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THE LAW OF MUNICIPAL REVENUES:
An Update on Props. 62 & 218

presented by

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League of California Cities
Annual Conference

Long Beach, California
October 4, 2002

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PROPOSITION 62

I. Retroactivity and the Statute of Limitations

Two critical issues were left undecided by *Guardino v. Santa Clara County Local Transportation Authority*, 11 Cal.4th 220 (1995), which held that Proposition 62, previously ruled invalid by lower courts, was in fact enforceable to require voter approval of local general taxes: Is the decision retroactively applicable to taxes adopted prior to the *Guardino* decision? What statute of limitations applies to a challenge to a tax under *Guardino*: three years, under Code of Civil Procedure § 338(a), as several trial courts have concluded, or does a new statute begin to run each time a tax is collected, so the tax is never immune from attack? The retroactivity question remains open, but the statute of limitations has been decided.

In *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal.4th 809 (2001), the California Supreme Court concluded that, although the three-year rule of § 338(a) applies, continued collection of a non-voter approved local tax subject to Proposition 62 constitutes a "continuing violation" and a new cause of action therefore arises with each tax payment.

Previously, the San Diego panel of the 4th District Court of Appeal determined in *McBrearty v. City of Brawley,* 59 Cal.App.4th 1441 (1997) that, although the 3-year statute applied, the statutory period did not begin to run until the 1995 decision in *Guardino.* In the subsequent case involving La Habra, the Orange County panel of the 4th District disagreed, holding that the three-year period ran from the date the tax ordinance was adopted. That court dismissed a suit challenging La Habra's utility users tax. The California Supreme Court reversed and changed local tax law in an important way.

The Supreme Court agreed that the appropriate statute of limitations for Proposition 62 challenges to local taxes is the 3-year rule of Code of Civil Procedure § 338(a). Further, the Court expressly overruled the *Brawley* court's holding that this period did not commence until the 1995 decision in *Guardino*. To uphold the *McBrearty* rule, the Court noted, would "allow virtually unlimited litigation every time precedent changed."

The Court also concluded, however, that the continued collection of a tax that had not been subjected to the voter approval required by Proposition 62 is a "continuing violation." Therefore, **a new cause of action arises and the statute of limitations with respect to that cause of action begins to run anew with each tax payment.** As a result, no recurring local tax levy is ever certain in its application or beyond challenge. Any change of case law affecting the manner of adoption, the permissible tax base, or other details of a local tax is fair game for argument upon the next tax payment. This level of uncertainty does not bode well for long-term fiscal planning at the local level.

These arguments were raised in an *amicus curiae* ("friend of the court") brief filed on behalf of the California State Association of Counties and 82 California cities and towns by the author of this paper and Brea City Attorney Jim Markman. The Court addressed the concern this way:

> "Finally, an amicus curiae group of California cities and counties contends that plaintiffs' theory of continuous accrual, applied to tax measures, would unacceptably impair the security and reliability of municipal revenue sources and interfere with budgetary planning. Plaintiffs, in turn, acknowledge the public policy favoring security of municipal finance, but observe that the policy 'is not a trump card that somehow requires the courts to countenance *ultra vires* or illegal tax practices.' We agree. The local governments' suggestion, 14 years after the passage of Proposition 62 and five years after *Guardino*'s resolution of the constitutional questions, that their budgetary planning processes will be disrupted if Proposition 62's requirements are enforced, is not well taken. Cities and counties must eventually obey the state laws governing their taxing authority and cannot continue indefinitely to collect unauthorized taxes." *Id* at 824-25 (citation omitted).

The Court nonetheless stated, "[o]ur decision in this case does not, in any event, subject municipalities to limitless claims for refund of illegal taxes." *Id*. at 825. The Court reasoned that: (i) its decision resolved only the statute of limitations issue raised in the case, and that the time for bringing legal challenges of a tax may be limited by other statutory or constitutional rules; (ii) the Court had concluded only that a tax measure can be challenged within the statutory period after any tax payment and only by one who had paid the tax and; (iii) the case did not involve tax ordinances pledged to pay bonds and other debt and therefore protected by the impairment of contracts clauses of the state and federal constitutions, or taxes subject to validation under Code of Civil Procedure §§ 860 et seq. Therefore, the Court concluded, "The legitimate public interest in stability of municipal finance is not imperiled." That certain favored taxes can be taken out of the sweep of this ruling by the Legislature or the federal Constitution would appear to do little to "stabilize" municipal finance. Thus, while the public interest in stability of municipal finance may be "legitimate" it would not seem, to the Court at least, to be persuasive.

Three limits on Proposition 62 liability are worthy of note:

First, the cases noted below make it reasonably clear that **Proposition 62 does not apply to charter cities**. In fact, no published authority to the contrary exists. Unfortunately, the California Supreme Court has yet to reach that question. If nothing else, *Guardino* taught local government that it can be expensive indeed to rely on appellate authority, no matter how ample or persuasive, if the California Supreme Court has not yet spoken.

Second, **it remains possible to argue that the tax provisions of Proposition 218 impliedly repealed those of Proposition 62**. Proposition 218 includes a requirement that taxes adopted without voter approval between January 1, 1995 and November 6, 1996 be submitted for voter approval or repealed not later than November 6, 1998. It can be argued that Proposition 218's validation of some pre-218 non-voter approved taxes, and its silence as to the remainder,

evidences the voters' intent to leave those taxes in place.[1]

Third, **it also remains possible to argue that the *Guardino* decision ought not to be applied retroactively**. It is the usual rule that judicial interpretations of the law "speak" from, or relate back to, the effective date of the law interpreted. However, there is authority that permits cases to be of prospective application only where fairness so requires. This argument was thoroughly argued in a League of California Cities *amicus* brief in a Proposition 62 appeal involving Butte County pending when the *Guardino* decision came down, but has yet to be decided in a published appellate precedent.[2]

II. The "Measure A/Measure B" Strategy

In *Coleman v. County of Santa Clara*, 64 Cal.App.4th 682 (1998), the 6th District Court of Appeal held that a sales tax imposed by Santa Clara County's Measure B, which appeared on the same November 1996 ballot as Proposition 218, was not a special tax subject to the ⅔-voter approval requirement of Propositions 13 and 62. Proposition 218 did not apply to the case, as that measure took effect the day after Measure B was approved. The ballot included Measure A, an advisory measure that advised the Board of Supervisors that, if the general sales tax to be imposed by Measure B were approved, the voters preferred the proceeds of the tax be devoted to a specific list of transportation projects. Measure B imposed a general ½-cent sales tax. The plaintiffs alleged the two measures were a transparent attempt to evade the ⅔-voter-approval requirement, but the Court of Appeal disagreed.

The court stated a two-part test for the identification of special taxes. First, the law asks whether the entity that imposed the tax is a general-purpose entity or a special-purpose entity, which can impose only special taxes by its very nature. Second, if the tax is imposed by a multi- or general-purpose entity, the law asks if the proceeds of the levy are "legally obligated" for a "special purpose." In *Coleman*, the Court concluded that although Measure A "expresses the voters' preference how new tax revenue should be spent, this relationship ... does not reflect such inseparability that, as a matter of law, the two measures must be considered as one. On the contrary, the measures were not legally connected." *Id.* at 670. The court concluded:

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[1] The *Brawley* court explicitly rejected this argument in a portion of its analysis which was not in issue in *La Habra*. 59 Cal.App.4th at 1450.

[2] Earlier editions of this paper reported that these issues had been pending in *Griffith v. County of Santa Cruz, et al* (6th District Court of Appeal Case No. H019505) involving Proposition 62 challenges to the utility tax of the County of Santa Cruz and the utility taxes and admission taxes of the cities of Santa Cruz, Watsonville, and Scotts Valley. Prior to the *La Habra* decision, the California Supreme Court granted review of an appellate decision which rejected the challenges based on the three-year statute of limitations of Code of Civil Procedure § 338(a) , but which did not reach the other issues. On October 10, 2001 the California Supreme Court returned this case to the 6th District for further proceedings in light of the *La Habra* decision. The Court of Appeal then found that Proposition 62 inapplicable to the charter cities of Santa Cruz and Watsonville, but found that the statute of limitations had not run with respect to the County and the general law city of Scotts Valley and remanded to the trial court for further litigation. The Supreme Court refused a petition to review that second appellate decision. Trial in the case is stayed pending the outcome of an election on the Scotts Valley tax slated for November 2002. Accordingly, resolution of the issues outlined above must await another appeal in this case or another appropriate suit.

> "We readily acknowledge that as a result of our decision, ballot bifurcation makes it possible for cities and counties to raise new tax revenue by simple majority and then spent it on a specific list of projects. However, we do not believe that such bifurcation ... represents a means to circumvent supermajority requirements. This is so because Propositions 13 and 62 were not intended to make it more difficult to raise *all* new taxes, only those that are legally earmarked for specific purposes." *Id*. at 672-73 (emphasis original).

Proposition 218 contains a more detailed definition of "special tax" than did either Propositions 13 and 62 and the Measure A / Measure B strategy of combining a general tax with an advisory measure is not without risk of challenge under that new definition. Indeed, HJTA has indicated eagerness to bring such a challenge. Nonetheless, *Coleman* suggests this strategy to local governments seeking new revenues.

III. Charter City Cases

Most public agency counsel have concluded that Proposition 62 is not applicable to charter cities. However, the adoption of Proposition 218 does require voter approval of general taxes of charter cities imposed after January 1, 1995, and thus exemption for Proposition 62 is of historical interest only for most charter cities. Nonetheless, a few cases contest the applicability of *Guardino* to pre-Proposition 218 charter City taxes.

The first published opinion on point after the *Guardino* decision was *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 64 Cal.App.4th 1217, 1226-27 (1998).[3] The Airport Authority and one of the cities that created it litigated this dispute over the City's parking tax. Burbank obtained voter approval of the tax on the April 1997 ballot as a Proposition 218 "window-period" tax and prevailed in the trial court on the ground that Proposition 62 does not apply to charter cities. The Court of Appeal affirmed. The appellate decision focuses on a number of other theories and its discussion of Propositions 62 and 218 is quite terse. Nonetheless, it is authority that charter cities are exempt from Proposition 62.

More recent is *Trader Sports, Inc. v. City of San Leandro*, 93 Cal.App.4th 37 (2001). The charter city of San Leandro proposed, by a simple majority of its council, a 3% gross receipts tax on sales of concealable firearms, which the voters approved. A gun dealer sued, claiming that the ordinance should be invalidated because Government Code § 53724, adopted by Prop. 62, requires ⅔ of the council to propose a general tax. The trial court granted the City's demurrer and the Court of Appeal affirmed, concluding that charter cities are exempt from the ⅔-council-vote requirement of § 53724, both as a municipal affair and under the specific language of Article 11, § 5(b) allowing charter cities freedom to determine the means by which ordinances are adopted.

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[3] Pre-*Guardino* authorities holding Proposition 62 inapplicable to charter cities include *Fielder v. City of Los Angeles*, 14 Cal.App.4th 137 (1993), and *Fisher v. County of Alameda*, 20 Cal.App.4th 120 (1994).

PROPOSITION 218[4]

Proposition 218 has four primary effects: (1) some of Proposition 62's rules regarding taxes are now placed in the State Constitution and made applicable to charter cities;[5] (2) broad new restrictions are imposed on assessments; (3) complex and poorly drafted rules regarding so-called "property related fees" are imposed; and, (4) the initiative power is extended to local fiscal matters. Those four topics provide the structure of most of the balance of this paper. Because Proposition 218 treats standby fees as assessments, these fees are treated separately. This paper closed by addressing issues arising under the federal Voting Rights Act and the Political Reform Act of 1974.

I. Taxes

In most respects, the tax provisions of Proposition 218 do not differ significantly from those imposed by Propositions 13 and 62. Accordingly, there is less ambiguity in this area, although important questions have arisen.[6]

A. Definition of "Impose" or "Extend"

In *McBrearty v. City of Brawley*, 59 Cal.App.4th 1441 (1997), Brawley contended that Proposition 218's requirement of voter ratification of non-voter approved taxes imposed after January 1, 1995 (so-called "window period" taxes) impliedly validated non-voter approved taxes imposed prior to that time without need for an election under Proposition 62. The court rejected this argument. The court's conclusions, however, are helpful to local governments for two reasons.

First, the court cited as authoritative the **Proposition 218 Implementation Guide** issued in January 1997 by the League of California Cities.[7] This will permit use of that document as authority in future cases involving Proposition 218.

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[4] A useful website containing data regarding municipal finance in California, Propositions 62 and 218 is maintained by Michael Coleman, a consultant to the League of California Cities, at www.cal.net/~coleman.

[5] A key provision of Proposition 62 that does not appear in Proposition 218 is the requirement of Government Code § 53724(b) that general taxes be proposed by a ⅔-majority of the legislative body. This requirement thus extends to general law cities, counties and special districts, but not to charter cities, as discussed in the *Traders Sports* case discussed above.

