot be imposed or increased until approved by a majority vote of the "owners of the property subject to the fee" or, at the option of the local government, by a two-thirds vote of the electorate in the affected area. (Cal. Const., art. XIII D, § 6, subd. (c).)[79] The election must be conducted not less than 45 days after the public hearing. (*Ibid*.) Although the Constitution does not specify procedures for elections for property related fees, it does authorize a local government to adopt procedures that are similar to those required for assessments. An all-mail ballot election is authorized by Elections Code section 4000, subdivision (c)(9). The California Supreme Court upheld the result of a mailed ballot election among property owners on a flood control fee conducted by the County of Marin in *Greene v. Marin County Flood Control and Water Conservation Dist*. (2010) 49 Cal.4th 277. Although the parties there litigated whether the vote must be one vote per parcel, or whether votes might be weighted by the amount to be paid (as is the case for assessments under article XIII D, section 4), the Supreme Court found it unnecessary to decide that issue.

2. Exemption for sewer, water and refuse collection services

Sewer, water, and refuse collection fees are exempt from article XIII D, section 6, subdivision (c)'s election requirement. More information about what constitutes sewer, water, and refuse collection services can be found above.

Two cases address whether fees other than typical water, sewer, and refuse collection service charges are exempt from the voting requirement of Article XIII D, section 6, subdivision (c). *Howard Jarvis Taxpayers Association v. City of Salinas (2002)* 98 Cal.App.4th 1351, 1356–1358, determined a stormwater service charge collected on the property tax roll and based on impervious coverage of property (i.e., paving) was neither a "sewer" or "water" service charge within section 6, subdivision (c)'s exemption, but that it was a property-related fee. The Legislature since added a definition of "sewer" to the Proposition 218 Omnibus Implementation Act. (Gov. Code, §§ 53750(k) and 53751) The definition of "water" was also amended to include water "from any source." (Gov Code, § 73750(n).) Cities may consider relying on the new definition of "sewer" to finance costs of stormwater collection, treatment, and disposition facilities and programs that benefit the sewer system through sewer service fees, or a combination of water and sewer fees if "water" is also provided. A careful review of facilities and programs in light of the definitions of "drainage system," "flood control," "sewer," and "water" should be undertaken when evaluating fees for water and sewer programs that include storm water management.

Crawley v. Alameda County Waste Management Authority (2015) 243 Cal.App.4th 396, 409–410, concluded that a fee charged to each household to fund hazardous waste facilities was a fee imposed for "refuse collection" within section 6, subdivision (c)'s exception.

3. Procedures for elections

There are two sources for procedures for property-related fee elections:

- Government Code § 53755.5; and
- Local procedures adopted pursuant to article XIII D, section 6, subdivision (c).

Government Code § 53755.5 requires:

- If an agency submits the fee or charge for approval by two-thirds of registered voters, then the election must be conducted by the agency's elections official. If the election is conducted by the county elections official, the local agency must reimburse the county for its actual and reasonable costs.

79 Fees for the provision of electrical or gas service are not imposed as an incident of property ownership and, therefore, are not subject to voter approval (or any of the procedural or substantive requirements of Article XIII D, section 6). (Cal. Const., art XIII D, § 3, subd. (b).) They are, however, subject to Proposition 26 because it has no comparable exception. (Cal. Const., art. XIII C, § 1, subd. (e)(2).)

- If an agency submits the fee or charge for approval by a majority of the property owners, then several detailed requirements are provided as to the form of the ballot and ballot tabulation (Gov. Code, § 53755.5, subd. (b)(1) – (4). A fee submitted for approval by property owners is not an election for purposes of the Constitution or the Elections Code. (*Id*. subd. (c).)

Article XIII D, section 6, subdivision (c) authorizes an agency to adopt procedures similar to those for increases in assessments under article XIII D, section 4 for elections on property-related fees or charges. Such local procedures will be essential given the paucity of law governing them and their exclusion from the Elections Code. Such rules should cover matters such as the procedure for issuing duplicate ballots (when a ballot is lost or spoiled); proportional ballots (when joint property owners cast separate ballots); and treatment of unsigned or incomplete ballots.

The provisions of the California Constitution that provide that "voting shall be secret"[80] do not apply to voting in an election on a property related fee during and after the tabulation of the ballots. (*Greene v. Marin County Flood Control and Water Conservation District* (2010) 49 Cal.4th 277, 294.) Local governments may require property owners to identify themselves and their parcels on the ballot. Ballots must remain secret at least until the time they are tabulated, however, under Government Code section 53755.5, subdivision (b)(2). Although assessment ballots and the information used to weight them are disclosable public records, and assessment ballots must be preserved for two years, neither provision of the Omnibus Act applies to ballots for property-related fees. (Gov. Code, § 53753, subd. (e)(2).)

▶ PRACTICE TIP:

Local governments may wish to include escalators and maximum fee amounts in ordinances presented for voter approval. This approach will obviate the need for renewed voter approval until service costs exceed inflation-adjusted amounts. (See Gov. Code, § 53739.)

▶ PRACTICE TIP:

Local procedures for property related fee elections may wish to adopt rules for assessment ballots, as these cover many common issues including a requirement to retain ballots for a minimum of two years; and whether ballots are disclosable as public records after tabulation. (Cf. Gov. Code, § 53753, subd. (e)(2).)

80 Cal. Const., art. II, § 7.

Chapter 5

Fiscal Initiatives

I. Proposition 218 Provisions Related to Initiatives

The power to enact statutes and amendments to the Constitution is reserved to the People by article II, section 8 of the California Constitution and is expressly extended to local legislation by article II, section 11. The referendum power is reserved to the People by article II, section 9.

Article XIII C, section 3 of Proposition 218 allows initiatives to reduce or repeal any local tax, assessment, fee, or charge and prohibits the Legislature and local governments from imposing a signature requirement higher than that for statewide statutory initiatives. (See Cal. Const., art. II, § 8, subd. (b).) Section 3 states:

> *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.

(Cal Const., art. XIII C, § 3.) The stated intent of section 3 is to allow voters to repeal taxes without offending article II, section 9, which excludes tax measures from the referendum power.

The section prohibits limitations on initiatives "reducing and repealing" taxes, assessments, fees, or charges, but the same section speaks of "[t]he power of initiative to **affect** local taxes, assessments, fees, and charges" (emphasis added), suggesting Proposition 218 must be read to allow initiatives to propose taxes, as well. As discussed more fully in the Introduction to this Guide, this conclusion is also supported by the history of the initiative in California, which began as the broad power of the electorate to propose legislation regarding taxation and which Progressives defended against many challenges, including those in the early 20th Century to prohibit tax initiatives. (E.g., Hichborn, Story of the Session of the California Legislature of 1921 (Barry 1922) pp. 181, 188–189.)

For a complete discussion of initiatives, see chapter 3, part VI of the *Municipal Law Handbook*.

II. Pre-Proposition 218 History of Fiscal Initiatives

Proposition 218 does not redefine the initiative power reserved to voters since the initiative was established in 1911, but simply removes an exception to it, which prohibited initiatives to repeal taxes. The exception was created by cases reasoning that what voters could not do directly by referendum they could not do indirectly by initiative. (E.g., *Myers v. City Council of City of Pismo Beach* (1966) 241 Cal.App.2d 237, 243–244 (*Myers*) [citing limitation on use of referenda for tax repeals in former article IV, § 1, predecessor to article II, § 9]; *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864, 867 (*Dare*) ["Although the foregoing authorities deal generally with referendum powers it is also the law that the initiative process does not lie with respect to statutes and ordinances 'providing for tax levies[,]'" original emphasis, citing *Myers*].) After November 1986, when voters enacted Proposition 62, a statutory initiative requiring majority voter approval of local general taxes, the Court of Appeal cited *Myers* and *Dare* to conclude the new measure required an indirect referendum barred by article II, section 9. (*City of Woodlake v. Logan* (1991) 230 Cal.App.3d 1058, 1065–1066 (*Woodlake*).)

Rossi v. Brown (1995) 9 Cal.4th 688 (*Rossi*), overruled this conclusion and —as discussed throughout this guide — Proposition 218 was intended to constitutionalize this holding. *Rossi* relied on the legislative history of the initiative power and noted the lack of a constitutional prohibition on tax initiatives, as distinguished from the referendum, thus rejecting *Myers*, *Dare* and *Woodlake*. *Rossi* also distinguished a fiscal referendum, which has the immediate impact of delaying implementation of a fiscal act until the voters approve it or a governing body repeals it, from the prospective effect of an initiative to repeal a tax:

> An initiative has no immediate impact, however. Passage of an initiative which repeals an existing tax will rarely affect the current budgetary process of a local government… . Moreover, local officials have ample notice of the potential impact of an initiative long before the measure can become effective. An initiative is proposed by petition submitted to the board of supervisors … but notice of an intent to circulate the petition for signature must be published before it may be circulated… . Even those initiatives that qualify for a special election may not actually be voted on for as long as four, and in some cases six, months after the proposed ordinance is presented to the supervisors… . Therefore, the potential for disruption of local government services by qualification of a referendum petition on a newly enacted tax measure is not present in the procedures leading to possible passage of an initiative which prospectively repeals an existing tax.

