

Props. 13, 218 & 26 – An Overview & New Developments

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Prop. 13, Art. XIII A

- §1(a): 1% assessed valuation tax collected by the county, apportioned by law
- §1(b): except
 - Pre 7/1/78 voter-approved debt
 - 2/3-voter-approved debt to acquire or improve real estate
 - 55%-voter-approved school bonds (Prop. 39 of 2000)

Prop. 13, Art. XIII A

- §2(a): 1% applied to “full cash value” on “change of ownership” + value of “new construction” excluding “reconstruction” after “disaster.”
- §2(b): basis falls w/ deflation & rises w/ inflation capped at 2%
- §2(c): “new construction” excludes solar, fire sprinklers, other politically favored improvements

Prop. 13, Art. XIII A

- §2(d): “Change of ownership” excludes eminent domain
- §2(g): Other exclusions from “change in ownership including spousal transfers
- §2(h): still more exclusions for parents, children, grandchildren

Prop. 13, Art. XIII A

- §3(a): 2/3-vote of Legislature for new taxes; no new a.v. taxes or sales or transactions tax on real property
- §3(b): Prop. 26 expanded definition of tax
- §3(c): Prop. 26 window period
- §3(d): Prop. 26 burden of proof

Prop. 13, Art. XIII A

- §4: Special taxes may exceed 1% cap on property taxes upon 2/3 voter approval
- GC §50076: “‘special tax’ shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not leveled for general revenue purposes.”

Prop. 13 Legislation

- In 1978 Legislature adopted statute to allocate property tax for FY 78-79
- In 1979 adopted AB 8 to establish the property tax allocation system that prevails today
- ERAF shifts of '92, '93
- Triple Flip and VLF Swap of '04

Prop. 13 Litigation

- *Amador Valley Jt. H. Sch. Dist. v. SBE* (1978) 22 Cal.3d 208
 - Rejected range of constitutional challenges to Prop. 13
 - Not void for vagueness: “according to law” meant “according to statute”
 - Contracts clause challenge not ripe
 - Assessment system no viol’n right to travel
 - Was not an unconstitutional revision (but cf. *Schmidt v. Younger*, 2nd DCA)

Prop. 13 Litigation

- *Amador Valley* also found:
 - No violation of single-subject rule
 - Assessment system did not violate equal protection

Prop. 13 Litigation

- *Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974
 - Prop. 13 does not bar assessments or assessment bonds

Prop. 13 Litigation

- *Kern Co. Water Agency v. Bd. Of Sups.* (1979) 96 Cal.App.3d 874
 - Obligation to impose supplemental property tax to honor obligation of US ACOE contract was exempt from Prop. 13 as pre-1978 debt

Prop. 13 Litigation

- *MWD v. Dorff* (1979) 98 Cal.App.3d 109
 - Annexation of land to Met did not require 2/3 voter approval for collection of Met's special taxes
 - Cf. Prop. 218: *Citizens Ass'n of Sunset Beach v. Orange Co. LAFCO*, pending 4th DCA, Division 3

Prop. 13 Litigation

- *LA County Transportation Comm'n v. Richmond* (1982) 31 Cal.3d 197
 - Supplemental sales tax to fund regional transportation did not require 2/3 vote because tax placed in general fund
 - *Rider v. Co. of San Diego* (1991) 1 Cal. 4th 1
 - rejected *Rider* – single-purpose agency can impose only special taxes

Prop. 13 Litigation

- *Carmen v. Alvord* (1982) 31 Cal.3d 318
 - Supplemental tax for voter-approved pensions constitutes pre-1978 voter-approved “debt”
- But cf. *HJTA v. Co. of Orange* (2003) 110 Cal.App.4th 1375
 - Tax limited to cost of 1978 pension benefits

Prop. 13 Litigation

- *CCSF v. Farrell* (1982) 32 Cal.3d 47:
 - Payroll tax paid into City's general fund did not require 2/3 voter approval because "special tax" as used in Prop. 13 limited to taxes imposed for a special purpose and excludes taxes which fund general funds