[6] For an interesting law student commentary on the policy implications of the voter-approval requirements of Proposition 218, see Simon, *"A Vote of No Confidence: Proposition 218, Local Government, and Quality of Life in California,"* 25 **Ecology L.Q.** 519 (1998) (arguing that local governments must engage their electorates to built support for municipal services which enhance quality of life).

[7] The most current edition of *Guide* is the 2000 edition, which is available from the League of California Cities' Publications Unit at (916) 658-8257 or via the League's website at www.cacities.org. Kudos to Rohnert Park City Attorney Betsy Strauss and San Diego County Water Authority General Counsel Daniel S. Hentschke for their substantial contributions to this significant revision and update of the *Guide*.

Second, and more importantly, the court rejected Jenean McBrearty's argument that Prop. 218 requires voter approval of all taxes and property-related fees that local governments continue to collect at pre-existing rates:

> "McBrearty, however, takes the position that the City's continued collection of the tax during the window period constituted an 'imposition' or 'extension' thereof. She offers no ballot history or other legal basis for such a broad definition of those terms. Further, applying those terms as she defines them would require a local government to annually resubmit taxes previously approved by the voters, even in the absence of any change in the amount or duration of those taxes. Such an absurd result was clearly not intended by the voters."

Id. at 1450. This is an important victory, as the HJTA and others have offered just this broad interpretation of "impose" and "extend" in debates regarding the impact of Proposition 218. This rule may potentially affect many more local revenue sources than the Proposition 62 taxes affected by *Guardino*. Indeed, the Attorney General has construed this language from *McBrearty* broadly to require *legislative* action before an increase in a tax or fee will trigger a duty to comply with Proposition 218's procedures. 82 *Ops. Calif. Att'y Gen'l* 35, 38-39 (1999).[8]

B. Definition of "Special Tax"

Coleman v. County of Santa Clara, 64 Cal.App.4th 682 (1998), is a Proposition 62 case discussed more fully above. Although it does not construe Proposition 218, which took effect the day after the measures in issue in the case were voted upon, it will be helpful in future litigation regarding the meaning of the newly broadened definition of "special tax" provided by Article 13C, § 1(d).

A case pending in the Third District Court of Appeal in Sacramento may also shed light on the distinction between general and special taxes. *Howard Jarvis Taxpayers Ass'n v. City of Roseville*, 3rd District Court of Appeal Case No. C039942, involves competing ballot measures. The city responded to an initiative to repeal its utility users tax with a counter measure which would dedicate revenues from the tax to police, fire, parks and library services. Both measures passed by simple majorities. The city filed an action in Placer Superior Court, apparently to validate its measure. The Howard Jarvis Taxpayers Association (HJTA) argued that the city's measure was a special tax requiring ⅔-voter approval and that it had therefore failed, while the competing repeal measure had passed. The trial court agreed with HJTA and dismissed the case. The city's appeal is now pending and, as this paper is written, the appeal is being briefed. Decision in the case, if published, will shed light on how far a city may go in telling the voters how tax proceeds will be spent without triggering the ⅔-voter approval requirement. Decision is likely in 2003.

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[8] The California Supreme Court expressly overruled *McBrearty* on its core holding regarding the tolling of the statute of limitations on Proposition 62 challenges to non-voter approved local taxes. *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal.4th 809, 817 n.2 (2001). *McBrearty's* reasoning on the Proposition 218 issue was not discussed there, however, and remains citable authority.

SCA 13 (Alarcon, D-Los Angeles) would amend the Constitution to reduce Proposition 218's ⅔-voter approval requirement for special taxes to a simple majority for taxes "imposed exclusively to fund projects related to transportation and other local development." It would also lower the approval requirement for general obligation bonds from ⅔ to a simple majority if those bonds are used to fund low- and moderate-income housing and transportation from such housing to employment sites. As this paper is written, the proposed constitutional amendment is slated for its first committee hearing.

C. Annexations and Incorporations

Given Proposition 218's failure to define the critical term "extend," it was initially open to question whether the annexation of land to a city amounted to the "extension" of the city's taxes into previously unincorporated territory such that an election would be required under Article 13C, §§ 2(b) and (d). In 82 *Ops. Calif. Att'y Gen'l* 180 (1999), the Attorney General concludes that Proposition 218 does not generally apply in this context:

> "We believe that the provisions of the Constitution [i.e., Proposition 218] and the [Cortese-Knox-Hertzberg Local Government Reorganization] Act can be harmonized to promote efficient governmental operations and public control over government spending. Under the Act, the taxes, assessments, fees, and charges have been previously approved by the electorate, if so required by the Constitution, prior to the change of organization or reorganization. Those who would become subject to the established taxes, assessments, fees, and charges upon the change of organization or reorganization have the opportunity to reject the imposition of the previously approved taxes, assessments, fees, and charges by rejecting the annexation proposal. (§§ 57075-57078.) The Act's provisions thus coincide with the constitutional requirements; an additional election under article 13C or 13D would be wasteful of taxpayer funds." *Id*. at 197.

In reaching this conclusion, the Attorney General noted that the ballot materials available to the voters who passed Proposition 218 gave no hint that it might apply in the annexation or incorporation context. The Attorney General noted, too, that administering Proposition 218's requirements in the context of a boundary change "would present an administrative imbroglio" thus suggesting the voters did not intend that result. *Id*. at 188.

This conclusion is, of course, not unlimited. The Attorney General notes that "[f]or purposes of this opinion, we may assume that the LAFCO [Local Agency Formation Commission] would not require a change in the methodology of determining the amounts to be collected, would not increase the rates, and would not lengthen the period of collection." *Id*. at 187, n. 4. Thus, changes in taxes, assessments, fees and charges that trigger an election or protest proceeding under Proposition 218 do so whether or not they are proposed in tandem with a boundary change. On the other hand, the mere fact of a boundary change does not "extend" existing revenue measures into the area affected by the change within the meaning of Proposition 218 such that an election or protest proceeding is required.

This issue, like so many others, is unlikely to be finally resolved without litigation. Thus, a degree of caution remains appropriate.[9]

D. Zoning Statute of Limitations Bars Challenge to Business License Tax Enforcement Against Home Occupation

The undefined term "extension" in Article 13C, §§ 2(b) and (d) led the HJTA to challenge Los Angeles' decision to allow home occupations in residential zones, on condition that such businesses comply with the City's pre-existing business license tax. HJTA took the position that this zoning ordinance amendment constituted the "extension" of the business license tax into residential zones where it had not previously applied (because business activity there was illegal) and that voter approval of this "extension" was therefore required. The Second District Court of Appeal affirmed judgment for Los Angeles, concluding that the very short statute of limitations of Government Code § 65009(c), which requires challenges to zoning ordinances to be filed and served within 90 days, barred the action. *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, 79 Cal.App.4th 242 (2000).[10]

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[9] The first test case on these issues was *Howard Jarvis Taxpayers Ass'n v. City of Cathedral City* (Riverside County Superior Court). That case, however, settled and the League of California Cities is currently unaware of any other pending case on these issues.

Arguments contrary to those of the Attorney General are outlined in two opinions of the Legislative Counsel. Opinion No. 11267 (May 15, 1997) concluded that Proposition 218 is triggered if an annexation to a City results in the imposition of a tax, assessment or fee on annexed properties to which those properties were not previously subject. This would require an election in virtually every annexation case and ⅔-voter approval wherever special taxes are in issue. This conclusion is reiterated in Legislative Counsel Opinion No. 25418 (March 17, 1998). Legislation to address the problems created by these opinions was introduced in 1999 as S.B. 1142 (Senator Morrow, R-Carlsbad), but the measure was not approved.

Legislative Counsel opinions are not generally available, as they constitute attorney-client-privileged advice from the Legislative Counsel to his client. They can often be obtained from a legislator, however. The Legislative Counsel opinions cited here were included in the 1998-A edition of the League's **Proposition 218 Implementation Guide** and can also be obtained from the League of California Cities or the author of this paper.

[10] In an interesting irony, the HJTA argued to the Court of Appeal that the appropriate statute of limitations was C.C.P. § 338(a), the very statute it is challenging in *HJTA v. La Habra*, discussed above with respect to Proposition 62.

One aspect of the Court of Appeal's decision appears to be in error. The court states: "The 90-day period [established by Government Code *§* 65009(c)] commences on the date the ordinance becomes effective. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22)," Hensler does indeed state that the statute of limitations established by *Government Code* § 65009(c) runs from the "date the statute becomes effective." However, the relevant language of Government Code § 65009(c) provides:

> "no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days *after the legislative body's decision*: ... to attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance." (Emphasis added.)

This language would seem to be clear that the 90-day period runs from the "decision" of the legislative body to adopt a zoning ordinance, rather than from the later date that the ordinance becomes effective (30 days later for a general law city under Government Code Section 36937(a)). This ill-considered language in *Hensler* and *HJTA v. Los Angeles* creates unnecessary ambiguity. Fortunately, it appears to be *dicta*.

E. Judicial Circumvention of Voter Approval Requirements

F&L Farm Co. v. City of Lindsay, 65 Cal.App.4th 1345 (1998). Lindsay is renowned for its production of olives, packed in brine. For many years the City accepted waste brine at its municipal landfill. It appears that brine leaked from the landfill, contaminating local groundwater supplies and harming overlying farmland. Several farm owners obtained judgments in inverse condemnation that, with interest, amounted to more than $5 million, far more than the City could pay. When the City failed to do so, the plaintiffs sought a writ to compel payment. The City argued that Proposition 218 and the debt limitation requirement of Article 16 of the California Constitution "overrode" its duty to pay the judgment. The trial court disagreed, as did the Court of Appeal. In a decision that is consistent with previous case law involving Proposition 13, the Court concluded that the constitutional duty to make amends for government damage to property has equal weight with the constitutional limits on local government finance and both must be given effect.

Underlying the case is a more fundamental issue, one that caught the attention of the HJTA – can a court impose a tax to fund its judgment without the voter approval required by Propositions 62 and 218? On the one hand, a city's duty to pay its debts ought not to depend on the generosity of its voters. On the other, the HJTA fears that judicial power to impose taxes will invite collusive litigation, such as where a friend of town hall sues a city for failing to maintain public streets, hoping for a court order to fill in where a voter-approved street tax could not. These issues arose in *Ventura Group Ventures, Inc. (VGV) v. Ventura Port District* (9th Cir. No. 97-55269).

The League of Cities coordinated an *amicus* brief in this case, in both the federal and state courts. The Port District filed for Chapter 9 bankruptcy after a multi-million dollar judgment was entered against it in a contract dispute. The judgment debtor assigned its claim to VGV, which asserted the claim in the bankruptcy court. The bankruptcy was resolved, with a partial payment on the debt, but the stipulated decision left VGV free to appeal to the Ninth Circuit the question whether the federal courts have power to impose an additional property tax on the land within the Port District, or to re-allocate the existing 1% property tax, to pay the debt. Obviously, taking property tax money from the City of Ventura, Ventura County, and schools could satisfy the judgment, but would not be warmly greeted by those local governments!

The California Supreme Court accepted certification of these questions from the 9th Circuit and the unanimously decided the certified case.[11] *Ventura Group Ventures, Inc. (VGV) v. Ventura Port District,* 24 Cal.4th 1089 (2001). The Court determined that Prop. 13 *does* prohibit such a tax increase and that Prop. 218 prohibits such assessments due to its requirement that the assessment reflect "special benefit" to assessed property. Along the way, Justice Janice Rogers Brown reaffirmed the Legislature's power to apportion property taxes. *Id.* at 1099 (citing *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 22 Cal.3d 208 (1978)).

[11] Certification is a process by which a federal appellate court invites a state supreme court to decide state law issues that arise in the context of a federal appeal. If the state court accepts certification, consideration of the federal appeal is suspended pending decision in the state court. The decision of the state court becomes binding state law on the questions certified and the federal court applies that law to resolve the case.

The case notes that the statutes governing the enforcement of judgments distinguish between those arising from contracts and in eminent domain ("voluntary actions") and those arising from tort and inverse condemnation cases ("involuntary actions"). The statutes do not permit the imposition of a tax to fund a judgment arising from a voluntary action. Since this case arose from a contract, the Court concluded there was no need to determine if these statutes create an implicit exception to the 1% cap of Prop. 13 – VGV was not entitled to imposition of the tax on the face of the statutes themselves. Thus, the court has not yet decided whether a court could impose a tax beyond the 1% limit of Prop. 13 if necessary to fund payment of a tort judgment or an inverse condemnation award. Other portions of its decision, however, suggest that it will eventually decide that question in the negative.

