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California Supreme Court Decides Important Proposition 218 Case in Favor of Local Government

By
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Introduction. On February 9, 2004, the California Supreme Court issued its unanimous decision in *Richmond v. Shasta Community Services District* interpreting 1996's Proposition 218, the "Right to Vote on Taxes Act." This is the second Supreme Court interpreting Proposition 218 and breaks important new ground for local governments, holding:

> (1) water capacity or connection charges and other charges triggered by the voluntary decision of private persons to seek government services are not "assessments" subject to property-owner approval; and
>
> (2) water capacity or connection charges are not "property related fees" subject to Proposition 218 even if used to recover capital costs for fire and emergency medical services.

Richmond thus provides clear guidance for local governments that utility connection and capacity charges needed to fund services to new development are not subject to voter- or property-owner approval. This is good news for the development industry, too, for without a clear and administrable means to finance new infrastructure to serve development, many local governments would not permit that development. The Supreme Court shed light on Proposition 218's exemption for "development fees." However, the decision also includes language suggesting that water is a property-related service and creates some confusion about when a charge imposed on existing, rather than new, water customers is subject to Proposition 218.

The Facts. The Shasta Community Services District provides water, fire, and emergency medical services to a small, rural district in Shasta County east of Redding. The District imposes a water connection charge on those who seek new water service, that has three components: a water capacity component, to fund water infrastructure; a fire suppression component, to fund capital purchases for the District's fire and emergency medical services programs; and, a water connection component, to recover the cost of installing a new meter and connecting the customer's property to the District's water system. The developers of a failed subdivision challenged a November 1997 increase in the connection fee arguing, among many other claims, that the water capacity component was actually an assessment subject to the property-owner approval requirements of Article XIII D, Section 4 of Proposition 218 and that the fire capacity component was a property-related fee and violated Article XIII D, Section 6(b)'s requirement

that such fees not be used for general governmental services such as fire suppression. The plaintiffs also argued that the District erred by amending is water fee ordinance by resolution. The District ultimately prevailed on this last issue in the California Supreme Court but, as it is not germane to the Proposition 218 issues of concern here, we do not address that issue further.

The Case History. After an 8-day, non-jury trial, the Shasta County Superior Court ruled for the District on all grounds, concluding that the water capacity charge was not an assessment but rather a "development fee" exempted from Proposition 218 by Article XIII D, Section 1(b), and that the fire suppression component of the charge was merely a continuation of a pre-Proposition 218 fee and immune from attack on that ground. The Court of Appeal affirmed the trial court on the assessment issue, concluding that the water capacity charge was an exempt development fee. Curiously, the appellate court ruled that fire capacity component of the same water meter fee was not a development fee, but an illegal, property-related fee. The plaintiffs petitioned the California Supreme Court for review, which was granted in May 2002.

The Decision. Assessments. Article XIII D, Section 2(b) defines "assessment" for purposes of Proposition 218 as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." While acknowledging that the District's connection charge was not imposed on real property, the Supreme Court also found that an "assessment" under Proposition 218 could not include any revenue measure for which the assessing government cannot identify the affected properties at the outset:

> "[I]t is impossible for the District to comply with article XIII D's requirement that the agency identify the parcels on which the assessment will be imposed and provide an opportunity for a majority protest weighted according to the proportional financial obligation of the affected property.
>
> We agree with the Court of Appeal that the proper conclusion to be drawn from this impossibility of compliance is that an assessment within the meaning of article XIII D must not only confer a special benefit on real property, but also be imposed on identifiable parcels of real property. Because the District does not impose the capacity charge on identifiable parcels, but only on individuals who request a new service connection, the capacity charge is not an assessment within the meaning of article XIII D."

Thus, if the persons who are to pay the charge cannot be known until future events unfold – such as future development or requests for service – the charge is not an assessment under Proposition 218.

San Marcos. The Court also narrowly construed its 1986 holding in *San Marcos Water District v. San Marcos Unified School District.* That case held that capacity charges used to pay for capital facilities were in the nature of assessments rather than user fees for purposes of Article XIII, Section 3(b) of the Constitution, which exempts government agencies from property taxes (including assessments) but not from fees for service. The Court found this case of no relevance outside the intergovernmental tax immunity setting and of no help to the *Richmond* plaintiffs,

who had relied upon the case to argue that any fee which recovers capital costs is necessarily an assessment which cannot be imposed except by consent of property owners who are to pay it.

Development Fees. The Court rejected the trial and appellate courts' reliance on the "development fee" exception to Proposition 218. Article XIII D, Section 1(b) states:

> "Nothing in this [Proposition 218] shall be construed to: … (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development."

