No. S172199

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FORD GREENE,
Plaintiff and Appellant,
vs.

MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT,
Defendant and Respondent,

FRIENDS OF CORTE MADERA CREEK WATERSHED AND FLOOD MITIGATION LEAGUE OF ROSS VALLEY,

Intervenors and Respondents.

Review of Decision of the Court of Appeal for the First Appellate District
(Case No. A120228)

Superior Court for the County of Marin
The Honorable M. Lynn Duryee, Judge Presiding
(Marin County Superior Court Case No. CV 073767**)**

OPENING BRIEF OF DEFENDANT AND RESPONDENT MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

PATRICK K. FAULKNER,
County Counsel
SHEILA SHAH LICHTBLAU, Deputy County Counsel (SBN 167999)
3501 Civic Center Drive, Room 275
San Rafael, California 94903
Telephone: (415) 499-6117
Facsimile: (415) 499-3796

COLANTUONO & LEVIN, PC
MICHAEL G. COLANTUONO (SBN 143551)
ERWIN M. BENEDICTO (SBN 237140)
555 W. 5th Street, 31st Floor
Los Angeles, California 90013-1018
Telephone: (213) 533-4155
Facsimile: (213) 533-4191

Attorneys for Defendant and Respondent,
Marin County Flood Control and Water Conservation District

ISSUES PRESENTED FOR REVIEW

On June 24, 2009, this Court granted Respondent Marin County Flood Control and Water Conservation District's ("District") Petition for Review of an Opinion filed March 11, 2009 by the First District Court of Appeal, Division Five. This Court granted review of the issues raised in the Petition for Review and no issues were stated in the Answer to the Petition. As stated in the Petition for Review, the issues presented are as follows:

1. Does the voting secrecy requirement of California Constitution, article II, § 7 apply to property-owner "voting" on a property-related fee pursuant to article XIII D, § 6(c)?[1]

2. Does the voting secrecy requirement of California Constitution, article II, § 7 apply to property-owner "ballots" on assessments subject to article XIII D, § 4 notwithstanding the contrary direction of subdivision (d) of that § 4 and of Government Code § 53753?

[1] Unspecified references in this brief to articles and sections refer to articles and sections of the California Constitution, as amended by 1996's Proposition 218. Unspecified references to sections alone are to sections of the Government Code as amended by the Omnibus Proposition 218 Implementation Act of 1997.

3. If voting secrecy applies in these contexts, must local governments affirmatively inform property owners ballot secrecy will be maintained?

4. May a court overturn property owners' election to approve an assessment or property-related fee because a local government failed to inform property owners that ballot secrecy would be maintained or because a lapse in ballot secrecy occurred?

INTRODUCTION

This case concerns a government agency's ability to rely upon the language of the California Constitution to enact measures to protect its residents and property owners from flooding, and to impose a fee that reflects the will of the property owners empowered to approve it.

Following a devastating flood on December 31, 2005, and a history of many such floods, property owners in the Ross Valley voted pursuant to Proposition 218 to impose a property related fee upon themselves to fund flood control improvements. An attorney fee-payer, litigating *in pro per*, and since elected to the San Anselmo Town Council, brought an election

challenge alleging, among other things, that the will of the property owners ought to be set aside because Respondent Marin County Flood Control and Water Conservation District's ("the District") procedures, which required property owners to sign their ballots, violated the right to vote in secret.[2]

This case is the first presented in this Court and, to the knowledge of counsel, any appellate court regarding the procedures required by Proposition 218 for property related fees and charges.[3]

---

[2] The District resolution adopting the rules governing the election challenged in this action an those rules are attached to this brief pursuant to California Rules of Court, Rule 8.520(h).

[3] This Court has had occasion to consider the scope of the property related fees and charges subject to Proposition 218 in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal.4th 830 (2001) (fee on multi-family rental property collected via tax roll to fund slum abatement and housing code enforcement not subject to Prop. 218); *Richmond v. Shasta Community Services District*, 32 Cal.4th 409 (2004) (water connection fee imposed on new development not subject to Prop. 218); and *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal.4th 205 (2006) (fee for continuing domestic water service through an existing connection subject to Prop. 218). However, neither this Court nor the Courts of Appeal have had occasion to consider the procedures required for the adoption of a property related fee or charge and, in particular the election requirement of article XIII D, § 6(c) from which water, sewer and solid waste fees are exempt.

Indeed, research reveals only one published appellate decision construing that subdivision (c): *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 (water quality fee collected via tax roll based on impervious coverage on property was not a "sewer" or "water" fee exempt from the election requirement of article XIII D, § 6(c)). That case, too, was a definitional dispute, and did not provide guidance as to how a fee

Proposition 218, adopted by California's voters in November 1996, added to our Constitution articles XIII C (concerning taxes) and XIII D (concerning assessments and property related fees and charges). The category of "property related fees and charges" is newly defined by Proposition 218 and did not previously exist in California's law of public finance.

The essential question in this case is this: does the requirement of article II, § 7 that "voting shall be secret" apply to an election among property owners on a property related fee or charge under article XIII D, § 6(c)? The District contends that the plain language of the Constitution bars such a requirement and that the voters who approved Proposition 218 did not intend to require ballot secrecy in this context. Rather, strong reasons of law and policy support construction of article XIII D, § 6(c) to distinguish between secret elections among registered voters and non-secret procedures among property-owners that are not "elections" governed by article II or the Elections Code.

---

may be adopted in compliance with Proposition 218's new and relatively untested procedures for such fees.

The requirement of article II, § 7, unchanged since it was adopted in 1849, that "[v]oting shall be secret" is inapplicable to property-owner elections under Proposition 218 under the plain language of this measure, adopted in 1996. Article XIII D, § 6(c)'s final sentence provides: "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision." Assessment proceedings involve non-secret, weighted ballots under the unambiguous text of both Proposition 218 (article XIII D, §4) and the Omnibus Proposition 218 Implementation Act of 1997 (Government Code § 53753). Thus, the voters' intent to allow non-secret, weighted voting on property related fees and charges is plain on the face of the Constitution. Non-secret procedures facilitate weighted voting by property owners, when local governments choose that method, and allow transparency and accountability in government tallies of property-owner voting.

Moreover, even if the voters intended ballot secrecy to apply in this setting, to grant Petitioner Ford Greene ("Greene") the relief he seeks, this Court must set aside the vote of Ross Valley property owners to approve the fee without evidence of a procedural error that actually affected the outcome of the election. Although little guidance on this issue is available

from the text or context of Proposition 218, the democratic principles which require judicial deference to the will of voters in registered-voter elections are equally applicable here and therefore this Court should not disturb the outcome of the election.

Nor does any precedent exist for the rule, created by the Court of Appeal in this case, that local governments are obliged to affirmatively tell property owners their ballots will be secret, and that courts may overturn election results if they do not.

Because there is no evidence of an error that affected the outcome of the Ross Valley property owners' vote and because no law supports a rule that local governments must affirmatively inform voters their votes will be secret, even if this Court finds that ballot secrecy is required, it should still affirm the trial court's rejection of Greene's election challenge.

STATEMENT OF THE CASE

A. Trial Court Proceedings

Greene filed his election contest on August 9, 2007. Pursuant to Elections Code § 16100, the complaint alleged: (a) no form of ballot was

approved by the District; (b) the ballot form hid the notice that a failure to sign the ballot would invalidate it; and (c) invalidation of unsigned ballots violated equal protection by unreasonably classifying voters as between those who signed their ballot and those who did not.

The District answered, denying the allegations. On August 28, 2007, the Flood Mitigation League of Ross Valley and Friends of the Corte Madera Creek Watershed filed a Complaint in Intervention seeking declaratory relief that: (a) a majority of lawful ballots cast favored the fee; (b) the vote was consistent with election law and Proposition 218; and (c) the storm drainage fee should be upheld.