The court concluded that this result did not violate due process, the takings clause or the guarantee clause.[12] The court partly overruled the Court of Appeal decision in *F&L Farm Co.*, concluding that Prop. 13:

> "is most assuredly not a license to 'stiff' a judgment creditor with impunity. ... However, the fact that article 13 A does not absolutely shield a local public entity from a judgment creditor does not mean that a court can compel a county to levy property taxes in excess of Article 13 A's 1 percent limit in order to satisfy the judgment." *Id.* at 1102-03

The court identified two other options available to the City of Lindsey in the *F&L* case: it could have made installment payments on the judgment under Government Code § 970.6 or it could have filed for bankruptcy, as did the Ventura Port District. *Id.* at 1104.

On the second question, the court noted that an assessment could not be imposed on property within the port district to pay VGV's judgment because such an assessment would not provide "special benefit" to the assessed property as Article 13D, § 4 requires. The analysis states, "Our decisions prior to its [Prop. 218's] adoption were consistent with Proposition 218 in requiring that an improvement that was the subject of a special assessment had to *specially benefit* the assessed property." *Id.* at 1106 (original emphasis). The court cited *Knox v. City of Orland,* 4 Cal.4th 132, 142 (1992), and *County of Fresno v. Malmstrom*, 94 Cal.App.3d 974, 984 (1979). That point might disconcert the HJTA, which has attacked these cases as construing the "special benefit" rule too liberally.

On the other hand, HJTA will take solace in the fact that Justice Brown cites with favor the rule of construction of the uncodified § 5 of Proposition 218 that requires it to be construed broadly to limit local government revenue and to enhance taxpayer consent. *Id.* at 1107.

While most of the case's analysis is useful only in the fairly narrow field of enforcement of judgments against public agencies, the suggestion that Prop. 218's special benefit rule is comparable to that of *City of Knox v. Orland* and C*ounty of Fresno v. Malmstrom* may be

[12] Article 4, Section 4 of the United States Constitution provides that Congress shall "guarantee to each state in this Union a Republican Form of Government."

of broader utility. The reaffirmation of the Legislature's power to apportion property tax proceeds may have future (and unwelcome) significance for cities and counties, as well.[13]

F. Is the Repeal of a Tax Exemption an "Increase" Subject to Proposition 218?

Proposition 218 does not define the term "increase" for purposes of the requirement of Article 13C, §§ 2(b) and (d) that tax increases be presented for voter approval. The Legislature did provide a definition of this term, helpful to local governments, at Government Code § 53750(h).[14] That section does not completely resolve this question, however: Does the repeal of a tax credit or exemption that creates a new or increased tax liability for those who previously benefited from the credit or exemption require voter approval? The legally conservative answer is "yes," and a decision to repeal a credit or exemption without voter approval involves a degree of risk. One authority that might assist a contrary argument, however, is *Western Petroleum Importers, Inc. v. Freidt*, 127 Wn.2d 420, 899 P.2d 792 (Wash. 1995). In that case, the Washington Supreme Court concluded that the repeal of a tax exemption and credit for "gasahol" production was not a "raise" in existing taxes requiring voter approval under that state's Initiative 601 which provided: "After [December 2, 1993], the state may raise existing taxes, impose new taxes as authorized by law, or make revenue-neutral tax shifts only with approval of a majority of the voters ...."[15]

G. Is Voter Approval Required for Administrative Changes and Re-Interpretation of Tax Ordinances?

A related question is arising with increasing frequency: Does a change in administrative practice or interpretation of an unchanged tax ordinance require voter approval if that change increases a taxpayer's liability? This question does not yet have a clear answer and would appear to depend on the facts concerning the language of the tax ordinance, the manner in which the "old" and "new" interpretation were adopted, and the apparent equities of the case (if a court thinks an agency is seeking to avoid an election, it may be inclined to rule against it; if it thinks a taxpayer is exploiting a technicality, it may be inclined to rule for the agency). The application of Government Code § 53750(h)'s definition of "increase" might be read to require voter approval in many cases, because it refers to an agency "decision" (without limitation to legislative action) that "revises the methodology by which the tax …is calculated." However, if the administrative change is to correct an error or to comply with changes in law, it is not clear that an *agency* has made a decision at all. Litigation in this area is likely.

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[13] The 9th Circuit affirmed the trial court decision against VGV, relying on the California Supreme Court's analysis of the state law issues and finding the Guarantee Clause issue to be non-justiciable. The decision is not published, but may be obtained at 2001 WL 1006415 (9th Cir. 2001).

[14] A law student commentary on the Proposition 218 Omnibus Implementation Act appears at Cole, *"Implementing Proposition 218: Will the Curtain Finally Close on Property Tax Reform in California?"* 29 **McGeorge L. Rev.** 739 (1998).

[15] My thanks to David Greenburg of the San Francisco City Attorney's Office, who brought this case to my attention.

The issue presents itself in a forceful way in *Howard Jarvis Taxpayers Ass'n v. City of Huntington Beach*, 4th District Court of Appeal Case No. G029292. Like 14 other cities, Huntington Beach has a pre-Proposition 13 special property tax imposed, with voter approval, to fund police and fire retirement benefits. Such taxes were upheld against post-Prop. 13 challenges in such cases as *Carman v. Alvord*, 31 Cal.3d 318 (1982). Under such taxes, the benefited cities annually determine the tax rate necessary to fund the retirement system obligations and impose tax rates to be collected along with the 1% property tax and any taxes imposed for voter-approved debt. The bull real estate market of the mid- to late-1990's put Huntington Beach and many other agencies which contract with the Public Employees Retirement in the enviable position of being "super-funded" for their safety retirement obligations – the assets on hand at PERS were more than sufficient to meet actuarial estimates of future pension obligations and no additional employer contributions from these agencies were needed. Huntington Beach used the proceeds from its special property tax to fund other retirement benefits for its police officers and firefighters, such as survivor's benefits. HJTA filed suit, claiming that using the proceeds of the tax for any purpose other than the pension benefits in effect when the tax was approved by the City's voters in 1978 violates Proposition 13. The trial court agreed, ruled the continuing collection of the tax illegal, and ordered a $22 refund to the plaintiffs. The City has appealed and the case has been set for oral argument in October 2002, with a decision therefore likely by January 2003.

Although the case is of particular interest to the other 14 cities which have voter-approved retirement taxes of this type, it will also shed light on an increasingly important question – to what extent may a taxing agency adjust the uses of a special tax to reflect changed circumstances after the tax was adopted? As many such taxes pre-date Proposition 13's 1978 imposition of the 2/3-voter approval requirement, the passage of time makes this an important question for many jurisdictions.

H. Mandatory Accountability Measures for Voter-Approved Taxes

Responding to perceived abuses in school bond measure campaigns, the Legislature adopted Chapter 535 of the Statutes of 2000 (Alarcon, D-Los Angeles to add §§ 50075.1 - 50075.5 and §§ 53410 - 53412 to the Government Code. These sections require that "any local special tax measure" and "any local bond measure" subject to voter approval include: (i) a statement of the "specific purposes of the" tax or bond; (ii) "a requirement that the proceeds be applied only to the specific purposes identified;" and (iii) provision for "the creation of an account into which the proceeds shall be deposited;" and (iv) an annual report of amounts collected and expended and "the status of any project required or authorized to be funded" by the measure. On its face, the measure applies to charter cities, although a compelling argument can be made that these issues are "municipal affairs" as to which a charter controls over state law.

I. Duty to Pay Tax before Challenging It in Refund Action

It has long been the law that, in order to challenge the enforcement of a tax, a taxpayer must first pay the tax and then sue for a refund. Authorities in this line include *Writers Guild of America, West, Inc. v. City of Los Angeles*, 77 Cal.App.4th 475 (2000), and *Dows v. City of Chicago*, 78 U.S. 108, 100 (1870). This rule was recently reaffirmed in *Flying Dutchman Park, Inc. v. City and County of San Francisco*, 93 Cal.App.4th 1129 (2001).

J. Business License Tax Exemption for Employees

Chapter 36 of the Statutes of 2001 (Koretz, D-West Hollywood)) exempts persons classified as employees from business license taxes and local zoning controls. This statute appears to be another expression of the opposition of screenwriters and other work-at-home professionals to local business taxes on their efforts. It adopts Business and Professions Code § 16300, which states:

> "no city, including a charter city, city and county, or county may require an employee to obtain a business license or home business occupation permit for, or impose a business tax or registration fee based on income earned for services performed for an employer by the employee in an employment relationship as determined by reference to the common law factors as reflected in rulings or guidelines used by either the Internal Revenue Service of the Franchise Tax Board. When there is a dispute between a city, city and county, or county and a taxpayer, the manner in which a taxpayer reports or reported income to the Franchise Tax Board or the Internal Revenue Service shall create a presumption regarding whether the taxpayer performed services for an employer as an employee, or operated a business entity. For purposes of this section, 'income' includes income paid currently or deferred and income that is fixed or contingent."

Paragraph (b) of this new section preserves police power over home-based occupations, as follows:

> "Nothing in this section shall be interpreted to limit the authority of a city, city and county, or county to adopt and enforce zoning, health and safety ordinances, or regulations that define and limit activities that are permissible within its jurisdiction for the purposes of health, safety, welfare, and the provisions of applicable noise ordinances."

The bill was "co-joined" with Chapter 915 of the Statutes of 2001 (Cedillo, D-Los Angeles), which authorizes the Franchise Tax Board to share certain information with cities about taxed business activity within their boundaries. The apparent logic of the co-joinder is to limit cities' ability to tax home-based businesses while ensuring that they have good information about the business activity performed. While this could allow zoning and other code enforcement to eliminate inappropriate commercial activities in residential zones, it could also allow cities to precisely measure how much revenue Mr. Koretz's bill has cost them! More seriously, obtaining information from the FTB under the authority created by Revenue and Taxation Code § 19551.1 will be a very useful tool to enforce local business taxes and zoning regulations.

K. Utility Users Tax Issues

At the request of the state's utility providers, the Legislature adopted Public Utilities Code Section 799(a) to provide that challenges to such taxes are to be filed against the taxing local government only, and that the utility which collects the tax is not to be named. This statute was applied to the utility's benefit in *Balikov v. Southern California Gas Company*, 94 Cal.App.4th 816 (2002).

Thorny questions have arisen as to the application of utility users taxes to cellular telephone calls. It is basic constitutional law that cities and counties may only tax activity that takes place within their boundaries. Given the mobility of cellular phones, however, it has been administratively difficult to determine which portions of a cell phone bill are within an agency's jurisdiction. A federal statute has been enacted to authorize local taxation of cellular calls and to provide cellular providers with a degree of consistency in the nature of these taxes. The legislation is the Mobile Telecommunications Sourcing Act, 4 U.S.C. 116 et seq.[16]

L. Property Tax Assessment Mechanisms

Proposition 13 limits property tax assessments to the acquisition cost of property. That assessed valuation can be increased by not more than 2% per year to reflect appreciation in property values. If a property's value falls below the price at which it was acquired (a common situation in California during the down real-estate market of the early 1990s), its assessment must be reduced, either upon application by the property owner or by the county assessors acting on his own. Thus, some properties will have assessed valuations below the ceiling calculated by adjusting historic acquisition by 2% per year ("adjusted acquisition cost"). It has been the uniform practice of California's counties that when such properties appreciate by more than 2% a year (as been common in California during the current real estate boom) to increase assessment all the way to the lesser of the adjusted acquisition cost or the current full, fair-market value. So for example, consider a home purchased for $200,000 in 1990, assessed at $180,000 in 2001 that has a fair market value of $220,000 in 2002. Most assessors would assess the home at $220,000 – a far greater than 2% hike above the previous assessed value – but still below the adjusted acquisition cost of $248,675.

In *County of Orange v. Orange County Assessment Appeals Board No. 3*, Orange County Superior Court Case No. 00CC03385, the Superior Court ruled that the 2% per year limit of Proposition 218 does not permit "recapture" of adjusted acquisition cost in this way and that re-assessments may never increase assessed valuation by more than 2% in a year. The underlying question involves billions of dollars in property taxes around the state and can be expected to reach the Court of Appeal in the coming year.[17]

II. Assessments

The assessment provisions of Proposition 218 are the heart of its objectives. These contain many disputed terms and a wealth of authorities quickly developed as a result.

A. 1989 Act Business Improvement District Assessments are Exempt

Howard Jarvis Taxpayers Ass'n v. City of San Diego, 72 Cal.App.4th 230 (1999),

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[16] The League of California Cities has established a task force to assist cities in dealing with utility users tax issues, including the taxation of mobile phones.

