PROPOSITION 218

Local Agency Guidelines for Compliance

2007 Update

Association of California Water Agencies
Leadership Advocacy Information Since 1910

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910 K Street, Suite 100, Sacramento, California 95814-3577

Association of California Water Agencies
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Leadership
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ACWA is a statewide non-profit association whose 440 public agency members are responsible for about 90% of the water deliveries in California.

ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner.

May 2007

Association of California Water Agencies

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Foreword

This publication is intended to provide general information and guidance to ACWA member agencies on Proposition 218-related issues typically faced by ACWA members (i.e., water districts and agencies and other special districts that provide water and sewer services). ACWA members tend to rely more on fees, charges, assessments and standby charges for revenue than on new or increased taxes. Therefore, these guidelines put greater emphasis on fees, charges and assessments than on taxes.

This publication is not intended to provide legal advice. Readers should consult their legal counsel when confronted with issues relating to Proposition 218's applicability and requirements. A public agency's legal counsel is responsible for advising its governing board and staff and should always be consulted when legal issues arise.

Dedication

This publication is dedicated to Nicole A. Tutt, Esq., 1969 - 2007, formerly of Nossaman, Guthner, Knox & Elliott, LLP in San Francisco. A peerless water law and public agency attorney and a member of ACWA's Proposition 218 Legislative Subcommittee, Nicole's contributions to ACWA and to the development of Proposition 218 jurisprudence will always be remembered.

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Chapter 1 – Introduction and Summary

Introduction

Proposition 218, officially titled the "Right to Vote on Taxes Act," was approved by California voters on November 5, 1996. It amended the California Constitution by adding articles XIII C and XIII D, which established additional substantive and procedural requirements and limitations on new and increased taxes, assessments and property-related fees and charges.

In 1997, shortly after the adoption of Proposition 218, the Association of California Water Agencies (ACWA), through a Proposition 218 Subcommittee of the Legal Affairs Committee, published ***Proposition 218: Local Water Agency Guidelines for Compliance*** (ACWA, Feb. 1997). With the law having just been adopted, the 1997 guidelines did not have the benefit of subsequent implementing legislation and court cases that have clarified the applicability, meaning and operation of Proposition 218. In preparing the 1997 guidelines, the subcommittee struggled in particular with the applicability of Proposition 218 to new and increased water and other utility system service charges.

Subsequent implementing legislation and court cases have clarified the scope and nature of the requirements and limitations under Proposition 218. ACWA therefore has determined that it is appropriate to update the 1997 guidelines with this 2007 ACWA Proposition 218 publication.

Brief History Leading to Proposition 218

Proposition 218 can best be understood against its historical background. It was the latest in a line of voter-approved initiatives in California restricting the authority of government agencies to raise and spend local revenue. The line started with Proposition 13 in 1978.

Proposition 13 (Cal. Const., art. XIII A), also known as the Jarvis Initiative, focused mainly on property taxes. It rolled back property taxes, required that special taxes be approved by two-thirds vote of the electorate, limited *ad valorem* real property taxes to 1% of assessed valuation, limited increases in assessed valuation to 2% per year unless the property ownership changes, and provided that only counties may levy a property tax. Since courts consider Proposition 218 as Proposition 13's progeny, cases involving Proposition 13 therefore provide guidance in construing Proposition 218. (See, e.g., *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838-839; *Howard Jarvis Taxpayers Association v. City of San Diego* (1999) 72 Cal. App.4th 230, 237-240.)

In 1979, voters approved Proposition 4, also known as the Gann Initiative. (Cal. Const., art. XIII B; Gov. Code, §§ 7900–7914.) It imposed appropriations limits on spending proceeds of taxes. This fiscal restraint focused on controlling spending as opposed to limiting taxes, as did Proposition 13.

Proposition 62 was approved by voters in 1986 and amended parts of the California Government

Code. (See Gov. Code, §§ 53720–53730.) Proposition 62 imposed substantive and procedural requirements on new and increased taxes. Proposition 218 made much of Proposition 62 redundant, and only a few provisions relating to the procedure to approve new taxes remain significant today.

In the decades following the adoption of Propositions 13 and 62, courts have been called upon to interpret and construe the laws in a variety of facts and circumstances. Proposition 13 contains some general language and does not define key words and phrases. For example, it imposed for the first time limitations on "special taxes," but did not define the phrase. In some cases, courts found the new restrictions to be applicable while other courts concluded the restrictions did not apply. In one significant case shortly before Proposition 218 was approved, the California Supreme Court concluded in *Knox v. City of Orland* (1992) 4 Cal.4th 132 that a particularly controversial assessment district levy for park maintenance was a valid special assessment and not a special tax within the meaning of Proposition 13.

The authors of Proposition 218 believed that the courts were not fairly and properly interpreting and applying the requirements of Propositions 13 and 62. They particularly disagreed with the ruling in *Knox*. Consequently, the initiative proponents proposed another voter-approved initiative to clarify, tighten up and expand restrictions against local government taxes, assessments and property-related fees and charges. Proposition 218 was placed on the ballot at the November 1996 election and approved by 56.6% of the electorate.

Like the earlier measures, Proposition 218 also contained some ambiguous and undefined terms and phrases, especially in connection with property-related fees and charges. It also imposed significant and novel procedures concerning the adoption of new and increased assessments. In 1997, in an effort to clarify some aspects of Proposition 218, the California Legislature adopted implementing legislation, the Proposition 218 Omnibus Implementation Act (Gov. Code, §§ 53750–53754).

As with Propositions 13 and 62, Proposition 218 immediately precipitated litigation and numerous court cases. These guidelines discuss and cite key cases. Many of the cases considered the scope and applicability of Proposition 218. In particular, there was uncertainty about its applicability to water service charges. That uncertainty was resolved by the California Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, which concluded that a water agency's charges for ongoing water delivery are subject to Proposition 218.

Summary of Proposition 218

Overview

The principal purpose of Proposition 218 can be found in its findings and declarations: "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This mea-

sure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Right to Vote on Taxes Act § 2, West's Ann. Cal. Const., art. XIII C, § 1, Historical Notes.) Proposition 218 was designed to close local government-devised and court-approved loopholes in Proposition 13.

Proposition 218 buttressed Proposition 13's limitations on real property taxes and special taxes by placing analogous restrictions on assessments, fees and charges. Proposition 218 contained two parts, articles XIII C and XIII D. Article XIII C imposed restrictions on new and increased general and special taxes. It also extended the initiative power to the reduction and repeal of local taxes, assessments, fees and charges. Article XIII D imposed restrictions on new and increased assessments (which include standby charges) and property-related fees and charges.

Although the phrase "property-related fees and charges" is not defined in Proposition 218, it has become a common phrase to describe fees and charges subject to Proposition 218 and is used throughout this publication. Generally, property-related fees and charges are those that are (a) imposed on property, (b) imposed on persons as an incident of property ownership, or (c) imposed as user charges for a property-related service.

The act includes a "liberal construction" provision requiring that the "provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Right to Vote on Taxes Act § 5, West's Ann. Cal. Const., art. XIII C, § 1, Historical Notes.) Courts therefore will construe Proposition 218 in accordance with the natural and ordinary meaning of the language used by the voters of California in a manner that effectuates their purpose in adopting the law. (*Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355.)

Articles XIII C and XIII D apply to cities, counties, special districts, school districts, redevelopment agencies, and other local or regional governmental entities. "Special district" means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited geographic boundaries, which covers all water districts and water agencies. (Cal. Const., art. XIII C, § 1, subds. (b)-(c) and art. XIII D, § 2, subd. (a).)

Proposition 218 imposed procedural requirements and substantive limitations on local government agency fiscal affairs. It did not provide legal authority to any agency to adopt or impose any tax, assessment, fee or charge. (Cal. Const., art. XIII D, § 1; see also Gov. Code, § 53727.) The substantive authority for any levy must be found in some other constitutional provision or statute.

Since Proposition 218, the only types of levies that may be imposed on property or on persons as an incident of property ownership are the following:

- *Ad valorem* property tax (generally limited to the 1% property tax)
- Special taxes
- Assessments
- Fees and charges for property-related services

(Cal. Const., art. XIII D, § 3, subd. (a).)

Gas and electrical service fees and charges are not subject to article XIII D, but may be subject to

the initiative provisions of article XIII C. (See Cal. Const., art. XIII D, § 3, subd. (b).)

Taxes

Article XIII C provides that all taxes imposed by a local government agency must be either general taxes or special taxes. There can be no other type of tax. (Cal. Const., art. XIII C, § 2, subd. (a); see also Gov. Code, § 53721.) "General tax" means any tax imposed for general governmental purposes. "Special tax" means any tax imposed for specific purposes, even if the tax is ultimately placed into a general fund. (Cal. Const., art. XIII C, § 1, subds. (a) & (d).)

General Taxes

Article XIII C prohibits special purpose districts and agencies from levying general taxes. (Cal. Const., art. XIII C, § 2, subd. (a).) For most ACWA members (which generally are special districts), the only potential taxes to consider are special taxes. The distinction between general and special taxes therefore is of little significance. These guidelines will not address general taxes in detail nor the distinction between general and special taxes.

For cities, counties and other local government agencies authorized to levy general taxes, a general tax cannot be imposed, extended or increased until the electorate approves the tax by majority vote. The tax election must be consolidated with a regularly scheduled general election for governing board members of the local government agency (except in cases of emergency). (Cal. Const., art. XIII C, § 2, subd. (b).)

Special Taxes

No local government agency may impose, extend or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. (Cal. Const., art. XIII C, § 2, subd. (c).)

To "extend" an existing special tax means a decision by an agency to extend the effective period for the tax, including, but not limited to, amendment or removal of a sunset provision or expiration date. To "increase" an existing special tax means a decision by an agency that either increases the applicable tax rate or revises the methodology used to calculate the tax if that revision results in an increased amount being levied on any person or parcel. (Gov. Code, § 53750, subds. (e) & (h).)

A tax is not "increased" if the action (1) adjusts the amount of a tax in accordance with a pre-Proposition 218 schedule of adjustments (including a clearly defined inflation adjustment formula), or (2) implements or collects a previously approved tax, so long as the previously approved rate or methodology is not increased or revised. A tax also is not considered "increased" if higher payments are attributable to events other than an increased rate or revised methodology, such as a change in the density, intensity, or nature of the use of land. (Gov. Code, § 53750, subd. (h).)

A new or increased special tax must be proposed by an ordinance or resolution approved by two-thirds vote of the local government agency governing board. The tax ordinance or resolution must include the type and rate of tax, method of collection, date of the tax election, and the purpose or service for the proposed special tax. (Gov. Code,

§ 53724.) The revenues from any special tax shall be used only for the purpose or service for which it was imposed, and for no other purpose whatsoever. (Cal. Const., art. XIII D, § 6, subd. (b), par. (2); Gov. Code, § 53724.)

A tax ordinance or resolution may state a range of rates or amounts or provide that the tax rates or amounts may be adjusted for inflation pursuant to a clearly identified formula, or do both. If approved, the local government agency's governing board may thereafter impose the tax at any rate or amount consistent with the voter-approved range of rates or amounts and/or inflation adjustment formula. However, for a tax determined based on a percentage calculation, an inflation adjustment formula may not provide that the percentage will be adjusted for inflation. (Gov. Code, § 53739.)