Prop. 13 Litigation

- *Rancho Cucamonga v. Macksum*
(1991) 228 Cal.App.3d 929
 - Rejected range of constitutional challenges to AB 8, including:
 - Tax situs rule (Art. 13A, §1)
 - Uniform assessment rule (Art. 13, §1)
 - State tax for local purposes (Art. 13, §24)
 - Charter Cities' home rule powers (Art. 11, §5)
 - Equal protection rights of residents of no- and low-property-tax cities

Prop. 13 Litigation

- *Nordlinger v. Hahn* (1992) 505 U.S. 1
 - “Welcome stranger” method of assessment does not violate equal protection or right to travel if consistently applied

Prop. 13 Litigation

- *Ventura Group Ventures, Inc. v. Ventura Port District* (2001) 24 Cal.4th 1089
 - Prop. 13 does not violate the Republican Form of Government Clause of the US Constitution

Prop. 218, Art. XIII C

- §2(b): local general taxes require majority voter approval & must appear on ballot w/ Council or Board seats unless emergency declared by unanimous vote
- §2(c): Prop. 218 window period
- §2(d): 2/3 vote for special taxes

Prop. 218, Art. XIII C

- §3: Extends initiative power to repeal or reduction of taxes, assessments, fees and charges
 - No signature requirement higher than that for statewide statutory initiatives (5% of the last gubernatorial turnout)

Prop. 218, Art. XIII D

- §1: Prop. 218
 - provides no taxing authority
 - does not affected fees imposed “as a condition of property development”
 - Does not affect timber yield taxes
- §2: Definitions

Prop. 218, Art. XIII D

- §3: Only permissible taxes on real property are
 - a.v. tax under Prop. 13
 - Special taxes under Prop. 13
 - Assessments under Prop. 218
 - Fees and charges under Prop. 218
 - Fees for electric and gas service are not property related fees subject to Prop. 218

Prop. 218, Art. XIII D

- §4: approval of assessments by majority of property owners casting mailed weighted ballots
- §5: grandfathering of certain pre-218 assessments

Prop. 218, Art. XIII D

- §6(a): majority protest for property related fees
- §6(b): substantive rules for calculation and use of property related fees
- §6(c): 50% property owner or 2/3-voter approval of fees other than water, sewer & trash

Assessment Litigation

- *HJTA v. City of San Diego* (1999) 72 Cal.App.4th 230
 - Non-property-based BID assessments not subject to 218
- *HJTA v. City of Riverside* (1999) 73 Cal.App.4th 679
 - Pre-218 '72 Act assessment need not comply w/ 218 until increased

Assessment Litigation

- *Not About Water Comm. v. Bd. of Sups.* (2002) 95 Cal.App.4th 982
 - Weighted voting on assessments does not violate due process or equal protection

Assessment Litigation

- *Silicon Valley Taxpayers Ass'n v. Sta. Clara Co. Open Space Auth.* (2008)
 - Independent judicial review of findings of special benefit & proportionality
 - Struck down assessment b/c engineer's report failed to provide basis for conclusions re special benefit and proportionality

Assessment Litigation

- *Dahms v. Downtown Pomona PBID* (2009) 174 Cal.App.4th 708
 - Deferential review of PBID
 - Supplemental muni. services always provide special benefit
 - Gentle review of proportionality
- *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057:
 - Undergrounding=100% special benefit

Assessment Litigation

- *Beutz v. Co. of Riverside* (2010)
 - 100% assessment funding of M&O permitted b/c other funds used for capital
 - Agency always bears burden to prove special benefit and proportionality even when petitioner fails to exhaust administrative remedies on these issues

Assessment Litigation

- *Golden Hill Neighborhood Ass'n v. City of San Diego* (2011) 199 Cal.App.4th 416
 - MAD assessment for supplemental muni. services struck down for failure to make record supporting assignment of voting power to City properties
 - Helpful discussion of how to demonstrate proportionality

Assessment Litigation

- *Concerned Citizens for Responsible Gov't v. West Point Fire Protection District*, Cal. S. Ct. Case No. S195152
 - Do fire suppression services provide special benefit?
 - How demanding is Prop. 218 with respect to showing of special benefit and proportionality?