On October 15, 2007, after briefing and argument, Marin County Presiding Judge M. Lynn Duryee dismissed the complaint and approved the fee.[4] Her order states, in pertinent part:

> "The property fee election ballot sent to identified property owners, fully complied with the applicable law (i.e. California Const. article XIII D, and its implementing legislation Govt.

[4] AA 284.

Code 53753), requiring voters to sign their ballots in order to be counted.

Plaintiff's reliance on California Const. article II 7, and the Election Code Requirements for ballots in other types of elections, is misplaced. (See Govt. Code 53753(e)(4).)"[5]

Presiding Judge Duryee's order denied Greene's equal protection claim, noting the signature requirement applied to all property owners equally, the statutory scheme did not impair property owners' ability to vote, and invalidating unsigned ballots advanced a compelling interest in preventing fraud.[6] Judge Duryee also concluded the election was not governed by the Elections Code and therefore, the ballot form need not conform to the provisions of that code for absentee ballots cast in registered-voter elections.[7]

---

[5] *Id.*
[6] AA 284-285.
[7] *Id.*

B. Court of Appeal Proceedings

Greene filed his notice of appeal on January 8, 2008 and his opening brief on April 24, 2008. His opening brief urged reversal because: (a) the right to a secret vote under article II, § 7, is not abrogated by Proposition 218; (b) Government Code §§ 53753(c) and (e)(4) violate article II, § 7 and article XIII D, § 4; and, (c) invalidation of unsigned ballots violated equal protection. The District filed its brief June 18, 2008, asserting: (a) Greene could not satisfy the burden of his facial challenge to § 53753, a provision of the Omnibus Proposition 218 Implementation Act of 1997 ("the Omnibus Act"); (b) Section 53753 exempts assessment elections from the secrecy requirement of article II, § 7, and article XIII D, § 6(c) allows property-related fee elections pursuant to assessment procedures, thereby exempting those elections from voting secrecy requirements; and (c) Greene's equal protection argument failed because the signature requirement applied equally to all property owners. Also on June 18, 2008, Intervenors filed their brief, describing the history of damaging floods necessitating the fee and demonstrating that the District's procedures complied with Proposition 218 and § 53753. On July 16, 2008, Greene filed his reply brief.

On December 5, 2008, the Court of Appeal issued a *sua sponte* order requesting supplemental briefs on:

(a) The Court's proposal to take judicial notice of legislative history of § 53753.

(b) The Court's request that the District address an argument raised for the first time in Greene's reply brief that this Court's decision in *Silicon Valley Taxpayer's Ass'n v. Santa Clara County Open Space Authority*, 44 Cal.4th 432 (2008) ("*Silicon Valley*")[8] altered the standard of appellate review.

(c) Whether *Silicon Valley* undermined precedents exempting property-owner voting from the secrecy requirement of article II, § 7.

(d) Whether there was any breach of voting secrecy in this case.

[8] This recent decision holds that article XIII D, § 4 requires independent judicial review of legislative determinations by local governments that assessments reflect special benefit to assessed property and that assessments are fairly apportioned among property owners. It does not discuss property-related fees governed by article XIII D, § 6.

(e) Whether there was a basis in Elections Code § 16100 to overturn the property owners' vote notwithstanding the absence of any breach of secrecy "because the voters apparently were provided no assurances on the ballot or in the accompanying materials that their votes would remain confidential."

The District and Greene filed simultaneous supplemental briefs in response to the order ten days later, on December 15, 2008.[9] Greene's brief argued: (a) The District's elections procedures were insufficient to prevent any breach in secrecy; and (b) assurances of secrecy by the District could not cure failure to comply with article XIII D, §§ 4 and 6. The District's brief argued: (a) Pre-Proposition 218 precedents exempting property-owner voting from secrecy requirements were not undermined by *Silicon Valley;* (b) No breach of secrecy occurred and voters had, in fact, been assured secrecy would be maintained; and (c) there was no basis to overturn the

[9] Intervenors did not file a supplemental brief. Greene's initial supplemental brief exceeded the page limit; a replacement brief was filed December 17, 2008 – the day before oral argument.

vote of the property owners. The case was argued and submitted three days later, on December 18, 2008.

On March 11, 2009, the Court of Appeal issued its opinion, concluding the voters who adopted Proposition 218 intended to incorporate the ballot secrecy rule of traditional elections into property-owner voting under article XIII D, § 6(c). Slip Op. at 28. The Court of Appeal invalidated the vote of the Ross Valley property owners, finding those property owners had not been assured their votes would be secret. Slip Op. at 2; 30, n. 17; and 31. The Court of Appeal recognized that, before adoption of Proposition 218, this Court ruled that election laws applicable to registered-voter elections, including the voting secrecy required by article II, § 7, did not apply to property-owner voting.[10] The Court of Appeal also recognized *Silicon Valley* "is not directly relevant to this appeal" because it involved not a property-related fee subject to article XIII

[10] The Court of Appeal cites *Tarpey v. McClure* (1923) 190 Cal. 593, 606 (water district formation); *Potter v. Santa Barbara* (1911) 160 Cal. 349 (permanent road division formation), and *People v. Sacramento Drainage Dist.* (1909) 155 Cal. 373 (drainage district formation). Slip Op. at 17-18. The Court of Appeal also cites *Salyer Land Co. v. Tulare Lake Water Basin Dist.* (1973) 410 U.S. 719, 728 (property owner voting for district providing services to and funded by property owners did not offend one-person-one-vote doctrine) and *Southern Cal. Rapid Transit Dist. v. Bolen* (1992) 1 Cal.4th 654, 655 (same as to transit assessment). Slip Op. at 17, n.13.

D, § 6, but rather judicial review of local agency assessment determinations. Slip Op. at 19. Nevertheless, the Court of Appeal ruled that *Silicon Valley* undermined precedents of this Court exempting property-owner voting from secrecy, the one-person-one-vote doctrine of equal protection, and other requirements for registered-voter elections. Slip. Op. 19-20. Ultimately, the Court of Appeal reversed the trial court and invalidated the decision of the Ross Valley property owners to approve a fee to fund flood protection for their homes and businesses.

On March 27, 2009, the District filed its Petition for Rehearing. On April 7, 2009 the Court of Appeal denied that petition without changing the opinion.

STATEMENT OF FACTS

A. History of Devastating Floods in the Ross Valley

The Ross Valley has been beset by flooding for over 50 years. Engineers define a 100-year storm as one that has a 1% chance of occurring in any year.[11] However, the Ross Valley has experienced three such storms

[11] AA 50 (Storm Drainage Fee Report).

in just 25 years – in 1982, 1986 and 2006.[12] Much of the Ross Valley storm drainage system currently provides only about 5-year flood protection, meaning that it can be overwhelmed by a storm that has a one in five chance of occurring in any year.[13] Global warming may likely increase the Ross Valley's vulnerability to flooding. Most recently, a major flood occurred in early morning hours of December 31, 2005 into January 1, 2006, devastating homes and businesses and inflicting some $100 million in property damage.[14]

Following this flood, the District consulted city and town councils, nonprofits, businesses, and members of the public to seek means to reduce the risk of future damaging floods. These discussions led to the development of a series of potential flood protection solutions, such as removing constrictions that block creeks, allowing containment of flooding during 20-25 year storm events, and detention basins in upstream areas to hold water and release it slowly to provide 100-year protection. These programs were designed to (i) reduce damage due to flooding, (ii) maintain natural creek functions, (iii) reduce pollution of the San Francisco Bay, (iv)

---

[12] *Id.*
[13] *Id.*
[14] *Id.*

enhance habitat, and (v) improve fish passage.[15] Funding was necessary to implement these projects and the District therefore proposed the fee here in issue to the affected property owners, who approved it in the election challenged now.[16]

B. The District Conducted an Election Pursuant to Article XIII D, § 6(c) on a Property Related Flood-Prevention Fee

Article XIII D, adopted by 1996's Proposition 218, sets forth procedures an agency must follow to impose a property related fee or charge or to levy an assessment. Article XIII D and its implementing legislation, "The Proposition 218 Omnibus Implementation Act of 1997" (Gov. Code, §§ 53750-53755), together detail those procedures.