[17] A.B. 1315 (Havice, D-Cerritos) would have legislated the result reached by the Orange County Superior Court in this case, but the bill died in committee in February 2002. Also potentially relevant here is *Santa Ana Unified School Dist. v. Orange County Development Agency*, 90 Cal.App.4th 404 (2001) (statutory pass-through from redevelopment agency to school district must be adjusted upward by 2% per year whether or not school district so elected when project area formed).

holds that assessments on business owners (who are not necessarily property owners) under the 1989 Business Improvement District Act are not subject to Proposition 218. Because Proposition 218 defines the assessments to which it applies as assessments "on property," the court concluded that the measure does not apply to 1989 Act BIDs. BIDs formed under the several other statutes that authorize them likely *are* subject to Proposition 218. In the face of this rather obvious omission from Proposition 218, HJTA argued that the definition of "assessment" in Proposition 218 was intended to repeal by implication all assessments that are not imposed "on property." The court flatly rejected this argument:

> "Proposition 218 plainly states the definition of the term 'assessment' is 'as used in this article.' '[T]he phrase 'as used in this article' carefully limits the field of application' to article 13D. (See *Rihn v. Franchise Tax Board* (1955) 131 Cal.App.3d 356, 366.) Proposition 218 clearly does not state a constitutional definition of assessment for all constitutional and statutory provisions. To read such an all encompassing 'constitutional definition' of assessment into Proposition 218 would require us to ignore the clear language of the proposition and rewrite the proposition. This we may not do.
>
> Moreover, as the City and Amici[18] point out, construing Proposition 218 as providing for a 'constitutional definition' of assessment would result in repealing by implication many other statutory 'assessments' which are not property based and which appear to be clearly outside the scope of the proposition." *Id*. at 236-37.

HJTA also relied on the language of Proposition 218, § 5, which states that the measure is to be "liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent," as it does in all disputes regarding the meaning of the measure. The Court soundly rejected the assertion that § 5 is a magic wand sweeping away all other legal considerations:

> "Liberal construction cannot overcome the plain language of Proposition 218 limiting the scope of its assessments to assessments based on real property. Nor is there anything in the language of Proposition 218 or in the ballot arguments that supports a conclusion that Proposition 218 was intended to encompass assessments imposed in the 1989 Act. Nothing in the ballot arguments or language of the proposition would have alerted the electorate to such a construction." *Id*. at 237-38.

Finally, HJTA attempted to re-litigate *Evans v. City of San Jose*, 3 Cal.App.4th 728 (1992), which concluded that 1989 Act BID assessments are not special taxes subject to the ⅔-voter-approval requirement of Proposition 13. The *San Diego* court affirmed the earlier ruling.

Legislation to amend the 1994 Property and Business Improvement District Act to conform its procedures to those required by Proposition 218 took effect on January 1, 2000 as

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[18] Eighty-five California cities and towns joined an *amicus* brief in support of San Diego coordinated by the League of California Cities and written by the author of this paper and attorney T. Peter Pierce.

Chapter 871 of the Statutes of 1999. Chapter 262 of the Statutes of 2000, a further "clean up" measure to comprehensively amend the most prominent of the more than 40 California assessment statutes to reflect the requirements of Proposition 218, took effect on January 1, 2001.

B. Streetlights are Exempt as "Streets"

In *Howard Jarvis Taxpayers Ass'n v. City of Riverside*, 73 Cal.App.4th 679 (1999), the Fourth District Court of Appeal concluded that streetlights fall within the definition of "streets" for purposes of Article 13D, § 5(a), which exempts from the requirements of Proposition 218 an assessment imposed prior to November 1996 solely for "street" purposes. As many California local governments rely on assessments imposed under the Landscaping and Lighting Act of 1972 to fund streetlights, the case is an important victory.

After the adoption of Proposition 218, Riverside obtained simple-majority voter approval of its existing street-lighting assessment. The City then took the position that its assessment was exempt from Proposition 218 under Article 13D, § 5(d) as a voter-approved assessment as well as under Article 13D, § 5(a) as an assessment imposed solely for "street" purposes. In its complaint, the HJTA contended that the assessment does not confer "special benefit" and must therefore be considered a special tax for which ⅔-voter approval was required. The trial court ruled for the City on the ground that street-lighting assessments reflect special benefit and fall within the exemption for existing "street" assessments.

The Court of Appeal affirmed, concluding that street-lighting falls within the Article 13D, § 5(a) exemption:

> "Electrical current is necessary to operate streetlights; and streetlights, we believe, are necessary to operate streets and sidewalks. Streetlights make streets and sidewalks safer. They are analogous to traffic lights. ...
>
> Our conclusion finds support in the apparent purpose of the exemption [of Article 13D, § 5(a)]. ...
>
> Streetlighting, however, like sidewalks, sewers and flood control, has traditionally been financed through special assessments. In California, the history of special assessments for streetlighting goes back to at least 1905. Special assessments for streetlighting are by no means an abuse or a loophole. Thus, although the drafters of Proposition 218 did not exempt streetlighting assessments in so many words, it does not violate their evident intent to hold that a streetlighting assessment is exempt as an expense of the operation of streets and sidewalks." *Id.* at 685-86 (citations omitted).

Like, the *San Diego* case discussed above, the court rejects HJTA's reliance on the "liberal construction" language of Proposition 218, section 5.

> "However, '[a] proviso that '[t]his section shall be liberally construed ...' does not license either enlargement or restriction of its evident meaning.' Where 'the statutes at issue are unambiguous ... no resort to this command is required.'"

Id. at 687 (citations omitted). The Court also rejected HJTA's reliance on its own opinion, as the measure's proponent, as to the meaning of its terms:

> "[t]he opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent."

Id. at 689 (citations omitted). Given the HJTA's frequent reliance on annotations of Proposition 218 prepared before and after the adoption of the measure, this point is especially valuable.[19]

C. Secrecy of Assessment Ballots

Proposition 218 did not specify whether assessment protest "ballots" are to be treated as public records subject to inspection upon submission, as had been true of protests filed under prior law, or as "secret ballots" to be exempt from disclosure, either permanently or prior to tabulation. Chapter 220 of the Statutes of 2000 (Lewis, R-Orange), introduced at the request of the HJTA, now mandates "ballot" secrecy for assessment protest ballots. The legislation amends Government Code §§ 53753(c) and (e) to provide the new rules quoted below. That measure, in turn, was amended by Chapter 539 of the Statutes of 2001 to make clear that a city clerk may tabulate assessment ballots.

> (c) ... Each assessment ballot shall be in a form that conceals its contents once it is sealed by the person submitting the assessment ballot. ... *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.
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> ....
>
> (e) (1) At *the conclusion of the public hearing* conducted pursuant to subdivision (d), *an impartial person, including, but not limited to, the clerk of the agency*, designated by the agency who does not have a vested interest in the outcome of the proposed assessment *shall tabulate the assessment ballots* submitted, and not withdrawn, in support of or opposition to the proposed assessment. In a city, the impartial person may include, but is not limited to, the clerk of the agency. The impartial person may use technological methods of tabulating the assessment ballots, including, but not limited to, punchcard or optically readable (bar-coded) assessment ballots. *During and after the tabulation, the assessment ballots shall be treated as discloseable public records, as defined in Section 6252 [i.e., in the*

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[19] The appellate court deemed HJTA's argument that streetlights do not provide the "special benefit" required by Proposition 218 to have been waived and did not address it. *Id*. at 690, n.6.

Public Records Act], and equally available for inspection by the proponents and the opponents of the proposed assessment." (Emphases added.)

In short, the Legislature has provided that assessment ballots are secret when submitted; that a local government may not commence tabulation until after the close of the public hearing on an assessment, and that ballots become discloseable public records once tabulation begins.[20]

D. Imposition of Assessments on Federal Agencies.

Among the more peculiar provisions of Proposition 218 is Article 13D, § 4(a)'s requirement that:

> "Parcels within a[n assessment] district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit [from the improvement or service to be funded by the assessment]."

While this provision of the California Constitution might be construed to create authority for local governments to impose assessments on the State or other local governments, it clearly cannot alter the federal government's constitutional immunity from local revenue measures. A decision of the Ninth Circuit bears this out.

Novato Fire Protection District v. United States of America, 181 F.3d 1135 (9th Cir. 1999), affirmed a District Court judgment reversing the detachment of Hamilton Air Force Base from the District following the base's termination of a contract under which it paid fees to the District in lieu of property taxes. The Court explained that the detachment was an attempt to compel the Base to contract for the payment of taxes from which it was immune:

> "This is not to say that the United States cannot be charged reasonable fees related to the cost of governmental services provided, such as payment for metered water usage. However, the contractual fees that the District charged the government in exchange for continued fire and emergency medical protection were based not on the actual cost of services provided to Hamilton Field, but rather upon the value of the property in question. The fee was calculated to be 'an amount equivalent to the revenue the District would receive were the Navy on property tax rolls.' The assessed tax value of a property is not equivalent to the cost of services rendered to that property. Indeed, tax revenue may be allocated to unrelated government services. ... Accordingly, we hold that the fees charged to the United States by the District for fire protection and emergency medical services clearly constituted an impermissible tax." *Id*. at 1139 (citations omitted).

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[20] Legislative Counsel Opinion No. 8053, dated April 20, 2000, concluded that ballot secrecy is required even prior to S.B. 1477. As discussed in note 10 above, copies of that opinion are available from the League of California Cities or from the author of this paper.

Because the detachment proceeding was merely a device to exact the illegal fee, the court overturned it, as well. *Id*. at 1139-40.

Federal agencies will sometimes pay fees in lieu of assessments for services that benefit their properties. For example, post offices have agreed to contract with business improvement districts (BIDs) for the services for which other businesses pay via an assessment. Nonetheless, local governments lack power to tax or assess federal property, making compliance with Article 13D, § 4(a) most often a matter of providing local funds to replace the assessments that federal property owners cannot be made to pay.[21]

E. Duty to Give Recorded Notice of Benefit Assessments

Chapter 673 of the Statutes of 2001 (Poochigian, R-Fresno) adopts Government Code § 53340.2 and 53754 to require local governments that impose Mello-Roos special taxes or benefit assessments to provide sellers of real property notices of those taxes or assessments so that sellers can provide these notices to buyers. Local governments may charge up to $10 per notice to recover the cost of complying with this new statute. The required form of such notices appears in the statute.

F. Weighted Assessment Protests Do Not Violate Federal Due Process

In *Not About Water Committee v. Solano County Board of Supervisors*, 95 Cal.App.4th 982 (2002), the First District Court of Appeal affirmed the formation of an assessment district with two zones of benefit. The first zone imposed an average assessment of $20,000 to provide water service to a checkerboard area, which excluded properties served by wells; the second zone imposed an average assessment of $2,400 to fund fire hydrants alone over the checkerboard area and the lots excluded from it. The first zone served many property owners who sought residential development of the once-rural area, while the second served many active farmers who opposed urban infrastructure. When the Proposition 218 assessment proceeding was conducted, the first zone outvoted the second and the entire assessment was approved. The challengers brought what was construed as a reverse validation action, arguing that the majority protest procedure violated federal due process, that the fire hydrant assessment did not provide "special benefit" to their property, that the County had failed to comply with the California Environmental Quality Act (CEQA) and that the process had been so unfair as to compel judicial relief.

The Court of Appeal ruled for the County on every claim. It noted that the weighted ballot proceeding was compelled by Proposition 218 and was valid under federal due

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[21] Another decision interpreting the assessment provisions of Proposition 218 is *Consolidated Fire Protection District v. Howard Jarvis Taxpayers Ass'n*, 63 Cal.App.4th 211 (1998). There, the County of Los Angeles sought protection for its multi-year fire assessment in the contracts clause of the federal Constitution. The Court of Appeal affirmed judgment for HJTA, concluding that no "contract" within the meaning of the impairment of contract clauses of the state and federal constitutions was in issue and that *Guardino* precludes argument that a requirement for voter approval for imposition of a revenue measure amounts to an unconstitutional referendum. The case did not consider the potential argument that the continued collection of a multi-year assessment does not constitute the "levy" of an assessment sufficient to trigger the provisions of Article 13D, § 4 because the assessment was levied for all years upon its initial imposition.

process case law involving landowner voting districts. The Court also concluded that the County had met its burden to prove special benefit to the property owners from the fire suppression component of the assessment. Especially helpful is the Court's discussion of the burden of proof on the latter question: "we conclude that under case law decided prior to the passage of Proposition 218, under which legislative-like determinations by public improvement agencies are reviewed under an abuse of discretion standard, continues to apply in the post-Proposition 218 environment."

G. May Property Owners Be Assessed 100% of the Cost of a Project?

The pending case of *City of Saratoga v. Hinz*, 6th District Court of Appeal Case No. H023549, is a condemnation action in which the City is seeking to acquire land to widen a private street so that it may be made a public street. The condemned property was adjacent to, but excluded from, an assessment district imposed on the properties served by the private street to fund 100% of the cost of the street improvement. The City found that the project had no public benefit, even though the affected street would be added to the public street system, because the primary effect of the project was to provide better access to the properties served by the street. The condemnee challenged the taking on a wide range of theories, including the claim that Proposition 218 prohibits an assessment which does not reflect at least some general benefit from the proposed improvements. Query whether the condemnee, who is not to pay any of the assessments, has standing to challenge an assessment which was approved pursuant to the Proposition 218 majority protest proceeding in which the affected property owners voted for the improvement. As this paper is written, briefing in the Court of Appeal is not yet complete.