Proposition 218 did not provide legal authority for the adoption of a special tax. (Cal. Const., art. XIII D, § 1; see also Gov. Code, § 53727.) A new or increased special tax must be authorized by some other law. For special districts, there must be specific statutory authority. (See, e.g., Mello-Roos Community Facilities District Act (Gov. Code, § 53311 et seq.), Irrigation District Law (Wat. Code, § 22078.5), County Water District Law (Wat. Code, § 31653), Municipal Water District Law (Wat. Code, § 72090.5).)

Assessments and Standby Charges

Article XIII D, section 4, regulates the levy of assessments. Proposition 218 broadly defined "assessment" as any levy or charge upon real property by a local government agency for a special benefit conferred upon the real property, and including special assessments, benefit assessments, maintenance assessments, and special assessment taxes. (Cal. Const., art XIII D, § 2, subd. (b).) Standby charges are deemed to be assessments and subject to the same procedural and substantive requirements as other assessments. (Cal. Const., art XIII D, § 6, subd. (b), par. (4).)

Proposition 218 made the following key changes to assessment law: (1) it modified and firmed up the substantive standards for lawful assessments; (2) it required that assessments be supported by a detailed engineer's report; (3) it established new procedural notice, hearing and approval requirements, including a requirement for property owner approval by a new mailed ballot process, with ballots weighted according to a property's assessment burden and with approval based only on ballots returned to the agency; (4) it altered the burden of proof in legal actions to contest the validity of an assessment; and (5) it required the assessment of publicly owned property within the assessment district. (Cal. Const., art. XIII D, § 4.)

Assessments and standby charges are discussed in more detail in Chapter 3 of these guidelines.

Property-Related Fees and Charges

Article XIII D, section 6, regulates property-related fees and charges, which means any levy imposed on a parcel or upon a person as an incident of property ownership for a property-related service. (Cal. Const., art. XIII D, § 2, subd. (e).)

Proposition 218 made the following key changes to the law governing property-related fees and charges: (1) it established procedural requirements for 45-day notice to affected property owners, hearing, and an opportunity for defeat by major-

ity protest (however, unlike the assessment procedures, the fees and charges provision does not require a protest ballot to be provided to property owners; rather the agency determines a majority protest based on all affected property owners and parcels, and the protest is not weighted based on relative financial burden); (2) it required majority property-owner approval or two-thirds voter approval for new or increased fees and charges, except for water, sewer and refuse collection service charges, which are expressly exempt from voter approval; (3) it prohibited fees for general governmental services, including police, fire, ambulance and library services; and (4) it memorialized but did not significantly change the substantive standards for lawful fees and charges. (Cal. Const., art. XIII D, § 6.)

Property-related fees and charges are discussed in more detail in Chapter 2 of this publication.

Water Transfer Contracts

Proposition 218 does not apply to water transfer contracts and prices paid for a water supply pursuant to a negotiated contract between a water agency seller and buyer. A water supply purchase price paid voluntarily by a buyer under the terms of a water supply contract is not a levy of a tax, assessment or property-related fee or charge as defined by articles XIII C and XIII D. Other limitations on water supply contracts are beyond the scope of these guidelines.

Expansion of Initiative Power

Initiative is the power of the electorate to propose and enact amendments to the Constitution, state statutes and ordinances. (Cal. Const., art. II, § 8.) Prior to Proposition 218, some courts had ruled that an initiative and referendum could not be used to reduce or affect local agency taxes, assessments and fees. (See, e.g., *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623; *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400.) In 1995, though, the Supreme Court distinguished between a voter referendum and initiative, finding that the referendum power expressly precluded a referendum on statutes and ordinances that impose a tax, but that no such limitation was imposed on the initiative power. (*Rossi v. Brown* (1995) 9 Cal.4th 688; see also S*anta Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, upholding the constitutionality of Proposition 62.)

Proposition 218 memorialized the holding in *Rossi* and expanded the scope of the initiative power: "[T]he initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments . . ." (Cal. Const., art. XIII C, § 3.) *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 confirmed that local voters have the authority to adopt an initiative to reduce water service charges; however, the court indicated that initiative authority is not without limits. The court also ruled that an initiative cannot require voter pre-approval of future new or increased service charges.

The Elections Code sets forth detailed initiative petition, signature, election and related requirements. (Elec. Code, §§ 9300–9323.)

Initiatives are discussed in more detail in Chapter 5 of this publication.

Pre-Existing Taxes, Assessments and Fees

Articles XIII C and XIII D became effective November 6, 1996, the day after the election approving Proposition 218. (Cal. Const., art. II, § 10, subd. (a), and art. XIII D, § 5.) However, the act contains various deadlines for compliance, special rules for certain "window periods," and "grandfather" provisions.

Taxes

Effective November 6, 1996, Proposition 218 applied to imposing, extending or increasing any general or special tax. (Cal. Const., art. XIII C, § 2.) Local government agencies that imposed, extended or increased general taxes without voter approval after January 1, 1995, but before November 6, 1996, were required to submit them for voter approval by November 6, 1998. (Cal. Const., art. XIII C, § 2, subd. (d).) Taxes imposed before January 1, 1995, are valid.

Assessments

Effective July 1, 1997, all new, increased and existing assessments must comply with article XIII D. Significantly, except for the "grandfathered" assessments discussed below, all assessments adopted before Proposition 218 were required to come into compliance with the new law by July 1, 1997. (Cal. Const., art. XIII D, § 5.)

The following assessments existing on November 6, 1996, were exempt from the new assessment procedures and approval process: (1) assessments imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control; (2) assessments imposed pursuant to a petition signed by all property owners when initially imposed; (3) assessments that previously received majority voter approval; and (4) assessments whose proceeds are used exclusively to repay bonded indebtedness of which the failure to pay would violate the contract impairment clause of the U.S. Constitution. Subsequent increases in the assessments described in (1), (2) and (3) above are subject to Proposition 218. (Cal. Const., art. XIII D, § 5.)

Property-Related Fees and Charges

Effective July 1, 1997, all property-related fees and charges must comply with Proposition 218. (Cal. Const., art. XIII D, § 6, subd. (d).)

The applicability of Proposition 218 to property-related fees and charges in effect before July 1, 1997, is unclear. On one hand, article XIII D, section 6, subdivision (d) requires "all fees and charges" to comply beginning July 1, 1997. The use of the word "all" can be construed to mean both new and existing fees. In the Proposition 218 analysis prepared by the State Legislative Analyst, the Legislative Analyst construed section 6 to require that existing property-related fees and charges be repealed or in compliance by July 1, 1997.

On the other hand, the language in section 6, subdivision (d) ("all fees or charges") is significantly different from the analogous assessment provision in article XIII D, section 5, which refers to "all existing, new or increased assessments." This distinction can be cited in support of an argument that

the measure does not apply to pre-July 1, 1997, fees and charges.

Applicability to Pre-*Bighorn* Non-Compliant Service Charges

Until the 2006 case, *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal.4th 205, there was some uncertainty about the applicability of Proposition 218 to water service fees and charges. An earlier Court of Appeal case and Attorney General opinion had concluded that it did not apply to metered water rates. (*Howard Jarvis Taxpayers Association v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 82-83; 80 Ops.Cal.Atty.Gen. 183 (1997).) In reliance on this authority, some water districts after July 1, 1997, approved new and increased water service charges without complying with Proposition 218. *Bighorn* rejected the commodity charge distinction in these earlier authorities and definitively ruled that all charges for water delivery are charges for a property-related service, whether calculated on the basis of consumption or imposed at a fixed rate.

Consequently, water service charges approved or increased after July 1, 1997, that did not comply with Proposition 218 are invalid. Even if years have passed, the service charges may not be beyond legal challenge. Statutes of limitations (the period of time within which a challenger must file a lawsuit) issues are addressed later in Chapter 4, Judicial Review.

Chapter 2 – Fees and Charges

Introduction

The interpretation of "fees" and "charges" defined in article XIII D, section 2, subdivision (e) underwent a significant change as a result of the California Supreme Court's decision in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. That decision, in particular, rejected ACWA's position that water commodity rates were not fees and charges subject to articles XIII C and XIII D. *Bighorn* made it clear that user charges for property-related services are subject to the limitations of those articles. In *Bighorn*, the Supreme Court concluded that "once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service. . . . Because it is imposed for the property-related service of water delivery, the Agency's water rate . . . is subject to article XIII D." (*Id*. at p. 217.) In effect, the Supreme Court has created an "on/off" switch for user charges for ongoing property-related services – "on" when the owner or tenant is a customer and "off" when the owner or tenant is not a customer.

Definition of Fees and Charges

Article XIII D, section 2, subdivision (e) defines fees and charges as (i) any levy, other than an *ad valorem* tax, special tax, or assessment, (ii) imposed by an agency, (iii) upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service. That definition makes no distinction between manufacturing and industrial water service and agricultural or irrigation water; it therefore applies to all types of water service regardless of the end use of the water. The definition includes the following terms, which in turn have their own definitions, either in article XIII D, or established by court decisions:

- "User fees" were defined in *Bighorn* as "amounts charged to a person using a service where the amount of the charge is generally related to the value of the services provided." Water rates are user fees under this definition.
- "Property ownership" is deemed to include tenancies of real property where the tenants are directly liable to pay the assessment, fee or charge in question. (Cal. Const., art. XIII D, § 2, subd. (g).)
- "Property-related service" means a public service having a direct relationship to property ownership. (Cal Const., art. XIII D, § 2, subd. (h).)

Case Law Application of Fees and Charges

The definition of fees and charges set forth in article XIII D, section 2, subdivision (e) was applied in several important court decisions before *Bighorn*. Those decisions initially supported the position that water and sewer rates were not subject to articles XIII C and XIII D.

In *Howard Jarvis Taxpayers Association v. City of Los Angeles* (2000) 85 Cal.App.4th 79, the Court of Appeal held that commodity water usage rates were not subject to article XIII D because water rates are based primarily on the amount consumed and, therefore, are not incident to, or directly re-

lated to, property ownership. The court also based its decision on the fact that article XIII D, section 6, subdivision (c) exempts water charges from voter approval requirements. (Accord, 80 Ops.Cal. Atty.Gen. 183 (1997).)

In *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, the California Supreme Court held that a property inspection fee on residential landlords was not subject to article XIII D. The court held that in order for article XIII D to apply to a fee or charge, the fee or charge must be levied solely by virtue of property ownership; burdening landowners in their capacity as landowners. In this case, the fee was charged in connection with a regulatory program, which landowners could avoid by not renting the property.

Based on those two decisions and the Attorney General's opinion, it appeared settled that consumption-based water rates were not subject to the requirements of either article XIII C or article XIII D. However, in February 2004 the California Supreme Court issued its opinion in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409. That case primarily dealt with whether a water service connection fee was subject to article XIII D. The Supreme Court ruled that such connection fees were not subject to article XIII D. However, in a part of its opinion not necessary to deciding the issues then before it, the court declared that fees for ongoing water service through an existing connection were subject to article XIII D because such fees are imposed as an incident of property ownership as they require "nothing other than normal ownership and use of property." (*Id.* at p. 427.)