Article XIII D separately provides for the levy of an assessment (§§ 4 and 5) and for the imposition of a property-related fee or charge (§ 6). For a fee, article XIII D, §§ 6(a)(1) and (2) first require a protest hearing. If owners of fewer than half the affected parcels object in writing prior to the close of the hearing, the agency must then conduct an "election" if it wishes

---

[15] AA 49-50 (Storm Drainage Fee Report).
[16] AA 41-42; AA 62-64 (portion of unnumbered, seven-page **Official Notice to Property Owners**).

to impose the fee (article XIII D, §6(c).)[17] Article XIII D, § 6(c) does not specify the election procedures to be followed, but authorizes local governments to adopt regulations specific to their circumstances: "[a]n agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision."

Assessment procedures are set forth in article XIII D, § 4, and the Omnibus Act. As to assessments, § 53753 mandates that an agency mail notice of a proposed assessment and an assessment ballot to the record owner of each parcel to be assessed. Section 53753(c) requires that "*each assessment ballot shall be signed* and either mailed or otherwise delivered to the address indicated on the assessment ballot." (Emphasis added). Section 53753(e)(4) also states that assessment protest proceedings "*shall not constitute an election or voting for purposes of Article II of the California Constitution or of the Elections Code*." (Emphasis added.)

The District diligently followed the procedures and requirements set forth above for its fee election. Pursuant to article XIII D, § 6(c), the

[17] Section 6(c) exempts property related fees for "sewer, water, and refuse collection services" from its election requirement; those fees are subject only to the protest hearing required by article XIII D, § 6(a).

District notified property owners of a public hearing held on May 1, 2007.[18] At the hearing, the District tallied the protests submitted and determined there was far less than a majority protest.[19] Accordingly, the District adopted Resolution No. 2007-74 to memorialize its finding that no majority protest had been lodged, to confirm the consultant's report respecting the proposed Storm Drainage Fee to fund the proposed Ross Valley Flood Protection and Watershed Program, to call a special election on the proposal under article XIII D, § 6(c), and to adopt the local rules for that election as authorized by § 6(c).[20]

The rules by which the Clerk of the Board of Supervisors was to conduct the election were set forth in an Exhibit A to that resolution,[21] and made express provision for the security of the ballots cast. Section D.2. and D.3. of those rules state:

---

[18] AA 62-64. The record includes a copy of this notice addressed to Greene which bears a stamp indicating it was received in his law office on March 23, 2007 – more than 5 weeks before the May 1st hearing (fourth of seven, unnumbered pages of **Official Notice to Property Owners**).
[19] AA 66.
[20] AA 65. A copy of this resolution is attached to this brief for the convenience of the Court.
[21] AA 69-74.

2. Each business day upon receipt of ballots in the mail, the Clerk, or the Clerk's deputy shall date stamp the return envelopes of the unopened ballots and deposit the unopened, date-stamped envelopes into a secure container (the "Lock Box") to be kept in the office of the Clerk for such purpose. The Clerk shall keep the ballots in the Lock Box until the commencement of canvassing the ballots, which may not occur until the time specified in the published notice respecting the canvassing the ballots, which in any event shall not be prior to 5:01 p.m. on June 25, 2007.

3. Only the Clerk and the Clerk's deputies shall have access to the Lock Box and to the ballots in the Lock Box. The Clerk shall commence the tabulation of ballots at the time and location for canvassing of ballots, or as

> soon thereafter as the Clerk determines to be feasible. No ballot shall be removed from its return envelop prior to the time specified for the commencement of canvassing ballots.[22]

The Rules also expressly provide for ballot secrecy, stating in Sections E.2. and 3. as follows:

> 2. During and after the canvass of ballots, neither the Clerk not any person deputized by the Clerk as a Deputy Clerk, shall disclose the contents of any individual ballot that identifies how a voter voted to any person or entity, including any member of the Board, District staff, or any member of the public, unless ordered to do so by a court of competent jurisdiction.

[22] AA 72-73.

> 3. No report, in written, electronic or other form, shall be produced, nor shall any record (other than the ballots themselves) be maintained in such a manner that would disclose how any voter voted.[23, 24]

Consistent with article XIII D, § 4(d)'s and Government Code § 53753's mandates for assessment balloting, each ballot for the District's flood control fee stated the property owner's name and address.[25] The ballot implemented § 53753(c)'s requirement that ballots be signed, stating: "in order to be counted, a ballot must be signed … by the record owner as attested to pursuant to the declaration under penalty of perjury."[26] The

[23] AA 74.
[24] There is no evidence in this record that the Clerk failed to implement these procedures or that security or secrecy were not, in fact, afforded. That dearth of evidence, combined with the evidentiary presumption that official duty has been regularly performed, provides this Court an adequate basis to determine that ballot secrecy was actually afforded in this case. Evidence Code § 664.
[25] AA 78.
[26] AA 72.

District's procedures stated: "[t]he clerk shall not accept a ballot … that does not contain an original signature."[27]

The ballot form noted the signature requirement three times. Its instructions state: "**Sign your name** and write in the date in ink."[28] (Emphasis original.) An admonition is printed below the instructions that "Ballots received without a signature will not be counted."[29] Finally, below the voting box are spaces for the "date," "printed name" and signature of the voter.[30]

C. Property owners voted to impose the fee

Voters cast ballots until June 25, 2007 and the Registrar of Voters tallied the result on June 29, 2007. As required by the District's procedures and § 53753, the Registrar excluded unsigned ballots and certified these results: [31]

[27] AA 73.
[28] AA 77.
[29] *Id*.
[30] AA 78.
[31] AA 84.

Total **Ballots Cast**	Total **Yes**	Total **No**	Total **Count**	Total **Invalid**
8,059	3,208	3,143	6,351	1,708

Therefore, on July 10, 2007, the District adopted Resolution No. 2007-94 declaring the results of the election and that the measure had been approved by a majority vote of property owners.[32, 33]

This election challenge followed.

ARGUMENT

Greene argues that property owner voting under article XIII D, § 6(c) is subject to the voting secrecy requirement of article II, § 7 and that the fee election at issue in this case should be overturned as a result. The

[32] AA 87-88.

[33] Greene claims he conducted a "recount" of invalid ballots and determined they were sufficient, if counted, to defeat the fee. This "recount," as described at AA 98-108, is inherently unreliable, lacks foundation, and does not constitute a valid count. Should the need arise, the District is prepared to demonstrate that the manner of Greene's review of the ballots protected voter secrecy by concealing from him property owners' names and addresses. Because the Court of Appeal entertained these issues for the first time on appeal, the District never had opportunity to present its evidence other than via a request for judicial notice, which the Court of Appeal denied. These issues may be proper areas of inquiry following remand of this case to the trial court, depending on this Court's resolution of the legal issues presented here.

District contends that ballot secrecy is applicable to registered-voter elections, including those under Proposition 218, but not to property owner elections whether or not under Proposition 218.[34]

As detailed below, the District's argument rests on the text of Proposition 218 and the Proposition 218 Omnibus Implementation Act of 1997, the legislative history of those measures, and the policy consequences of applying secrecy in this context. Support for the District's construction includes: (i) the plain language of article XIII D, §6(c); (ii) evidence that the voters who adopted Proposition 218 intended to allow for weighted ballots on both assessments and fees; and, (iii) the fact that weighted ballots cannot be secret ballots because the weight of a ballot will often disclose who cast it and because there can be no transparent means to recount a weighted ballot election if the identity of the voter (which controls the weight of the vote) is not identifiable from the ballot.