(*Id.* at pp. 703–704.)

Six months later, in Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220 (Guardino), the Supreme Court addressed Proposition 62 in light of Rossi, upholding its requirement for voter approval of taxes and overruling seven years of contrary appellate decisions. The ballot measure challenged in Guardino, which would have imposed a sales tax to fund Santa Clara County's transportation needs, had been approved by a majority of voters, but less than the two-thirds required by Propositions 62 and 13. (Id. at p. 227.) Thus, even before the enactment of Proposition 218 in 1996, the Supreme Court held that voters could address taxation issues by initiative, including by prospectively repealing existing taxes.

The effects of *Rossi* as to charter cities and its broader impacts on the initiative power remain contested. Charter city advocates contend they can limit initiatives on taxes and assessments, as *Rossi* discusses only San Francisco's charter provisions which did not. (See *Rossi*, *supra*, 9 Cal.4th at pp. 711–714.) Those advocating ballot measures to repeal or reduce taxes argue *Rossi* holds the initiative power has always included the power to repeal taxes and that power may not be limited by city charter. (See *id*. at pp. 696–697, 700–702.) No case has yet resolved this debate.

III. Proposition 218 Did Not Expand the Initiative Power

Proposition 218 amended the Constitution, but did not expand the initiative power. Were section 3 interpreted to allow fiscal initiatives to avoid other constitutional limitations on the initiative, it arguably would be an unlawful constitutional revision by initiative. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223 ["an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof"]; *Legislature v. Eu* (1991) 54 Cal.3d 492, 510 ["to find such a revision, it must **necessarily or inevitably appear from the face** of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution," original emphasis].)

The Proposition 218 voter guide and statements by its drafter, the Howard Jarvis Taxpayers Association (HJTA) are in accord. The Legislative Analyst's analysis of Proposition 218 states the initiative provision "broadens the existing initiative powers" but does not fundamentally revise them. ([Proposition 218 Voter Guide, Analysis by Legislative Analyst].) The HJTA annotations to Proposition 218, written after the voters approved it, confirm that section 3 "does not greatly expand the initiative power." ([HJTA Annotations, January 1997].) Section 3 refers to only two constitutional provisions — sections 8 and 9 of article II — and does not affect others, such as the authority of the Legislature under article II, section 11 to determine procedures for local initiatives. This silence as to other relevant constitutional restrictions on the initiative power must be understood to maintain them.

Proposition 218 was not a revision of the Constitution — and could not have been, given that constitutional revisions require the Legislature to call a constitutional convention (see Cal. Const., art. XVIII, §§ 1–3) — and thus it should be interpreted as simply extending the initiative power to fiscal matters, thus preserving all other constitutional limitations on the initiative power.

IV. Limitations on Proposition 218 Initiatives

Because Proposition 218 simply removed a case law exception to the initiative power, the limitations on that initiative power provided by other cases and article II, section 8 continue to apply to initiatives notwithstanding article XIII C, section 3. Case law supports this position, holding that Proposition 218 did not fundamentally alter the initiative power, citing both its text and its proponents' statements during the initiative campaign. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 920–921 & n.6 (*Mission Springs*) [section 3 "presupposes an otherwise valid use of 'the initiative power'"].)

Therefore, even though an initiative purports to reduce taxes or fees, it is invalid if it violates any of these rules:

- Authority delegated specifically to a local legislative body by the Legislature (such as when the Legislature directs the "city council" or "board of supervisors" to take action) may not be exercised by initiative (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 500–505);
- An initiative must undertake a legislative act, not quasi-judicial or administrative action (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776);
- An initiative may not direct a local government to take a legislative action, but must itself enact legislation (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1510); and
- An initiative is subject to constitutional limitations on legislative action by the local government, such as preemption by state or federal statute (*DeVita v. County of Napa, supra,* 9 Cal.4th at p. 776; *Committee of Seven Thousand v. Superior Court*, *supra*, 45 Cal.3d at pp. 510–512; *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal. App.4th 357, 371)[81] and the requirement of equal protection for minimum rationality and an absence of invidious discrimination (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1025 [discrimination based on sexual orientation affecting fundamental rights]; *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.

81 In *Committee of Seven Thousand*, the Supreme Court distinguished preemption of the entire subject matter of a field from preemption by virtue of the State imposing procedural rules on the exercise of the power granted, such as barring local initiative and referendum. (*Committee of Seven Thousand v. Superior Court*, *supra*, 45 Cal.3d at p. 511.) For a complete discussion of preemption, see chapter 1, sections I.C. and I.D. of the Municipal Law Handbook.

App.3d 330, 337 [arbitrary and capricious land use measure]; *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009, 1020 [unwarranted distinction between city and unincorporated voters]).

- The contracts clauses in our state (Cal. Const., art. I, § 9) and federal constitutions (U.S. Const., art. I, § 10) bar initiatives that would violate contracts, but such impairment must be "material." (*County of San Bernardino v. Way* (1941) 18 Cal.2d 647, 663.) Successful challenges might arise in the bond or pension contexts, in which long-term contracts and obligations are typical. (See *Consolidated Fire Protection Dist. of Los Angeles County v. Howard Jarvis Taxpayers' Ass'n* (1998) 63 Cal. App.4th 211, 219–225.)

Courts have also recognized that an initiative may not impair an essential governmental function (*Simpson v. Hite* (1950) 36 Cal.2d 125, 134; *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466, 470), but no subsequent cases have extended this rule. Instead, our Supreme Court has held that ballot measures that can be construed not to impair essential governmental services must be so construed. (*Rossi*, *supra*, 9 Cal.4th at p. 703, quoting *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 839.) No case yet applies this argument to municipal utility rates, however; the provision of water, sewer, and other utility services are likely essential governmental services and thus an initiative to reduce rates to a level that would materially impair the ability of an agency to provide those services could be found to violate this limitation. One case does invalidate an initiative because it fails to comply with a statute requiring a County Water District to set fees sufficient to maintain a safe and adequate water supply. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892.)

A. Restrictions on Local Legislative Action also Limit Fiscal Initiatives

The establishment of a new local tax, assessment, fee, or charge is legislative action. (E.g., *McHenry v. Downer* (1887) 116 Cal. 20, 24–25 [taxation]; *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683–684 [assessments]; *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 196 [water rates]; *Garrick Dev. Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320 [school facilities fees].) The legislative act of establishing these levies, whether by initiative or compliance with Propositions 218 or 26, is subject to limits as is any other local legislation.

A general law city's power to tax is, of course, limited by the general laws. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 248.) For charter cities, the taxing power is limited by a city's charter and the Constitution. (*West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516, 526.) Thus, an initiative cannot avoid procedural requirements or substantive limitations that state law imposes on local taxes, assessments, or charges. (E.g., *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 233–234 [Gov. Code, § 65995 cap on school development fees invalidated initiative to exceed cap].)

Local initiatives that would affect levies are also subject to constitutional limits. Article XIII D, section 4 establishes specific requirements for the levy of assessments, such as capping every parcel's assessment at the special benefit it receives. Article XIII D, section 6 establishes similar requirements for property related fees and charges. As an example, a local initiative might reduce an assessment to fund a facility or service and be consistent with article XIII C, section 3, but the initiative could not reallocate that assessment among specially benefited parcels; benefits must be allocated as required by article XIII D, section 4. Further, if an initiative measure simply alters the procedures by which the levy is administered, it might be vulnerable as being administrative and not legislative in character.

V. Scope of Proposition 218 Initiative Power

A. Which Levies May be the Subject of an Initiative?

Article XIII C, section 3 expressly allows initiatives to reduce or repeal "any local tax, assessment, fee or charge." The Supreme Court held "fee or charge" includes a fee for a property-related service (those discussed in article XIII D) and may include other fees and charges as well. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212–213 (*Bighorn*).) The Court suggested the fees and charges subject to initiative reduction or repeal under article XIII C, section 3 may be broader than those "property related" fees and charges governed by Article XIII D (like water, sewer, and trash fees), but that section applies at least to those defined in XIII D, including the water fees at issue:

> Comparing the provisions of article XIII C and article XIII D, it appears to us that the words "fee" and "charge," which appear in both articles, may well have been intended to have a narrower, more restrictive meaning in article XIII D. The title of article XIII D is Assessment and *Property–Related* Fee Reform (italics added) and section 6 of article XIII D, which imposes restrictions on fees, is titled *Property Related* Fees and Charges (italics added). Consistent with these references to "property-related" fees, article XIII D's definition of "fee" requires that it be imposed "upon a parcel or upon a person as an incident of property ownership." (Cal. Const., art. XIII D, § 2, subd. (e).) By comparison, the words "property related" do not appear anywhere in article XIII C, nor does anything in the text of article XIII C suggest that it is limited to levies imposed on real property or on persons as an incident of property ownership… .
>
> Thus, it is possible that California Constitution article XIII C's grant of initiative power extends to some fees that, because they are not property related, are not fees within the meaning of article XIII D. But we perceive no basis for excluding from article XIII C's authorization any of the fees subject to article XIII D. The absence of a restrictive definition of "fee" or "charge" in article XIII C suggests that those terms include all levies that are ordinarily understood to be fees or charges, including all of the property-related fees and charges subject to article XIII D.