Fee Litigation

- *McBrearty v. Brawley* (1997) 59 Cal.App.4th 1441
 - continued collection of existing phone tax did not require voter approval under Prop. 62 or Prop. 218 b/c continued collection is not the adoption, extension of increase of a tax

Fee Litigation

- *HJTA v. City of Los Angeles* (2000)
85 Cal.App.4th 79
 - metered water fee was not property-related fee
 - No longer good law; rejected by *Bighorn-Desert View* in 2006

- *Apartment Ass'n of Los Angeles Co., Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830
 - housing inspection fee on landlords was not a property-related fee b/c triggered by voluntary entry in housing market
 - Together w/ *HJTA v. LA* was basis to avoid applying 218 to metered utility fees until 2006

- *HJTA v. City of Roseville* (2002) 97 Cal.App.4th 637
 - franchise fee imposed on City utilities for benefit of its general fund violated Prop. 218 b/c no cost basis shown
 - Thus metered fees were subject to Prop. 218 in view of this court
 - Expressly invites cost justification for general fund transfers

Fee Litigation

- *HJTA v. City of Salinas* (2002) 98 Cal.App.4th 1351
 - Storm water service fee based on amount of impervious coverage was property related fee and neither “water” nor “sewer” services under 6(c)
 - Superficial analysis ignores definitions of Omnibus Act and subject to attack in light of *Greene*

Fee Litigation

- *Richmond v. Shasta CSD* (2004) 32 Cal.4th 409
 - water connection charge not property related fee b/c cannot know to whom to send hearing notice
 - Dicta states that water service charge subject to Prop. 218 even if metered
 - B/c this second point was unwelcome dicta, local utilities ignored it.

Fee Litigation

- *HJTA v. City of Fresno* (2005) 127 CA4th 914
 - PILOT authorized by city charter was not valid as wholesale UUT
 - violated 6(b) b/c of insufficient cost justification
 - Like *Roseville*, court invited cost-justification of general fund transfers

Fee Litigation

- *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205
 - metered water fees subject to Prop. 218
 - initiative may lower such fees but may not alter 218's procedure for increasing them in the future
 - converts *Richmond's* dicta into a holding, implicitly limits *Apt. Ass'n* & expressly rejects *HJTA v. LA*

Fee Litigation

- *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 CA4th 747
 - demanding phone carriers implement wider tax base made available by Mobile Telecommunications Sourcing Act of 2000 was a “change of methodology” and therefore tax increase under GC 53750(h) requiring voter approval

Fee Litigation

- *Pajaro Valley Water Mgmt. Agency v. AmRhein* (2007) 150 Cal.App.4th 1364
 - groundwater charge was property-related fee subject to Prop. 218
 - 6th DCA might revisit the issue in *Great Oaks Water Co. v. Santa Clara Valley Water District*, Case No. H035885 (to be argued April 2012)

Fee Litigation

- *Greene v. Marin County Flood Control & Water Cons. Dist.* (2010)
49 Cal.4th 277
 - 6(c) fee election not subject to ballot secrecy of Art. II, §7
 - Omnibus Act good authority
 - local rules under 6(c) subject to some deference
 - Provides basis to limit *HJTA v. Salinas*

Fee Litigation

- *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926
 - conservation water rates violated 218 b/c insufficient record support for gap between tiers and between customer classes
 - but 218 and constitutional mandate to conserve water resources (Art. 10, §2) can be reconciled

Proposition 26 – Overview

- Proponents' goal was to repeal *Sinclair Paint Co. v. State Bd. of Equalization* and make it more difficult for gov'ts to enact fees
- Specific target: Regulatory fees
- Reclassifies many "fees" as "taxes"
- Reiterates that gov't has the burden to prove a fee or charge is not a tax

Impact on State Government

What is a state "tax" under Prop 26?