Moreover, even if ballot secrecy were to apply here, the District complied with that requirement, Greene provides no evidence to the

[34] It is plain that voting secrecy does not apply to property-owner elections not governed by Proposition 218. See *Alden v. Superior Court* (1963) 212 Cal.App.2d 764, 766-767; see also the authorities cited in footnote 10 of this brief above.

contrary and, therefore, the trial court's rejection of Greene's election challenge ought to be affirmed.

I. GREENE'S SECRECY ARGUMENT READS THE LAST SENTENCE OF ARTICLE XIII D, § 6(C) OUT OF THE CONSTITUTION

By arguing for secrecy, Greene gives no meaning to the last sentence of article XIII D §6(c), which authorizes the District to establish non-secret voting procedures for fees "similar to" the procedures required by article XIII D, § 4 for assessments.

A court interpreting multiple provisions of the Constitution must prefer a construction which harmonizes them and gives each a sphere of operation and disfavor a construction which allows one to trump another; where conflict is unavoidable, the later or more specific provision is read to amend or make exception to the former or more general provision. *E.g.*, *Serrano v. Priest* (1971) 5 Cal.3d 584, 596; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735. In *Serrano v. Priest*, this Court considered the intersection of sections 5 and 6 of article IX of our Constitution. Section 5 requires a unified "system of common schools;" section 6 requires a

district-by-district system of property taxes to fund schools. As this Court explained:

> "Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted. (*People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 637, *app. dism.* (1954) 348 U.S. 859.) This maxim suggests that section 5 should not be construed to apply to school financing otherwise it would clash with section 6. If the two provisions were found irreconcilable, section 6 would prevail because it is more specific and was adopted more recently. (*Id*.; *County of Placer v. Aetna Cas. etc. Co.* (1958) 50 Cal.2d 182, 189.) Consequently, we must reject plaintiffs' argument that the provision in section 5 for a "system of common schools" requires uniform educational expenditures.

To similar effect is *Bowens v. Superior Court* (1991) 1 Cal.4th 36, upholding against an equal protection challenge Prop. 115's elimination of

the right to a preliminary hearing in felony cases initiated by indictment:

> [W]hen constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 596; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision. (See, e.g., *People v. Valentine* (1986) 42 Cal.3d 170, 181; *Serrano v. Priest, supra*, 5 Cal.3d at p. 596; *People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 637.)" (*Izazaga, supra*, [1991] 54 Cal.3d [356] at p. 371.)

These fundamental principles – that constitutional provisions are to be harmonized where possible and that more recent and more specific provisions are read as amendments or exceptions to earlier and more general provisions – require little elaboration.

Greene, however, asks this Court to essentially read the last sentence of article XIII D, § 6(c) out of the Constitution by requiring the ballot

secrecy of article II, § 7 to apply, despite the express direction of article XIII, § 6(c) that: "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision." What the Constitution says an agency may do, Greene argues it may not – he would forbid an agency to use non-secret procedures like the assessment provisions of article XIII D, § 4 for property owner voting under § 6(c), while § 6(c) expressly permits it.

Section 6(c) requires an election on a property related fee (other than those for sewer, water and refuse collection services), but leaves to the local government the choice of electorate as between property owners or registered voters:

> (c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate

> residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

Article XIII D, § 6(c).

There seems little likelihood that the voters who added this provision to our constitution understood "submitted and approved … by a two-thirds vote of the electorate residing in the affected area" to mean anything other than the ordinary, at-the-polls, registered voter elections like the one in which Proposition 218 itself was adopted. No argument is made here to the contrary by the District, Greene, Intervenors, the trial court or the Court of Appeal. However, this Court is asked to resolve what the voters who adopted Proposition 218 intended by the phrase "submitted and approved by a majority vote of the property owners of the property subject to the fee or charge."

Read literally, this phrase could mean a one-person-one-vote election among all holders of any interest in property (lenders, holders of community property interests, lessees, etc.) More plausibly this phrase

might mean, as the Legislature suggests in its construction of the rules for majority protests under article XIII D, § 6(a), a one-vote-per-parcel election in which ballots are mailed only to owners whose names appear on the property tax roll. See Government Code § 53755(a) (notice mailed to registered owner or tenant of property subject to fee), § 53755(b) (one protest per parcel counted in majority protest proceeding under art. XIII D, § 6(a)).

The District offers this Court a construction of article II, § 7's ballot secrecy requirement and article XIII D, § 6's procedures for the approval of property related fees that does not require the Court to read the last sentence of § 6(c) out of the Constitution, as does Greene's construction. The District contends that the voters who adopted Proposition 218 intended to apply ballot secrecy to votes of "the electorate residing in the affected area" under § 6(c), but to apply non-secret procedures "similar to" the assessment ballot procedures of article XIII D, § 4 to property owner voting under article XIII D, § 6(c). This construction gives meaning to both article II, § 7 and to the last, crucial sentence of article XIII D, § 6(c). This construction also does not violate the rules of Constitutional interpretation set forth above by allowing article II, § 7, a general rule regarding voting

enacted in 1849, to trump article XIII D, § 6(c), enacted in 1996 to govern one specific type of property-owner election.

II. VOTERS DID NOT INTEND VOTING SECRECY TO APPLY TO ARTICLE XIII D, § 6(C) ELECTIONS AMONG PROPERTY OWNERS

A. Voters Intended to Exempt Property-Owner Proceedings under § 6(c) from Ballot Secrecy but to Require Secret Votes When Decision is Given to Registered Voters

Articles XIII C and XIII D require some processes that are unambiguously elections subject to Election Code and constitutional requirements. So, for example, the imposition, extension, or increase of a general tax under article XIII C, § 2(b), or the ratification of taxes adopted in 1995 and 1996 under article XIII C, § 2(c), must first "be submitted to the electorate and approved by a majority vote." Similarly, the imposition, extension or increase of special taxes must be approved by two-thirds of the electorate under article XIII C, § 2(d) and article XIII D, § 3(a)(2).

Other provisions of Proposition 218 plainly require something other than an election. The procedures for the approval of assessments under article XIII D, § 4 are implemented by § 53753(e)(4), which states such proceedings "shall not constitute an election or voting for purposes of article II of the California Constitution or of the Elections Code." While the Court of Appeal reserved the question whether ballot secrecy applies to such proceedings,[35] it suggested this was not likely the voter's intent. Commenting on article XIII D, § 4(g), the Court of Appeal stated:

> This provision tends to demonstrate that the voters did *not* intend assessment balloting under article XIII D, section 4 to be a 'vote' within the ordinary or constitutional meaning of the term, absent a federal legal ruling to the contrary.[36]

The text of article XIII D, § 6(c) states that, for voter approval of new or increased property related fees or charges:

[35] Slip Op. at 14, n. 12; 22, n.14.
[36] *Id*. at 12, n. 10.

> An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

This sentence, which the Court of Appeal acknowledged to be "critical," (Slip Op. at p. 4) expresses that property-owner proceedings under article XIII D, § 6(c) are not intended to be traditional elections for at least two reasons. First, no meaning can be given to this sentence other than to allow use of procedures "similar to" assessment protest proceedings under article XIII D, § 4, which the Court of Appeal acknowledges are not intended to be traditional elections. Second, there would be no need to empower "an agency" – defined by article XIII D, § 2(a) as a local government – to adopt election procedures "similar to" those for assessment protests if traditional elections were intended. Procedures for such elections are well defined by state law and local governments have only limited authority to establish them. *E.g., Steinkamp v. Teglia* (1989) 210 Cal.App.3d 402, 404 (statutes preempt local legislation regarding election of officers of counties and non-charter cities); *Howard Jarvis Taxpayers Ass'n v. City of San Diego* (2004) 120 Cal.App.4th 374,

388-389 (local initiative requiring supermajority vote for fiscal matters preempted by Government and Election Codes); *Francis v. Stanislaus County* (1967) 249 Cal.App.2d 862, 865 (neither board of supervisors nor voters may enact ordinance in conflict with state laws).