(*Id.* at p. 216.)

B. Which Changes to Levies can be Accomplished by Initiative?

Bighorn also interprets "affect" as used in section 3's phrase "affect local taxes, assessments, fees and charges." The Court rejected an initiative proponent's argument that "affect" allowed a local initiative to require future voter approval of water fee increases, reading section 3's provision that the initiative power may not be limited "in matters of reducing or repealing" taxes, assessments, fees, or charges. (*Bighorn*, *supra*, 39 Cal.4th at p. 218.) As such, *Bighorn* held Proposition 218 addressed only "reducing or repealing" such levies, not requiring voter approval for future increases. Given *Rossi*'s holding that the initiative power has always included fiscal measures discussed above, however, there is a strong argument that article XIII C, section 3 does not prohibit initiatives to increase public revenues; at most, it does not authorize them and that authority arises instead under Article II.

C. Post-Proposition 218 Challenges to Local Fiscal Initiatives: Bighorn and Mission Springs

Two cases explain that Proposition 218 did not expand the right to initiative except to clarify that initiatives may repeal existing taxes, fees, and charges, so all other requirements for initiatives arising from statutory and case law remain. They provide guidance on potential defenses to fiscal initiatives that endanger the provision of essential services.

Where the Legislature has required agencies to fund certain projects or specifically delegated authority to their legislative bodies, those statutes cannot be frustrated by initiative any more than an ordinance might. *Bighorn* rejected the plaintiff water agency's position that, because the Legislature delegated to its Board exclusive authority to set the agency's rates and charges, rates could not be set by initiative. Instead, *Bighorn* reasoned the Water Code could not trump Proposition 218's language allowing initiatives to reduce or repeal fees. (*Bighorn*, *supra*, 39 Cal.4th at p. 217.) Bighorn refrained from deciding whether article XIII, section 3 forbids any restriction on initiatives to reduce, repeal, or affect taxes, assessments, or fees. (*Id*. at p. 221.) Because Proposition 218

did not fundamentally change the initiative power, the better argument is still that voters are no freer of legal mandates binding an agency than is its governing body.

Mission Springs answered the question *Bighorn* reserved. Mission Springs is a 2013 case brought by another water district seeking declaratory relief from its duty to conduct an election on a water-rate-reduction initiative. The court found the Legislature mandated the district to establish rates sufficient to pay its operating expenses, maintain its water works, and pay the interest and principal on debt, but this mandate did not exclusively delegate rate-making authority to the District's board to the exclusion of voters. (*Mission Springs*, *supra*, 218 Cal.App.4th at pp. 912–914 citing *DeVita v. County of Napa*, *supra*, 9 Cal.4th at p. 776.) However, both elected officials and voters must make rates sufficient to operate the utility. Accordingly, the proposed initiative, which would have prevented the water district from doing so, was invalid. (*Id.* at p. 921.)

Thus, *Mission Springs* holds that even though Proposition 218 allows initiatives to reduce water rates, it does not allow initiatives to violate statutory limits on rate-making. As such, an initiative that would set rates too low to meet a bond covenant would meet a similar fate under the impairment of contracts clause of the state and federal Constitutions. (See Gov. Code, § 53753.5, subd. (b)(3) [exempting assessments to repay bonds from Proposition 218]; *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 32 [federal constitution's contracts clause prohibits retroactive repeal of bond covenant].)

> **▶ PRACTICE TIP:**
>
> Because local agencies are subject to many statutory mandates, initiative drafters should take care to avoid preventing agencies from meeting them. By the same token, those challenging an initiative might identify those statutory mandates the initiative would prevent the local agency from satisfying, as in *Mission Springs*. Statutory mandates to provide a safe and adequate water supply, to fund cost of sewer service requirements, or to satisfy other environmental requirements and mandates such as the Clean Water Act and Safe Drinking Water Act may be relevant to such disputes. If a fiscal initiative will disable a water provider from meeting statutory water quality standards or service needs, a court should strike it down.

Mission Springs thus lays a path for challenges of this type, rejecting the initiative proponents' argument against pre-election review and examining evidence submitted by the water district demonstrating that the initiative reducing rates would have set its rates so low that it could not have met statutory requirements to pay operating costs, bond covenants, etc. (*Mission Springs*, *supra*, 218 Cal.App.4th at p. 921.)

For a more complete discussion of defenses to initiatives, including a public agency's options for responding to initiatives it believes are invalid, see sections 3.102 to 3.118 of the Municipal Law Handbook.

VI. Implementation of successful fiscal initiatives

If an initiative is adopted to repeal, the question arises whether and when the agency can pass a new fee without voter approval. This may depend on a close reading of local ordinances and resolutions, but *Bighorn* invalidated the provision of the measure there purporting to require two-thirds voter approval of new water rates. Under the Elections Code, a local initiative takes effect 10 days after the election results are certified by the agency's legislative body. (Elec. Code, § 9217.) But if rates are repealed, an agency must be able to impose a rate to avoid selling a service for free. Options include: (1) re-implementing the rates in effect before those repealed; (2) adopting new rates before the election to take effect if rates are repealed; or (3) implementing rates by urgency action. Any of these options would arguably not require compliance with Proposition 218 because they do not constitute imposing, extending, or increasing a levy.

If a public entity increases an existing levy while initiative proponents seek to reduce or repeal it, whether the proponents' initiative would affect the levy adopted during the initiative process turns on the language of the initiative. Courts will attempt to give meaning to the initiative (including any stated intent to legislate retroactively) but must also apply current law; how to balance these competing principles will turn on the language of the initiative. (E.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037–1039 [initiative impliedly repealed statutes regulating contracts between State and private contractors].)

VII. Proposition 218's Petition Signature Threshold

Article XIII C, section 3 also prohibits the Legislature and local governments from imposing "a signature requirement higher than that applicable to statewide statutory initiatives." In other words, the required number of signatures to qualify a fiscal initiative can be no higher than 5 percent of the votes cast for Governor in the relevant jurisdiction in the last gubernatorial election. (See Cal. Const., art. II, § 8, subd. (b); Elec. Code, § 9035.) As gubernatorial turnouts are in the range of 40 percent, this figure is quite low: 5 percent of 40 percent is just 2 percent of all registered voters.

In 2002, the Attorney General interpreted article XIII C, section 3 to mean that, to qualify an initiative for a special election, an initiative petition must obtain signatures of 15 percent of voters from the last gubernatorial election because there is no "signature requirement" for initiatives at statewide special elections; only the Governor may call such elections. (85 Ops.Cal.Atty. Gen. 151 (2002).) This is to say that Proposition 218 speaks to the signature requirement for fiscal initiatives but is silent as to the timing of elections, which is governed by the Elections Code. An unpublished (but citable in state court) Ninth Circuit decision is to similar effect. (*Coltharp v. Herrera* (9th Cir. 2014) 584 Fed. Appx. 334 [affirming clerk's refusal to conduct election on measure demanding special election not signed by 15 percent of voters as required by the Elections Code.)

Under the Elections Code, the number of signatures submitted by an initiative proponent determines the timing of an election. If the proponent submits valid signatures of 5 percent of the number of voters who participated in the last gubernatorial election, the initiative will be voted on at the next regular election unless the local government chooses to conduct a special election under the Election Code or city charter. (Cal. Const., art. II, § 8; art. XIII C, § 3; Elec. Code, §§ 1405, subd. (b); 9215.) If a proponent submits signatures from 15 percent of voters on a petition requesting a special election, the local agency must specially call an election within 103 days. (Elec. Code, § 9214.) Of course, that Code also allows a local government to call a special election to consider an initiative proposal even when it is not obliged to do so. (Elec. Code, § 9222.)

VIII. Who Votes on Proposition 218 Initiatives?

Article XIII C, section 3 does not define who votes on fiscal initiatives or discuss whether only those who pay the tax, assessment, or fee may vote. Article XIII D, section 6, covering property-related fees, limits voting to "the property owners of the property subject to the fee or charge" or, at the agency's option, the "electorate residing in the affected area." (Cal. Const., art. XIII D, § 6, subd. (c).) The use of "the electorate" and "the voters" in article XIII C, section 2 appears to require the entire electorate to vote on imposing taxes, suggesting the entire electorate would participate in any initiative to reduce or repeal them.

