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KEY TOPICS UNDER PROPOSITIONS 13, 62 & 218

1. Utility Users Tax Litigation

Most utility users taxes ordinances in California date from a model ordinance developed by the League of California Cities in the mid-1980s after negotiations with the major utilities. Since that time, the telecommunications industry has been completely transformed with the break up of Ma Bell, the demise of telegrams, and the internet revolution. Now that Propositions 62 and 218 require voter approval of any change in the "methodology" by which a tax is administered (Government Code § 53750(h)), the telephone carriers – Verizon lead among them – have begun to use litigation as a means to reduce the scope of utility taxes as applied to their services. Our firm is defending two taxes in cases of note:

Palo Alto v. Verizon (Santa Clara Superior Court) is the City's effort to enforce its UUT as to Verizon's services to customers who receive "bundled" or "packages" of both local and long-distance calls on cellular and wireline phones for a flat monthly fee. The trial court granted Verizon's motion for summary judgment, concluding that such bundled services were neither "local" nor "long distance" telephone calls taxable under the Federal Excise Tax on Telephones (FET). The League's model UUT, adopted by Palo Alto, exempts from the local utility tax telephone calls – such as those paid by coin in phone booths – which are exempt from the FET. The City's motion for new trial is pending and an appeal to the 6th District Court of Appeal is likely. News coverage of the trial court ruling has spawned a pending class action suit for refunds. Such a suit is not possible if the taxing agency has a modern claiming ordinance as authorized by Government Code § 935. A model of such an ordinance may be found at www.cllaw.us/papers.htm.

Verizon Wireless v. Los Angeles (2nd District Court of Appeal, Case No. B185373) involves Los Angeles' effort to apply its UUT to the call detail portion of cellular telephone bills. Prior to the adoption of the Mobile Telecommunications Sourcing Act (MTSA) by Congress in 2000, cellular carriers argued that the federal Constitution forbade the application of a UUT to

telephone calls which neither originated nor destinated in the taxing city. Because the wireless carriers had not developed technology to track the origin and destination of calls, Los Angeles allowed them to tax the monthly base rate for cell service, and not to tax call details. After passage of the MTSA, Los Angeles sought to enforce its tax on all cell calls within its jurisdiction (which, under the MTSA, includes all calls billed to an account with a Los Angeles address). Verizon paid under protest and sued to invalidate the tax, arguing that Los Angeles had "changed its methodology" for administering the tax and could not do so without a vote of the electorate under Proposition 218. Verizon prevailed in Los Angeles Superior Court and the case is now on appeal.

In light of this trend of cases, agencies which rely on UUTs on telephony should look for an opportunity to seek voter approval of an updated ordinance that reflects the realities of the modern telecommunications industry.

2. Transient Occupancy (Hotel Bed) Taxes

AB 1916 (Maddox, R-Costa Mesa) added § 7283.5 to the Revenue and Taxation Code to allow a buyer of a property subject to a transient occupancy tax to request a tax clearance certificate from the taxing agency. The agency must issue a tax clearance certificate, stating the tax due on the property or request the current owner of the property to provide transient occupancy tax records for audit and issue a certificate after the audit is complete. If a tax clearance certificate is issued, the new owner may rely upon the certificate as conclusive evidence of the tax liability associated with the property as of the date specified on the certificate. Any purchaser or transferee who does not obtain such a certificate, or who fails to withhold sufficient funds for the benefit of the City in the escrow account for the purchase of the property, is liable for the transient property tax due the City.

AB 1916 also added § 7283.51 to the Revenue and Taxation Code, which imposes a four-year statue of limitations for any action to collect unpaid transient occupancy taxes. This statute does not apply in cases of fraud or failure of a property owner to file a transient occupancy tax return. Nor does it affect the one-year claiming period for refunds of taxes by taxpayers imposed by a local claiming ordinance, as discussed in section 1 of this paper.

Finally, AB 1916 amended Revenue and Taxation Code § 7280, to impose uniform requirements with respect to forms that must be prepared when a local agency has exempted government officials from its transient occupancy tax. Such a form must (1) require the employee or officer claiming the exemption to provide travel orders, a government warrant or a government credit card issued to pay for the occupancy, and (2) require the officer or employee to provide photo identification and proof of employment.

3. Fees on Telephone Customers to Fund 911 Response and Related Services

San Francisco imposed a non-voter-approved fee on telephone bills to recover the cost of a significant and costly upgrade to its 911 response system following the Loma Prieta earthquake in 1989. More recently other local governments have implemented similar fees and litigation has ensued in the general law City of Union City, the charter city of Stockton, and against the County of Santa Cruz. The central legal issues are whether the fee is in fact a tax for which voter approval is required and whether the state 911 fee is preemptive as to some or all local governments.

Mancini v. County of Santa Cruz, 6th District Case No. H028434, is an unpublished victory for Santa Cruz County upholding its fee. As this paper is written, the plaintiff's petition for review in the California Supreme Court is pending, as is a request for publication supported by the League of California Cities and Union City. Taxpayers rights organizations have opposed publication.

Telephone carriers challenged Union City's 911 fee and cross-motions for summary judgment are pending before Alameda Superior Court Judge Winifred Smith and likely to be heard in early 2006.

The Third District Court of Appeal head oral argument on appeal in Stockton's case against phone companies on January 20th and the case should be decided in late February. This case turns on whether the phone companies have a duty to pay the fee under protest before challenging it. A related case brought by phone carriers to challenge Stockton's fee is in discovery in San Joaquin County Superior Court.

4. Utility Rates

Apartment Association of Los Angeles County, Inc. v. City of Los Angeles, 24 Cal.4th 830 (2001) (housing inspection fee not subject to Prop. 218 because imposed on voluntary decision to enter rental market, not mere ownership of property).