Both lower courts viewed the water connection charge as triggered by a decision to develop property and thus exempted at least the water capacity component of the District's water connection fee from all of Proposition 218. The Supreme Court construed the term "development fee" more narrowly:

> "We agree with plaintiffs that the District's capacity charge is not a development fee. It is similar to a development fee in being imposed only in response to a property owner's voluntary application to a public entity, but it is different in that the application may be only for a water service connection without necessarily involving any development of the property. (See *Utility Cost Management v. Indian Wells Valley Water Dist., supra,* 26 Cal.4th at p. 1191, 114 Cal.Rptr.2d 459, 36 P.3d 2 [noting that a capacity charge 'might apply regardless of whether a development project is at issue']; *Capistrano Beach Water Dist. v. Taj Development Corp.* (1999) 72 Cal.App.4th 526, 530 [concluding that a capacity charge is not a development fee under the Mitigation Fee Act (Gov. Code, § 66000 et seq.)].) Our agreement that the capacity charge is not a development fee does not assist plaintiffs, however, because it does not mean that the capacity charge is an assessment within the meaning of article XIII D. The capacity charge is neither an assessment nor a development fee under article XIII D."

This discussion tells us a few things about the development fee exemption from Proposition 218, but leaves other questions unresolved. First, a development fee is "imposed only in response to a property owner's voluntary application to a public entity," presumably to engage in regulated development. Second, fees imposed on new water service connections may not generally be development fees, because the new connection may "not necessarily involve[e] any development of the property." I would not, however, read this as a blanket statement that water fees can never be development fees. Rather, it is necessary to look to the activity on which the fee is imposed. For example, a condition of a subdivision map that a developer install water mains and convey them to the water utility or pay the utility to do so would seem to be a classic development fee notwithstanding that it relates to water service. On the other hand, where a fee is imposed on new users of services which sometimes, but not always, relate to development – as will be true of water, sewer and other utility services – this language suggests the development fee exception to Proposition 218 will not be available. Given that the Court has found another basis to exempt water capacity charges from Proposition 218, this aspect ruling may be of little import in other settings.

Property-Related Fees. Turning to the challenge to the fire suppression component of the District's water connection fee, the Court concluded that this fee was not within the definition of the property-related fees and charges subject to Proposition 218 because it was triggered not by property ownership, but by "voluntary decisions to request water service." This restates the "voluntariness" test of the Court's 2001 decision in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, its only previous Proposition 218 case.

This conclusion should have been enough to resolve the matter. The Court continued in what appears to be *obiter dicta* (Latin for "otherwise said" and referring to discussion not essential to a holding and therefore not of precedential value) that "supplying water is a 'property-related service' within the meaning of article XIII D's definition of a [property-related] fee or charge." The Court stated:

> "In the ballot pamphlet for the election at which article XIII D was adopted, the Legislative Analyst stated that '[f]ees for water, sewer, and refuse collection service probably meet the measure's definition of property-related fee.' (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73.) The Legislative Analyst apparently concluded that water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges (see Gov. Code, §§ 61621, 61621.3). But the Legislative Analyst was apparently referring to fees imposed on existing water service customers, not fees imposed as a condition of initiating water service in the first instance."

These would also seem to be true of sewer services, but not of refuse collection services.

The Court noted two provisions of Proposition 218 which tended to support its view that water service is a "property related service": the exclusion of gas and electric utility service charges from Proposition 218 stated by Article XIII D, Section 3(b), and the partial exemption from the requirements of Article XIII D, Section 6 for "sewer, water, and refuse collection services." Why include these whole and partial exceptions for certain utility services if water service were generally excluded from Proposition 218 because it is triggered by a voluntary decision to consume water? The Court noted that the Sacramento-based 3rd District Court of Appeal had relied on this same reasoning in its 2002 decision in *Howard Jarvis Taxpayers Ass'n v. City of Roseville*, but did not generally adopt the reasoning of that case.

Taxpayer advocates can be expected to argue that this case unequivocally means that water service charges are necessarily property-related fees subject to Proposition 218. There are several reasons why such a reading is overbroad. First, this discussion is *dicta* and not precedential. Second, the parties to the *Richmond* case argued the relevant provisions of the *Apartment Ass'n* case and cited a 2000 decision of the Los Angeles-based 2nd District Court of Appeal entitled *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, which had squarely concluded that metered water consumption fees are not property-related because they are not

triggered by property ownership, but by voluntary decisions to consume water. Despite the fact that these authorities were cited to the Court, Justice Kennard found no need to discuss them, much less overrule them. Moreover, the *Roseville* decision the *Richmond* Court cites carefully distinguished the *Los Angeles* case:

> "Roseville also cites to *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* to claim that the in-lieu fee is not subject to Proposition 218. That case is distinguishable. There, the appellate court faced the question whether certain municipal water usage rates were imposed as an incident of property ownership, and therefore, required voter approval. The court noted that fees or charges for water services are specifically exempted from the voter approval requirement by California Constitution, article XIII D, section 6, subdivision (c). The court also noted that under the ordinances setting water rates, the supply and delivery of water did not require that a person own or rent the property where the water was delivered; and that the charges for water service were usage rates – basically, commodity charges – based primarily on the amount consumed. Therefore, the water usage rates were not incident to or directly related to property ownership within the meaning of Proposition 218. … We do not suggest that measured or metered consumption determines, on its own, whether a fee is property related within the meaning of Proposition 218; it is simply a factor to consider in an analysis like that undertaken in *Jarvis-L.A.*"

Thus, the *Richmond* Court cited without criticism a case which found itself consistent with the conclusion of the *Los Angeles* case that a metered water consumption rate is not subject to Proposition 218's property-related fee provisions where there is no requirement that the person buying the water own or rent the property on which it is used.

Perhaps most convincing is the Court's own language on this issue:

> "Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.' (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection." (Original emphasis.)

Thus, to trigger Proposition 218's property-related fee provision, a utility service fee must constitute both a fee for a property-related service (because it "is indispensable to most uses of real property," "provided through pipes that are physically connected to the property," and because the fees can be enforced via liens on title) but must also be "imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of

property." If something other than ownership and use of property is required – such a decision to consume a service on that property by a person who need not take the service and who need not be a property owner – then the fee is not within the scope of Proposition 218.

The Court also notes that, like its definition of "assessment," Proposition 218's definition of "property related fees and charges" impliedly requires that the properties on which the fees will be charged be knowable when the fee is established. Charges contingent upon volumes of consumption would not appear to fit this description, although there may be more room to argue about utility fees collected via the property tax roll, minimum monthly account charges, and other charges which can be identified with a property at the outset and are triggered by "nothing other than normal ownership and use of property."

What Does it All Mean? Clearly the case is good news for local government with respect to capacity and connection charges. As to the question of service charges for ongoing utility services such as water and sewer services and, perhaps, refuse collection services, a few points are worth bearing in mind. First, the safest legal course is to comply with the property-related fee provisions of Proposition 218 when establishing or increasing such fees. Doing so eliminates any need to argue this point. Those procedures require notice by mail to all fee payors – a notice that can be included with another mailing such as a monthly bill – and a majority protest proceeding. If an absolute majority of affected fee payors protest, the new or increased fee cannot be approved. Majority protests are rare in all but the smallest jurisdictions and these procedures will rarely block a necessary increase, although they will impose expense and delay.

Second, risk of suit can be mitigated by some or all of the following:

(i) tying charges to consumption or some other voluntary action by fee payor rather than merely owning property, such as a request for service (it may be useful to amend service initiation request forms to make clear that the fee payor is requesting service as a utility customer and not as a property owner),

(ii) imposing charges on those who use a service and not on those who own property on which it is used,

(iii) clarifying that liening property to collect unpaid charges is only a debt collection device (approved in *Apartment Ass'n*) and not a basic element of the fee,

(iv) avoiding the use of the property tax roll for collection of the fee,

(v) relying on the discontinuance of service rather than liening to enforce fees where possible (this is problematic for sewer service providers that are not also water providers),

(vi) clarifying that property may be used without taking the service, by indicating that lawful wells, septic and leach systems may be used, or that documented self-hauling of refuse is permissible, and

(vii) demonstrating that the properties with respect to which the charge will be paid cannot be identified at the outset because the source of requests for service, and the volume of service requested, is not knowable.

Open Questions. As is true of any important decision, the full import of *Richmond v. Shasta Community Services District* will only be known after other courts have had opportunity to apply it. In addition, another important question regarding the scope of Proposition 218's property-related fee provisions is pending in a case involving the City of Fresno in the 5th District Court of Appeal: Do the property-related fee provisions of Proposition 218 apply to a fee which was adopted prior to the July 1, 1997 effective date of those provisions or are those provisions triggered only when a fee is "extended, imposed or increased"? This issue was briefed in the *Richmond* case, but the Court did not find it necessary to decide it. A decision in the Fresno case may be had in early 2005.

Conclusion. So far, the local government community is 2 for 2 in the California Supreme Court with respect to Proposition 218. *Richmond v. Shasta Community Services District* is an important win for local governments and reflects not only our efforts and those of our co-counsel David L. Edwards, General Counsel to the Shasta CSD, but to others as well. Kudos and thanks to Betsy Strauss, author of the *amicus* brief on behalf of the League of California Cities, the Association of California Water Agencies and the California State Association of Counties; and to Dan Hentschke, General Counsel of the San Diego County Water District, who critiqued Betsy's brief as well as our briefs on behalf of the Shasta Community Services District.

New developments in this area of the law will continue, of course. As always, we will keep you posted!