H. Are Utility Connection Fees "Assessments" Under Proposition 218?

The California Supreme Court has granted review of *Richmond v. Shasta Community Services District*, Cal. S. Ct. Case No. S105078.[22] The case involves a challenge to the District's increase in its water connection charge. The charge has three components: a water capacity component, a fire suppression charge, and a charge to cover the cost of installing a meter and physically connecting the water service. The petitions argued that the first component – charged to reflect the cost to the District of creating additional capacity in its water utility – provided special benefit to property and, therefore, could only be an assessment under Proposition 218. The petitioners challenged the fire suppression component (of the same water connection charge) as a property-related fee in violation of Article 13D, § 6(b)(5), which prohibits such fees to fund general government services, including fire and ambulance services. The District argued in response that the whole fee was not property-related because it is triggered by the voluntary act of seeking a new water connection and thus was entirely outside the scope of Proposition 218. Further, the District argued that both aspects of the fee were exempt from Proposition 218 under Article 13D, § 1(b), which exempts development fees.

The trial court ruled for the District on all issues. The Third District Court of Appeal in Sacramento found that the development fee exception to Prop. 218 was sufficient to protect the water capacity component of the water connection charge. However, the appellate

[22] The author of this paper is co-counsel in the California Supreme Court for the Shasta Community Services District.

court invalidated the fire suppression component under Article 13D, § 6(b)(5). The fee discussion overlooks the development fee exception of Article 13D, § 1(b). It also ignores the fact that the fee in issue had not been changed since the adoption of Proposition 218 and should therefore have been exempt because Article 13D, § 6(b) applies only when a fee is "extended, imposed or increased." To apply the substantive requirements of § 6(b), but not the procedural requirements of § 6(a), is problematic because changing the substance of a fee probably amounts to the adoption of a new fee and therefore requires the procedural provisions to be followed, gutting the exemption of § 6(a).

The Supreme Court's grant of review vacates the appellate decision, which is no longer citable precedent. As this paper is written, briefing is underway in the Supreme Court and decision is not likely before mid- to late-2003.

III. Fees

The fee provisions of Proposition 218 were hastily drafted and intended to prevent local governments from evading the measure's detailed requirements for taxes and assessments by relabeling such a levy as a "fee." The fee provisions are very uncertain in their expression and it has not been possible to achieve much in the way of legislative clarification of their terms. Thus, much of the activity in advisory opinions, litigation, and even the unsuccessful Proposition 37, involves the fee provisions of Proposition 218.[23]

A. Regulatory Fees

Apartment Association of Los Angeles County, Inc. v. City of Los Angeles, 24 Cal.4th 830 (2001), is of great importance not only because it is the first substantive treatment of Proposition 218 by the California Supreme Court, but because it adopts a very narrow construction of the taxes and fees "imposed as an incident of property ownership" that are subject to the voter- and property-owner approval requirements of Proposition 218.

The decision involved a $12-per-year fee imposed on residential landlords in Los Angeles to recoup the cost of housing code enforcement and slum abatement programs. If not paid, the fee could be enforced by liening the property. The Apartment Association sued, alleging the fee was a property-related fee subject to Prop. 218 and therefore could not be imposed without the approval of the affected property owners under Article 13D, § 6(c). The Superior Court disagreed, finding the fee was not imposed "as an incident of property ownership." The Court of Appeal, in a brief opinion by Justice Miriam Vogel, found that the fee was "quite plainly" subject to Prop. 218 and reversed. The City, with support from the League of California Cities, the California State Association of Counties, and other local government organizations, obtained review.

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[23] The meaning of Proposition 218's fee provisions has also drawn the attention of law student commentators. *See* Throckmorton, "*Note, What is a Property-Related Fee? An Interpretation of California's Proposition 218*," **48 Hastings L.J.** 1059 (1997) (arguing for an expansive interpretation of "property related fee"). Much of the analysis in this student's work would seem to be obviated by the California Supreme Court's subsequent decision in the *Apartment Association* case, discussed immediately below. *See also* Patel, *"Is Nothing Certain But Death? The Uncertainty Created by California's Proposition 218,"* 35 **U.S.F. L.Rev.** 385 (2001) (discussing scope of the property-related fees subject to Proposition 218).

The Supreme Court adopted the view asserted by many local government attorneys that the fee provisions of Prop. 218 apply only to fees imposed as an incident of property ownership in the sense that property ownership alone triggers the liability and that the fee cannot be avoided other than by selling the property:

> "Hence, the mere fact that a levy is regulatory (as this inspection fee clearly is) or touches on business activities (as it clearly does) is not enough, by itself, to remove it from article 13D's scope. But the city is correct that article 13D only restricts fees imposed directly on property owners in their capacity as such. The inspection fee is not imposed solely because a person owns property. Rather, it is imposed because the property is being rented. It ceases along with the business operation, whether or not ownership remains in the same hands. For that reason, the city must prevail." *Id.* at 838.

The court continued:

> "The foregoing language [from Prop. 218 and its legislative history] means that a levy may not be imposed on a property owner as such – i.e., in its capacity as property owner – unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.
>
> "The contrary reasoning of the Court of Appeal, and of plaintiffs, stems from a reliance on the word 'incident,' leaving aside that the constitutional provision does not refer to fees imposed *on* an incident of property ownership, but on a parcel or person *as* an incident or property ownership. As amicus curiae for the city persuasively argue, the distinction is crucial." *Id.* at 839-40 (emphasis original).

In another phrase, the court describes the sweep of the tax and fee provisions of Proposition 218 this way: "In other word, taxes, assessment, fees and charges are subject to the constitutional strictures [of Prop. 218], when they burden landowners *as landowners." Id.* at 842 (emphasis original).

The Court was unpersuaded by plaintiffs' reliance on provisions of Article 13D §§ 1(b), and 3(b), which state that property related fees subject to Prop. 218 "includ[e] a user fee or charge for a property-related service" defined as "a public service having a direct relationship to property ownership" or the plaintiffs' citation of the exemptions for pre-existing development fees and fees for the provision of electrical or gas service. The plaintiffs had argued that these provisions evidenced the voters' intent to apply Prop. 218's rules to a broad range of fees, otherwise there would have been no need for these express exemptions. The Court wrote:

> "We note, however, that the provision regarding development fees refers only to those existing at the time of Article 13D's enactment.[24] Moreover, it is unclear to us whether a fee to provide gas or electricity service is the same as a fee imposed on the consumption of electricity or gas. In any event, we believe that the aforementioned exemptions may have been included in an abundance of caution in case court interpretations of article 13D similar to the Court of Appeal's should prevail. Finally, we not believe that any incongruity can trump the plain language we have discussed herein. In short, we are unpersuaded." *Id.* at 844.

This leaves some doubt as to the precise impact of the property-related service and gas and electric exemptions, but does not dilute the core force of the opinion's restriction of Prop. 218's fee provisions to fees on property ownership *per se*.

The Court also rejected plaintiffs' reliance on the fact that the fee could become a lien on property if unpaid:

> "Similarly unpersuasive is plaintiffs' contention, also emphasized at oral argument, that the city's ability to enforce payment of the inspection fee by imposing a lien on the property shows that the fee is property-related, not business-related. The fact is that the city is simply availing itself of all possible means to collect the fee." *Id.*

The decision also rejects plaintiffs' reliance on the liberal construction language of § 5 of Prop. 218, citing *Howard Jarvis Taxpayers Ass'n v. City of San Diego,* 72 Cal.App.4th 230, 237-38 (1999), and concluding that the plain meaning of the measure renders resort to a broad rule of construction unnecessary. *Id.*[25]

In sum, Prop. 218's fee provisions are limited to fees imposed on property ownership *per se* and do not extend to fees imposed on a voluntary use of property. If a fee can be avoided without selling the property, the fee should be outside the sweep of Prop. 218. The special tax rules that require that fees not exceed the cost of the service or program for which they are imposed, of course, remain applicable.

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24 In fact, Article 13D, § 1(b) states that nothing in Proposition 218 "shall be construed to ... [a]ffect existing *laws* relating to the imposition of fees or charges as a condition of property development." (Emphasis added.) Thus, it is the authority for a development fee, not the fee itself, which must pre-date Proposition 218 for the exemption to apply. This issue has been briefed by the author of this paper in the *Richmond* case discussed above.

25 Interestingly, the court did not rely on its own precedent in *Sinclair Paint Company v. State Board of Equalization*, 15 Cal.4th 866 (1997), and *Pennell v. City of San Jose*, 42 Cal.3d 365 (1986), as the *amicus curiae* brief urged, relying instead on the text and legislative history of Prop. 218 itself. This was at least in part a response to Justice Brown's dissent. *Id.* at 843, n.6. In addition, the Court cites as relevant legislative history the Legislative Analyst's "Understanding Proposition 218," published in December 1996 – immediately after the adoption of Prop. 218. Thus, the document may be a useful authority for future disputes regarding the meaning of the measure. *Id.* at 838, n.1. Other authorities for future use include the court's interesting discussion of the meaning of the term "incident." *Id.* at 840, n.2. In this same vein is the court's analysis of *Acme Freight Lines, Inc. v. Vidalia*, 193 Ga. 334, 18 S.E.2d 540 (1942), a Georgia Supreme Court case invalidating a business license tax on a trucking concern because it was imposed on an "incident" of the motor carrier business. *Id.* at 841-42, n.4.

This fee case also has implications for taxes. Article 13D, § 3 adopts a closed list of authorized taxes "assessed by any agency upon any parcel or property or upon any person as an incident of property ownership" that includes only the 1% property tax and ⅔-voter-approved special taxes. This was originally thought to forbid charter-city documentary transfer taxes like those upheld in such cases as *Cohn v. City of Oakland,* 223 Cal.App.3d 261 (1990), and *Fielder v. City of Los Angeles,* 14 Cal.App.4th 137 (1993).[26] The *Apartment Association* case, however, suggests that this analysis may bear reexamination.

B. Metered Services Fees are not "Property-Related"

In 80 *Ops. Calif. Att'y Gen'l* 183 (1997), the Attorney General concluded that tiered water rates that encourage conservation by increasing unit rates with higher volume do not violate Proposition 218. The Opinion is of broader significance than this, however, as the Attorney General concluded:

> "We believe that fees for water that are based upon metered amounts used are not 'imposed ... as an incident of property ownership' and do not have 'a direct relationship to property ownership.' Consequently, such fees would not be governed by [Proposition 218]." *Id*. at 186.

This logic can be extended to other fees based on the amount of a service provided, such as most trash and sewer fees. This decision supports a compelling argument that the property related fees subject to Proposition 218 are a narrow class of impositions that function much like taxes in that they attach to the mere fact of property ownership, require no further conduct by the property owner to attach, and can be avoided only by sale of the property.

In light of the *Apartment Association* case, it would now seem reasonably clear that metered fees for water and other utility services are not fees imposed "as an incident of property ownership" and therefore are not subject to Proposition 218. Los Angeles prevailed on this issue in *Howard Jarvis Taxpayers Ass'n v. City of Los Angele*s, 85 Cal.App.4th 79 (2000), discussed in greater detail below.

C. Storm-Drainage Fees

A counterpoint is provided by 81 *Ops. Calif. Att'y Gen'l* 104 (1998). Here, the Attorney General discusses the application of Proposition 218 to storm drainage fees. The opinion responded to a request from then-Senator (now Congressman) Mike Thompson (D-St. Helena) for advice regarding storm drainage fees proposed by the Vallejo Sanitation and Flood Control District. According to the opinion, the Vallejo District imposed two fees: a sewage fee based on volume of effluent from improved parcels served by the District's sewer mains and a storm water fee charged only to properties served by sewers and in proportion to the volume of sewage effluent from each property. The sewage fees were not in issue in the opinion. The

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[26] General law city taxes of this type are proscribed by Government Code § 53725, a provision of Proposition 62 that has not been tested in a published appellate decision but, in light of *Guardino v. Santa Clara County Local Transportation Authority*, 11 Cal.4th 220 (1995), appears to be enforceable.

District proposed to revise the storm water fee to charge all properties without regard to their use of sewers. The proposed fee was to be based on the area of impervious coverage on each parcel.

The Attorney General concluded first that the District's existing storm fee violates Article 13D, § 6(b) of the State Constitution, as it necessarily exceeds the cost of service because sewer customers pay for all storm drainage services even though properties not connected to the sewer also benefit. The opinion does not consider the potential argument that the District could maintain the existing fee without voter approval, as some change in the fee is necessary to trigger the requirements of Article 13D, § 6(b), which requires approval only when a fee is "extended, imposed or increased."