The Court of Appeal stated in this case: "it is unclear from the language of article XIII D, section 6(c) whether the fee election required by that subdivision may be conducted without ensuring secrecy in voting."[37] As this Court instructs, this question turns on what the voters who adopted Proposition 218 intended. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212 (construing Proposition 218); *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 759 (same).

As detailed above, the legislative history and text of Proposition 218 demonstrate voters intended article XIII D, § 6(c) proceedings involving *registered voters* to be subject to ballot secrecy and other election law requirements, but did not intend to apply those rules to article XIII D, § 6(c) proceedings involving *property owners.* This distinction ensures property-owner control without interference from such election requirements as the one-person-one-vote rule. Why else would the measure give local

[37] *Id*. at 15 (original emphasis).

governments incentive to allow property owners to make these decisions by allowing a simple majority of property owners to approve a property-related fee, but requiring a two-thirds vote of registered voters to do so?[38] Article XIII D, § 6(c) promotes property-owner elections. Ballot secrecy frustrates that intent by preventing weighted voting, for weighting requires the identity of the voter to be discernible from the ballot itself; otherwise transparent recounts are impossible. This latter point is elaborated in Section II.D. of this brief below.

B. Contemporaneous Construction of Proposition 218 by Its Proponents Indicates Ballot Secrecy Was Not Intended to Apply to Property Owner "Voting" Under Article XIII D, § 6(c)

A September 5, 1996 Annotation of Proposition 218 prepared by the Howard Jarvis Taxpayers Association (HJTA) – a proponent of the initiative – reveals the meaning ascribed to the measure by its drafters. As this Court explained in its decision upholding Proposition 13:

[38] Indeed, the disfavored choice to allow a registered-voter election may have reflected the same caution regarding a possible problem under the one-person-one-vote rule stated in article XIII D, § 4(g) as discussed at p.12, n.9 of the Court of Appeal's opinion.

> [A]pparent ambiguities frequently may be resolved by the contemporaneous construction of the Legislature or of the administrative agencies charged with implementing the new enactment. [Citations.] In addition, when … the enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language. [Citations.]

Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245-246; see also *Carman v. Alvord* (1982) 31 Cal.3d 318, 331, n.10 (recognizing portions of letter by the late Howard Jarvis constituted an "after-the-fact" declaration of intent worthy of limited consideration because Jarvis proposed Proposition 13, but standard remained the intent of voters.)

That HJTA annotation of Proposition 218 states, regarding all of article XIII D, § 6:

> The purpose of this section is to prevent the exploitation of 'fees' as a means to avoid the new restrictions on assessments. Because flat rate parcel taxes have avoided the strictures of Proposition 13 simply by being called 'assessments,' the drafters are concerned that the same will happen with 'fees' – that is, circumventing taxpayer protections by manipulating the label of the levy.[39]

This reveals the close relationship between article XIII, § 4 (regarding assessments) and § 6 (regarding property related fees and charges) – both are intended to give property owners, as opposed to government or registered voters, control over revenues derived from property owners. Ultimately, the framers of Proposition 218 viewed property-related fees and assessments as essentially the same, especially in terms of a property owner's relationship with government. Consequently, application of ballot secrecy to property-owner voting on fees under article XIII D, § 6(c) as Greene urges, but not to protests on assessments under article XIII D, § 4, disserves this intent to equate the two revenue types. Article XIII D, § 4, of

[39] Respondent's Request for Judicial Notice ("RJN") filed concurrently herewith, Exhibit B, at 13.

course, is plain that assessment ballots are not secret and must be signed, as detailed below.

C. The Proposition 218 Omnibus Implementation Act Is Authoritative Evidence Voting Secrecy Was Not Intended for Property Owner Voting on Either Fees under Article XIII D, § 6(c) or Assessments under Article X III D, § 4

Immediately upon adoption of Proposition 218 in November 1996, local government and taxpayer advocates – including the HJTA, a proponent of Proposition 218 – collaborated on what became the Omnibus Act, which was signed by Governor Wilson on July 1, 1997, barely 9 months after adoption of Proposition 218.[40]

[40]Respondent's RJN, Exh. D, at 4-5, entitled "Unfinished Business Analysis of Senate Bill 919 prepared by the Office of Senate Floor Analysis," shows the following supporters of the measure: Association of California Water Agencies; California Association of Bond Lawyers; California Association of County Treasurers and Tax Collectors; California Association of Sanitation Agencies; California State Association of Counties; California Taxpayers' Association; Contra Costa Water District; Cities of Carlsbad, Claremont, Los Angeles, Stockton, Poway, and Del Mar; Counties of San Bernardino, Santa Barbara, and Madera; Howard Jarvis Taxpayers

The legislation expressed a consensus as to the intent of Proposition 218 shared by local governments, taxpayer advocates and, of course, the Legislature – indeed, it drew not a single "no" vote in either the Assembly or Senate.[41] As such, the Omnibus Act is entitled to judicial deference. *E.g., Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 ("presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions in mind;" such statutes enjoy "significant weight and deference by the courts"); *San Francisco v. Industrial Acc. Com* (1920) 183 Cal. 273, 279-280.

Moreover, in the 12 years since its adoption, the Omnibus Act has provided guidance to local governments, taxpayer and property owner advocates, lenders and other creditors, beneficiaries of government services and all who depend on stable and predictable local government finance. These substantial reliance interests are also worthy of judicial respect.

The Omnibus Act specifically states that assessment protest proceedings "shall not constitute an election for voting purposes of article

---

Association; League of California Cities; and the Regional Council of Rural Counties.

[41] Respondent's RJN, Exh. C, "The procedural history of Senate Bill 919 from the January 29, 1998, Senate Weekly History."

II of the California Constitution or of the Elections Code." § 53753(e)(4). Greene, however, would refuse to give effect to the Act's provisions allowing non-secret balloting for assessments or to the last sentence of article XIII D, § 6(c), which provides that those non-secret, non-electoral, assessment procedures may be the basis of locally adopted, "similar" rules for elections on property-related fees. He argues instead that article II, § 7's rule of voting secrecy controls over all of Proposition 218.

Proposition 218 affirmatively requires that an assessment ballot bear the name, address and signature of the property owner casting it. Article XIII D, § 4(d) states:

> (d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) 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*." (Emphasis added.)

The Omnibus Act is to the same effect, as § 53753(c) provides:

> (c) Each notice given pursuant to subdivision (b) shall contain an assessment ballot that includes the agency's address for receipt of the form and a place *where the person returning the assessment ballot may indicate his or her name, a reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.* Each assessment ballot shall be in a form that conceals its contents once it is sealed by the person submitting the assessment ballot. *Each assessment ballot shall be signed* and either mailed or otherwise delivered to the address indicated on the assessment ballot. Regardless of the method of delivery, all assessment ballots shall be received at the address indicated, or the site of the public testimony, in order to be included in the tabulation of a majority protest pursuant to subdivision (e). Assessment ballots shall remain sealed until the tabulation of ballots pursuant to subdivision (e) 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 required pursuant to subdivision (d). 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 pursuant to subdivision (e), the enclosed assessment ballot shall remain sealed as provided in this section." (Emphasis added.)