Shapiro v. City of San Diego (2014) 228 Cal.App.4th 756 concludes that a charter-city ordinance limiting the "electorate" on a special tax under a charter-city ordinance comparable to the Mello Roos Act violated Propositions 13 and 218 in limiting the franchise on a hotel bed tax to hoteliers on which the City imposed the tax (most bed taxes are an incident on hotel guest). *Shapiro* noted the Supreme Court has used the phrases "qualified electors" in article XIII A, section 4 (part of Proposition 13) and "electorate" in article XIII C, section 2 interchangeably, and thus concluded their interpretations should be harmonized. (*Id.* at pp. 778–779.) *Shapiro* also distinguished the provisions in article XIII D, which allow only property owners to vote on assessments, from the use of "electorate" in article XIII C to conclude that elections on taxes, unlike those for assessments, must be open to all registered voters. (*Id.* at pp. 779–781, 782–783.) As an independent basis for invalidating the ordinance, *Shapiro* held that San Diego's ordinance limiting "electorate" violated San Diego's charter, which the court held required the City to include all City voters. (*Id.* at pp. 790–792.)

Shapiro does not resolve whether a subset of the "electorate" may exercise the initiative power to reduce or repeal a tax, assessment, fee, or charge. Article II, section 11 of the Constitution holds that the power of initiative "may be exercised by the electors of each city or county," which supports a conclusion that all voters of a local government have the right to vote on any initiative even if the revenue measure in issue does not apply agency-wide. But article II, section 11 also notes that those electors may exercise the initiative power "under procedures that the Legislature shall provide" and makes clear the restriction does not apply to charter cities, meaning that the Legislature and charter cities may have the power to address this procedural question. *Shapiro* questioned the provision of the Mello Roos Act (Government Code section 53326, subd. (b)) limiting the vote to property owners when a Mello Roos District has fewer than 12 registered voters (228 Cal.App.4th at p. 786, fn. 2.) However, this statute appears to the authors of the Guide to be defensible under landowner voting cases such as *Sayler Land Co. v. Tulare Lake Basin Water Storage Dist*. (1973) 410 U.S. 719 [upholding landowner voting against 14th Amendment challenge as to district which primarily funded services to property owners which funded them].)

A. Equal Protection Challenges by Non-Voters Who Pay a Levy

Case law allows cities to limit the vote to registered voters when implementing new taxes on non-resident property owners. In *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, a non-resident landowner challenged a city's flat-rate special parcel tax approved by the city's registered voters. The plaintiff argued the city's failure to allow non-resident property owners who would pay the tax to vote on the measure violated equal protection. *Neilson* disagrees, holding that strict scrutiny analysis for limitations on the right to vote applies only when the right is denied those who are otherwise qualified to vote. (*Id*. at p. 1315.) In *Neilson*, because the plaintiff was a non-resident property owner not qualified to vote in city elections, the court applied a rational basis test to determine whether California City violated his equal protection rights. Limiting the vote to the city's voters had a rational basis given their interest in local affairs and the city's planned uses of the special tax for city services, and thus it was not a violation of equal protection to prevent non-resident landowners from voting. (*Id.* at p. 1317.) *Neilson* holds there is no authority requiring a government entity to extend the right to vote to nonresident property owners, but cites no authority stating a government entity may not do so. (*Ibid*.)

In the fiscal initiative context, given that votes on property-based assessments may be limited to those who own property affected by the assessment and the limited scope of those assessments, an equal protection challenge would likely be analyzed using a rational basis test. *Shapiro* expressly avoided the question for tax elections, citing *Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 297, fn. 8, which held that the equal protection provisions of the state Constitution do not apply to fee elections under article XIII D, section 6, subdivision (c). (*Shapiro*, *supra*, 228 Cal.App.4th at p. 780, fn. 23.) The Mello-Roos Act, which *Shapiro* distinguishes, expressly allows an election of only those who would pay an assessment in a community facilities district (Government Code, § 53326), and further supports a conclusion that limiting the vote for an assessment to landowners would not violate equal protection. (See also *Not About Water Committee v. Board of Sup'rs* (2002) 95 Cal.App.4th 982, 987–1001 [upholding weighted assessment protests under article XIII D, section 4 against equal protection challenge] disapproved on other grounds by *Silicon Valley*, *supra*, 44 Cal.4th at p. 450 fn. 6.)

Neilson does note, however, that local entities may base the right to vote on land ownership in limited situations without violating equal protection. (*Neilson*, *supra*, 133 Cal.App.4th at p. 1316; cf. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.* (1973) 410 U.S. 719, 728 [upholding landowner vote on water storage agency's board of directors because it provided services to property funded by property owners]; *Southern Cal. Rapid Transit Dist. v. Bolen* (1992) 1 Cal.4th 654 [upholding votes on special benefit district referendum to owners of real property subject to assessment]), meaning an assessment levied on a well-defined subset of a district's parcels could also be limited to the owners of those parcels consistently with *Neilson*. Thus, limiting the vote on an initiative to repeal a property-based assessment (but perhaps not a tax, given *Shapiro*) to those who actually pay it would survive an equal protection challenge.

Litigating Cases Under Propositions 26 and 218

I. Statutes of Limitations

Lawsuits challenging the imposition and collection of local taxes, assessments, fees, and charges are governed by a variety of statutes of limitations. As a general matter, however, these statutes of limitations can be divided into two categories: the default statutes, which apply when no specific statute of limitations exists for the particular tax, assessment, fee, or charge at issue; and the special statutes, which impose a statute of limitations applicable to a specific tax, assessment, fee, or charge. When assessing the timeliness of a challenge to a local tax, assessment, fee, or charge, one should carefully review the statutory provisions applicable to the particular levy at issue to determine whether a special limitations period exists. If no specific statute of limitations governs the challenge, the default statutes of limitations will apply.

A. The Default Statutes of Limitations

There are two default statutes of limitations applicable to actions challenging taxes, assessments, fee and charges: the Government Claims Act, which imposes the equivalent of a one-year limitations period for actions seeking a refund of a tax, assessment, fee, or charge (Gov. Code, § 911.2); and Code of Civil Procedure section 338(a) [following the denial of an administrative Government Code claim], which imposes a three-year limitations period for actions in which no refund is sought.

If a plaintiff challenges a tax, assessment, fee, or charge but only seeks prospective relief, such as a writ or declaration invalidating the levy, the Government Claims Act does not apply. In such situations, unless a special statute of limitations applies to the particular tax, assessment, fee, or charge at issue, Code of Civil Procedure section 338(a) — which applies to actions "upon a liability created by statute — will govern. (*La Habra*, *supra*, 25 Cal.4th at 815; see also *City of Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823, 833–834 [liabilities created by statute under section 338(a) (then section 338(1)) include liabilities created by ordinance].)

Code of Civil Procedure section 338(a) imposes a three-year statute of limitations that runs from the accrual of the cause of action. (See Code Civ. Proc. § 312.) Despite its reference to "liability created by statute," this section establishes the statute of limitations for constitutional challenges to revenue measures. (*State ex rel. Dept. of Motor Vehicles v. Superior Court* (1998) 66 Cal. App.4th 421, 434–436 & fn. 8 [Dormant Commerce Clause challenge to tax on out-of-state vehicles brought into California subject

to Code Civ. Proc., § 338, subd. (a)]; *Peles v. LaBounty* (1979) 90 Cal.App.3d 431, 435 [First Amendment challenge to expulsion from public university subject to Code Civ. Proc., § 338].)

As is the case with refund actions subject to the Government Claims Act, discussed above, the continuous accrual rule applies to actions subject to Code of Civil Procedure section 338(a). (*La* Habra, supra, 25 Cal.4th at 818–825.) Thus, a challenge to a tax, assessment, fee, or charge that seeks only prospective relief will be timely under section 338(a) if brought by someone who paid any installment on the challenge a levy within the three-year period preceding the filing of the complaint.

B. Special Statutes of Limitations

A patchwork of statutory provisions found in the Code of Civil Procedure, Government Code, Streets and Highways Code, and elsewhere impose specific, and sometimes very short, statutes of limitations governing challenges to specific taxes, assessments, fees, or charges. The statutory provisions are discussed below.

1. The Validation Statutes

Code of Civil Procedure sections 860 through 870, known as the "validation statutes," establish a unique, expedited procedure for challenging certain government acts. When made applicable by another substantive statute, the validation statutes create a 60-day period in which the public entity or any interested person may sue to determine the validity of a governmental act. (*Golden Gate Hill Development Company, Inc. v. County of Alameda* (2015) 242 Cal.App.4th 760, 765–767.) Lawsuits brought by the public entity are called "validation actions," and lawsuits by the public are called "reverse validation actions." (*Ibid.*)

"A validating proceeding differs from a traditional action challenging a public agency's decision because it is an in rem action whose effect is binding on the agency and on all other persons." (*Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 197, citations omitted.) Moreover, (except with respect to claims under Government Code section 66022, discussed below) if no action is brought by the public entity or members of the public within the 60–day timeframe, the public is "forever barred from contesting the validity of the agency's action in a court of law." (*Id.* at 766, citations omitted; Code Civ. Proc. § 869 ["No contest except by the public agency … of any thing or matter under this chapter shall be made other than within the time and the manner herein specified."])