The opinion next concludes that storm water fees do not constitute either "water" or "sewer" fees within the meaning of Article 13D, § 6(c) . That section exempts water, sewer and refuse fees from its election requirement, but not from § 6(a)'s requirement for a majority-protest proceeding. The opinion relies on the definitions of Government Code § 53750 and the language of Proposition 218 itself. In essence, the Vallejo storm water fees are not "sewer" fees because Article 13D, § 5(a) makes an exception to certain requirements for assessments imposed to fund a number of listed services, including assessments imposed for "sewers, water, [and] flood control." The Attorney General reasoned that, because "flood control" appears in § 5(a), but not in § 6(c) , it must have been omitted from § 6(c) purposefully. These fees are not "water" fees as that term is defined in the Government Code because the Vallejo District does not treat storm water in any way, as the definition of "water" in Government Code § 53750(m) requires.

This opinion, then, does not suggest that all storm water fees are outside the exception from voter approval requirements for "water" fees. It does suggest that a storm-water-only system that transports, but does not treat or store, storm water is outside that exception. A combined system which collects both sewage and storm water and treats both would be analyzed differently, as would a storm-water-only system that treats water, especially if the system recharges groundwater basins, provides recycled water, or otherwise augments water supplies.

The Attorney General's opinion also concludes that Vallejo's proposed storm water fee is a "property related fee" governed by Prop. 218: "Undoubtedly, the new monthly fees will be 'property related,' since they will be based upon the amount of impervious area of each developed parcel." *Id*. at 187. This is probably consistent with the view stated in the League's **Proposition 218 Implementation Guide** that truly involuntary fees are property related. The analysis might well be different if the fee structure exempted properties that generate no more storm-water flows than property in a "natural" (i.e., unimproved) state. In that case, it would be possible to argue that the fee is the consequence of a voluntary choice to generate storm runoff, as by developing property and failing to build an on-site detention basin.

The Attorney General also concluded that the proposed fee is "increased" and an election is therefore required because the changed methodology imposed fees on some people who had not previously been subject to it, thus falling within the definition of "increased" in Government Code § 53750(h).

This opinion is largely consistent the local government community's previous understanding of Proposition 218's ambiguous fee provisions and with the subsequent decision in *Apartment Association*. Truly involuntary fees imposed on property without respect to any voluntary action to use or develop the property are "property related" fees governed by Proposition 218. The opinion does not suggest that fees, like most water and sewer fees, which are based on voluntary use of a service, are "property related" fees governed by Proposition 218.

Storm water management fees are of increasing importance, as more vigorous enforcement of the federal Clean Water Act (CWA) by the state's Regional Water Quality Control Boards and by environmental advocacy groups has imposed an enormous, unfunded mandate on California cities and counties.[27] Staff members of at least one Regional Water Quality Control Board have asserted that local governments can and should impose storm water fees on the property tax rolls to fund compliance with the CWA.

In *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal.App.4th 1351 (2002),[28] the HJTA challenged the manner in which Salinas adopted its storm water fee. The City complied with the majority protest requirements of Article 13D, § 6(a), but treated the fee as a "sewer" fee exempt from the election requirement of Article 13D, § 6(c). In that case, the Monterey County Superior Court rejected HJTA's petition to invalidate the fee in a "reverse validating" action filed under Code of Civil Procedure § 863 but, in a published opinion filed June 3, 2002, the Sixth District Court of Appeal reversed.

Salinas imposed its fee on "every developed parcel of land, within the City, and the owners and occupiers thereof, jointly and severally" and calculated the fee "according to the degree to which the property contributed runoff to the City's drainage facilities" as measured by "impervious area." The City argued that this is not a property-related fee within the sweep of Prop. 218, but rather a fee on those who elect to use a city service. The City pointed out that property owners could avoid the fee by not using the storm water service, as by leaving their properties in their natural state or by making other arrangements to prevent storm water from reaching the City's facilities.

The Court of Appeal rejected Salinas' argument: "Accordingly, the resolution [imposing the fee] makes the fee applicable to 'each and every developed parcel of land within the City.' This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests." The court's references to metered water use and to business fees were intended to distinguish the *HJTA v. Los Angeles* and *Apartment Association* cases discussed above.

Salinas allowed property owners to reduce or entirely avoid the fee by showing that other arrangements for storm water were in place. The court dismissed the city's claim that this made the fee non-property related: "A property owner's operation of a private storm drain

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[27] The *Los Angeles Times* has reported that the Davis Administration has emphasized storm water clean-up efforts and has greatly enhanced funding and staffing both for the State Water Quality Control Board and the various regional boards. "Under Davis, State Water Officials are Cracking Down on Polluters," *Los Angeles Times*, Sept. 4, 2000, at A-2, col. 2.

[28] The author of this paper, together with City Attorney James Sanchez and attorney Mitchell E. Abbott, represent Salinas in this case.

system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee nonetheless is a fee for a public service having a direct relationship to the ownership of developed property." It would seem that the fees for housing inspection services and metered water charges are also "fees for public services having a direct relationship to the ownership of developed property" but were nonetheless found exempt from Prop. 218 by previous courts. Thus, the decision appears to be inconsistent with both *HJTA v. Los Angeles* and *Apartment Association*.

Salinas also argued that its fee was within an exemption from the voter approval requirement of Prop. 218 for "sewer" and "water" fees. The appellate court rejected the City's efforts to rely on dictionary definitions of the term "sewer," which Prop. 218 does not define. It also rejected the HJTA's reliance on the Attorney General's opinion discussed above which had reasoned that, because Prop. 218 distinguishes flood control from sewer services in its assessment provisions, the word "sewer" ought to be read to exclude storm sewers in Prop. 218's fee provisions, too. Instead, the court relied on what it deemed "[t]he popular, nontechnical sense of sewer service, particularly when placed next to 'water' and 'refuse collection' services, suggests the service familiar to most households and businesses, the sanitary sewerage system."

The court similarly rejected the City's reliance on the definition of "water services" adopted by two-thirds of each house of the Legislature and signed into law by then-Governor Pete Wilson immediately after the approval of Prop. 218, with support from both local government and taxpayer advocates: "[t]he average voter would envision 'water service' as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean."

In light of this case, local governments' options for funding NPDES compliance include:

(1) Wait to see if the case becomes final in its current form, as Salinas' petition for review is pending as this paper is written. That petition has drawn *amicus* support from the League of California Cities and the National Resources Defense Council. As this paper is written, the State Water Resources Control Board is seeking the Governor's permission to provide *amicus* support, as well. Environmental interest in the case arises from concern that cities and counties must have means to fund federal clean water mandates if those programs are to be successful. Given this breadth of support, review may be likely.

(2) Pursue a storm water fee drafted just a bit more tightly than Salinas' to make clear that the fee is imposed on those who use storm water systems and not those who own improved property.

(3) Comply with the voter approval requirements of Prop. 218 (i.e., obtain the approval of a majority of property owners).

(4) Fund NPDES compliance with other revenues. These might include a voter-approved special tax, a property-owner approved assessment, or other fee revenues.

On April 16, 2001, the Attorney General answered the following question posed

on behalf of the City of Santa Clarita by Assemblyman Runner (R-Lancaster) in Opinion No. 01-106:

> "May a city impose storm drainage pollution abatement charges with respect to property owned by school districts and the California Department of Transportation within the city's boundaries to fund the city's activities in meeting federal stormwater discharge requirements?"

84 *Ops. Calif. Att'y Gen'l* 61 (2001). The Attorney General concluded that such fees were permissible as to school districts if they funded services rather than capital facilities and that they were not permissible as to CalTrans because that agency separately complies with the federal stormwater program for its properties in Santa Clarita.

A few points of the analysis are worthy of note. First, the Attorney General stated that Health & Safety Code § 5471 is express authority for stormwater fees. *Id*. at 61-62. Second, the Attorney General cited the rule of *San Marcos Water Dist. v. San Marcos Unified School Dist.*, 42 Cal.3d 154, 161 (1986), that the express exemption from property taxes afforded to public property by Article 13, § 3(b) of the Constitution impliedly exempts such property from assessments imposed to fund capital facilities, but not service fees. *Id*. The *San Marcos* rule has generated a raft of litigation, but the Attorney General suggested that the line between permissible fees and impermissible assessments be drawn as follows:

> "The court pointed out that normally a special assessment (1) covers the cost of constructing a capital improvement, (2) is based upon the value of the improvement to the property benefited, (3) is compulsory in nature and unrelated to actual use of the improvement, and (4) is often imposed as a one-time charge. The court observed that a typical fee (1) covers the furnishing of goods or services, (2) is based upon the amount of usage, (3) is voluntary in nature since actual use triggers the fee, and (4) is often imposed as a monthly or other ongoing charge." *Id*. at 62-63 (quoting 71 *Ops. Calif. Att'y Gen'l* 1635 (1988)).

Thus, the Attorney General concluded "the fees cannot be collected from school districts or the Department if they are used to fund the construction of capital improvements." *Id*. at 63.[29]

In its dispute with Santa Clarita, the state had relied upon Government Code § 6103, which exempts government agencies from court filing fees, as well as other fees "for the performance of any official service." The Attorney General rejected the application of this section, writing:

> "A user fee is not a fee for an 'official service' such as filing court documents. Government Code section 6103 does not exempt agencies from paying for the goods and services that they use. (Citations omitted.) Furthermore, as observed by the court in *Anaheim City School Dist. v. County of Orange* (1985) 164 Cal.App.3d 697, 702, it appears from the legislative history of Government Code section 6103 that an 'official

[29] The *Richmond v. Shasta Community Services District* case, discussed above, may also shed light on the relevant of the *San Marcos* case to Proposition 218 analysis, as the issue has been briefed to the Supreme Court in *Richmond*.

service' is one for which fees are prescribed by law. Like the fees to use the county's solid waste disposal site in the *Anaheim* case, the fees here are not prescribed by law but rather are discretionary." *Id*.

D. Irrigation Surcharge Fees

A third Attorney General's Opinion helps complete the picture with respect to the scope of the "property related fees" subject to Proposition 218. 82 *Ops. Calif. Att'y Gen'l* 43 (1999) considers whether an irrigation district may "adopt a surcharge based upon the volume of irrigation water actually delivered without complying with [Proposition 218]." The decision concludes, unsurprisingly, that a surcharge on a property-related fee is itself a property-related fee subject to Proposition 218, even if that surcharge is based on service consumption. The following passage, however, is troubling:

> "It is apparent here that the District's per-acre charge for delivering irrigation water to landowners is a fee for a property-related service. The water is used in connection with real property, it is assessed only upon landowners, *and even those landowners who do not choose to use the District's water receive some benefit from the irrigation system since the water in the canals assists in recharging groundwater supplies and maintaining the water table*. The District's existing levy is thus a fee for a property-related service and is imposed as an incident of property ownership." *Id*. at 46 (emphasis added).

The underscored text suggests that benefit to property is a relevant factor in determining whether or not a fee is property-related. Nothing in the text of Proposition 218 suggests that this is the case. Instead, Proposition 218 uses the term "special benefit" only with respect to assessments. The author of this paper concludes, as does the League's **Proposition 218 Implementation Guide**, that the critical issue in determining whether or not a fee is property-related is whether there is an element of voluntariness in its imposition. If a property owner takes an elective action that triggers the fee, the fee ought not to be viewed as property-related. If the fee is imposed on property or on a property owner without respect to any voluntary action of the property owner, then the fee is a property-related fee subject to Proposition 218, unless an exception applies. The California Supreme Court's decision in the *Apartment Ass'n* case is consonant with this view. The *Richmond v. Shasta Community Services District* case discussed above may shed more light on the point.

E. County Dump Charges are "Property Related"

Legislative Counsel Opinion No. 7359 (April 28, 1997). The Legislative Counsel advised Senator Byron Sher (D-Palo Alto) that county waste disposal fees (i.e., fees imposed to fund the operations of county landfills) collected via the property tax rolls are property-related fees governed by Proposition 218. The Legislative Counsel also concluded that such fees come within the partial exception of Article 13D, § 6(c), which exempts "fees or charges for sewer, water, and refuse collection services" from the requirement for voter approval. Hence, all that is required to impose or increase such a fee is an old-fashioned majority protest proceeding (in which silence equals consent), but not an election. Government Code § 53750(i) allows notice for such a proceeding to be combined with another mailing, such as a utility bill.

F. General Fund Transfers from Enterprise Accounts

One of the goals of the fee provisions of Proposition 218 was to end revenue transfers from enterprise funds to general funds. Article 13D, § 6(b)(2) provides: "Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed." HJTA has filed a number of cases to test this new constitutional requirement.