Once tallied, the statute dictates that assessment ballots be open to public inspection – assessment protest ballot secrecy is afforded only until the ballots are tallied. Section 53753(e)(1) states, in relevant part:

> During and after the tabulation, the assessment ballots shall be treated as disclosable public records, as defined in Section 6252 [*i.e.*, the Public Records Act], and equally available for inspection by the proponents and the opponents of the proposed assessment.

Thus, it is plain from the text of Proposition 218 and the Omnibus Act that assessment ballots are *not* subject to the secrecy requirement of article II, § 7. It is equally clear that votes in property-owner elections may be handled in similar fashion, as article XIII D, § 6(c), the provision of Proposition 218 requiring, and governing, the election here in issue states:

> An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

Thus, the answers to the first two questions on which this Court granted review – whether the ballot secrecy rule of article II, § 7 applies to elections among property owners on property-related fees under article XIII D, § 6(c) or to assessment ballot proceedings under article XIII D, § 4 – are plainly "no."

D. Transparent Tallies of § 6(C) Elections Cannot Be Accomplished if Ballots Are Secret

As the Court of Appeal acknowledged, ballot secrecy and weighted voting are not easily reconciled. Slip. Op. at 13-14. Because the voters plainly provided for weighted voting, their intent to avoid ballot secrecy in this context can be implied.

Article XIII D, § 4(e) requires that property-owner assessment ballots "be weighted according to the proportional financial obligation of the affected property." Article XIII D, § 6(c) is less explicit; it allows, but does not require, weighted voting among property owners.

Under article XIII D, § 6(c), decision on a property-related fee is determined by "a majority vote of the property owners of the property subject to the fee or charge." Neither article XIII D, § 6 nor the Omnibus Act defines what constitutes a "majority vote," *i.e.*, whether a majority is determined per capita, one vote-per-parcel, or by votes weighted according to the financial obligations of property owners – the standard for assessments under article XIII D, § 4. Rather than impose a one-size-fits-all definition, Proposition 218 leaves local legislation to determine these questions and envisions that rules may differ from place to place and time to time as local needs and resources may dictate. Of course, this varied local legislation is subject to a single standard specified by Proposition 218:

"An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision." Article XIII D, § 6(c). Given that such procedures must be "similar to" the detailed assessment procedures of article XIII D, § 4, it is plain that such procedures may – but need not – allow for weighted voting.

The Court of Appeal also acknowledged that application of ballot secrecy to weighted voting is problematic and struggled to reconcile the two:

> On the other hand, an agency could comply with article XIII D, section 4 while maintaining secrecy in voting. The information on the ballot need not be publicly disclosed at the public hearing. The persons tabulating the ballots could use the information on the ballot (even if all gathered on a single piece of paper) to validate, weight, and count the ballots but keep the information confidential in the absence of a challenge to the balloting resulting in a court disclosure order.

Indeed, this was the procedure prescribed for the District's fee election under the election procedures.[42]

Alternatively, the voter and parcel identifying information could be placed on the outside of an envelope that contains the ballot, in the manner of absentee voting. (See Elec. Code, §§ 3010-3011.) The voter's qualification could then be confirmed and the weight to be accorded the ballot calculated before the ballot was opened. *There would need to be a mechanism to associate the actual vote with the weight of the ballot, but this could be done using computer coding to avoid public disclosure of any individual property owner's vote (i.e., the association of a particular voter to a particular vote would be hidden within the computer data bank* unless ordered disclosed on a challenge to the balloting) or by some other mechanism strictly limiting the disclosure of

[42] And, the District would add, there is no evidence in this record that the District failed to comply with those procedures.

information that would link the identity of a voter to a yes or no vote."[43]

These proposed reconciliations of secrecy and weighted ballots are unsupported by legal or legislative precedent. Indeed they are contrary to the Legislature's direction in § 53753 for assessment ballots. Moreover, these proposals have consequences that cannot have been the voters' intent. Applying ballot secrecy to weighted voting prevents the public from auditing the vote tally without filing an election challenge because ballots cannot be disclosed. Moreover, even if ballots are disclosed, ballots must conceal the information needed to ensure they have been properly weighted – such as who cast them or how much land that voter owns. Absence of secrecy allows any member of the public to examine the ballots to confirm they were tallied correctly, as the Legislature has determined the voters intended for assessment ballots. § 53753(e)(1) ("During and after the tabulation, the assessment ballots shall be treated as disclosable public records … and equally available for inspection by the proponents and the opponents of the proposed assessment.")

[43] Slip Op. at pp. 13-14 (emphasis added).

Entrusting the weighting of ballots to information "hidden within the computer data bank" evidences greater confidence in the integrity of electronic voting systems – and the human who operate them – than the Legislature has shown after exhaustive study and public debate. *American Ass'n of People with Disabilities v. Shelley* (C.D. Cal. 2004) 324 F.Supp.2d 1120, 1123 (upholding decertification of electronic voting systems that do not provide paper trail); Elections Code § 19250(a) (prohibiting use of such voting systems).

Given the anti-government sentiment which animated Proposition 218, the voters surely did not want local governments to create a computer database to weight ballots so as to prevent transparent tallies. It is far more likely the voters who adopted Proposition 218 did not intend to apply ballot secrecy to property owner votes under article XIII D, § 6(c) than that they intended to constitutionally require a process that frustrates transparency and accountability in tallying those votes.

E. The Legislative History and Text of Proposition 218 Do Not Use Electoral Language with Sufficient

Consistency to Make That Language a Useful Tool for Discerning Voter Intent

The Court of Appeals concluded that the ballot material regarding Proposition 218 "supports a construction of article XIII D, section 6(c) to require secret voting."[44] With respect, the District believes this interpretative approach is ill-suited to products of the initiative process such as Proposition 218. Proposition 218 and its legislative history use the words "vote" and "election" so inconsistently and imprecisely that they shed little light on its intent. Rather than parse the many uses of electoral language to refer to assessment protest proceedings (which the Legislature has declared in § 53753(e)(4) are not elections) and of non-electoral language to refer to tax elections and initiatives (which plainly are elections) via text, it is more economical to present this information in the following table:

Document	**Text**	**Election Language**	**Election Proceeding**
Title & Summary	"Voter Approval for Local Government Taxes. Limitations on Fees, Assessments and Charges.	Yes	Yes

[44] Slip Op. at 23.

	Initiative Constitutional Amendment."[45]		
Impartial Analysis	"Finally, local governments must hold a mail-in election for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to vote. Ballots cast in these elections would be weighted …."[46]	Yes	No
Same	"In addition, the measure specifies that before adopting a *new* property-related fee (or increasing an *existing* one), local governments must: mail information about the fee to every property owner, reject the fee if a majority of the property owners protest in writing, and hold an election on the fee (unless it is for water, sewer, or refuse collection service)."[47] "Local governments would also have to mail information to every property owner and hold elections."[48]	Yes	No
Same	Finally, local governments must hold a mail-in election for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to vote. Ballots cast in these elections would be weighted based on the amount of the assessment the property owner or renter would	Yes	No

[45] Respondent's RJN, Exh. A, at p. 1.
[46] Respondent's RJN, Exh. A, at pp. 3-4.
[47] Respondent's RJN, Exh. A, at p. 3. (original emphasis).
[48] *Id*.

	pay. For example, if a business owner would pay twice as much as a homeowner, the business owner's vote would "count" twice as much as the homeowner's vote.[49]		
Same	"Proposition 62 – a statutory measure approved by the voters in 1996 – requires new local general taxes to be approved by a majority vote of the people."[50] "The measure states that all *future* local general taxes, including those in cities with charters, must be approved by a majority vote of the people. The measure also requires existing local general taxes established after December 31, 1994, without a vote of the people to be placed before the voters within two years."[51]	Yes	Yes
Same	"Within two years, local governments also would be required to hold elections on some recently imposed taxes and existing assessments. … If voters do not approve these existing taxes and assessments, local governments would lose *additional* revenue."[52]	Yes	Yes & No (both tax elections and assessment ballot proceedings discussed)
Same	The measure's restrictions and voter-approval requirements would constrain	Yes & No (election	Yes & No (tax and fee