Bighorn relied upon *Richmond* to decide that charges for ongoing water service through existing connections are subject to article XIII D. In so doing, the Supreme Court also reiterated the *Richmond* test for determining whether a service is "property-related." (*Bighorn*, 39 Cal .4th at pp. 214-215.) In *Richmond*, the court cited with approval the Legislative Analyst's three characteristics for determining whether ongoing water service is a property related service. "The Legislative Analyst apparently concluded that water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges." (*Richmond*, 32 Cal.4th at p. 426.) In addition to ongoing water service, ongoing sewer service meets the test of provision through physical connection, and may meet the essential service test, particularly for any use of land other than growing crops or maintaining open space.

Bighorn, in part, involved the question of whether the initiative provision of article XIII C, section 3 applied to water rates, so as to allow local agency voters to reduce or repeal those rates by initiative. The Bighorn-Desert View Water Agency had been faced with such an initiative, which it challenged as impermissibly interfering with its Board of Directors' authority to set water rates. After having prevailed at the trial court and twice at the Court of Appeal with rulings that water rates were not subject to the requirements of articles XIII C and XIII D because those rates are imposed as a result

of the voluntary use of water rather than solely as an incident of property ownership, the case was appealed to the California Supreme Court. Relying on its analysis in *Richmond*, the Supreme Court ruled that water rates were subject to articles XIII C and XIII D, including the initiative provision of article XIII C, section 3. The Court unanimously decided that all charges for ongoing water delivery are charges for a property-related service, whether calculated on the basis of consumption or imposed at a fixed rate.

However, the court affirmed the Court of Appeal's judgment because part of the initiative at issue in *Bighorn* would have required any future water rate increase or new fee or charge to be approved by the voters. The Supreme Court found that provision violated the exemption of water-related fees and charges from voter approval set forth in article XIII D, section 6, subdivision (c). The Court ruled that provision invalidated the entire initiative and therefore ruled that the Court of Appeal had correctly decided the case in favor of the agency, although for a different reason.

Exemptions

Article XIII D includes some express exemptions for certain "fees and charges." In addition to those stated exemptions, the definition of "fees and charges" set forth in article XIII D, section 2, subdivision (e) has been construed to create several implied exemptions. Exempt fees include:

Development Fees

Development fees are those fees or charges imposed as a condition of property development (Cal. Const., art. XIII D, § 1, subd. (b)), but such fees are subject to the Mitigation Fee Act (Gov. Code, § 66000 et seq.). After *Richmond*, agencies must have development approval authority to impose development fees, generally limiting this exemption to fees imposed by cities and counties.

Water and sewer connection charges likewise are exempt from article XIII D, not as development fees, but because these charges are imposed as an incident of the voluntary act of connecting to a local agency's water or sewer system. (*Richmond*, 32 Cal.4th at pp. 425-427.)

Gas or Electric Service

Fees for the provision of electrical or gas service are deemed not to be imposed as an incident of property ownership and are exempt from article XIII D. (Cal. Const., art. XIII D, § 3, subd. (b).) However, fees or charges for these services, if provided by a local agency, may be subject to the initiative provision in article XIII C. (See *Bighorn*, 39 Cal.4th at pp. 215-216.)

Regulatory Fees

Fees or charges imposed by a public agency in connection with a regulatory program are not considered imposed as an incident of property ownership. An example is a fee imposed on a business in connection with its business operations, similar to the fee imposed on landlords in *Apartment Association*, discussed above. This exemption was used as the basis for determining that a fee imposed on the voluntary act of pumping water out of a regulated groundwater basin was not subject to article XIII D. (*Pajaro Valley Water Management Agency v. Amrhen* (2006) 141 Cal.App.4th 928, rehearing granted.)

Wholesale Water Rates

Although not a true exemption, it is widely accepted that article XIII D does not apply to wholesale water rates because they are not directly imposed on property owners; rather, they constitute the price charged by the wholesaler to the retail supplier for the water provided. These rates are subject to the possibility of reduction by initiative under article XIII C. Wholesale water rates are further discussed below.

Tests for Evaluating Fees and Charges

As discussed above, the only fees and charges subject to article XIII D's requirements are those which are "imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Cal. Const., art. XIII D, § 2, subd. (e).) Also, article XIII D, section 3 prohibits local agencies from imposing fees or charges on parcels of property or on persons as an incident of ownership unless the fee or charge is for a "property-related service." The following tests are applicable in determining whether a fee or charge is imposed on a parcel or on a person as an incident of property ownership, and whether a service is a property-related service.

"On a Parcel"

Parcel Maps

"Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership." (Cal. Const., art. XIII D, § 6, subd. (b), par. (5).) Thus, as an initial test, an agency should ask whether the fee is of a type generally based upon reference to a parcel map. For example, a sewer rate that is collected on the tax roll would be a fee imposed on a parcel because of this test.

Lien

The fee or charge may be considered imposed on a parcel and subject to article XIII D if a lien on the parcel is established from the creation of the fee or charge, as distinguished from being a lien on the parcel in the event of a default in payment.

"As an Incident of Property Ownership"

The court in *Apartment Association* explained the meaning of "as an incident of property ownership." Essentially, it means the fee or charge must be paid by a person simply as a result of property ownership. If the fee or charge results from some other reason, then it is not imposed as an incident of property ownership. Another aspect of this test is whether a property owner can avoid payment of the fee or charge by declining the service for which the fee or charge is paid. In *Richmond*, the Supreme Court, distinguishing between a water service connection charge and charges for ongoing water delivery said, "A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing more that normal ownership and use of property." (*Richmond*, 32 Cal.4th at p. 427.)

User Fee or Charge for a Property-related Service

In *Bighorn*, the Supreme Court rejected the argument that consumption-based water charges were not subject to article XIII D because they were not imposed as an incident of property ownership. Because article XIIID, section 2, subdivision (e) defines fee or charge as "including a user fee or charge for a property related service," the Supreme Court found that consumption-based rates were "user charges" under existing law and said, "once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (*Bighorn*, 39 Cal.4th at p. 217.) Thus, if the fee or charge is a user fee for a property related service, such as a fee for ongoing delivery of water service to an existing connection, the fee or charge is subject to article XIII D.

Example: An agency is contemplating levying a sewer charge that is based on a percentage of billed water rates. In the post-*Bighorn* era, the agency would need to consider the following: (a) is the sewer charge imposed on a parcel? No – because it is not collected on the tax rolls; (b) is the charge imposed on a person as an incident of property ownership? No – because the person only pays if the person is connected to the sewer system; (c) is the charge a user charge for a property-related service? Maybe, depending on whether the facts show that property owners have a choice of opting out upon showing the ability to provide a private disposal system (in which case the charge may not be property-related), or whether, in the particular community, there are normal and lawful uses of the property that do not require sewer service. If so, it is possible the sewer charge would be only indirectly related to property ownership and therefore not subject to article XIII D.

Table of Fees and Charges

Following is a table of fees and charges typically imposed by water suppliers, along with the likely conclusion whether the fee or charge is subject to article XIII D.

Type of Fee or Charge	Application of Art. XIII D?	Why or Why Not?
Commodity Rates	Yes	Under the *Bighorn* decision, charges for ongoing water delivery to an existing connection are subject to article XIII D.
Tiered Commodity Rates	Yes	Tiered rates are treated the same as an untiered commodity rate and thus are subject to article XIII D. There are substantive requirements that tiered rates must meet in order to be permissible.

Type of Fee or Charge	Application of Art. XIII D?	Why or Why Not?
Sewer Charges	Yes (probably)	Although no reported case has specifically held that charges for ongoing sewer service are subject to article XIII D, the same rationale applicable to water rates would apply to sewer charges to make them subject to article XIII D. An unreported appellate decision involving the City of Rohnert Park concluded that sewer service in that city should be treated the same as water service.
Stormwater Fees	Yes	In *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App.4th 1351, 1356, the court of appeal held that storm drainage fees were subject to article XIII D's requirements. The court also ruled that "storm drainage" services differ from water or sewer services and therefore held that the exception from voter approval applicable to water, sewer and refuse collection services set forth in article XIII D, section 6(c) did not apply and the storm drainage fee was subject to voter approval. (*Id*. at pp. 1358-1359.)

Wholesale Rates Charged to Other Wholesalers or Retailers

As discussed above, wholesale rates generally are not subject to the requirements of article XIII D because they are not imposed as an incident of property ownership. However, a question that was not resolved in *Bighorn* is whether such rates can be reduced or repealed by an initiative under article XIII C, section 3. The California Supreme Court discussed that issue in *Bighorn* but did not reach a conclusion as to whether the initiative provision of article XIII C, section 3 was limited only to "fees and charges" as defined under article XIII D, section 2, subdivision (e). Thus, a possibility remains that a court could conclude that wholesale rates are subject to reduction or repeal by initiative.

Several other issues pertaining to wholesale rates are related to Proposition 218. First, as discussed below, article XIII D, section 6, subdivision (b) (1) generally limits the amount of a fee or charge to the costs required to provide the service. Although that section does not apply to wholesale rates, those rates, where they are imposed unilaterally by agency ordinance, are limited by similar common law principles. (See, e.g., *Rincon Del Diablo Municipal Water District v. San Diego County Water Authority* (2004) 121 Cal.App.4th 813, 822 (holding the wholesale rate to be reasonable because it did not exceed the cost of providing the service).) However, it has not been determined whether such limitations apply where wholesale prices are determined by contract, as in those instances market forces may determine what is or is not reasonable. Lastly, the inclusion in a wholesale rate

of a transportation or wheeling component has been approved in prior appellate cases so long as it is reasonably related to the transportation costs incurred. (See, e.g., *id*. at pp. 823-24.)

Pass-Throughs

It is unclear whether a retail water provider can adopt a "pass-through" rate that is based on a formula that incorporates the wholesale rate into the calculation of the retail rate. In that situation, the issue is whether the approved rate can include subsequent increases in the retail rate that result solely from increases in the underlying wholesale rate and not be subject to article XIII D's requirements for subsequent notice, hearing and protest proceedings resulting from those later automatic increases. No case has addressed such a "pass-through" rate, but that rate structure appears to be permissible if the rate is initially adopted in compliance with the notice and hearing procedure of article XIII D, section 6, subdivision (a) in a range that covers increases in the wholesale rate to a certain percentage or stated amount.

It is doubtful, however, that an unlimited "pass-through" rate would be permissible, as article XIII D, section 6, subdivision (a) states that its required notice, hearing and majority protest provisions apply to <u>any</u> increase to a "fee" or "charge." Most retail agencies are simply including the wholesale rate as a cost of service when increasing their own rates. One thing that appears clear is that even if the wholesale agency went through a process that met the requirements of article XIII D, section 6, the retail agency would still have to go through the process again when setting its own rates.

Type of Fee or Charge	Application of Art. XIII D?	Why or Why Not?
Capacity Charges & Connection Fees	No	Capacity charges are considered the same as connection fees as a result of the California Supreme Court's decision in *Richmond*, where the court confirmed that connection fees are not subject to article XIII D.
Standby Charges	Yes – as assessment	Standby charges are specifically referenced in article XIII D, section 6, subdivision (b) (4) as being assessments and are not treated as property-related fees or charges. See Chapter 3 relating to assessments.
Wholesale Rates	No	Wholesale rates are not directly imposed upon specific property or an owner and thus would not meet the "incident of property ownership" requirement.
Acreage-Based Irrigation Charges	Yes	Article XIII D makes no distinction for agricultural water. Thus, domestic, municipal and industrial, and agricultural water service should all be analyzed using the same tests. (See, e.g., 82 Ops. Cal.Atty.Gen. 43 (1999), Prop. 218 applied to irrigation district per-acre charge for irrigation water.)