Richmond v. Shasta Community Services District, 32 Cal.4th 409 (2004) (water connection charges not subject to Prop. 218 because triggered by voluntary conduct of developers; decision includes *dicta* suggesting ordinary water and sewer rates subject to Prop. 218).

Howard Jarvis Taxpayers Association v. Fresno, 127 Cal.App.4th 914 (2005) (charges for water, sewer and solid waste services to existing customers are subject to Article XIII D, § 6 and such fees adopted prior to Proposition 218 have been required to comply with it since July 1, 1997 whether or not those fees have been adopted, extended or increased since that time).

Bighorn-Desert View Water Agency v. Beringson, Cal. S. Ct. Case No. S127535 (pending; fully briefed as of April 7, 2005) (court of appeal upheld trial court order preventing election on initiative measure to reduce water rates both because metered water rates are not subject to Prop. 218 and because the measure violated case law barring initiatives from exercising power delegated by the Legislature to the local elected body alone or from impairing an essential government function).

5. General Fund Transfers

Cost Allocation Plans and debt repayments raise no issues under Props. 13 & 218. Transfers justified by costs imposed by utilities on general fund programs, such as streets and public safety, appear defensible under *Roseville* and *Fresno* cases discussed below.

Hansen v. City of San Buenaventura, 42 Cal.^{3d} 1172 (1986) (Ventura entitled to a "reasonable rate of return" on water rates charged to non-City residents, suggesting a return on investment might be earned by any public utility). Still good law for utilities not subject to Prop. 218, such as electric utilities and non-utility enterprise funds.

Howard Jarvis Taxpayers Association v. City of Roseville, 97 Cal.App.4^{th} 637 (2002) (*Hansen* is not good law as applied to fees subject to Prop. 218 and general fund transfers from accounts funded with such fees must be justified on the basis of cost recovery).

Howard Jarvis Taxpayers Association v. City of Fresno, 127 Cal.App.4^{th} 914 (2005) (Court of Appeal invalidated City's payment in lieu of property taxes from water and sewer utilities on basis of Prop. 218 even though these transfers were authorized by a 1957 voter-approved charter amendment and functioned much like a utility users tax applied at the wholesale level, finding all ordinary water, sewer and trash rates subject to Prop. 218, no "grandfathering" of rates not "adopted, imposed or increased" since the adoption of Prop. 218 and enforcing ban on general fund transfers of Article XIII D, § 6(b)(2)).

The Supreme Court's decision of the *Bighorn* case cited above may clarify this area of the law.

6. State "Water Capacity Fee" to Fund Regional Water Supply Projects

S.B. 1166 (Aanestad, R-Grass Valley) and A.B. 1839 (Laird, D-Santa Cruz) implement a portion of the Governor's infrastructure package and propose to fund regional water supply projects via a monthly fee, ranging from $3 per residential connection to $10 per industrial or large agricultural connection, to be collected by all water retailers in the state from their customers. The fee is likely justifiable under *Sinclair Paint Co. v. State Board of Equalization*, 15 Cal.4^{th} 866 (1997), or as a service fee if the manner in which the proceeds of the fee are to be expended can be more closely tied to the impacts of water service in a given region or to benefits

to fee payors. There are also questions whether the rate structure is rational and fair to urban and domestic users.

7. Storm Water Funding

General and special taxes with voter approval clearly legal to fund this service. (LA County imposed such a tax at the November 2005 election.)

Assessments defensible, too, if special benefit can be shown.

Property-related fees with Prop. 218 compliance are lawful (Palo Alto failed, San Clemente succeeded).

Non-property related fees (*e.g.*, inspection and permitting fees) are also lawful.

Utility fund transfers if utility operation imposes cost on storm water program.

Howard Jarvis Taxpayers Association v. City of Salinas, 98 Cal.App.4th 1351 (2002) (fee on property tax roll based on impervious coverage was a Prop. 218 fee even though property owners could avoid the fee by detaining or treating storm water on-site).

ACA 13 (Harman, R-Huntington Beach) would amend Article XIII D, § 6(c) to expand the partial exemption for water, sewer and refuse fees to include "flood control, and storm and surface water drainage" fees. This exemption allows such fees to be imposed without voter or property owner approval following mailed notice to all fee payors and a majority protest proceeding in which silence is consent.

8. Open Space Assessments

Does regional open space provide special benefit to private property sufficient to justify assessment financing?

BadTax v. Mountains Recreation and Conservation Authority (LA Superior Court 2003) (trial court ruled for MRCA and plaintiffs abandoned appeal).

Silicon Valley Taxpayers Association v. Santa Clara County Open Space Authority, Cal. S. Ct. Case No. S136468 (pending) (Court of Appeal found that assessment imposed for unspecified, future regional open space acquisitions sufficiently benefited property to justify assessment; Supreme Court granted review after strong dissent from Justice Bamattre-Manoukian).

9. Prop. 218 Initiatives to Repeal or Reduce Revenue Measures

Article XIII C, Section 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."

Open Questions: Is the 218 Initiative limited to assessments, fees and charges as those terms are defined in Article XIII D? Can the 218 Initiative be used to exercise a rate-setting power delegated directly to a legislative body? To impair an essential governmental function? To effectively disestablish an agency without complying with Cortese-Knox-Hertzberg?

Bighorn-Desert View Water Agency v. Beringson, Cal. S. Ct. Case No. S127535 (pending; fully briefed as of April 7, 2005) (Court of Appeal upheld trial court order preventing election on initiative measure to reduce water rates both because metered water rates are not subject to Prop. 218 and because the measure violated case law barring initiatives from exercising power delegated by the Legislature to the local elected body alone or from impairing an essential government function.