NOTE: On occasion, a statute will require a public entity to bring a validation action directly to secure the benefit of the 60-day statute of limitations. For instance, if a public entity levying an assessment under the Benefit Assessment Act of 1982 (Gov't Code § 54703 *et seq.*) does not bring a validation action within 60 days of the adoption of the assessment, members of the public need not bring a reverse validation action to challenge the assessment. (Gov't Code § 54712.)

The validation statutes apply only when some "other law" authorizes their application to the matter at issue. (Code Civ. Proc. § 860.) Thus, a public entity seeking to secure the protection of the 60-day statute of limitations must identify some law providing that challenges to the governmental act at issue be brought pursuant to the validation statutes. (*Santa Clarita Organization for Planning and the Environment (SCOPE) v. Abercrombie* (2015) 240 Cal.App.4th 300, 308.)

Historically, the validation statutes applied primarily to acts related to the issuance of debt. "[I]n its most common and practical application, the validation proceeding is used to secure a judicial determination that proceedings by a local government entity, such as the issuance of municipal bonds and the resolution or ordinance authorizing the bonds, are valid, legal, and binding. Assurance as to the legality of the proceedings surrounding the issuance of municipal bonds is essential before underwriters will purchase bonds for resale to the public." (*Friedland v. City of Long Beach* (1998) 62 Cal. App.4th 835, 842, citations omitted, brackets in original.) However, in the last few decades, validation proceedings have been authorized for a variety of taxes, assessments, fees, or charges.

NOTE: In addition to imposing a 60-day statute of repose, the validation statutes require that any appeal from a judgment in a validation or reverse validation action be brought within 30 days after notice of entry of judgment or, if there is no answering party in a validation action, within 30 days after entry of judgment.

a. Special Taxes

The validation statutes apply to actions seeking to attack, review, set aside, void, or annul an ordinance or resolution levying a special tax approved by the voters pursuant to Title 5, Division 1, Part 1, Chapter 1, Article 3.5 of the Government Code, a statutory scheme establishing procedures for the adoption of special taxes. (Gov't Code § 50075.5.) Any action challenging a special tax approved pursuant to that article must be brought as a reverse validation action within 60 days of the adoption of the ordinance or resolution. (Code Civ. Proc. § 863.) If an ordinance or resolution provides for an automatic adjustment in the rate or amount of tax that increases the amount of the tax, an action challenging the increase (but not the underlying tax) may be brought within 60 days of the effective date of the increase. (Gov't Code § 50075.5; see *Golden Gate Hill Development Company*, supra, 242 Cal.App.4th 760; *Katz v. Campbell Union High School District* (2006) 144 Cal.App.4th 1024.)

NOTE: Proposition 62, adopted by the voters in 1986, included a provision stating that "Article 3.5 of Division 1 of Title 5 of the Government Code" may not "be construed to authorize any local government or district to impose any general or special tax which it is not otherwise authorized to impose… ." (Gov't Code § 53727.) Proposition 62 thus withdrew any authority to adopt special taxes previously granted by these provisions. (*California Building Industry Ass'n v. Governing Board of the Newhall School District of Los Angeles County* (1989) 206 Cal.App.3d 212, 224, 232–233.) Nevertheless, public agencies that are otherwise authorized to adopt special taxes may still utilize the procedures established by Government Code section 50077 and gain the benefit of 60-day statute of limitations.

The validation statutes also apply to actions challenging the validity of special taxes adopted under sections 53311 *et seq*. of the Government Code, the Mello-Roos Community Facilities Act of 1982. (Gov't Code § 53359.) In fact, Mello-Roos special taxes are subject to an even shorter statute of limitations than is typically applied in validation actions, as a reverse validation action must be brought within 30 days after the voters approve the challenged special tax. (*Ibid.*)

b. Government Code section 66022

Government Code section 66022 states that challenges to development impact and certain other fees and charges must be brought under the validation statutes within 120 days of the effective date of the ordinance, resolution, or motion establishing the fee or charge. Many of the fees and charges subject to this 120-day statute of limitations involve levies designed to recover costs incurred in adopting and administering land use policies, including fees related to zoning variances and changes, use permits, building inspections and permits, LAFCO proceedings, the Subdivision Map Act, and specific plans, among other land use activities. (Gov't Code §§ 66014(a), 66016(d) [listing land use-related fees subject to Government Code section 66022].)

The California Supreme Court applied that statute in *Utility Cost Mgmt. v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1197 to bar plaintiff's claims, noting:

> the Legislature may well have determined that a short statute of limitations was appropriate to give public utilities certainty with respect to the enforceability of their ordinances and resolutions… , even if doing so was at the cost of making challenges to those ordinances and resolutions difficult.

Nor does the fact that these claims arise under the Constitution avoid the 120-day statute of limitations. *Barratt American v. City of San Diego* (2004) 117 Cal.App.4th 809 upheld a 30-day statute of limitations under Code of Civil Procedure section 329.5 to bar a Proposition 218 challenge to an assessment:

> Neither Proposition 218 nor the Omnibus [Implementation] Act mention section 329.5 or any other statute setting forth a limitations period, nor do they prescribe any period by which a legal challenge to an

> assessment levied under its provisions must be made. While Proposition 218 expressly references the local agency's burden of proof in any legal challenge contesting the validity of an assessment, nothing in the constitutional provisions it added addresses the timing of such challenges … . Proposition 218 thus conflicts with and renders unconstitutional contradictory procedures or process leading to the adoption or levy of an assessment falling within its ambit. It does not conflict with process or procedures relating to the timing of legal challenges to such an assessment. (*Id*. at pp. 817–818.)

Fees for sewer and water connections and "capacity charges" are also subject to Government Code section 66022's 120-day statute of limitations. (Gov't Code § 66013.) The inclusion of "capacity charges" is potentially significant, as the statutory definition of "capacity charge" is very broad:

"Capacity charge" means a charge for public facilities in existence at the time a charge is imposed or charges for new public facilities to be acquired or constructed in the future that are of proportional benefit to the person or property being charged, including supply or capacity contracts for rights or entitlements, real property interests, and entitlements and other rights of the local agency involving capital expense relating to its use of existing or new public facilities. A "capacity charge" does not include a commodity charge.

(*Id.* § 66013(b)(3).) "Public facilities" are defined as "public improvements, public services, and community amenities." (*Id.* § 66000(d), 66013(b)(6).)

However, the definition of "capacity charge" has not been extensively litigated, and there is uncertainty as to the fees and charges covered by this 120-day statute of limitations. (Compare *Utility Cost Management v. Indian Wells Valley Water District* (2001) 26 Cal.4th 1185 [portion of fees for water service used to fund capital costs of public facilities was a capacity charge subject to 120-day statute of limitations] and *Rincon Del Diablo Municipal Water District v. San Diego County Water Authority* (2004) 121 Cal.App.4th 813, 819-22 [capital component of water rates was not a capacity charge subject to 120-day statute of limitations].)

c. Public Utilities Code § 10004.5 and electric rates

Public Utilities Code section 10004.5, subdivision (a) imposes a 120-day statute of limitations on challenges to municipal power rates that is worded nearly identically to Government Code section 66022:

> [A]ny judicial action or proceeding against a municipal corporation that provides electric utility service, to attack, review, set aside, void, or annul an ordinance, resolution, or motion fixing or changing a rate or charge for an electric commodity or an electric service furnished by a municipal corporation and adopted on or after July 1, 2000, shall be commenced within 120 days of the effective date of that ordinance, resolution, or motion.

As Proposition 26 challenges to municipal power rates have been common, this statute of limitations is of particular value. Analogs to it with identical language appear in other statutes. (E.g., Wat. Code, § 22651.5(a) [Irrigation District Act]; see *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 254 & fn. 9].)

The Court of Appeal applied Public Utilities Code section 10004.5 and interpreted its legislative history in finding a Proposition 26 challenge to a municipal electric utility's rates time-barred. (*Webb v. City of Riverside* (2018) 23 Cal.App.5th 244.) The court gave "rate" and "charge" broad definitions, stating the bill that added section 10004.5 and statutes with identical language was intended "to protect public utilities from the fiscal uncertainty that results when a plaintiff can challenge any decision years after it is made," meaning any challenge to a utility's "price or cost sought" for electric service must come within 120 days of rate-setting. (*Id*. at 254-255.)

d. Local Ordinances

It is not uncommon for local ordinances authorizing and establishing procedures for the adoption of assessments to include provisions requiring that any challenges to an assessment be brought as a reverse validation action. (See, e.g., San Diego Mun. Code § 61.2526(a) [action to determine validity of tourism marketing district assessment must be brought under validation statutes]; cf. *Inland Oversight Committee v. City of Ontario* (2015) 240 Cal.App.4th 1140 [dismissing appeal from judgment sustaining demurrer to Prop. 26 challenge to TMD assessment for failure to comply with 30-day appeal rule of Health & Saf. Code, § 36633 [PBID Law].) Cases broadly construe the power of charter cities to legislate as to assessments. (E.g., *Redwood City v. Moore* (1965) 231 Cal.App.2d 563, 583 [charter city procedural ordinance sufficient to trigger "special fund" exception to debt limit] disapproved on other grounds by *Bishop v. San Jose* (1969) 1 Cal.3d 56; *J.W. Jones Companies v. City of San Diego* (1984) 157 Cal.App.3d 745 [upholding charter city assessment against Equal Protection and Prop. 13 challenges].) Limits on charter city assessment power appear in article XVI, section 19 of the California Constitution.

e. Validating Acts

In addition to the validation statutes, the Legislature adopts special statutes three times every year to validate governmental acts related to the issuance of bonds and to the formation of public entities and boundary changes such as annexations. These special statutes, which are not codified, are known as "Validating Acts." Validating Acts are enacted on the theory "that the Legislature … may subsequently ratify whatever it could have originally authorized so that an act ratified will be equivalent to an act performed under an original grant of power, provided no constitutional obstacles or vested rights are involved." (*Hewitt v. Rincon Del Diablo Municipal Water District* (1980) 107 Cal.App.3d 78, 91.)