Type of Fee or Charge	Application of Art. XIII D?	Why or Why Not?
Groundwater/ Pumping Charges	Maybe	A prevailing view is that groundwater pumping charges are treated similarly to wholesale rates, as the charges are imposed as a result of groundwater pumping and not as an incident of property ownership. (*Pajaro Valley Water Management*, 141 Cal.App.4th 928, rehearing granted.)
Fire Flow Charges	Yes	Fire flow charges are imposed on a parcel based on ownership regardless of consumption and cannot be avoided by declining water service.
Conservation Penalties	No	Conservation penalties are imposed as regulatory charges, but the amount of such penalties must be reasonable and justified.
Returned Check Charges; Late Fees; Application Fee; Plan Check Fee; Meter Test Charge; Door Tag Fee; Reconnection Fee	No	The listed charges result from a customer's request or actions in addition to the normal ownership and use of property (e.g., either paying a check on insufficient funds or failing to pay a bill on time) and, moreover, result from actions typically only within the customer's control.

Procedural Requirements for Fees and Charges

If a fee or charge is subject to article XIII D, the public agency levying that fee or charge must comply with the procedural and substantive requirements of article XIII D, section 6. However, the *Bighorn* court left open the question whether a levy that is not a property-related fee or charge under the definition set forth in section 2, subdivision (e) of article XIII D is subject to repeal or reduction under article XIII C, section 3. The court did state, however, that the absence of a restrictive definition of "fee" or "charge" in article XIII C suggests that those terms include all levies that are ordinarily understood to be fees or charges, including property-related fees and charges subject to Article XIII D. (*Bighorn*, 39 Cal.4th at p. 216.) The initiative provision of Article XIIIC, section 3 is further discussed in Chapter 5, below.

Statutory Requirements

In *Bighorn*, the Supreme Court made clear that water rates and other monthly service charges for water, imposed only on current customers of a public agency, are fees and charges subject to the requirements of article XIII D, section 6 to the same extent as fees or charges imposed upon identified parcels or property owners whether or not they make use of the service. Prior to the *Bighorn* decision, many agencies had concluded that Proposition 218 did not apply to consumption-based water charges, in part because it would be difficult or impossible to comply exactly with the procedural requirements of article XIII D, section 6, especially with respect to calculating the amount of the fee or charge on a particular parcel for

purposes of providing the notice prior to imposing or increasing the water rates. While the Supreme Court held that water rates and monthly service charges are "property-related" charges subject to Proposition 218, it did not give guidance on how to apply the article XIII D, section 6 procedures to fees and charges that are only imposed to actual users of the service.

The procedures for adoption or increase of "property-related" fees and charges are contained in article XIII D, section 6, subdivisions (a) and (c) and apply to all fees and charges imposed or increased after the effective date of the initiative (November 6, 1996). These procedures, which relate to notice and hearing and, possibly, an election, are in addition to any other requirements imposed by the specific statute or other authority under which the fee or charge is levied. With respect to fees and charges imposed upon a parcel or a property owner as an incident of property ownership, whether or not the service is actually used, it is reasonably clear how the procedural requirements are to be followed. With respect to consumption-based water rates and monthly service charges, many issues have been raised concerning how to apply the article XIII D, section 6 procedures. The discussion in this section identifies these issues and provides suggestions for compliance.

The constitutional procedures are found in article XIII D, section 6, subdivision (a).

"The parcels upon which the fee or charge is proposed for imposition shall be identified."

In the case of a fee or charge that is imposed on every parcel within a defined area, whether or not the service is currently used on the parcel, the identification of the parcels subject to the fee or charge is simple. With respect to water rates and monthly water service charges and user charges imposed only on persons who request and use the service for which the charge is imposed, the question of which parcels must be identified in the case of a rate increase is not entirely clear. If the schedule of rates and charges applies uniformly to any property that is physically connected to the system, and is paid only if an owner or tenant is actually using the service, it is not clear whether those parcels to which the service is not actually being provided at the time the rates are set are "parcels upon which the fee or charge is proposed for imposition" as contemplated by section 6(a). Further, undeveloped parcels within the territory to which the charge is applicable may become subject to fees and charges for water service if and when they are connected to the water system, or they may never pay the fees or charges if they are never connected. The definition provided by the Proposition 218 Omnibus Implementation Act is not helpful, merely repeating the language of Proposition 218. (Gov. Code, § 53750 (g).)

There are two views on the issue of which parcels must be identified, either all of the parcels within the area to which the rates and charges will be applied to any user of the service, or only to those parcels where there is an owner or tenant currently using the service. In *Bighorn*, the California Supreme Court stated that "once a property owner or resident has paid the connection fee and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on consumption or is imposed as a fixed monthly fee." (*Bighorn*, 39 Cal.4th at

p. 217.) For purposes of identification of parcels on which a rate increase is proposed for imposition, some have interpreted this language to mean that only parcels actually receiving ongoing service should be identified because the fee or charge is only a property-related charge to owners or tenants who are current customers. With respect to future customers, the rate is simply not considered "imposed as an incident of property ownership." Future customers voluntarily accept the rates and charges as they exist when the customer requests service. Prior to the request for service, increases in those rates and charges are not "imposed" on either parcels or on persons within the meaning of Proposition 218. This is similar to the analysis used to evaluate capacity and connection charges.

The other viewpoint is that the agency proposes to impose the same schedule of rates and charges on all parcels within the area to which the schedule of rates and charges applies whether they are currently connected or not. That is, the same schedule of rates and charges applies once those unconnected parcels actually become connected and the owners of those parcels should be treated the same as to current users. Therefore, the new or increased fees or charges are "proposed for imposition" upon all parcels to which they will apply if the service is used, undeveloped parcels as well as for current users. Under this view, all parcels to which the rates or service charges will apply if they use the service, should be identified as being subject to the proposed fee or charge. To fail to include such parcels, and failing to give the owners notice of the proposed fee or increase and the opportunity to protest or vote, could be argued to result in those parcels not being subject to the rate schedule if they later connect. Imposing the rates and charges on the users of service to those parcels when they do connect to the system might then require the agency to go through the procedure for adoption of a "property-related" fee or charge for those parcels not identified in the initial process. Further clarification of this issue by legislation or judicial decision would be helpful.

The identification of parcels subject to the fee or charge will also have bearing on whose protests are counted in determining whether a majority protest exists, and whether protests are received from a majority of the owners of parcels subject to the charge. By including parcels not currently using the service, the number of parcels against which the protest is measured may be increased. Likewise, the identification of parcels will determine who is entitled to vote on fees and charges that are subject to confirmation by a vote of the owners of property subject to the fee or charge.

"The amount of the fee or charge to be imposed upon each parcel shall be calculated."

Where the amount of the fee or charge is based upon a characteristic of the property, such as the size of the parcel, the size of the meter or the use to which the property is put, then the amount of the fee applicable to each parcel should be calculated, either individually or by reference to a formula or schedule. For instance if the fee is $10 per residential parcel and $5 per 1,000 sq. ft. for commercial and industrial parcels, then the agency should calculate what the amount of the fee is for each. Where the charge relates to the future use of a service, as with consumption-based water rates, it would be impossible to calculate the amount of the charge that will ultimately be incurred for each parcel. In that case it would seem to be adequate

to set forth a schedule of charges from which the property owner can calculate the charge applicable to his own use. Because many property owners are not aware of the amount of water they use, it would be helpful to calculate the amount paid by a typical residential user under the current rates and the amount they would pay under the proposed increase.

"The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge."

"Record owner" is defined by the Proposition 218 Omnibus Implementation Act as "the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, . . . the representative of that public entity at the address of that entity known to the agency." (Gov. Code, § 53750, subd. (j).) Under this definition it would seem to be adequate to send notice to public entities at the billing address for the account. With respect to private property however, Proposition 218 provides that "'property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee or charge in question." (Cal. Const., art. XIII D, § 2, subd. (g).) Therefore, mailed notice only to the record owners of the identified parcels as shown on the assessment roll may not be sufficient if the tenant is the customer responsible for paying the water rates and service charges. Likewise notice to only the customers on an agency's billing records may not be adequate. The constitutional definition specifies that property ownership *includes* tenants, but does not exclude the owner of the parcel. The use of the words "record owner" in the notice provision of article XIII D, section 6, subdivision (a) (1) and (2), as opposed to property owner, would indicate that the owner as shown in the public record is intended. Neither the constitutional language nor the Proposition 218 Omnibus Implementation Act indicates that an agency may dispense with notice to the record owner of the property if the charge is paid by a customer rather than by the property owner. Written notice should therefore be given to both the record owners and customers within the area subject to the fee or charge, until such time as future clarifying legislation or case law indicates otherwise.

The requirement that the notice state the amount of the fee or charge proposed to be imposed on *each parcel* would seem to require individualized notice to each property owner or customer stating the exact amount that customer will be charged under the proposed fee or increase. Where the amount depends upon future use this would be impossible. A formula or schedule of charges by which the property owner or customer can easily calculate his own potential charge would seem to be all that could reasonably be required in that case.

The notice must state the basis upon which the amount of the proposed fee or charge is to be imposed on each parcel. The basis would include some explanation of the costs which the proposed

fee or charge will cover and how the costs are allocated among property owners/customers under the proposed rate and fee schedule. For instance, the reason for a rate increase could include an increase in the cost of water from the wholesaler, increased treatment costs due to stricter quality standards, increased personnel costs, or general increases in the cost of operating the water system. The explanation of the reasons for the increase in the notice will necessarily be less detailed, but the agency nevertheless must have detailed data to support the amount of the increase, including actual cost data and water sales projections, prior to the hearing on the increase. Data that was not before the governing body at the time the fee or charge was adopted or increased cannot be used later to defend the amount of the increase against a challenge that the fee or charge exceeds the reasonable cost of providing the service. (*Beaumont Investors v. Beaumont-Cherry Valley Water District* (1985) 165 Cal. App.3d 227.) The basis upon which the amount of the proposed fee or charge was calculated would include such things as how the costs were allocated among various users and sources of revenue.

The date, time and location of a public hearing on the proposed charge must be included. The date must be at least 45 days after the mailing of the notice. (Cal. Const., art. XIII D, § 6, subd. (a), par. (2).)

Should the notice include a disclosure that written protests by a majority of the owners of the identified parcels will prevent imposition or increase of the fee or charge? Article XIII D does not specifically require a notice of a proposed imposition or increase of a property-related fee or charge to contain a statement that a majority protest will prevent the imposition or increase of the fee or charge. By contrast the constitutional procedure applicable to assessments does require a "disclosure statement" that the existence of a majority protest will result in the assessment not being imposed. (Cal. Const., art. XIII D, § 4, subd. (c).) For this reason, the omission of the requirement in the fee and charge notice appears to be intentional, and no explanation of the majority protest is required. This does not mean that an agency may not include an explanation of the majority protest provision if it desires. If one is included, remember that the protests required to defeat the fee or charge must be in writing and represent a majority of owners of all of the identified parcels, not just those who weigh in at the public hearing. This is different than the mailed ballot procedure for assessments, where an affirmative vote by a majority of those responding is required to impose the assessment.