The only case to reach a published decision to date is *Howard Jarvis Taxpayers Ass'n v. City of Roseville*, 97 Cal.App.4th 637 (2002). The case challenged the City's practice of transferring 4% of fees charged for the City's water, sewer, and refuse collection services to its general fund to recover the cost of those utilities' use of City streets. Although the case is bad news for the City involved, local utility providers can avoid the force of the decision by carefully structuring their utility fees to tie fees charged to services used (as is true of metered water fees) and thereby take their fees outside Proposition 218 entirely.

Under Roseville's ordinances, water charges are charged to property owners rather than to tenants and are charged in a flat monthly amount, and not with respect to metered consumption. Sewer charges are also based on a flat monthly charge depending on the type of occupancy of the served property (*i.e.,* single-family residential, multi-family residential, commercial, etc.). Trash service is charged to the occupant of property, but is also charged without respect to whether the service is actually used. The court found all of these fees to be property-related due to their mandatory character and the absence of ordinance language to tie fees to volume of service consumption. This seems correct as to the City's water fees because those are imposed as a flat fee on "owners." As to sewer and trash fees, it is not clear that the appellate court followed the California Supreme Court's decision in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles,* 24 Cal.4th 830 (2001), which had held that fees triggered by voluntary conduct of property owners and occupants (such as, arguably, the decision to make use of sewer systems and trash service) are not subject to Proposition 218.

These facts make the case distinguishable for most local utility providers, which meter water and base sewer charges on metered water usage. Most cities, counties, and special districts also have some means to tie solid waste fees to actual usage and should therefore be unaffected by the case. The decision helpfully cites 80 *Ops. Calif. Att'y Gen'l* 183, 186 (1997) for the proposition that "each water fee or charge must be examined individually in light of" Prop. 218, inviting other local utility providers to distinguish the case from their own situations. The court itself distinguishes a previous decision that had upheld Los Angeles' transfers from the Department of Water and Power to the City's general fund, as involving metered water fees not subject to Proposition 218. That case was *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, 85 Cal.App.4th 79, 83 (2000) and is discussed further below

The court also makes clear that local governments can recover all of their costs – including the costs of providing rights-of-way to utilities – provided that some effort is made to quantify those costs (as a flat 4% in-lieu of franchise fee does not):

> "Roseville may charge its water, sewer, and refuse utilities for the street, alley and right-of-way costs attributed to the utilities; and Roseville may transfer these revenues to its

general fund to pay for such costs. Here, however, there has been no showing that the in-lieu fee reasonably represents these costs."

Unhelpful to local utility providers is the court's flat rejection of in-lieu franchise fees not calculated with respect to costs of service:

> "While Roseville may be free to impose franchise fees on private utilities on the basis of contractual negotiations rather than costs, it is not free, under section 6(b) of [Article 13D of] Proposition 218, to impose franchise-like fees on a non-cost basis regarding its municipal utilities."

The decision's arguments on this point, however, turn on a conclusion that the California Supreme Court's decision regarding the use of utility funds for general fund purposes is no longer good law on these facts. Speaking of *Hansen v. City of San Buenaventura*, 42 Cal.3d 1172 (1986), the Sacramento appellate court writes: "*Hansen's* observations [countenancing general fund transfer from utility funds], however, were made 10 years before Proposition 218 added article 13D to the state Constitution."

Local governments which benefit from general fund transfers from utility funds should review their ordinances and fee policies to strengthen the claim that underlying fees are meaningfully related to the volume of services voluntarily consumed and not a reflection of mere property ownership. This is more readily done for metered services than for others, but there are ways to enhance the legal position of a utility provider in any event.

In *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, 85 Cal.App.4th 79 (2000), the HJTA challenged LA's water rates on the ground that the existence of reserves and transfers from those reserves to the City's general fund necessarily demonstrated that the City's water fees exceed the cost of service and therefore violate both the City Charter and Proposition 218. The court affirmed a trial court decision granting the City's demurrer. The highlights of the appellate court's 218 discussion are:

> "according to *Hansen* [*v. City of San Buenaventura*, 42 Cal.3d 1172, 1183 (1986)], a municipal utility is entitled to a reasonable rate of return and utility rates need not be based purely on costs. (*Hansen v. City of San Buenaventura, supra,* 42 Cal.3d at pp. 1176, 1183.)
>
> Appellants argue that *Hansen*, decided before the adoption of Proposition 218, is no longer good law. As discussed infra, we find that Proposition 218 does not apply to the rates at issue here." *Id.* at 82.

The court continued:

> "These usage rates are basically commodity charges which do not fall within the scope of Proposition 218. They do not constitute 'fees' as defined in Article 13D, Section 2, because they are not levies or assessments 'incident of property ownership." (Subd. (2)(e).) Nor are they fees for a 'property-related service,' defined in subdivision (2)(h), as 'a public service having a direct relationship to property ownership.' As indicated by the ordinances setting water

> rates, the supply and delivery of water does not require that a person own or rent the property where the water is delivered. The charges for water service are based primarily on the amount consumed, and are not incident to or directly related to property ownership." *Id.* at 83.

Interestingly, footnote 1 of the decision reads the partial exemption for water, sewer, and trash rates of Article 13D, § 6(c) as a complete exemption for these services from the measure.[30]

G. Development Fees

Most real property development fees are exempt from the requirements of Proposition 218. Local government counsel, however, may wish to note Senate Concurrent Resolution 13 of the Statutes of 2001 (Morrow, R-Oceanside), which directs the California Law Revision Commission to study the following topic:

> "Whether the Subdivision Map Act and the Mitigation Fee Act should be revised to improve their organization, resolve inconsistencies, clarify and rationalize provisions, and related matters?"

The Resolution was chaptered as Resolution Chapter 78 on July 10, 2001.

The California Supreme Court may shed light on the scope of the development fee exemption from Proposition 218 in *Richmond v. Shasta Community Services District*, No. S105078, more fully discussed above.

H. Are Property-Related Fees Exempt Until They are "Extended, Imposed or Increased?"

Article 13D, Section 6(d) states: "Beginning July 1, 1997, all fees or charges shall comply with this section." Thus, the measure's fee provisions took effect with the beginning of the fiscal year following its adoption in November 1996. What does the measure demand of a fee which pre-dates the November 1996 adoption of Proposition 218? The provisions of Article 13D, Sections 6(a) and (c) do not apply, because those concern only "New or Increased Fees and Charges." That leaves only subdivision b, entitled "Requirements for Existing, New or Increased Fees and Charges": "A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements: …" Thus, under the plain language of the measure, the fee provisions of Proposition 218 apply to property-related fees and charges existing as of November 6, 1996 only if they are subsequently "extended, imposed or increased." This argument has been fully briefed in the *Richmond v. Shasta Community Services District* case discussed above and presently pending in the California Supreme Court.

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[30] This discussion refers to "subdivision 5(c) of Article 13D" but apparently refers to § 6(c).

IV. Standby Fees

Standby fees are treated as assessments under Proposition 218 and, when an approval proceeding is required, such a fee must be approved by a majority of the affected property owners voting in proportion to the amount of fees they are to pay. Standby fees are typically imposed on those who are not currently using a service, as on vacant property made more valuable by the development rights made possible by an available water supply. It seems unlikely that property owners will often approve standby fees for services they do not use.

A. "Grandfathering" Exceptions

The California Court of Appeal in Fresno concluded that a standby water charge, reimposed after the effective date of Prop. 218 at the same rate as a pre-existing standby charge, was exempt from Prop. 218. *Keller v. Chowchilla*, 80 Cal.App.4th 1006 (2000). The case is good news for local governments and will help protect pre-Proposition 218 standby fees, even if those fees are levied each year. Second, it provides a very pragmatic and helpful interpretation of the otherwise impractical definitions of "capital cost" and "maintenance and operation expense," which are key to the scope of the § 5(a) exemption for certain traditional assessments. Section 5(a) also protects assessments under the 1972 Landscaping and Lighting Act (exempt from Prop. 218 until increased under *Howard Jarvis Taxpayers Ass'n v. Riverside*, discussed above).

A few finer points of the court's analysis bear mention. Counsel for the plaintiff farmers argued at oral argument (the court tells us) that § 5(a)'s exemption from Prop. 218's assessment requirements is limited to *procedures* and does not extend to the measure's *substantive* rules regarding assessments (its new rule against excluding benefited property owned by a government agency, for example). The court rejected this argument based on its reading of §§ 4 and 5 of the measure. A more fundamental objection to that argument is this: How does an agency comply with new substantive requirements for an assessment (which shift cost from some properties to others) without creating what is essentially a new assessment? To do so, wouldn't it be obliged to follow Proposition 218's new procedures? If so, § 5's exemptions would be meaningless.

Finally, the most difficult issue in the case was whether the commodity cost of water falls within the peculiarly narrow definitions of "capital cost" and "maintenance and operation" that Prop. 218 provides for these critical terms of § 5(a). The court concluded "yes": "In sum, purchasing the liquid is a cost of replacement necessary to properly operate the structures which comprise the permanent public improvements of the District and is therefore a maintenance and operation expense." *Id*. at 1014. This is a pragmatic and welcome interpretation that will be helpful to local governments in applying § 5(a) to the full range of assessments "grand-parented" by its terms.

B. Increased Standby Fees Require Property Owner Approval

In 82 *Ops. Calif. Att'y Gen'l* 35 (1999) , the Attorney General answered the following question, posed by then-Senator (now-Congresswoman) Hilda Solis (D-El Monte): May a water district impose an increased standby charge without complying with Proposition

218 "if the increased rate was specified in a previously adopted engineer's report ... [that] was approved by the district's board" prior to the effective date of Proposition 218? Relying on the text of Proposition 218, the Uniform Standby Charge Procedures Act, Government Code §§ 54984 et seq., and the Proposition 218 Omnibus Implementation Act, Government Code § 53750(h), the Attorney General concluded the Proposition 218 compliance *is* required:

> "We believe that the term '[s]ubsequent increases' (Cal. Const., art. 13D, § 5, subd. (a)) refers to the legislative action of imposing an assessment as distinguished from simply the continued administrative collection of an existing assessment. (See *McBrearty v. City of Brawley* (1997) 59 Cal.App.4th 1441, 1450.) Here, although the amount of the each increase was known beforehand by the landowners of the district, the increases could not be levied without subsequent legislative action. (§ 54984.2.) It is the requisite legislative action that triggers the public notice and voter approval requirements of the Constitution when a water standby charge is increased from the previous year." *Id*. at 38-39.

Government Code § 53750(h) provides a definition of the "increases" in revenue measures that require voter approval under Proposition 218. That definition excludes from the definition of "increase," and thus from the voter-approval requirement, increases in taxes, fees and charges (but not assessments) resulting from implementation of inflation-adjustment provisions established prior to the adoption of Proposition 218 (Government Code § 53750(h)(2)(A)), or which result from a change in the use of a parcel or some other change that triggers a higher rate under an existing assessment formula (Government Code § 53750(h)(3)). Assessments were excluded from these provisions at the insistence of HJTA and CalTax.[31]

V. Initiative Issues

A. The Scope of the Initiative Power to Affect Taxes, Assessments and Fees

Among the most important changes wrought by Proposition 218 is the extension of the initiative power to "matters of reducing or repealing any local tax, assessment, fee or charge" pursuant to Article 13C, § 3. Article 13C defines the terms "general tax" and "special tax," but not "assessment" or "fee or charge." Thus, the meaning of these critical terms will be left to the Legislature or the courts to determine, with the courts perhaps more likely to act first.

When those suits arise, local governments would do well to consider such defenses to Proposition 218 initiatives as: Do measures such as these impair an essential governmental power and thus exceed the scope of the initiative power?[32] Are such measures administrative, rather than legislative, in character and beyond the initiative power for this

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[31] The Proposition 218 Omnibus Implementation Act was adopted as an urgency measure and required ⅔-approval of each chamber of the Legislature and Governor Wilson's signature. Accordingly, any interest group represented in the negotiations (*e.g.,* the local government associations, HJTA, CalTax, etc.) had an effective "veto" over any provision of the bill.

[32] Authorities establishing this doctrine include: *City of Atascadero v. Daly*, 135 Cal.App.3d 466 (1982) (impairment of fiscal management abilities); *Simpson v. Hite*, 36 Cal.2d 125 (1950) (siting a courthouse); *Newsom v. Board of Supervisors*, 205 Cal. 262 (1928) (franchising authority).

reason, too?[33] And, did the Legislature delegate fee-setting power to local legislative bodies alone via Health & Safety Code § 5471, precluding a local initiative on such fees?[34]

It may be that the most practical means to limit the Proposition 218 initiative power to a reasonable scope is to grant a broad definition to the "assessments," "fees" and "charges" within the scope of Article 13C, § 3,[35] but to apply in a practical way these other restrictions on the initiative power so that Proposition 218 may accomplish its goal of "limiting local government revenue and enhancing taxpayer consent" without making cost-effective governance impossible, as by allowing every fee, including library fines and copying charges for public records, to become fodder for electoral strife.