Although Validating Acts do not typically apply to taxes, assessments, fees, or charges, a tax or other levy adopted for the purpose of funding the repayment of bonds or adopted pursuant to a LAFCO-imposed condition on a "change of organization" under the Cortese-Knox-Hertzberg Local Government Reorganization Act would be covered. (See Gov't Code § 56886(s).) However, because the Legislature cannot authorize unconstitutional acts, the Validating Acts do not directly ratify governmental actions that violate either the California or United States Constitutions, including Propositions 218 and 26. Nevertheless, Validating Acts often create a six-month statute of limitations, running from the Act's effective date, which does bar litigation of Constitutional challenges to governmental acts related to bonds and changes of organization. (See, e.g., *Las Tunas Beach Geologic Hazard Abatement District v. Superior Court* (1995) 38 Cal.App.4th 1002 [discussing First Validating Act of 1992, Stats. 1992, ch. 2, § 8].) This special six-month statute of limitations generally does not override other, shorter statutes of limitations. (See, e.g., Stats. 1992, ch. 2, § 8.)

C. Assessment Statutes of Limitations

Although lawsuits challenging the imposition of assessments are occasionally governed by the validation statutes, it is more common for statutory provisions to apply very short statutes of limitations to assessment challenges without subjecting those challenges to validation. For instance, a challenge to an assessment levied under the Property and Business Improvement District Law of 1994 (Sts. & Hy. Code §§ 36600 *et seq.*) must be commenced within 30 days after the resolution levying the assessment is adopted. (*Id.* § 36633; see also *id.* § 10400 [same, Municipal Improvement Act of 1913]; *id.* § 36537 [same, Parking and Business Improvement Area Law of 1989].)

> **NOTE:** On occasion, these short limitations periods do not apply to all assessments authorized by a particular statute. For instance, the Landscaping and Lighting Act of 1972 states the "validity of an assessment levied under this part *for the purpose of raising revenue necessary to pay the debt service on bonds*" must be brought within 30 days after the initial assessment is levied. (*Id.* § 22675.)

> **NOTE:** As is the case in actions subject to the validation statutes, appeals in actions subject to these short statutes of limitations for specified assessments must generally be brought within 30 days of entry of judgment rather than the 60 or 180 days typically allow for a civil appeal. (See, e.g., Sts. & Hy. Code §§ 10400, 36633, 36537.)

Charter cities that adopt their own assessment procedures are subject to a special statute of limitations for actions challenging assessments adopted under those procedures. Code of Civil Procedure section 329.5 states that any action challenging the validity of an assessment against real property for public improvements, "the proceedings for which are prescribed by the legislative body of any chartered city," must be brought within 30 days after the assessment is levied, or a longer period if provided by the city's legislative body.

D. Statutes Applying the Property Tax Refund Statute

The Revenue and Taxation Code details procedures for property tax refund actions. Any taxpayer must present a written claim to the county administering those taxes within four years of making a payment to be refunded. (Rev. & Tax. Code § 5097(a).) No lawsuit may be brought seeking a refund of property taxes unless a claim has been presented, and if a claim is presented, the lawsuit must be filed within six months after the claim has been rejected. (*Id.* §§ 5141, 5142(a).)

These procedures also apply to actions for refunds of certain types of assessments, fees, and charges. The property tax refund procedures are made applicable to assessments, fees, or charges only when directly incorporated by a separate statute, as is common for revenues collected on the property tax roll. When these procedures are applicable, they govern any attempt to secure a refund of the challenged assessment, fee, or charge on the grounds that it is "[e]rroneously or illegally collected" or "[i]llegally assessed or levied." (*Id.* § 5096.)

For instance, assessments that are "collected at the same time and in the same manner as county taxes" are subject to the refund procedures applicable to property taxes. (*Id.* § 4801.) Thus, any action brought to recover an assessment collected by a county on the property tax roll is governed by Revenue and Taxation Code section 5097's four-year statute of limitations, unless a more specific statute of limitations applies (see the above discussion).

Moreover, many assessment statutes state the assessments they authorized shall be collected at the same time and in the same manner as county taxes. (See, e.g., Pub. Resources Code § 33017 [assessments imposed by the Southern California Rapid Transit District "shall be levied and collected by the county at the same time and in the same manner as county taxes are levied and collected"].) This language generally triggers application of the property tax refund statutes, including Revenue and Taxation Code section 5097's four-year statute of limitations. (See *Hanjin International Corp. v. Los Angeles County Metropolitan Transportation Authority* (2003) 110 Cal.App.4th 1109.)

Moreover, these property tax refund procedures also apply to water, sanitation, storm drainage, or sewerage system fees or charges adopted by cities, counties, and special districts under Health and Safety Code section 5471, which states that these public entities:

shall have the power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system.

Fees or charges fixed pursuant to this statute must be challenged "in the manner provided for the payment of taxes under protest and action for refunds thereof in Article 2, Chapter 5, Part 9, of Division 1 of the Revenue and Taxation Code, insofar as those provisions are applicable." (Health & Safety Code § 5472; *Los Altos Golf and Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198.) Accordingly, Revenue and Taxation Code section 5097's four-year statute of limitations is applicable to actions challenging fees and charges adopted pursuant to the procedures established by Health & Safety Code section 5471.

II. Claiming Requirements & Standing

A. Government Claims Act

Under the Government Claims Act, "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented … until a written claim therefor has been presented to the public entity … ." (Gov't Code § 945.4; *State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1240 ["[T]he filing of a claim … is more than a procedural requirement"; it is a "condition precedent" to filing suit against a public agency and "an integral part of [a] plaintiff's cause of action."].) Government Code section 911.2(a) states that any claim (except those related to death or injury to persons, personal property, or crops) must be presented to the public agency "not later than one year after the accrual of the cause of action." Because the presentation of a written claim is a statutory prerequisite to suing a public agency for money or damages, Government Code section 911.2 operates like a one-year statute of limitations that is calculated backwards from the date the written claim is presented, although it is not technically a statute of limitations. (See, e.g., *Utility Audit Co. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 961–961.) Any action must be brought within six months after the claim is rejected or, if the claim is not rejected, within two years of accrual of the cause of action. (Gov't Code § 945.6.)

"[T]he date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented … ." (Gov't Code § 901.) Unless otherwise specified by statute, a cause of action accrues when "complete with all its elements"— wrongdoing, harm, and causation. (*Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 815; *Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797, citations omitted.) For most cases seeking a refund of a tax, assessment, fee, or charge, payment of the challenged levy that causes "harm" to taxpayers, is the last element of a cause of action to occur and triggers accrual. Thus, under this "last element" rule, a refund cause of action accrues upon the first payment of an allegedly illegal tax, assessment, fee, or charge, and any taxpayer who did not present a written claim within one year of making his or her first payment would be barred from filing a lawsuit by Government Code section 911.2(a).

However, the "last element" accrual rule often will not apply in actions seeking a refund of taxes, assessments, fees, or charges. Instead, courts apply an exception to the rule known as "continuous accrual," under which "separate, recurring invasions of the same right can trigger their own statute of limitations." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1198.) When the continuous accrual rule applies, each wrongful act creates a distinct cause of action. (*Hogar Dulce Hogar v. Community Development Commission of the City of Escondido* (2003) 110 Cal.App.4th 1288, 1295.) Since each breach of a recurring obligation "provides all the elements of a claim—wrongdoing, harm, and causation— each may be treated as an independently actionable wrong." (*Aryeh, supra*, 55 Cal.4th at 1199, citations omitted.) Thus, a new cause of action accrues — and a new statute of limitations commences — with each payment of a revenue measure.