The Public Hearing and Protest Requirements

Prior to adopting or increasing a property-related fee or charge subject to Proposition 218 (Cal. Const., art. XIII D, § 6), the agency must conduct a public hearing to receive protests. The hearing cannot be held earlier than 45 days after the mailing of the notice of the proposed fee or charge to record owners. At the hearing, the agency must consider all protests against the proposed fee or charge; however, when it comes to evaluating whether the number of protests defeats the imposition or increase of the fee or charge, only *written* protests are counted. "If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." (Cal. Const., art. XIII D, § 6, subd. (a), par. (2).)

If a fee or charge is imposed on all of the parcels whether or not they currently receive the service, then the determination of whether the protests received represent a majority of the parcels should be simple. If, as in the case of a water rate and other service charges, the charge is imposed only on current users, but would apply to any person within the agency who subsequently applies for water service, there may be questions about whether the undeveloped parcels would be included in the number of parcels subject to the charge for purposes of determining whether a majority protest is submitted. This would not be an issue for larger agencies where a majority protest is very unlikely. The issue may arise however if a developer within a smaller agency has subdivided his lands into numerous parcels but has not connected to the water system at the time of the hearing.

What Constitutes a Majority?

The Constitution states that the proposed fee or charge is defeated if written protests are received by "a majority of the owners of the identified parcels." If one owner has fifty parcels and another has one, does the first owner's protest count as fifty protests? If one parcel has several owners, does each owner's protest count as a separate protest? Where a parcel has one owner and 100 tenants, each of which is directly liable for payment of the rates and charges for water to his or her apartment, how is the value of the protest counted? Does a protest by the owner of a parcel within the area subject to the charge count if he does not currently pay the charge because he is not connected to the system? These questions are not answered by the language of the Constitution or the Proposition 218 Omnibus Implementation Act (Gov. Code, § 53750). Unlike the procedures for assessments, which specify how votes are to be weighted in determining whether the assessment is approved, the wording of the protest provisions applicable to fees and charges is ambiguous. If there is a question as to whether a majority protest has been submitted, the agency should probably evaluate the protest as a percentage of the number of identified parcels, the number of owners of the identified parcels, and of the number of customer accounts. If any of these represents a majority, there is a substantial likelihood that a court would consider the fee or charge to have been defeated.

The Voter Approval Requirement

Even if an agency does not receive written protests representing a majority of the owners of the identified parcels at the public hearing, it is required to obtain voter approval as a condition of implementing or increasing any "property-related fee or charge," except for fees or charges for sewer, water and refuse collection. (Cal. Const., art. XIII D, § 6, subd. (c).) The proposed charge or increase must be approved by a majority of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds majority of the electorate residing in the affected area. All of the issues concerning the valuation of protests at the public hearing are equally applicable to the vote where it is held among property owners of the property subject to the fee or charge. Since property ownership includes tenancies where the tenant is directly liable to pay the assessment, is the vote held only among customers of the agency? Do both tenants and record owners get to vote for the same parcel? Are the votes weighted according to how many parcels an owner owns, or is each owner entitled to one vote? It would seem to be easier to hold the vote among registered voters to

avoid these issues, but then the agency is required to obtain a two-thirds majority for approval.

Election Procedures

The election must be conducted not less than 45 days following the public hearing. The agency may, at its option, conduct a mailed ballot procedure similar to the procedures for increases in assessments. (Cal. Const., art. XIII, § 6, subd. (c).)

Fees and Charges Exempt from the Election Requirement

Fees and charges for sewer, water and refuse collection are not required to have voter approval. This exemption is strictly construed, and an agency may not avoid the vote requirement by calling its storm drains "storm sewers." (*Howard Jarvis Taxpayers Association v. Salinas* (2002) 98 Cal.App.4th 1351.)

Substantive Requirements for Fees and Charges

Article XIII D, section 6, subdivision (b) sets forth specific substantive requirements for water and sewer fees and charges. A fee or charge must meet all of the following requirements:

- Revenues derived from the fee or charge must not exceed the funds required to provide the property-related service.
- Revenue from the fee or charge must not be used for any purpose other than that for which the fee or charge is imposed.
- No fee or charge may be imposed for general governmental services, such as police, fire, ambulance, or libraries, where the service is available to the public in substantially the same manner as it is to property owners.
- The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership must not exceed the proportional cost of the service attributable to the parcel.
- The fee or charge may not be imposed for service, unless the service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Stand-by charges must be classified as assessments and must not be imposed without compliance with the proportionality requirements for assessments.

Nexus and Allocation Findings

The five substantive requirements imposed upon fees and charges are similar to existing requirements contained the Constitution, statutes and case law. (See, e.g., Gov. Code, § 66013 et seq., 66016 et seq.) Article XIII D, section 6, subdivision (b) would appear, however, to require a more rigorous documentation of expenses being paid for with the fee or charge, a more rigorously documented nexus between the fee or charge and the parcel-specific benefit, and a more rigorously documented allocation of costs between general services (such as the cost imposed on water and sewer utilities for the impact on city streets, and the general overhead costs (e.g., city manager) charged to water and sewer funds).

The five substantive requirements are composed of three requirements that relate to the specific expenses paid for with the proceeds of the charge, and two requirements which deal with the alloca-

tion of the charge to assure that the charge to each parcel is allocated in accordance with the cost of service to the parcel.

Content-Related Requirements

The substantive requirements, which impose restrictions upon the expenses that may be included in the fee or charge, are as follows:

- Revenues cannot exceed the funds required to provide the property-related service;
- Revenues from the fee shall not be used for any purpose other than that for which it was imposed; and
- No fee may be imposed for general governmental services available to the public at large.

Revenues Cannot Exceed the Funds Required to Provide the Property-Related Service

Article XIII D, section 6, subdivision (b) (1) prohibits fee revenue from exceeding the revenue requirement for the property-related service. Although most cost of service issues are not controversial or likely to be challenged, this requirement imposes a burden on the agency to develop cost of service studies that document the costs for which the fees and charges are being imposed, and justify those costs, utilizing appropriate industry principles and guidelines, including best management practices. Since article XIII D, section 6, subdivision (b) (5) places the "burden" "on the agency to demonstrate compliance with this article," there is no presumption of fairness or reasonableness upon which agencies have heretofore relied. Thus, cost of service studies should be performed, upon which the agency should make findings that its expenses are "required" to provide the service and are in accordance with industry standards.

A recent amendment to the statute commonly called the "*San Marcos* legislation" may provide guidance. Government Code section 54999.7, adopted in 2006 in response to the Court of Appeal decision in *Regents v. East Bay Municipal Utility Dist.* (2005) 130 Cal.App.4th 1361, addresses cost of service studies in the context of charges imposed on public schools. It requires the following:

> "A public agency providing public utility service shall complete a cost of service study at least once every ten years that addresses the cost of providing public utility service to public schools. The statute shall describe the methodology for the determination of cost responsibility, which may be identified by reference to appropriate industry rate making principles, including guidance associated with designing and developing water rates and charges issued by the American Waterworks Association or guidance associated with other comparable industry principles recognized by public agencies providing public utility service."

This requirement to document actual costs of performing services is articulated in the cases of *Howard Jarvis Taxpayers Association, et al v. City of Roseville* (2002) 97 Cal.App.4th 637, and Howard *Jarvis Taxpayers Association, et al v. City of Fresno* (2005) 127 Cal.App.4th 914, both of which interpreted section 6(b). In each case, the city had adopted an in-lieu fee imposed upon water and sewer utilities to compensate the city for expenses related to its utilities. In *Roseville*, the city transferred from the utilities' enterprise accounts to its general fund, a fee of 4% of the utilities' annual

budgets, and in *Fresno*, each municipal utility paid the city an amount equal to 1% of the assessed value of the fixed assets of the utility.

In each case, the courts concluded that under article XIII D, section 6, subdivision (b), the city could collect a fee to recover costs attributable to its water and sewer utilities, based upon an analysis of actual costs, but in each case, the court found the fee to violate section 6, subdivision (b) because neither city had analyzed or documented the actual cost required for the city to provide the services for which it charged the in-lieu fee. The court in *Roseville* articulated the requirement, as follows:

> "The theme of these sections is that fee or charge revenues may not exceed what it costs to provide fee or charge services. Of course what it costs to provide such services includes all the required costs of providing service, short term and long term, including operation, maintenance, financial and capital expenditures. The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for that service. In short, the section 6(b) fee or charge must reasonably represent the cost of providing service. In line with this theme, Roseville may charge its water, sewer, and refuse utilities for the street, alley and right-of-way costs attributable to the utilities; and Roseville may transfer those 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." (*Roseville*, 97 Cal.App.4th at pp. 647-648)

In *Fresno*, the court articulated the requirement as follows:

> "Before Proposition 218, a city did not need to be too precise in accounting for all of the costs of a utility enterprise, since the city was permitted (unless otherwise restricted by its charter) to make a profit on its utility operations in any event and rates were permitted to reflect the 'value' of the service not just the cost of providing the service. [Citations] Proposition 218 changed all that with its constitutional requirement that revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [Citations]
>
> "Together, subdivision (b) (1) and (3) of article XIII D, section 6, make it necessary – if *Fresno* wishes to recover all of its utilities' costs from user fees – that it reasonably determine [citations] the unbudgeted costs of utilities' enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel. Undoubtedly this is a more complex process than the assessment of the in lieu fee and the blending of that fee into the rate structure. Nevertheless, such a process is now required by the California Constitution." (*Fresno*, 127 Cal.App.4th at pp. 922-923)

Prior to the adoption of XIII D, the courts had reviewed constitutional and statutory provisions, similar to those contained in this requirement, in connection with litigation of Proposition 13 (Cal. Const., art. XIII A, § 4). Proposition 13 required that any "special taxes" must obtain a two-thirds vote of the qualified electors. Subsequently, the Legislature enacted Government Code section 50076, which provides that, "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 levied for general revenue purposes."

Many court decisions interpreted this language to determine whether a particular legislative enactment constituted a "special tax." (S*an Diego Gas & Electric Company v. San Diego County Air Pollution Control District* (1988) 203 Cal.App.3rd 1132; *Pennel v. City of San Jose* (1986) 42 Cal.App.3rd 365; *Brydon v. East Bay Municipal Utility District* (1994) 24 Cal.App.4th 178.) The courts concluded that if the expenses charged in the fee or charge were expenses required for the public entity to fulfill the purpose for which the fee or charge was imposed, it was not a special tax under Proposition 13.

Cost-of-service challenges are likely to focus on the creation and maintenance of operating and capital reserves, and raising revenues to finance capital facilities in future years. Best management practices, as described in a variety of industry publications, clearly advocate the maintenance of appropriately sized operating and capital reserves. In addition, reserves often are imposed as a requirement of issuing debt. An agency should base the level of reserves upon industry principles and guidelines, and should document its decision on levels of reserves. Capital reserves should be tied to a capital improvement plan that has been adopted by the agency's Board of Directors.