B. The Signature Requirement to Compel a Special Election on a Fiscal Measure

Proposition 218 imposes a very low signature requirement on measures which seek to "affect" taxes, assessments, fees and charges. Under Article 13C, § 3 the signature requirement to place such a measure on the ballot is just 5% of the number of voters in the jurisdiction who voted in the last gubernatorial election. As gubernatorial elections commonly have a 40% turnout, this means that 5% of 40% – or 2% – of the registered voters of a jurisdiction can compel an election, far fewer than the 10% of all registered voters Elections Code § 9215 requires to compel an election on a non-fiscal initiative in a general law city. Elections Code § 9214 also allows the proponents of an initiative in a general law city to compel a special election to be called to consider their proposal, provided that the petition includes a demand for a special election and is signed by 15% of the registered voters. Proposition 218 makes no reference to special elections in its initiative provisions (and the tax provisions of Article 13 C, § 2 indicate a preference that tax measures appear on general election ballots when legislative seats are contested). Accordingly, most public lawyers have concluded that the only means to compel a special election on a fiscal measure is to obtain the signatures of 15% of the

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[33] The power to initiate legislation is limited to legislative acts, and cannot be applied to adjudicative or administrative acts, cannot compel a legislative act, and cannot take the form of an advisory measure. *E.g.*, *Marblehead v. City of San Clemente*, 226 Cal.App.3d 1504 (1991).

[34] The decision in *Dare v. Lakeport City Council*, 12 Cal.App.3d 864 (1970), is frequently cited for the now-superceded rule that the initiative power does not extend to taxes. In fact, however, the case holds that sanitation fees established by the Lakeport City Council (sitting as the governing body of Lakeport Municipal Sewer District No. 1) pursuant to Health & Safety Code § 5471 (as are many trash and sanitation fees) are not subject to revision or repeal by initiative:

> "Article 11, section 12, of that document [the state Constitution] states that the Legislature may vest in public or municipal corporations 'the power to assess and collect taxes.' Pursuant to that power the Legislature, by Health and Safety Code section 5471, has enabled the legislative body of a municipal sewer district to 'prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it,...' It is worthy of note that the initiative powers here contended for by appellants would necessarily defeat the intent of section 5471 that the sewer district's governing body 'prescribe' and 'revise' the charges for its sewer facilities and services." *Id*. at 868-69.

Accordingly, *Lakeport* can be viewed as an application in the rate-setting context of the usual rules that the initiative power does not extend to administrative acts or to acts expressly delegated by the Legislature to the local legislative body alone. *E.g.*, *Committee of Seven Thousand v. Superior Court*, 45 Cal.3d 491 (1988).

[35] The rationale of *HJTA v. San Diego*, limiting Prop. 218's definition of "assessment" to Article 13 D of the Constitution, would seem to require this result. 72 Cal.App.4th at 236-37.

electorate under Elections Code § 9214 (unless a charter city's charter provides otherwise). Anti-tax activists, many eager to place utility taxes before the electorate during the throes of 2001's power crisis, viewed the matter differently.

The Legislative Counsel has issued a formal opinion to Senator Tom Torlakson (D-Antioch) adopting the view that Proposition 218 does not prohibit the 15% standard for the call of a special election. Legislative Counsel Opinion No. 24170, dated December 11, 2001.[36] The Attorney General has reached the same conclusion in Opinion No. 01-114 (issued August 12, 2002), concluding that "an initiative measure to repeal a city tax may be submitted to the voters on the date of the statewide primary election in March only if the measure statutorily qualifies to be submitted at a special election which coincides with the March primary election." *Id*., Slip Op. at 2. The Attorney General disagreed with the claim that denying a special election in these circumstances amounted to "prohibiting" or "limiting" the initiative power as applied to the repeal of fiscal initiatives. First, the Attorney General noted that fiscal initiatives were not treated disparately from other initiatives. Second, the Attorney General found no intent in the ballot materials that the voters who approved Proposition 218 intended "to override the statutes governing when tax initiative measures are to be placed on the ballot," but Article 13C, § 3 was instead included to "constitutionalize" the holding in *Rossi v. Brown,* 9 Cal.4th 688 (1995), allowing initiative repeal of local tax measures. *Id*. at 6. Finally, the Attorney General noted that Article 13C, § 3's specific reference to signature requirements reflected an understanding that the other aspects of the Elections Code regarding initiatives would remain unaffected by the measure, else there would have been no need to call out the signature requirement alone among Elections Code requirements.

The Attorney General also described the signature requirement for fiscal initiatives as "5 percent of all votes cast *in the city* for Governor in the last election." *Id*. at 7. This is standard that most public lawyers had understood, but this language will come in handy when proponents of the initiative repeal of measures which affect less than all of a city, such as some assessments and fees, argue that the electorate for these purposes should only be those who reside in the area affected by the assessment or fee.

VI. Voting Rights Act Issues

Two provisions of the Voting Rights Act of 1965, 42 U.S.C. 1973 et seq., are of relevance to our topic. Section 203 of the Act, which requires the preparation of multi-lingual election materials, and § 5, which requires "pre-clearance" by the U.S. Department of Justice before changes in voting procedures may be implemented by local governments in Kings, Merced, Monterey, and Yuba Counties.[37]

A. Bilingual Voting Materials Under § 203

Section 203 of the Act applies to all state and local governments and requires that

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[36] Copies of this opinion are available from the League of California Cities and from the author of this paper. See note 10 above.

[37] Section 5 applies to jurisdictions identified by the Attorney General as having acted to exclude minority citizens from the franchise as of November 1, 1964. The majority of these jurisdictions are found in the "Old South," but the four listed California counties, and political jurisdictions within them, are within this class.

ballots, absentee ballot applications, voter information pamphlets, and other "voting materials" must be provided in any language that meets the following criteria, as determined by the Director of the United States Census:

1. more than 5% of citizens of voting age of the jurisdiction are limited in their English proficiency and speak that language; or

2. more than 10,000 of the citizens of voting age of the jurisdiction are limited in their English proficiency and speak that language; or

3. if the jurisdiction contains any part of an Indian reservation, and more than 5% of the American Indian citizen of voting age within the reservation are limited in their English proficiency and speak that language.

This net casts broadly. Based on 1990 census data, jurisdictions in Los Angeles County, for example, are required by § 203 to translate all election materials into the following languages in addition to English: Chinese, Filipino, Japanese, Vietnamese, and Spanish.[38]

Section 203 defines "voting materials" as "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." Thus, the act is violated if a local government provides some, but not all, of these materials in the required minority tongues.

The Department of Justice's regulations define the "elections" to which § 203 applies as follows:

> "The language provisions of the Act apply to registration for and voting in any type of election, whether it is a primary, general or special election. Section 14(c)(1). This includes elections of officers *as well as elections regarding such matters as bond issues, constitutional amendments, and referendums*. Federal, State and local elections are covered as are elections of special districts, such as school districts and water districts." 28 CFR § 55.10. (Emphasis added.)

This definition clearly encompasses matters presented to registered voters under Proposition 218, such as taxes and property-related fees submitted to the voters, rather than to property owners, pursuant to Article 13D, § 6(c) . It is less clear whether assessment protest proedings pursuant to Article 13D, § 4; standby protest proceedings pursuant to Article 13D, §§ 4 and 6(b)(4); or majority protest proceedings for property-related fees under Article 13D, § 6(a), are "elections" within the meaning of § 203 because they involve not voters, but property owners, casting "protests" rather than "ballots."

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[38] A paper presented to the League of California Cities' February 2000 Continuing Education Seminar for Municipal Attorneys by David Becker, a trial attorney with the Civil Rights Division of the Department of Justice, lists by county the linguistic minorities protected by § 203 of the Voting Rights Act under the 1990 census. This paper is available from the League at (916) 658-8257 and via its website at www.cacities.org. It is likely that 2000 census data will increase the number of linguistic minorities in California protected by § 203.

Obviously, this legal issue need not be decided if a local government voluntarily provides multi-lingual materials for all Proposition 218 election and protest processes. There may be important political and social benefits to doing so. On the other hand, if the expense and delays associated with providing multi-lingual materials are problematic, then additional attention to this issue is in order.

B. Pre-Clearance Under § 5

Section 5 of the Voting Rights Act requires approval of the Department of Justice before a jurisdiction subject to the section may implement a change in voting procedures. This review is intended to prevent changes that disadvantage racial and ethnic minorities. In *Lopez v. Monterey County*, 519 U.S. 9, 142 L.Ed.2d 728, 119 S. Ct. 693 (1999), the U.S. Supreme Court held that pre-clearance was required for consolidation of Monterey County's trial courts even though that change implemented a law of state-wide application. Thus, the case can be read for the proposition that a statewide enactment that alters voting procedures may not be given effect in a jurisdiction subject to § 5 without pre-clearance by the Department of Justice. The case suggests this question – may the provisions of Proposition 218 that shift control over certain assessments and fees from voters to property owners be given effect in counties subject to § 5 of the Voting Rights Act without pre-clearance? Counsel for local governments located in Kings, Merced, Monterey, and Yuba Counties may wish to give further thought to this issue.

VII. "Campaign" Issues

Proposition 218 now requires voter- or property owner-approval for most new taxes, all new assessments, and some new fees. In many cases, there are few private-sector advocates willing to take on the task of educating the local electorate regarding fiscal ballot measures. The local government itself often becomes the only entity able to provide the information necessary for informed choices at the ballot box. This raises questions regarding the proper uses of public funds in this arena, and a need to avoid running afoul of the prohibition of using public revenues to advocate a political outcome, as discussed in *Stanson v. Mott*, 17 Cal.3d 206, 217 (1976).

The Fair Political Practices Commission (FPPC) has issued two opinions addressing these issues in the context of Proposition 218:

A. Majority Protest Ballot Proceedings are not "Measures" Governed by the Political Reform Act

In Opinion No. A-97-061 to Danville Town Attorney Rob Ewing, the FPPC advised that the majority protest proceeding required by Article 13D, § 4 for the adoption of a 1972 Landscaping and Lighting Act assessment is not a "measure" within the meaning of the Political Reform Act. The opinion relied on the definition of "measure" in Government Code § 82043, which refers to a matter "submitted to a popular vote at an election," and on the language of then-pending legislation that is now Government Code § 53753(e)(4), which states that "the majority protest proceedings described in this subdivision shall not constitute an election or voting for the purposes of Article 2 of the California Constitution or of the California

Elections Code." Accordingly, the opinion also concludes that a "yes" committee formed to advocate the passage of an assessment measure under Proposition 218's procedures is not obliged to report campaign expenditures pursuant to the Political Reform Act. Although the Opinion's analysis is restricted to assessments, its logic would also extend to majority-protest proceedings on fees pursuant to Article 13D, § 6(a) and perhaps, as well, to property-owner elections under Article 13D, § 6(c). Tax elections under Article 13C and registered-voter fee elections under Article 13D, § 6(c), however, would appear to be elections on "measures" within the sweep of the Political Reform Act, because these bear the indicia of traditional elections rather than mailed protest proceedings directed to property owners or fee-payers and not to registered voters.

B. Tax or Assessment Drafting Expenses are not Reportable Campaign Expenditures

In Opinion No. I-98-007, the FPPC informally advised then-Oakland Assistant City Attorney Joyce Hicks regarding the cost of a poll designed to measure whether the city's voters would support a special tax for police services or its property owners would support an assessment for those services. Commission staff opined that the cost of a poll would not be a reportable campaign expenditure because expenses incurred before a measure is placed on the ballot are generally not reportable. (However, the later use of poll data for advocacy could "recapture" that expenditure and require its later reporting). The City could also make use of the polling data for public education efforts without reporting those expenditures, provided that the City's education efforts did not amount to advocacy in favor or against the measure. If the City engaged in advocacy, its expenditures would be reportable (and possibly illegal under *Stanson v. Mott*). Donation of the polling data to an advocacy committee might be construed as a reportable campaign donation by the City, but release of that same information to the public as a whole (as the Public Records Act would seem to require) would not. This opinion repeats the conclusions of the Ewing Advice Letter, discussed immediately above, that mailed-ballot, assessment protest proceedings under Proposition 218 are not "elections" governed by the Political Reform Act.

Additional guidance on these issues can be had from a very useful guide prepared by the League of California Cities entitled, "Securing Voter Approval of Local Revenue Measures" (1999).

CONCLUSION

Just when we thought Proposition 62 was poised to become an historical footnote, the *La Habra* decision spawned a new wave of litigation under the measure. Proposition 218 also looks to be a major part of the local government landscape for years to come. Just as courts still render decisions interpreting the meaning of 1978's Proposition 13, we will be learning more about the meaning of that measure for decades. This area of municipal practice grows increasingly complex and appears likely to continue to do so. Through it all, we'll keep you posted!

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