

Prop. 218 Does Not Apply to Annexations

By Michael G. Colantuono

On October 5th, the Orange County Court of Appeal decided *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission*. The case answers the question whether Proposition 218 applies to annexations, an issue the local government community had been struggling with at least since a 1999 Attorney General's opinion on the subject. The decision affirms the City of Huntington Beach's trial court victory and confirms that Proposition 218 did not require an election before the City could collect its taxes in Sunset Beach after annexation of that area to the City.

The essence of the Court's holding is that the voters who approved Proposition 218 cannot have intended it to require an election before a city can collect taxes in annexed territory because the measure provides no details about how such an election would be conducted. In particular, Proposition 218 requires two-thirds voter approval for new or increased special taxes but requires only a simple majority for general taxes. Nothing in Proposition 218 describes how voters would express their views on the separate questions of (i) annexation, (ii) approval of general taxes, and (iii) approval of special taxes. Nor does the measure provide a means to determine if an annexation will make taxpayers pay more, as comparing city and county tax and fee regimes can require such apples-to-oranges comparisons as higher utility tax rates and lower trash service fees. Silence on all these issues, like the dog which did not bark in the Sherlock Holmes short story **Silver Blaze** (which the Court cites), suggests the voters did not intend to impose Proposition 218's election requirements on annexations. The court

explained: "There is much in the very structure of Proposition 218 that, if it had been intended to apply to annexations, should have been there, but isn't."

The court noted that the contrary interpretation would have impliedly repealed two provisions of the Cortese-Knox-Hertzberg Act (the LAFCo statute) — the island annexation rule which allowed annexation of small areas like Sunset Beach without an opportunity for protests and a provision stating that, upon an annexation, the annexing city's taxes take effect in the annexed territory. Implied repeal of statutes is disfavored, even in the context of initiative amendments to our Constitution. The Court relied on a comparable 1979 decision, *Dorff v. Metropolitan Water District of Southern California*, which found no intent in Proposition 13 to require voter approval of special property taxes made applicable to new territory by an annexation. The Court also noted the absence of any language in Proposition 218 or its ballot materials indicating voters' desire to repeal the Cortese-Knox-Hertzberg provisions noted above or to depart from the result in *Dorff*. "Had Proposition 218 been intended to satisfy or avoid the effects of *Dorff*, we would have expected *some* attempt somewhere in Proposition 218 to address the issue. We have found none."

Interestingly, the Court provided its own, partial definitions of the terms "impose," "extend" and "increase," which Proposition 218 uses to describe the local agency actions on taxes which trigger tax elections. It did not cite the Proposition 218 Omnibus Implementation Act as we urged in our brief for the City and as the California Supreme Court did in *Greene v. Marin County Flood Control & Water*

Conservation District, a case Michael Colantuono argued in 2010. *Citizens Association* is a deliberately narrow decision by a conservative court. The court agreed with our arguments for the City that a tax is “imposed” when it is first enacted, “extended” when a sunset date is repealed or delayed, and “increased” most often when a tax rate is increased; but reached its conclusions by narrow analyses we did not offer in our brief.

The court refused to apply an earlier decision of the Los Angeles Court of Appeal involving Los Angeles’ telephone tax which Sandi Levin argued, *AB Cellular LA, LLC v. City of Los Angeles*. That case found a tax “extension” requiring voter approval when Los Angeles ordered cellular telephone providers to tax not only minimum monthly account charges, but also the call-detail portion of bills. This court found no analogy between that expansion of Los Angeles’ “tax base” and the annexation of Sunset Beach to Huntington Beach because doing so would raise questions about how to administer tax elections in the annexation context without answers to be had from Proposition 218’s text: “given the problems of structure and implied repeal discussed above, we decline to extend the rule of *AB Cellular* to annexations.”

The court also found no reason for a different decision in Proposition 218’s uncodified language requiring it to be “liberally construed to effectuate its purposes of limiting local government revenues and enhancing taxpayer consent.” The court stated: “a rule of liberal construction cannot trump the rule against implied repeal, much less require us to blind ourselves to the history and language of the proposition.” Local governments will, no doubt, find this language helpful in future cases.

Finally, the Court found it unnecessary to decide whether LAFCo had the power to condition the annexation on a tax election, as the plaintiff urged. This question remains to be decided another day, but it is clear the Proposition 218 does not require such elections: “there was no constitutional *compulsion* to

hold an election. Whether OC LAFCo *could have* conditioned annexation on approval of the voters is not properly before us.”

The court’s reasoning is comparable to that of *Richmond v. Shasta Community Services District*, a case Michael Colantuono argued in 2004, which concluded that water connection charges on new development are not property related fees subject to Proposition 218 because local governments could not comply with the measure’s requirement to give property owners notice of a hearing because it could not be known in advance which property owners would choose to develop their properties. If a proposed interpretation of Proposition 218 opens many questions for which it provides no answers and a contrary interpretation that does no violence to the text of the measure is available that avoids those questions, the second interpretation is preferred.

The case is a nice win for Huntington Beach and provides helpful guidance to every LAFCo in the state and to cities, districts with taxing power, and others involved in annexations. In addition, it is an important reminder that interpreting Proposition 218 and other finance amendments to our Constitution, like Propositions 13 and 26, we can look not only to the text of the measures, but to their silences; not only to their words, but to the practical consequences of their requirements.

The next major Proposition 218 decision will likely come in *Concerned Citizens for Responsible Government v. West Point Fire Protection District*, a California Supreme Court case involving fire suppression benefit assessments. That decision is likely sometime in 2013.

As always, we’ll keep you posted.

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