The Proposition 13 cases, like the cases of *Roseville* and *Fresno*, would indicate that expenses are allowed when it can be established that "best management practices" or statutory mandates provide a basis for the expense. (*Brydon*, 24 Cal. App.4th at pp. 136-137) Clearly, the maintenance of both operating reserves and capital reserves, and raising money in a current year for future capital improvements, are the subject of best management practices, as well as covenants contained in financing documents. Thus, utilizing the analysis of the Proposition 13 cases, it would be fair to conclude that courts would accept that such expenses are required to provide the property-related service, so long as adequately documented.

Utilizing the language of *Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal. App.4th 637 and *Howard Jarvis Taxpayers Association v. Fresno* (2005) 127 Cal.App.4th 914, it is incumbent upon water and sewer service providers to document with some rigor actual costs to be paid out of revenue generated by the fees and charges, and to document a conclusion that the costs are supported by industry standards and best management practices.

Revenues Derived From the Fee or Charge Shall Not Be Used For Any Purpose Other Than That For Which the Fee or Charge Is Imposed

This requirement established in article XIII D, section 6, subdivision (b) (2) would appear to be subsumed in the first requirement. The only additional prohibition contained here is that once a water or sewer provider receives the revenues derived from the fee or charge, the revenues must be spent for the purposes for which the fee or charge was imposed. Thus, the revenues must be spent for water and sewer utility purposes, and not for "general governmental purposes" or other purposes. For example, water rate revenues cannot be used to finance sewer services.

No Fee or Charge May Be Imposed For General Governmental Services

Under article XIII D, section 6, subdivision (b)(5), general governmental services such as police, fire, ambulance or library services, or other services available to the public at large in substantially the same manner as to property owners, must generally be financed by taxes, or in limited circumstances, assessments.

Many general governmental jurisdictions that operate water and sewer utilities allocate the cost of general services (general management, accounting, engineering, etc.) to the water and sewer utilities. The analysis contained in *Roseville* and *Fresno* clearly mandate that any charges imposed upon water and sewer utilities to compensate for those general services must be based upon actual costs that the city bears because of the utility service for which the fee or charge is imposed. Any cost that is a general administrative charge such as a charge for city streets must be accounted for and documented. Such documentation would best be in the form of a comprehensive cost allocation study. The study should document the costs (general administration, streets, etc.) that are imposed on the water and sewer utilities, and demonstrate that said costs are actually provided for the exclusive benefit of the water and sewer utilities. It is advisable to have an outside third-party consultant perform the cost allocation studies.

Allocation-Related Requirements

The two remaining substantive requirements relate to the allocation of the cost of service among the parcels of property receiving the service. These two requirements provide that the cost of service may not exceed the proportional cost attributable to each parcel, and that the charge may only be imposed if the service is "actually used by or immediately available to . . . the owner of the property."

Proportional Cost of Service

"The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b), par. (3).) If the courts strictly construe this provision, it could change the currently applied standards. The leading rate allocation case is *Brydon v. East Bay Municipal Utility District* (1994) 24 Cal.App.4th 178, a pre-Proposition 218 decision in which the Court of Appeal approved East Bay Municipal Utility District's inclining block rate structure, after a challenge by residents who contended that it was a "special tax" under Proposition 13 and was arbitrary and discriminatory. The residents of a particular area within the district, east of the Berkeley/Oakland Hills, contended that the inclining block rate structure, which imposed a higher rate for higher water use, was discriminatory against them because they lived in a hotter, drier climate and thus had to use more water, merely because of the location of their residences. The Court concluded, after a thorough review, as follows:

- The burden to prove discrimination was on the petitioners;
- The legal test was whether the District's actions were arbitrary, capricious, or entirely lacking in evidentiary support;
- There is a presumption that the Board did not act arbitrarily or unreasonably; and

- Water conservation and the allocation of water resources must be considered by water agencies in creating water rate structures.

Important Court conclusions are summarized, as follows:

- "No rate structure is conceivable which would apply with complete fairness to each individual consumer." (*Brydon*, 24 Cal. App.4th at p. 194.)
- "Here, the record demonstrates a rate structure calculated to generate sufficient revenue to meet the District's annual maintenance and operation expenses and the rate funded capital costs and debt service, in order to achieve self sufficiency. That the structure had the further objective of establishing a disincentive for over consumption does not attenuate the essential reasonableness of its design." (*Brydon*, at p. 201.)
- "(We) also accord substantial deference to the public agency charged with the responsibility for not only fairly allocating this 'vital finite resource' but also for financing the system by which the resource is supplied. As noted in Hansen, "reasonableness . . . is the beginning and end of the judicial inquiry." (*Brydon*, at p. 204 (citation omitted).)

This case is undoubtedly useful to interpret section 6, subdivision (b) (2), especially its analysis of the validity of a rate structure designed to encourage water conservation, or to motivate the use or allocation of water to promote "reasonable use" concepts. Although the case is less useful to interpret section 6, subdivision (b) because of the provision imposing the "burden" on the agency to demonstrate compliance with the article, thus eliminating the "presumption" of fairness and reasonableness, it should remain useful to justify inclining block rates. The court's primary focus was on the water agency's obligations to promote reasonable use, under article X, section 2 of the California Constitution, and to promote conservation under Water Code section 375. The court supported its conclusion that the district's inclining block rate structure was valid upon the district's studies and findings that the inclining block rate structure would promote conservation. The court, relying upon the district's studies, concluded as follows:

> "Appellants' supposition that the cost of delivering 'water above 2,000 GPD' cannot exceed that of delivering a less amount is entirely without foundation. Urban water pricing is a vastly complex mechanism depending greatly upon the source and use of the water. For example, the cost of diverting water from a river and using it on adjacent lands can be less than $5 AF. The cost of seawater desalination can exceed $2,000 AF. . . . Urban supply systems involve costly facilities for system regulation, treatment plants, distribution systems and systems operations." (*Brydon*, 24 Cal.App.4th at pp. 201-202.)
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> "For these reasons, we suggest that virtually no law suit affecting the public regulation of water resources may be viewed without reference to article X, § 2. In viewing the totality of circumstances pertaining to the instant case, we are impressed by the findings of the District in support of the resolution which adopted the inclining block rate structure. Rather than waiting passively for potentially apocalyptic drought conditions to occur, the District con-

> sidered the climactic and hydrological conditions, actively pursued other sources of supply, and intelligently developed a Drought Management Program designed to conserve water supply with the least disruption to domestic, industrial and agricultural customers. . . .
>
> "In our view, the inclining block rate structure is one small and modest component of a well conceived and eminently reasonable Drought Management Program." (*Brydon*, at p. 204.)

The case also supports the concept that water rate setting is complex. "In pursuing a constitutionally and statutorily mandated conservation program, cost allocations for services provided are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity." (*Brydon*, at p. 193.)

Article XIII D says, "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." (Cal. Const., art. XIII D, § 6, subd. (b), par. (5).) Therefore, the analysis contained in *Brydon*, with respect to the presumption in favor of the district's rate structure, is inapplicable under an article XIII D challenge. The general principles set forth in *Brydon*, however, will undoubtedly pertain to a judicial analysis of section 6, subdivision (b) (3). In all likelihood, courts will continue to utilize a "reasonable relationship test," as set forth in *Brydon*.

Although *California Farm Bureau Federation, et al v. California State Water Resources Control Board* (2007) 146 Cal.App.4th 1126 analyzes the validity of regulatory fees as a subset of user fees, it contains a detailed discussion of the fair or reasonable relationship test of proportionality in fee setting. Like the courts in *Roseville* and *Fresno*, the court invalidated fees imposed by the State Water Resources Control Board because the Board did not provide sufficient documentation to support its allocation of fees. The court stated that the Board "offered no breakdown of costs or other evidence to demonstrate that the services and benefits provided to the non-paying water right holders were de minimus." (*Cal. Farm Bureau*, 146 Cal.App.4th at p. 1151.) It is expected that alternative rate structures that encourage water conservation, or provide for a different level of service such as interruptible water service, will be judicially approved so long as the fair and reasonable relationship test is met. Other alternative rate structures that favor one group of customers over another, such as "lifeline rates," would appear to be unsupportable under Proposition 218, unless the Legislature were to encourage such rates in a separate statutory scheme. The *California Farm* case is also helpful because it cites *Brydon* as a regulatory fee case, offering additional support for rates that support conservation of water and other valuable resources.

The requirement that the agency has the burden to demonstrate compliance with article XIII D requires that the agency not only fairly allocate its costs among all of the parcels served in a fair and reasonable manner, but also document the methodology used and the justification for the allocation of cost among the various types of properties and users located within the district. Such a rate study should, like the cost of service study described above, identify industry standards and best practices as a basis for the rate structure.

Standby Charges are not Fees but Assessments

Fees and charges subject to article XIII D may be imposed only when the service is actually used by or available to the owner of the property being served. (Cal. Const., art. XIII D, § 6, subd. (b), par. (4).) This provision distinguishes rates for service from standby charges. It also says, "Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with section 4." Water and sewer rates and charges, therefore, must be applicable only to parcels of property and customers who are hooked up to the water or sewer system.

Chapter 3 – Assessments

Introduction

Proposition 218 adopted the traditional definition of an assessment, whether called a "special assessment," "benefit assessment," " maintenance assessment," or "special assessment tax." (Cal. Const., art. XIII D, § 2, subd. (b).) It did not provide any new authority to impose assessments. (Cal. Const., art. XIII D, § 1, subd. (a).) It did impose new procedures and requirements applicable to all assessments. (Cal. Const., art. XIII D, § 4.) This chapter distinguishes assessments from taxes, fees and charges, and discusses the special procedural and substantive requirements for imposition of assessments.

Nature of Assessments

Article XIII D defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." (Cal. Const., art. XIII D, § 2, subd. (b).) Historically, an assessment is defined as a compulsory charge upon real property within a predetermined district, made under express statutory authority, to defray the cost of public improvements apportioned to each parcel according to the special benefit it receives. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141-142; *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, 30.) The essential feature of a special assessment is that the public improvement or service financed by the assessment confers a special benefit on the property assessed. (*Southern Cal. Rapid Transit Dist. v. Bolen* (1992) 1 Cal.4th 654, 661.) Article XIII D adopts this historical definition. (*Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 419; *Ventura Group Ventures, Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1106.) In consequence, an assessment levied on businesses pursuant to the Parking and Business Improvement Area Law of 1989 was determined to not be an assessment subject to article XIII D because it was not imposed on real property. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230.) Similarly, a capacity charge imposed at the time of a new connection to a water system was determined to not be an assessment because it was not possible to identify each parcel within a defined district upon which the charge was to be levied and because it was not levied on property. (*Richmond*, 32 Cal.4th at pp. 419-420.)

The Proposition 218 Omnibus Implementation Act, adopted in 1997 after the passage of Proposition 218 in November 1996, defines assessment as "any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the capital cost of the public improvement, the maintenance and operation expense of the public improvement, or the cost of the service being provided." (Gov. Code, § 53750, subd. (b).) Assessments must be levied pursuant to specific statutory authorization. Commonly used assessment authorizations are found in the Streets and Highways Code (e.g., Improvement Act of 1911, Sts. & Hy. Code, § 5000 et seq.; Improvement Act of 1913, Sts. & Hy. Code, § 10000 et seq.; Landscape and Lighting Act, Sts. & Hy. Code, § 22500 et seq.), the Government Code (e.g., fire suppression assessments, Gov. Code, § 50078 et seq.; Uniform Standby Charge Procedures Act, Gov. Code, § 54984 et

seq.), and the principal acts of special districts such as found in the Water Code or special district acts.