In 2001, the California Supreme Court held that this rule applies, at least as a general matter, to actions challenging taxes, and by extension, it likely applies to other government levies as well in the absence of a more specific statute of limitations than the general rule of Code of Civil Procedure section 338(a). (*La Habra*, *supra*, 25 Cal.4th at 818–825.) Because taxes, assessments, fees, and charges are generally collected periodically, each collection triggers all of the elements of a cause of action for a refund. Thus, taxpayers who first present a written claim within one year of making any payment of a challenged levy satisfy Government Code section 911.2, subdivision (a)'s one-year claiming requirement.

When a more specific statute of limitations applies — like the validation rule of Code of Civil Procedure sections 860 et seq. — the continuous accrual rule of *La Habra* will not apply. (E.g., *Utility Cost Management v. Indian Wells Valley Water Dist*. (2001) 26 cal.4th 1185, 1195 [120-day statute of Gov. Code, § 66022 for capital facilities fees displaced *La Habra* rule].)

The "continuous accrual" rule does come with an important caveat limiting liability. Because each wrongful act creates its own cause of action, the continuous accrual rule "supports recovery only for damages arising from those breaches falling within the limitations period[,]" effectively "limit[ing] the amount of retroactive relief a plaintiff or petitioner can obtain to the benefits or obligations which came due" during that period. (*Aryeh, supra*, 55 Cal.4th at 1199; *Hogar Dulce Hogar*, *supra*, 110 Cal.App.4th

at 1296.) Thus, any taxpayer seeking a refund of taxes, assessments, fees, or charges in situations governed by the continuous accrual rule may not recover any amounts collected more than one year before he or she presented a written claim to the entity imposing the levy.

> ▶ **PRACTICE TIP:**
>
> Typically, a plaintiff will not allege each collection of a tax, assessment, fee, or charge — whether it be monthly, annually, or on some other schedule — as a separate cause of action in a complaint. However, cases hold that "cause of action" for purposes of the summary adjudication statute (Code Civ. Proc. § 437c(f)(1)) means any "separate and distinct wrongful act," and that summary adjudication may be granted as to any such separate and distinct act, even if it is alleged in the aggregate with other wrongful acts. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853–1855; *Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 114–118.) A similar rule has been applied on demurrer. (See *Sun 'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 678–679, 692, 703.) Because each collection of an allegedly illegal tax, assessment, fee, or charge is a separate cause of action, if a taxpayer seeks a refund of amounts collected more than one year before he or she presented a written claim to the public entity imposing the levy, it may be possible to limit recovery to the one-year period by demurrer, motion for judgment on the pleadings, or motion for summary adjudication.

1. Exceptions to the claims presentation requirement

Despite the general rule that the filing of a claim is a condition precedent to filing suit, section 905 Government Code lists several categories of claims not subject to the Government Claims Act's claims presentation requirements. Two are of particular relevance to claims for taxes, fees, or assessments: claims by a government entity and claims for which there is a claim or refund procedure in the Revenue and Taxation Code or other statute. (Gov. Code § 905, subds. (a), (i).)

Subdivision (i) of section 905 provides that "[c]laims by the state or by a state department or agency or by another local public entity or by a judicial branch entity" are not subject to the claims presentation requirements of the Government Claims Act. However, Government Code section 935 allows a local government to create its own claims presentation requirements and procedures for claims that are exempted under section 905. (Gov. Code § 935, subd. (a).) The procedure must be substantially the same as the procedures of the Government Claims Act. (Gov. Code § 905, subds. (b)–(e).) Under this authority, local governments can enact claims ordinances requiring other government entities to submit claims as a precondition to suit. (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 901–902 [defeating CalTrans indemnity suit for failure to file a claim under city ordinance].)

There are a number of claims procedures in statutes, particularly in the Revenue and Taxation Code for levies collected with the property taxes. See discussion, infra, in this Guide.

B. Class Actions

Class claims can be submitted under the Government Claims Act. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 253.) Consequently, unless there is a statutory refund procedure applicable to a tax, fee, or assessment, the tax, fee, or assessment can be the subject of a class claim. (*Ibid*.)

Because local claims ordinances are not "statutes" under Government Code section 905, subdivision (a), a provision of the Government Claims Act (although they are for other purposes), they cannot override the claim procedures of the Government Claims Act and prohibit class claims. (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 616–617.) However, a class claim

can be prohibited by a claims procedure set forth in a statute. (See, e.g., *Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, 960 [class certification barred because claim for refund of municipal services tax was governed by Revenue and Taxation Code sections 5097 and 5140, which do not allow class claims].)

C. Pay First, Litigate Later Rule

The California Constitution provides that the validity a tax cannot be challenged unless the tax has first been paid.

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

(Cal. Const., art. XIII, § 32)

Although this provision only applies to the State by its terms, the courts have extended its "pay first, litigate later" requirement to local governments by common law. (*Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1137–1138.) The "pay first, litigate later" rule applies at all levels of government: federal, state, and local. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 72, disapproved of on other grounds by *McWilliams*, *supra*, 56 Cal.4th at p. 626.)

The "pay first, litigate later" rule has also been applied to water replenishment charges. (*Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1465–1466.) Logically, it also applies to a wide range of government fees, particularly because most challenges to fees assert that the fees are actually taxes.

For the "Pay first, litigate later" rule to apply, there must be an adequate post-payment remedy through which the taxpayer can obtain a refund. (*Batt v. City and County of San Francisco*, *supra*, 155 Cal.App.4th 65, 72 disapproved of on other grounds by *McWilliams v. City of Long Beach*, *supra*.)

III. Standards of Review

A. Review in the Trial Court

The setting of assessments, fees, and other charges pursuant to legislative authority is a quasi-legislative act. (See *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 14 Cal.4th 431, 443–444, 448 (*Silicon Valley*); *Shapell Industries, Inc. v. Governing Bd. of the Milpitas Unified Sch. Dist*. (1991) 1 Cal.App.4th 218, 230-231 (*Shapell Indus.*); *Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409; *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 139.) As such, trial courts review related challenges by writ of traditional mandate pursuant to Code of Civil Procedure section 1085. (*Shapell*, at pp. 230–231; see also *Western States Petroleum Assoc. v. Superior Court* (1995) 9 Cal.4th 559, 575 (*Western States*).)

Writ review is generally limited to the administrative record before the governing board when it set the challenged levy. (See *Western States*, *supra*, 9 Cal.4th at pp. 575–576; *Carrancho v. Cal. Air Resources Bd*. (2003) 111 Cal.App.4th 1255, 1269; *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 388.) As a corollary, discovery is generally not available. (See *San Joaquin LAFCO v. Superior Court* (2008) 162 Cal.App.4th 159, 167–170; see also *Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 599 [holding petitioner failed to justify discovery by identifying specific factual uncertainty affecting his right to mandate].) Further, discovery of a legislative body's mental or deliberative processes is prohibited. (*Id.* at p. 172; *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 541.)

However, there are limited exceptions to the foregoing limits on the factual record. (*Western States*, *supra*, 9 Cal.4th at pp. 578–579) For example, extra-record evidence may be admitted in traditional mandamus actions challenging ministerial or informal administrative actions if specific, material facts are in dispute. (*Id.* at p. 576; see also Code Civ. Proc., 1090 [specifying the procedures for setting a factual dispute for evidentiary resolution].) That rule will not commonly apply in rate-making disputes, as rate-making is a discretionary, legislative action. Extra-record evidence may also be relevant to evaluate whether an agency considered all relevant information or fully explained its actions. (*Id.* at pp. 579–579, citing *Asarco, Inc. v. U.S. Environmental*

Protection Agency (9th Cir. 1980) 616 F.2d 1153, 1160.) This exception also allows extra-record evidence to assist a court penetrate a record replete with dense, technical language. (*Ibid*.) Evidence may be introduced for the first time in a trial court when it existed before the agency made its decision, but could not with reasonable diligence have been presented to the agency. (*Id.* at p. 578.) Finally, *Western States* suggests that extra-record evidence may be relevant to evaluate collateral matters, such as a challenger's standing or the accuracy of an administrative record. (*See id.* at 575, fn. 5.) Critically, however, "extra-record evidence can *never* be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Western States*, *supra*, 9 Cal.4th at pp. 578–579, emphasis added.)

B. Separation of Powers and Burden of Proof

Under separation-of-powers principles, traditional mandate could issue to correct the exercise of discretionary legislative power, but only if the action taken was so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. (See *Shapell Indus.*, *supra*, 1 Cal.App.4th at p. 233; *Brydon v. East Bay Municipal Utility District* (1994) 24 Cal.App.4th 178, 196.) In addition, assessments, fees, and other charges were presumed valid, and the burden to prove otherwise was on the challenger. (*Brydon*, at p. 196.)

Propositions 26 and 218 changed this standard in part. Under Articles XIII C and XIII D, once a challenger has made a prima facie case, agencies now have the burden to demonstrate that their assessments, fees, and other charges satisfy the requirements of applicable constitutional provisions. (Cal. Const., art. XIII C, § 1, subd. (e)(unnumbered paragraph); art. XIII D, §§ 4, subd. (f), 6, subd. (b)(5); *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 914 [burden shifts to rate-maker under art. XIII D only if plaintiff makes a prima facie case].) These provisions not only shifted the burden of proof, but also implicitly abrogated the common law's presumption of validity. (*Silicon Valley*, *supra*, 44 Cal.4th at pp. 448–449.)