[49] *Id*.
[50] *Id*. at p. 4.
[51] *Id*. (original emphasis).
[52] *Id*. (original emphasis).

	new and increased fees, assessments and taxes.[53]	& non-election language)	elections, assessment proceedings discussed)
"Yes" argument	Proposition 218 guarantees your right to vote on local tax increases – even when they are called something else, like "assessments" or "fees" and imposed on homeowners.[54]	Yes	No
Rebuttal to "yes" argument	"Read Proposition 218 yourself and see how large corporations, big landowners and foreign interests gain more voting power than you."[55] "Promoters say you get 'tax reform' … you may actually get serious cutbacks in local service and FEWER VOTING RIGHTS for millions of California citizens."[56] "Blocks 3 million Californians from voting on tax assessments. The struggling young couple WILL HAVE NO VOTE on the assessments imposed on the house they rent."[57] "Grants special land interests more voting power than average homeowners. The 'elderly widow' promoters cite will be banned from voting if she is a renter, or her voting power dwarfed by large property owners."[58]	Yes	No

[53] *Id.*
[54] Respondent's RJN, Exh. A, at p. 6.
[55] *Id.*
[56] *Id.* (original ellipses and emphasis).
[57] *Id.* (original emphasis).
[58] *Id.*

	"Gives non-citizens voting rights on your community taxes."[59]		
"No" argument:	"PROPOSTION 218 DILUTES VOTING RIGHTS, HURTS LOCAL SERVICES."[60] "In the disguise of tax reform, Proposition 218's Constitutional Amendment REDUCES YOUR VOTING POWER and gives huge voting power to corporations, foreign interests and wealthy landowners."[61] "YOU LOSE RIGHTS: CORPORATIONS, DEVELOPERS, NON-CITIZENS GAIN VOTING POWER."[62] "Section 4(e) of Proposition 218 changes the Constitution to give corporations, wealthy landowners and developers MORE VOTING POWER THAN HOMEOWNERS. It lets large outside interests control community taxes – against the will of local citizens."[63] "EXAMPLE: An oil company owns 1000 acres, you own one acre: the oil corporation gets 1000 times more voting power than you."[64] "While Prop. 218 gives voting power to outside interests, Section 4(g) denies voting rights to more than 3,000,000 California renters."[65] "Reducing	Yes	No

[59] *Id.*
[60] Respondent's RJN, Exh. A at p. 7 (original emphasis).
[61] *Id.* (original emphasis).
[62] *Id.*
[63] *Id.*
[64] *Id.* (original emphasis).
[65] *Id.*

	American citizens' Constitutional rights, it grants voting rights to corporations and absentee landowners – even foreign citizens."		
Rebuttal to "no" argument	Proposition 218 expands your voting rights. It CONSTITUTIONALLY GUARANTEES your right to vote on taxes.[66]	Yes	Yes
Same	Under Proposition 218, only California registered voters, including renters, can vote in tax elections. Corporations and foreigners get no new rights.[67]	Yes	Yes
Same	Current law already allows property owners, including nonresidents to act on property assessments based on the assessment amount they pay. This is NOT created by Proposition 218.[68]	No	No

Thus, the ballot materials use electoral and non-electoral language inconsistently and imprecisely. Only the Attorney General's Title and Summary and the Proponents' rebuttal argument use election language with legal care; every other element of the ballot materials conflates elections and non-electoral assessment proceedings and uses electoral terms such as "vote," "ballot" and "election" regarding both. Therefore, parsing the

[66] *Id*. (original emphasis).
[67] *Id*.
[68] *Id*. (original emphasis).

ballot materials regarding Proposition 218 to determine voters' intent as to applying ballot secrecy to property-owner elections under article XIII D, § 6(c) is fruitless – the materials provide support for either interpretation.

The better means to determine voters' intent is to look to the language of the Constitution itself – article XIII D, § 4(c) requires property owners' names and address to appear on protest ballots and article XIII D, § 6(c) authorizes local governments to adopt procedures "similar to" these provisions for elections on property-related fees. What the Constitution says is sufficiently plain that resort to imprecise language in the ballot arguments is neither necessary nor helpful. *Silicon Valley, supra*, 44 Cal.4th at 444-45 ("If the language is clear and unambiguous, the plain meaning governs.") (construing Proposition 218).

III. BALLOT SECRECY IN ARTICLE XIII D, § 6(C) ELECTIONS WOULD IMPAIR THE FLEXIBILITY PROPOSITION 218 AFFORDS LOCAL GOVERNMENTS TO FRAME PROCEDURES RESONSIVE TO LOCAL CIRCUMSTANCE AND TO ENSURE TRANSPARENCY AND ACCOUNTABILITY

As noted above, article XIII D, § 6(c) expressly allows local governments to adopt local procedures for the conduct of property-owner "elections" on property-related fees "similar to" those provided for weighted assessment ballots under article XIII D, § 4. Proposition 218 could easily have specified those procedures, but did not. What purpose might the framers of Proposition 218 have had in delegating this authority to local governments? Those purposes may include allowing flexibility to address local circumstances – the needs of Los Angeles County and its 10 million residents are different from the needs of a rural, road district serving a few dozen parcels. Notice posted on a bulletin board at the post office is hardly effective means to communicate with the many million residents of our largest, urban counties, but might be the best means to communicate with the few hundred residents of a rural water district. Local rules can better balance voter secrecy, easily accommodated with ballots of equal weight, with the desire to weight ballots to ensure fair allocation of decision-making power among affected property owners. Weighting votes can allow fractional votes to each member of a couple who own a parcel as community property so each may be heard. Such votes might favor large landowners, who will pay larger fees and receive greater benefit from a

flood control program, for example. Weighted ballots, however, make secrecy problematic, if not impossible, as detailed above. Moreover non-secret procedures can provide for transparency and accountability in tallies, an important public policy sacrificed by Greene's one-size-fits-all conclusion that the voting secrecy requirement of article II, § 7 necessarily applies to every property owner vote under article XIII D, § 6.

IV. JUDGES SHOULD NOT OVERTURN PROPERTY OWNERS' DECISIONS UNDER ARTICLE XIII D, §§ 4 AND 6 WITHOUT EVIDENCE OF PROCEDURAL FAILURE THAT ACTUALLY AFFECTED THE OUTCOME

There is no dispute Ross Valley property owners are entitled by article XIII D, § 6(c) to decide whether to pay for enhanced flood protection. Yet, Greene urges this Court to invalidate their decision without finding the result would have differed if the rules of secrecy he now urges had been followed. As the Court of Appeal acknowledged in this case:

> "[I]t is a primary principle of election law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citations.] … The contestant has the burden of proving the defect in the election by clear and convincing evidence. [Citations.]" *Wilks v. Mouton* (1986) 42 Cal.3d 400, 404; *Gooch v. Hendrix* (1993) 5 Cal.4th 266, 277.[69]

Greene has never been asked to provide such proof and plainly has not done so. This record contains *no* evidence to support the remedy he seeks.

Similarly, although the Court of Appeal acknowledged that in *Alden v. Superior Court* (1963) 212 Cal.App.2d 764, 766-767, ballot secrecy did not apply to a weighted-vote, property-owner election to form a water district, it distinguished *Alden* as a pre-Proposition 218 case overtaken by *Silicon Valley*.[70] However, the Court of Appeal failed to discuss *Alden's* remedial holding that:

---

[69] Slip Op. at 28.