Distinguished from Fees and Charges

Fees and charges subject to article XIII D mean "any levy other than an *ad valorem* tax, a special tax, or an assessment, imposed by an agency on upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e).) Distinguishing among taxes, fees and assessments can be difficult and often depends on the context in which the distinction is made. (See, e.g., *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874-875.) The key feature that distinguishes an assessment from a fee or charge is the existence of special benefit. Without special benefit, there can be no assessment. (*Ventura Group Ventures, Inc.* 24 Cal.4th at p. 1106; see *Richmond*, 32 Cal.4th at p. 420.)

Distinguished from Taxes

Although often held to be an exercise of the sovereign's power to tax, "a special assessment is not, in the constitutional sense, a tax at all." (*Spring Street Co*., 170 Cal. at p. 29.) The existence of special benefit is what also distinguishes assessments from general and special taxes. (*City Council of the City of San Jose v. South* (1983) 146 Cal.App.3d 320, 332; *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 552-553; *County of Fresno v. Malmstrom* (1979) 94 Cal. App.3d 974, 984.) In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874.) A tax is generally uniform in its operation, since it is imposed according to a set formula. (*San Francisco-Oakland T. Rys. v. Johnson* (1930) 210 Cal. 138; see *Henkendorn v. City of San Marino* (1986) 42 Cal.3d 481, which validated a special tax for police and fire service levied at a rate that varied according to parcel size). While a tax may be imposed without regard to benefit or burden, the nature of an assessment requires that it be levied in proportion to the specific benefit to real property derived from the proceeds of the assessment. (See *County of Fresno*, 94 Cal.App.3d at p. 984.) The definitions of general and special taxes found in article XIII C, section 1 supersede prior judicial definitions of the terms. (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1309.)

Standby Charges as Assessments

Article XIII D, section 6, subdivision (b) (4) says, "Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4." Thus a new or increased standby charge may not be imposed without preparing an engineer's report and following the notice, hearing and assessment ballot process that applies to any other assessment. (82 Ops.Cal.Atty.Gen. 35 (1999).) Article XIII D does not define "standby charges," nor do any of the statutes authorizing agencies to impose standby charges. For water districts with the authority to levy standby charges, the Uniform Standby Charge Procedures Act provides alternative procedures for the levy of a charge on land to which water, sewer, or water and sewer services are made available "whether the water or sewer services are actually used or not." (Gov.

Code, § 54984.4.) Other statutes authorizing standby charges contain similar language. (E.g., Wat. Code, §§ 31031, 71630.) Under the Water Code, standby charges and availability charges have the same meaning. Article XIII D's treatment of standby charges as assessments is consistent with law in existence at the time Proposition 218 was adopted. (See Gov. Code, § 54984.1; S*an Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154; Kennedy v. City of Ukiah (1977) 69 Cal.App.3d 545, 552-553.) I*n Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006, the court of appeal found that a pre-existing standby charge that funded water purchases was a valid pre-existing assessment under article XIII D because the water purchased was a "replacement" necessary for the operation and maintenance of the district's improvements.

Note: *SB 444 as introduced in February 2007 would repeal the obsolete procedures in the Uniform Standby Charge Procedures Act and similar standby charge procedure language throughout the codes in conformity with the requirements of article XIII D, section 4. SB 444 expresses the Legislature's intent that the bill's provisions are declarative of existing law.*

Special Benefit – the Defining Attribute of an Assessment

Special benefit is defined in article XIII D, section 2, subdivision (j) as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute 'special benefit.'"

Distinguishing special benefit from general benefit is the bedrock foundation of special assessments. In 1898 the United States Supreme Court first stated the rule as follows, "The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement . . ." (*Norwood v. Baker* (1898) 172 U.S. 269 [19 S. Ct. 187, 43 L.Ed. 443].) Assessments assure that the costs of facilities providing the special benefits for the few are paid by the few, while the general public pays the costs of facilities providing general benefit to the public at large. (Roberts v. City of Los Angeles (1936) 7 Cal.2d 487, 491 [61 P.2d 323]; *Burnett v. City of Sacramento* (1859) 12 Cal. 76, 83-84.) Thus, "only a 'special benefit' to the property assessed will justify an assessment, not merely 'general benefit' inuring to the public as a whole." (*Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852, 857.)

By definition every public improvement contains an element of public benefit, otherwise it would be a private improvement. Historically, the law has required that portion of the cost of the improvement benefiting the public generally be separated from that portion of the cost of the improvement specially benefiting the assessed properties. The property assessed must receive some substantial, direct benefit from the public improvement. (*Solvang Municipal Improvement District v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 552; *Lloyd v. City of Redondo Beach* (1932) 124 Cal. App.2d 537, 546.) Many cases discuss special benefit as an increase in property value resulting from the existence of the improvement. General

enhancement of property value has not historically constituted "special benefit." (*Harrison*, 44 Cal. App.3d at p. 859.) But increased property value is only one factor to consider in determining whether "special benefit" exists to support an assessment. (*Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, 29.)

When evaluating special benefit it is sometimes helpful to look at cases where no special benefit was found. For example in *Harrison*, the court found that uphill property owners were not shown to specially benefit from a drainage project that would relieve flooding and traffic congestion several blocks away. Although the uphill property may have created a burden on the drainage system, the drainage project did not provide a special benefit to those properties. In *Safeway Stores, Inc. v. City of Burlingame* (1959) 170 Cal.App.2d 637, the court analyzing the formation of a parking district found no proof of special benefit to the challenger's property where the record indicated that the property already had sufficient parking for current and all potential future uses and other potentially benefited property was excluded because of owner protests.

However, special benefit must be determined by looking at the property as if devoted to any use that might reasonably be made of it. For example, an owner's voluntary use of property for agricultural uses would not preclude the property from receiving special benefit from a proposed sewer project, if future use for municipal or industrial purposes was reasonably foreseeable. (*Howard Park Co. v. Los Angeles* (1953) 119 Cal.App.2d 515, 519.)

The following three-step analysis for determining the validity of an assessment applies as well under article XIII D as it has historically:

Step 1: Identify the benefit the public improvement will provide;

Step 2: Determine if the property to be assessed receives a special benefit from the public improvement that is different from that received by the general public;

Step 3: Determine if costs of the improvements are apportioned among the specially benefited properties according to the special benefits each property receives. (*Harrison*, 44 Cal. App.3d at p. 857.)

If there are general benefits, a Step 4 is necessary: Determine whether the costs of improvements providing general benefits are paid for with other agency sources.

Establishing an Assessment

What May be Financed by Assessments?

Article XIII D, section 1, subdivision (a) specifically states that it does not create any new authority for an agency to levy an assessment. Therefore, the specific statute authorizing the assessment limits the purpose for which an agency may levy an assessment. Article XIII D, section 4, subdivision (a) provides that proportional special benefit shall be determined in relation "to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided." Maintenance and operation expenses are defined in article XIII D, section

2, subdivision (f) to include "cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care and supervision necessary to properly operate and maintain a permanent public improvement." The cost of maintaining and operating certain types of improvements that are not "permanent" and providing services may be justified as an assessment for the cost of a "property related service." "Incidental expenses" (for example those defined in Streets and Highways Code sections 5024, 10005.5 and 22526) relate to costs reasonably incurred for the planning and design of the public facilities, the formation of the assessment district, the approval of the assessment, the levy and collection of assessments, and the issuance of bonds. Incidental expenses are likely included within the scope of "the entirety of the capital cost of a public improvement."

With the exception of the new assessment ballot process (discussed below), the procedure for establishing a special assessment under article XIII D is not substantially different from that required by commonly used statutes for establishing assessments before the passage of Proposition 218. Under article XIII D, section 4, an assessment may not be imposed unless "(1) the agency identifies 'all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed' [citation]; (2) the agency obtains an engineer's report that supports the assessment [citation]; (3) the assessment does not exceed the reasonable cost of the proportional special benefit conferred on the affected parcel [citation]; and (4) after giving notice to affected property owners and holding a public hearing, the agency does not receive a majority protest based on ballots 'weighted according to the proportional financial obligation of the affected property.'" (*Richmond*, 32 Cal.4th at p. 418.) Government Code section 53753 establishes statutory procedures for assessment protest hearings. These procedures were intended to clarify any inconsistencies with Proposition 218 and pre-existing statutes and supersede any other processes. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 816.)

The Engineer's Report

Article XIII D, section 4, subdivision (b) requires that all assessments "be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California." Each of the following items must be analyzed in the engineer's report. In the event of a substantive legal challenge, the engineer's report will be the foundation on which the agency bases the defense of its action.

Identifying the Parcels to be Assessed

The engineer's report must "identify all the parcels that will have a special benefit conferred upon them." These are the parcels that must be included within the assessment district. These are also the parcels upon which the assessment will be imposed. Parcels that are owned by the government are included, unless the government land receives no special benefit. (Cal. Const., art. XIII D, § 4, subd. (a).) Assessing the government poses special problems that are discussed later in this chapter. If an agency excludes from assessment parcels that receive a special benefit, the agency must pay the costs of those benefits from other revenues, but cannot spread those costs by assessments to other parcels.

Distinguishing Special and General Benefit

The engineer's report must separate general benefits from special benefits. Only special benefits are assessable. (Cal. Const., art. XIII D, § 4, subd. (a).) The general and special benefit must be analyzed for the particular public improvement or property-related service that will be funded by the proposed assessment. However, it should not be assumed that because the improvement or property-related service to be funded by the assessment is a public improvement or service (as it must be), there is general benefit for the purpose of determining and levying assessments to pay the cost of the improvement or service. (See *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202.)

Apportioning the Assessment

Once the special and general benefits have been identified, costs of the project less the costs attributable to general benefits are apportioned to each specially benefited parcel according to the proportionate special benefit of each parcel. This "assessment spread" must also be supported by the engineer's report. Under article XIII D, section 4, subdivision (a) the assessment to a parcel cannot exceed the "reasonable cost of the proportional special benefit" to the parcel, and the "proportional special benefit" is determined "in relationship to the entirety" of capital costs and maintenance and operation expenses of public projects, or costs of property-related services.

The Protest Hearing

The procedures for conducting the protest hearing and counting assessment ballots for new or increased assessments are set forth in Government Code section 53753. The provisions of this section prevail over any other statutory notice, protest and hearing requirements. However, other procedural and substantive requirements of the statutory scheme pursuant to which an assessment is proposed to be levied may apply. The protest hearing consists of three main parts: mailed notice, a public hearing and counting the assessment ballots.

Mailed Notice

Mailed notice to the record owner of each parcel subject to a new or increased assessment must be given at least 45 days before the public hearing on the proposed assessment. (Gov. Code, § 53753, subd. (b).) Mailed notice is sufficient if it is addressed to the owner whose name and address appears on the last equalized secured property tax roll and is mailed, postage prepaid, by deposit in the United States Postal Service. Notice is deemed given when so deposited. Notice may be included in any other mailing provided to the record owner, such as a bill for collection of an assessment, fee, charge, or rate. Notice to a public entity, the State or the United States may be mailed to the representative of that public entity at the address of the public entity known to the agency sending the notice. (Gov. Code, § 53750, subds. (i) & (j).) Article XIIID, section 4, subdivision (g) states in part: "Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment."