- "Any levy, charge, or exaction of any kind imposed by the State"
- Unless w/in 5 exceptions or not "imposed"
- Legislature must now pass what were formerly "fees" by 2/3^{rds} vote because they are now "taxes"

Impact on State Government

Programs funded by fees that would likely require a 2/3rds vote if adopted after 1/1/10:

- California Used Oil Recycling Fund
- Underground Storage Tank Cleanup Fund
- Pesticide Regulation Fund
- Air Pollution Control Fund
- Oil Spill Administration Fund

1: Benefits & Privileges

A charge imposed for a **specific benefit conferred or privilege granted** directly to the payor

1. Not provided to those not charged
2. Doesn't exceed reasonable costs to the gov't of conferring the benefit or granting the privilege to the payor

E.g., professional & ABC licenses, franchises

2: Services & Products

A charge imposed for a **specific government service or product** provided directly to the payor

1. Not provided to those not charged
2. Doesn't exceed reasonable costs to government of providing service / product

E.g., park services, medical services

Issue: free or discounted services / products

3: Regulatory Costs

A charge imposed for **reasonable regulatory costs** to the government incident to

1. Issuing licenses and permits
2. Performing investigations, inspections & audits
3. Admin. enforcement and adjudication

3: Regulatory Costs

- Issues:
 - Unclear how this differs from 1st exception
 - Unclear if this covers rulemaking and other general administrative costs

4: Use of Gov't Property

A charge imposed for

- 1. Entrance to or use of gov't property**
- 2. Or purchase, rental, or lease of gov't property**
3. As to state, doesn't cover Vehicle License Fees

E.g., park entrance and equipment rental fees

4: Use of Gov't Property

- Issue: No reasonable cost limitation; compare burden-shifting language

5: Fines & Penalties

A fine, penalty, or other monetary charge

1. Imposed by the judicial branch of government or the State or a local gov't
2. As a result of a **violation of law**

E.g., criminal fines, parking fines, late penalties

More on Fines & Penalties

- *Cal. Tax v. FTB* (2010) 190 C.A.4th 1139
 - 20% penalty on late corporate taxes raising \$1.4b was not a tax
 - Distinguishing characteristics: label, revenues diminish overtime, triggered by violation
 - No need for findings, good faith defense; post-payment remedy sufficient

Revenue Neutral Laws

- Previously, Legislature arguably could raise a tax w/o 2/3 vote another lowered by same amount b/c Prop. 13 applied to laws that **“increased revenues”**
- Now, any laws that **“result in any taxpayer paying higher tax”** must be approved by a 2/3rds majority
- E.g., the “gas tax swap”

Retroactivity

- Prop. 26 explicitly “voids” State taxes adopted after 1/1/10 unless readopted by 11/3/11
- No analogous provision for local laws
- Potential examples:
 - Gas tax swap – Legislature readopted by 2/3 vote in 2011
 - AB 2398 – carpet waste reduction fee
 - AB 1343 – paint recovery fee

More on Retroactivity

- Changes that indirectly result in a taxpayer paying higher taxes
 - increasing the minimum wage
- Inflation adjustments & other automatic increases
 - Gov't Code § 53750(h)(2)(A) exempts automatic inflation adjustments, but applies only to local gov'ts
 - However, 2/3^{rds} vote not necessary if adjustment does not require a change in "state statute"

Mandates

- Unfunded mandates
 - Under the provisions affecting local governments, more funding measures will be subject to voter approval
 - A mandate is “unfunded” if the local agency needs voter approval to fund program

Conclusion as to State

- Fees not w/in 5 exceptions are taxes subject to 2/3rds vote
- Some fees may fall w/in 2 or more exceptions
- Significant impact on funding of environmental, public health, and social programs
- Fees passed before 1/1/10 grandfathered