[70] *Id*. at 18. The District notes that the independent judgment standard of judicial review announced by *Silicon Valley* is inapplicable to a property-

> "A failure to comply with some technical direction of the statute, where due alone to mistake or inadvertence on the part of those whose duty it is to prepare and furnish the ballot, should not disfranchise the entire vote of the district and vitiate the election, unless it be made to appear that by reason of the irregularity the result was different from what it would otherwise have been, or that it prevented the voter from freely, fairly, and honestly expressing his choice of the candidate for the office."

Alden, supra, 212 Cal.App.2d at 772 *quoting Dennen v. Jastro* (1913) Cal.App. 264, 267.

Thus, it is long-established law, essential to the preservation of voter- and property-owner election rights, that an election cannot be overturned absent compelling evidence a procedural error actually affected the outcome. *See also Preston v. Culbertson* (1881) 58 Cal. 198, 209

---

related fee under § 6. Rather, that case involved judicial review of determinations made by local governments regarding the existence and apportionment of special benefits arising from facilities and services funded by assessments.

(question is whether "qualified electors have been deprived of a fair opportunity of expressing their preference;" "[m]ere irregularities which do not affect the final outcome should be disregarded"); *Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430 ("a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation").

Similarly, *Gooch v. Hendrix* (1993) 5 Cal.4th 266, which the Court of Appeal cited to support invalidating the vote of the Ross Valley property owners, applies the same rule – an election is not overturned absent substantial evidence that election defects affected the outcome. In *Gooch*, this Court found "widespread illegal voting practices … permeated [the] election – including fraud and tampering;" that violations of the Elections Code were clearly established; "that nearly all of the candidates … took part in … 'soliciting' absentee votes in violation of specific Elections Code provisions;" and that "large percentages … of illegal ballots [were] cast and counted …." *Id.* at 284-85. This Court concluded, unsurprisingly, that these findings constituted "sufficient, essentially uncontroverted

circumstantial evidence in support of the conclusion that 'it appear[ed]' the illegal votes affected the outcomes of the consolidated elections." *Id.* Moreover, in *Gooch*, substantial evidence supported the trial court's factual finding after trial that a significant number of ballots were illegally cast. *Id.* at 274-77.

Gooch is plainly distinguishable because the trial court here never reached the disputes whether ballot secrecy was afforded, whether any violation of such secrecy occurred, and whether any violations affected the outcome. Indeed, the Court of Appeal acknowledges that the District's election procedures, "if followed, might have been sufficient to preserve the secrecy in voting."[71] There is no evidence in this record to the contrary and, given the presumption of Evidence Code § 664 "that official duty has been regularly performed," this record compels the conclusion that the District followed its procedures, and did afford ballot secrecy to the property owners of the Ross Valley.

Clearly, one challenging an election must present compelling evidence the results would have been different if not for the alleged

[71] *Id*. at 29. Again, there is no evidence in this record that the District failed to follow its own procedures or that secrecy was breached in any way beyond the fact that property owners were obliged to sign their ballots attesting to their right to cast them.

misconduct. Here, Greene would have this Court invalidate the property owners' decision on a record which contains no such evidence. It ought not to do so.

V. EVEN WERE BALLOT SECRECY TO APPLY, NO PRECEDENT CREATES A DUTY TO NOTIFY PROPERTY OWNERS OF THAT FACT OR EMPOWERS A COURT TO INVALIDATE THE ELECTION IF THEY ARE NOT

The Court of Appeal "set aside the District's fee election because the voters … were given no assurances that the ballot would be kept confidential."[72] The Court of Appeal cited no authority for this requirement, which does not appear in article II, § 7. That section simply states, as it has since 1849, that: "Voting shall be secret." It does not state that voters must be reminded or assured that voting will be secret – just that voting shall be secret.

Nor does this disclosure requirement appear in the Elections Code. The statutory Voter Bill of Rights provides "There shall be a Voter Bill of Rights for voters, available to public, which shall read: … (4) You have the

[72] Slip Op. at 31-32.

right to cast a secret ballot free from intimidation." Elections Code § 2300. However, the election challenge statute pursuant to which this case was filed does not include failure to notify voters of this requirement, as a basis for judicial invalidation of an election. Elections Code § 16100. Indeed, the consequence of a violation of ballot secrecy is not to penalize voters by overturning their decision, but to punish those who violate the requirement. *E.g.*, Elections Code § 18403 (fine for requesting voter to disclose ballot).

Nor do the provisions of Proposition 218 or the Omnibus Act require that property owners be assured their ballots will be secret. These provisions require only that an agency provide property owners a general summary of procedures for the completion, return and tabulation of assessment ballots. Article XIII D, § 4(c); § 53753(c) . Although these requirements may well be inapplicable to a property-related fee governed by § 6, rather than assessments subject to § 4, this record shows District did give such notice.[73] The District should at least be given the opportunity to try this issue on remand on the trial court.

[73] AA 62-64 (seven-page "Official Notice to Property Owners bearing stamp indicting it was received in Greene's law office five weeks before the majority protest hearing on the fee involved in this case).

Moreover, due process was satisfied by adoption of the resolution establishing procedures for this article XIII D, § 6 (c) proceeding. This was a legislative act and due process is satisfied if a legislative body adopts legislation in public and the enactment is thereafter available to interested persons. *E.g.*, *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1 (no violation of procedural due process absent claim ordinance adopted without notice or opportunity for public to be heard).

Accordingly, the Court of Appeal's requirement that elections officials inform voters their ballots will be secret, and its conclusion that failure to provide such notice empowers courts to overturn election results, are unsupported by the Constitution or the Elections Code.

CONCLUSION

Strong reasons of law and policy support construction of article XIII D, § 6(c) to distinguish between secret elections among voters and non-secret, non-election procedures among property-owners. Doing so gives meaning to the last sentence of article § 6(c), which plainly allows agencies to follow non-secret voting procedures "similar to" those of article XIII D,

§ 4 for property owner voting on assessments. It also facilitates weighted "voting" by property owners, where local governments choose that method, and allows transparency and accountability in government tallies of property-owner voting. Accordingly, the District urges this Court to affirm the trial court's ruling rejecting the challenge to the decision of the Ross Valley property owners to impose a fee on themselves to fund a program of flood protection measures to protect their homes and businesses.

If the Court does determine that the ballot secrecy of article II, § 7 applies here despite the last sentence of article XIII D, § 6(c), then the District respectfully urges the Court to find that secrecy was afforded because of the presumption of Evidence Code § 664 that official duty has been regularly performed and the void in this record of evidence to the contrary. If this Court is unpersuaded to do so, then the District requests the Court remand this matter to the trial court for further proceedings, including fair opportunity for all parties to be heard on the as-yet untried questions whether (i) the District afforded ballot secrecy and (ii) whether any failure to do so, or to communicate the existence of that secrecy, actually affected the outcome in such a profound way as to justify judicial action to overturn the electoral outcome.

DATED: July 24, 2009

Respectfully submitted,
PATRICK K. FAULKNER,
Marin County Counsel

SHEILA SHAH LICHTBLAU, Marin County Deputy County Counsel

COLANTUONO & LEVIN, PC

By:_____
Michael G. Colantuono
Attorneys for Defendant and Respondent,
MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1))

The text of this brief consists of 10,656 words, as counted by the Word version 2007 word-processing software program used to generate the brief.

DATED: July 24, 2009

Respectfully submitted,
COLANTUONO & LEVIN, PC

By:_____
Michael G. Colantuono
Attorneys for Defendant and Respondent,
MARIN COUNTY FLOOD CONTROL
AND WATER CONSERVATION
DISTRICT

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Constitutional Provisions, Statutes and Rules:

TABLE OF AUTHORITIES

Page