

Prop. 218 & Fiscal Initiatives

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Art. 13C, 3

Initiative Power for Local Taxes, Assessments, Fees and Charges.

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

Signature Requirements

- 5% of number of voters in jurisdiction who voted in last gubernatorial election
- As gubernatorial turnouts average around 40%, this is just 2% of all registered voters
- Election Code requires 10% for an initiative and 15% for a special election

Signature Requirements (Cont.)

- The 15% standard continues to apply to requests for special elections, as nothing in Prop. 218 discusses this issue
 - 80 Ops. Calif. Att’y Gen’l 151 (2002)

What Electorate?

- Because some fiscal measures (Mello-Roos CFD taxes and assessments, e.g.) apply to less than all of a city or county, the question arises whether an initiative to repeal such a measure is to be voted on by all voters or just those who are subject to it
- Consensus is that all voters can vote absent legislation authorizing a smaller electorate (and none presently exists)

Rationale for Whole Electorate

- No present administrative means to administer a smaller electorate (*but c.f.*, Mello-Roos CFDs)
- No statutory authorization and Prop. 218 displaced the Legislature's authority only as to signature requirements
- Art. 2, 11

Art. 2, 11 and the Whole Electorate

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

Who Votes?

- It can be argued that the property-owner balloting of Art. 13D, § 4 for assessments and Art. 13D, § 6 for property-related fees should be applied to an initiative repeal of an assessment or fee.
- Prop. 218 does not say this.
- Restricting vote to property owners raises 14th Amendment issues: *Nielson v. City of California City* (2005) 133 Cal.App.4th 1296 (Prop. 13's limitation of special parcel tax election to registered voters was required by one-person-one-vote rule of equal protection clause and did not violate rights of absentee land owner).

What Fiscal Measures are Subject to Initiative Repeal Under Prop. 218?

- HJTA's pre-election analysis said measure was only intended to "constitutionalize" *Rossi v. Brown* (1995) 9 Cal. 4th 688.
- *Rossi* upheld, under SF's charter, a measure to repeal a utility users tax, finding no violation of pre-218 constitutional prohibition on a referendum on a tax.

Scope of Prop. 218 Initiatives

- Prop. 218 does not define the “initiative” power; it merely repeals one exception to that power
- Broader legal principles defining the scope of the initiative power therefore apply

Direct Legislative Delegation

- Authority delegated specifically to a local legislative body (“city council” or “board of supervisors”) by the Legislature may not be exercised by the electors by initiative. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491
- But *Bighorn* ruled that Legislature is bound by Art. 13C, § 3 and cannot delegate power to impose fiscal measure solely to legislative body
- Rule may have some force on rate-making issues, but is generally inapplicable

Impairment of Essential Gov't Function

- The power of the initiative may not be exercised if it will cause the impairment of an essential government function. *City of Atascadero v. Daly* (1982)135 Cal.App.3d 466
- May be hard to prove in a finance case
 - *Bighorn* punted on whether initiative subject to statutes requiring rates to cover costs
 - *Rossi* said loss of UUT with advance notice would not impair SF's fiscal powers
 - *But cf., Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1331 (anti-El Toro Airport measure invalid as impairment of gov't fiscal and admin. powers)

Initiatives, Like Other Ordinances, can be Preempted

- An initiative may not enact ordinance that would be preempted if adopted by city council. *DeVita v. County of Napa* (1995) 9 Cal.4th 763; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491

Initiative Limited to Legislative Acts

- An initiative must undertake a legislative act, and not quasi-judicial or administrative action. *DeVita v. County of Napa*, 9 Cal.4th 763 (1995)
- An initiative may not direct a local government to take a legislative action, but must enact legislation in and of itself. *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504

What's Legislative?

- Establishing or completely eliminating a revenue measure is more likely to be legislative than altering the allocation of the fiscal burden among payors
- Establishing a new assessment or fee?
 - Determining special benefit is not legislative
 - Prop. 218's own procedures probably must be followed and these seem to prevent initiative action

Impairment of Contracts

- Contracts clause of U.S. Constitution protects revenues pledged to serve debt prior to 1996 effective date of 218
- Subsequent pledges likely protected, too:
 - HJTA post-election analysis says initiative power cannot break a promise that a council ordinance cannot break
 - Omnibus 218 Implementation Act says, so, too
 - Gov't Code 5854

Disclosure Issues

- Most offering statements now mention Prop. 218
 - May be prudent to mention the potential for initiative repeal, along with Gov't Code 5854
- If an initiative repeal makes the ballot, consider whether disclosure is required under SEC continuing disclosure rule (15c2-12) and disclosure agreements

Constitutional Limits on All Local Legislation

218 Initiative cannot:

- establish invidious discrimination (race, class, gender, etc.)
- Violate Dormant Commerce Clause, as by favoring local businesses
- Adjudicate the tax status of individual property

What Fees are Subject to 218 Initiative?

- *Bighorn* punted on whether initiative subject to rule requiring rates to recover costs
- Did say that 13C's initiative power has at least the breadth of 13D's definitions of assessments and fees
- Remains to be seen whether non-218 assessments (BIDs) and fees (gas & electric) are found to be within the initiative power

What Fees are Subject to 218 Initiative? (cont.)

- Art. 13D, § 1 - Neither 13C nor 13D :
 - creates new power to impose tax, fee, or assessment
 - Affects existing law regarding fees imposed as a condition of property development
 - Affects timber yield taxes
- Art. 13D procedures for assessments and property-related fees likely control over initiative power
 - Bighorn measure void for attempting to require 2/3-voter approval on future water rate increases in teeth of Article 13D, § 6(c)'s exemption of such fees from election requirement

Can an Initiative Increase a Tax, Fee, or Assessment?

- Bighorn says Art. 13C, § 3 applies only to reductions or repeals
- The Court may come to regret that statement:
 - The issue was not briefed
 - Poses 14th Amendment problem in allowing ballot access based on point-of-view
 - The text of § 3 uses the word “affect,” which allows an interpretation allowing increases and decreases

Initiative Increase in Fiscal Measure

- Little doubt a measure can impose a new tax. *Dye v. City of Compton* (1947) 80 Cal. App. 2d 486 (allowing use of referendum under city charter to repeal part of a sales tax ordinance).
- Art. 13D procedures probably control for new assessments and property-related fees
- Special district without power to act by ordinance does not obtain it via Prop. 218: Art. 13D, 1(a)

Questions?