Local Government Perspective

- Most of what has been said about State also applies to local government but:
 - No retroactivity (protects all existing legislation, including implementation)
 - Much clearer interpretive rules b/c 26 amends Prop. 218, so Omnibus Implementation Act (GC 53750 ff.) applies; *cf. Greene v. Marin Co. Flood Control & Water Cons. Dist.*

Exceptions Limited to Cost of Service or Regulation

- Specific Benefit / Privilege (permits, franchises)
- Specific Service / Product (utility charges, park & rec. fees)
- Reasonable Regulatory Fees for licenses & permits (permits, inspections)

Prop. 26 Exceptions Not Limited to Cost Recovery

- Fee for entry, use or purchase of gov't property (park & rec. entrance fees, equipment rental, franchises)
- Fines & penalties

Prop. 26 Exceptions Specific to Local Gov't

- Fees imposed as a condition of property development (limited to cost by AB 1600, Gov't Code §66000 et seq. & other law)
- Assessments & property-related fees subject to Prop. 218 (limited to cost by 218)

What Does “Imposed” Mean?

- State & local provisions define as taxes “any levy, charge, or exaction ... **imposed** ...”
 - What does “imposed” mean?
 - **Ponderosa Homes v. City of San Ramon**
(1994) 23 Cal.App.4th 1761, 1770
(dictionary definition suggests force or authority required)

What Does “Imposed” Mean?

- Can we exclude:
 - voluntary payments?
 - prices set in competition w/ non-gov't providers?

Another Definitional Issue

- Exceptions refer only to “charges,” but seem to have same breadth as “levy, charge or exaction”
- Limiting exceptions to “charges” would make them nearly moot
- *Cf. Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (“fee” and “charge” synonymous under Prop. 218)

Burden of Proof

- Gov't bears burden to prove by preponderance:
 - Not a tax
 - Fee amount doesn't exceed cost
 - Cost allocation reasonably related to payor's benefits from / burdens on gov't activity
- Burden of production, too:
 - *Homebuilders Ass'n v. Lemoore* (2010) 185 Cal.App.4th 554

More on Burden of Proof

- Doesn't impose cost limit on exceptions 4 – 7
 - When other law imposes cost limit, gov't bears burden, but not an independent source of a duty to limit fees to cost
- Gov't can choose whether to use benefit or burden justification under *Sinclair Paint* line of cases from which this test is drawn

Major Impacts on Local Gov't

- Gas & Electric Utilities
- Non-property-based assessments
- Park & Rec. service fees? *Cf.* Gov't Code §50402
- Discounts & free passes for fees excepted as benefit / privilege or service / product
- Scope of recoverable regulatory costs
- Application to voluntary payments (development agreements, *e.g.*)
- In-lieu fees

More Impacts of Prop. 26

- Some good news for some local governments at expense of other agencies:
 - Fish & Game Fees
 - Booking Fees
 - Property Tax Administration Fees

Prop. 26 Litigation

- *Citizens for Fair REU Rates v. City of Redding* (Shasta CSC filed 2/11/11)
 - Does PILOT from electric utility violate Prop. 26 when rates, but not PILOT increased post-26?
- *Bauer v. Harris* (E.D. Cal. filed 8/25/11)
 - Challenge to gun registration fees under 2nd Amendment & Prop. 26

Prop. 26 Litigation

- *Ventura v. United Water Conservation Dist.* (Ventura CSC filed 08/11)
 - Challenge to 3:1 ratio of agricultural to M&I groundwater charges under Props. 218 & 26

More Prop. 26 Litigation

- *Schmeer v. County of Los Angeles*
(LASC filed 10/3/11)
 - Does \$0.10 fee on paper bags collected by retailers under County plastic bag ban violate 26?

Prop. 26 To-Do's

- Protect grandfathered fees / fee components
- Be careful when adopting or increasing fees
- Review existing fees
- Consider fees by agreement rather than by ordinance or rule
- Stay tuned!

Questions?