Nonetheless, some traditional separation-of-powers principles remain intact. For example, trial courts still constrain their review to the administrative record and may not consider extra-record evidence. (*Western States*, *supra*, 9 Cal.4th at pp. 575–576.) Consistently, even under the constitutionally shifted burden, trial courts should not substitute their judgment for that of the local agency, so long as the administrative record demonstrates no violation of constitutional standards. (See *Silicon Valley*, *supra*, 44 Cal.4th at pp. 447–448 [holding legislative discretion is subordinate to constitutional mandate].) The fact that challengers or even a court find alternative rates or methodologies preferable should not be relevant. Put differently, courts should review an agency's action for constitutional compliance; they should not compare the relative strengths of an agency's actions with the universe of alternatives proposed by challengers:

> Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than that the amount shall not exceed the proportional cost of the service attributable to the parcel, defendant's method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render defendant's method unconstitutional. Proposition 218 does not require a more finely calibrated apportion."

(Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586, 601, *disapproved on other grounds by City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 [holding groundwater pumping charges are not property related service fees].*)*

C. Review in the Court of Appeal

Whether a charge is a tax or a fee is a question of law decided upon independent review of the rate-making record. (*Sinclair Paint, supra*, 15 Cal.4th at p. 874 [applying Prop. 13]; *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436 [same]; *Morgan, supra,* 223 Cal.App.4th at p. 912 ["We exercise our independent judgment in reviewing whether the District's rate increases violated [article XIII D] section 6. … In applying this standard of review, we will not provide any

deference to the District's determination of the constitutionality of its rate increase."].)

Even so, the courts of appeal will not decide disputed issues of fact. (See *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368–369.) Further, appellate courts will always presume that an underlying judgment is correct. (*Ibid.*) Thus, even de novo review extends only to the issues properly raised by the appellant in its briefs. (*Ibid.*)

"Constitutional facts" are reviewed de novo to ensure meaningful appellate review of facts on which constitutional rights depend. (See *McCoy v. Hearst Corp*. (1986) 42 Cal.3d 835, 842 [independent review "reflects a deeply held conviction that judges — and particularly Members of this Court — must exercise such review in order to preserve the precious liberties established and ordained by the Constitution," quoting *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 510–511].) An interesting discussion of this theory of appellate review of trial court fact-finding can be found in Faigman, Constitutional Fictions: A Unified Theory of Constitutional Facts (2008).

Factual findings on conflicting evidence adduced at trial are properly reviewed for substantial evidence. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894.) However, in mandate review of a cold administrative record, the trial and appellate task is the same: "Although an appellate court defers to a trial court's factual determinations if supported by substantial evidence," where, as here, "the trial court's decision did not turn on any disputed facts," the trial court's decision "is subject to de novo review." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; see also *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032; *Moore, supra*, 237 Cal.App.4th at p. 369.)

If, however, a rate-making agency waives the benefit of *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559 (mandate review of agency action limited to administrative record) and offers — or allows a challenger to offer — extra-record evidence, the trial court's findings of facts are reviewed for substantial evidence. Such was the case in *Morgan*, *supra*, 223 Cal. App.4th at p. 915 [applying substantial evidence standard to challenger's attack on rate-making using extra-record data].)

Finally, a trial court sitting in equity has broad remedial discretion, and remedy is reviewed for abuse of discretion. (*In re Estates of Collins* (2012) 205 Cal.App.4th 1238, 1246.)

IV. Remedies

A. Proposition 62 Penalty Remedy

Proposition 62 is a 1986 statutory initiative applicable to general law cities, counties, and special districts. (Gov. Code, § 53720 et seq.) It includes a penalty provision requiring that, if a court finds a local government did not comply with Proposition 62's requirements, "the amount of property tax revenue allocated to the jurisdiction … shall be reduced by one dollar ($1.00) for each one dollar ($1.00) of revenue attributable to such tax for each year that the tax is collected." (Gov. Code, § 53728.) Thus, pursuant to Proposition 62, a court can order withholding of property tax revenue from local governments on a dollar-for-dollar basis for each dollar of revenue attributable to an unauthorized special tax.

Despite Proposition 62's enactment in 1986, no reported case has yet discussed this remedy. The Proposition 62 remedy arguably does not apply to "taxes" as defined by 2010's Proposition 26, which succeeded it by 24 years, but only "taxes" as they were defined by common law in 1986 when Proposition 62 was adopted. (See *Sinclair Paint v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 [pre-Prop. 26 case noting "'tax' has no fixed meaning" and "compulsory fees may be deemed legitimate fees rather than taxes"].)

The Proposition 62 penalty is also arguably unconstitutional under Proposition 13, which requires property taxes to be distributed "to the districts" from which they are collected. (Cal. Const., art. XIII A, § 1, subd. (a).) Further, Prop. 62 has no provision redirecting funds withheld pursuant to Government Code section 53728, leaving open the question of whether withheld funds should be returned to the State general fund, left with the Counties, held as escheat, or returned to taxpayers as a refund.

B. Prospective Relief

Writ relief is commonly pursued in actions under Propositions 218 and 26. (E.g., *Golden Hill Neighborhood Assn., Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 435 [writ of mandate to vacate resolution forming special assessment district in violation of Proposition 218]; *AB Cellular, LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 767 [affirming writ of mandate directing city to reinstate previous calculation of tax on telephone services under Prop. 218].) Injunctions are available after litigation challenging the tax is complete. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 252.) They are not available pendent lite, however. (See Cal. Const., art. XIIII, § 32 and related case law, discussed above.)

Plaintiffs will often seek declaratory and injunctive relief as separate causes of action when bringing writ claims under Proposition 218 and 26. Courts often dismiss separate causes of action for declaratory or injunctive relief as duplicative of relief requested in a writ claim, many cases hold an injunction is a remedy, not a cause of action, and a writ of mandate often has the same effect as an injunction: requiring action by a public agency. (E.g., *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1467 [no declaratory relief with writ claim challenging administrative decision in post-redevelopment dispute]; *Mental Health Assn. in California v. Schwarzenegger* (2010) 190 Cal.App.4th 952, 959 [declaratory and injunctive relief claims "redundant" of mandate petition when all present same question of law].) When a plaintiff seeks only declaratory relief to challenge a levy and that declaratory relief would have an injunctive effect, the same "pay first, litigate later" rule applies as in taxpayer challenges seeking injunctions. (*Chodos v. City of Los Angeles* (2011) 195 Cal.App.4th 675, 680.)

C. Validation Actions

The Code of Civil Procedure allows public entities to bring validation actions to confirm a decision to institute or raise a levy subject to Propositions 218 and 26 in an in rem judgment that binds all who might later challenge that decision. (Code Civ. Proc., § 860 et seq.) Agencies might use validation actions to control litigation that challenges a tax or to establish that a levy is valid. (E.g., *Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 [agency's complaint to validate groundwater augmentation fee increase]; *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756 [complaint to validate special tax].)

Challengers to levies may file "reverse validation" actions within the same, short, 60-day statute of limitations if an agency does not file a validation action. (E.g., *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 [taxpayers' reverse validation action to challenge storm drainage fee pursuant to Prop. 218].) As mentioned above, some procedural ordinances require challenges to a levy to be brought in validation.

Further discussion of validation appears above, in the section regarding statutes of limitation.

D. Attorneys' Fees

Successful plaintiffs can be entitled to attorneys' fees pursuant to Code of Civil Procedure section 1021.5 so long as those plaintiffs filed actions result "in the enforcement of an important right affecting the public interest," as successful challenges to levies often do. (Cf. *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 929–931 [reversing award of attorneys' fees based on trial court's incorrect assumption challenged rates violated Proposition 218].)

A litigant who has a financial interest in the litigation may be disqualified from obtaining fees under Code of Civil Procedure section 1021.5 because no fee award is necessary to induce litigation to establish important principles of law to benefit the public. (E.g., *Norberg v. California Coastal Commission* (2013) 164 Cal.Rptr.3d 440.)

Attachments

A. Proposition 26 Materials

1. Text of Proposition 26
2. Proposition 26 Ballot Materials
3. Text of Articles XIIIC and XIIID with Proposition 26 Codified Therein

B. Proposition 218 Materials

1. Text of Proposition 218
2. Proposition 218 Ballot Materials
3. Howard Jarvis Taxpayers Association Annotated Version of Proposition 218
4. Proposition 218 Statement of Drafters Intent
5. Legislative Analyst Post-Election Analysis on Proposition 218
6. Proposition 218 Guidelines for Placing Flat Fees on the Secured Role, California State Association for County Auditors, April 1997

C. Sample Notice of Proposed Assessment

D. Sample Notice of Assessment Procedures

E. Sample Resolution Setting Rules for Counting Protests on Property Related Fee

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