This provision, coupled with the fact that assessments subject to article XIII D are always levied on property and, as far as the agency is concerned, always the responsibility of the record owner, would appear to eliminate the controversy sur-

rounding whether tenants should be entitled to notice. Article XIII D, section 2, subdivision (g) defines "property ownership" to include "tenancies of real property" when the tenant is "directly liable" to pay an assessment, fee or charge, but the controversy regarding whether tenants should get notice appears to be limited to charges imposed on persons for a property-related service subject to the provisions of article XIII D, section 6, and does not apply in the context of assessments subject to article XIII D, section 4.

Content of the Notice

The content of the mailed notice is specified in Government Code section 53753, subdivisions (b) and (c). The mailed notice must include all of the following information:

- The reason for the assessment
- The basis upon which the amount of the proposed assessment was calculated
- The total amount of the proposed assessment for the entire district
- The amount chargeable to the record owner's parcel
- The duration of the payments
- The time, place and date of the public hearing to consider objections and protests, if any, to the proposed assessment
- A summary of the procedures for completion, return and tabulation of assessment ballots, including a description of the weighting of ballots according to assessment amount
- A statement that the assessment shall not be imposed if weighted ballots in opposition to the assessment exceed the weighted ballots in favor of the assessment
- The assessment ballot

The information in the mailed notice should be based upon the engineer's report. The summary of the ballot procedure and statement that the assessment will not be imposed if the opposition ballots exceed the ballots in favor must be in a conspicuous place on the notice.

The mailed notice should advise the property owners where they can review the engineer's report and how they can obtain a copy. It should also contain the name and contact information for a staff member or other person who can answer questions regarding the proposed assessment. The agency may desire to include other information, such as information regarding the conduct of public hearings and the process for submitting written statements.

The Assessment Ballot

The requirements for assessment ballots are specified in Government Code section 53753, subdivision (c). The assessment ballot must include:

- The agency's address for receipt of the form
- A reasonable identification of the parcel
- A place where the property owner may indicate his or her name
- A place for the property owner's signature
- A place for the property owner to indicate support or opposition to the proposed assessment

The assessment ballot must be designed so that it conceals the vote once sealed by the person submitting the ballot. Although the agency is not required to provide a return envelope, the agency may choose to do so. Regardless whether the agency provides return envelopes, the ballots must

be designed so that if the envelope is opened before the time for counting ballots, the ballot itself remains sealed. Because ballots may be withdrawn or changed prior to the conclusion of the public testimony at the public hearing, some means of identifying the property owner or parcel should be included on the outside of the sealed ballot. To ease counting, its proportionate weight should be stated on each ballot. Ballots may be designed so that the vote may be cast in machine-readable format. (Gov. Code, § 53753, subd. (e) (1).)

The Public Hearing

The public hearing on the proposed assessment is commonly referred to as the protest hearing. It is a meeting subject to the Brown Act. (Gov. Code, § 54950 et seq.) At the hearing any interested person may submit oral or written testimony regarding the proposed assessment. The agency may apply its customary rules for the presentation of public testimony. A typical order of procedure at a protest hearing is:

- Staff report
- Presentation of engineer's report
- Public testimony, including submission of assessment ballots
- Staff or engineer's response to public comments
- Opportunity to submit, withdraw or change assessment ballots
- Acceptance of reports and written testimony into the record of the proceedings
- Closing of public testimony portion of the hearing
- Deliberation of legislative body, subject to counting of assessment ballots
- Counting of assessment ballots
- Determination of majority protest
- Final decision of legislative body

An agency may terminate assessment proceedings at any time. For example, if as a result of the testimony at the public hearing the legislative body determines not to proceed with the assessment, it may terminate the proceedings without counting the assessment ballots. It may also order revisions to the proposed assessment; however, changes to the assessment would require revisions of the engineer's report, new notices and ballots, and another public hearing. Courts have long recognized that establishing assessments is an exercise of legislative authority vested in the governing body of an agency. (See discussion under Burden of Proof, page 40.)

Counting the Assessment Ballots

An assessment cannot be imposed unless the assessment ballots favoring the assessment exceed the assessment ballots opposing the assessment. The weight of a ballot is determined according to the proportional financial obligation of the property owner, a one dollar-one vote system instead of a one person-one vote system. The weighted vote method for approving assessments was upheld in *Not About Water Com. v. Bd. of Supervisors* (2002) 95 Cal.App.4th 982, 1001.

The assessment ballot process is not an election. (Gov. Code, § 53753, subd. (e) (4); Elec. Code, § 4000, subd. (c) (9).) The procedure for tabulating the assessment ballots is established by Government Code section 53753, subdivision (e). The assessment ballots must be tabulated "by an impartial person designated by the agency who does not have a vested interest in the outcome of

the proposed assessment." Section 53753 contains specific authorization for cities to designate the city clerk as the impartial person. Although a rule of statutory construction is that inclusion of a specific authorization in a statute can be construed as exclusion of another authorization, there appears to be no good reason why the clerk of a special district could not be designated to tabulate ballots, so long as the clerk did not otherwise have an interest in the outcome. The assessments may be tabulated using a vote counting machine. Once the process of counting ballots starts, the assessment ballots are subject to disclosure as public records, and must be equally available for inspection by the proponents and opponents of the proposed assessment.

It is not clear whether the counting of the assessment ballots must occur at the public hearing. Section 53753, subdivision (e) states that the tabulation shall occur "at the conclusion of the public hearing." Section 53753, subdivision (d) says the public agency must consider all objections or protests at the hearing, and provides that the hearing may be continued from time to time. Section 53753, subdivision (e) provides that a majority protest exists if assessment ballots in opposition to the assessment exceed the ballots in favor of the assessment. Article XIII D, section 4, subdivision (e) says, "At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots." It would appear that an agency could, following the close of public testimony, continue the public hearing and delegate to the impartial person the job of counting the ballots, subject to final tabulation and determination of the results by the legislative body when the continued public hearing is reconvened.

If more than one record owner of a parcel subject to assessment submits a ballot, the votes for that parcel will be split according to the respective ownership interest of the owners submitting separate ballots. (Gov. Code, § 53753, subd. (e) (1).)

Assessing Public Property

Prior to the adoption of Proposition 218, the State and local public entities were exempt from assessments unless the Legislature provided otherwise. (*San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal.3d 154.) At the time Proposition 218 was adopted, a variety of statutes authorized assessment of public property. (See, e.g., Sts. & Hy. Code, §§ 5301-5303, 5320-5320, 10206, 22663; Gov. Code, § 54999 et seq.) It does not appear that Proposition 218 affected these statutes. However, the supremacy clause of the United States Constitution and the Act for the Admission of California into the Union effectively exempt the property of the federal government from assessment levied without authorization by an act of Congress. (*Palm Springs Spa, Inc. v. County of Riverside* (1971) 18 Cal.App.3d 372, 376-377.)

The rule that only property receiving special benefit may be assessed applied to parcels owned by the government. However, under article XIII D, section 4, subdivision (a) it appears that the burden is on the government to prove by clear and convincing evidence that the government parcel receives no special benefit before it may be excluded from the assessment. "Clear and convincing evidence" refers to a higher than usual standard of evidence sufficient to establish a fact in an ordinary civil case, but not as high as the burden in a

criminal case. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.) Because assessment proceedings are determined on the record before the public agency levying the assessment, the evidence of lack of special benefit must be submitted to the public agency.

If government property is subject to assessment, the assessing agency may be forced to consider funding the amount of the assessment from other agency revenues. Clearly, the special benefit attributable to the government property cannot be assessed to other property within the district without violating article XIII D, section 4, subdivision (a). However, because the improvements or services funded by the assessment are public services provided by the assessing agency, payment of the costs by an assessing agency would not constitute gifts of public funds, even if the payment relieves another agency of that expense. Under existing law, assessing agencies may make contributions to an assessment district and in some instances must make such contributions on behalf of other public agencies included in an assessment district. (See, e.g., Sts. & Hy. Code, §§ 5303, 5320-5325, 10205, 10206, 22663.) Generally, public property used for public purposes may not be foreclosed for non-payment of an assessment. Instead, a mandamus action may be filed against an agency that chooses not to pay. A mandamus action is an action seeking an order of the court directing the agency to take a statutorily required action, such as paying an assessment. (See generally Sts. & Hy. Code, §§ 5302.5, 10206; Code of Civ. Proc., § 1085.)

Exemptions

Constitutional Exemptions

Article XIII D, section 5 lists four categories of assessments existing as of November 6, 1996, that are exempt from the procedures and approval process of article XIII D, section 4. The four categories of exemptions are:

- Assessments imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control
- Assessments imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed
- Assessments used to repay bonded indebtedness when the failure to pay would violate the Contract Impairment Clause of the United States Constitution
- Assessments previously approved by a majority vote of the electors

Except for assessments levied to pay bonded debt, increases in any exempt assessment are subject to the procedures and approval process of article XIII D, section 4. The "procedures and approval process" means all of the requirements of section 4 including the requirement to separate general and special benefit and to assess publicly owned parcels. (Gov. Code, § 53753.5, subd. (c) (2).) An assessment is not increased by a ministerial adjustment resulting from the application of an existing assessment methodology that calls for an adjustment, for example, because of a change in density,

intensity, or nature of land use. However, a change of assessment methodology or rate for calculating assessments may result in an increase that removes the assessment from the exemption. (Gov. Code, §§ 53750, subd. (h) (1) & (3), 53753.5, subd. (a).)

Keller v. Chowchilla Water Dist. (2000) 80 Cal. App.4th 1006, contains an extensive discussion of exemption for pre-existing assessments to fund capital costs and maintenance and operation expenses in the context of water purchases funded through a standby charge. In *Howard Jarvis Taxpayers Association v. City of Riverside* (1999) 73 Cal. App.4th 679, the court of appeal concluded that streetlights fall within the definition of "streets" for purposes of article XIII D.

Assessments Not Imposed on Property

Article XIII D applies only to assessments levied on parcels of property. (*Howard Jarvis Taxpayers Association v. City of San Diego* (1999) 72 Cal. App.4th 230.) In that case, the court held that assessments on business owners under the 1989 Business Improvement District Act are not subject to article XIII D. This exemption would apply only if statutory authority exists to levy such assessments. If an assessment were authorized to be levied on a person as an incident of property ownership, it would appear this exemption would not apply. (Cal. Const., art. XIII D, § 3.)

Burden of Proof

Article XIII D, section 4, subdivision (f) provides that in any legal action contesting the validity of the assessment, the public agency has the burden of demonstrating the existence of special benefit and that the assessment is spread among the specially benefited properties in proportion to the special benefit received by each parcel. This burden would appear to be met in the first instance if the agency prepares an adequate engineer's report and there is no evidence presented during the public hearing that rebuts the engineer's report. Article XIII D does not change the legislative character of special assessments. Thus, it follows that the burden placed on the agency to support its determination in assessment proceedings is one that must be met, and challenged, at the legislative hearing process. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576.) In that case, the Supreme Court reconfirmed that judicial review of legislative actions must be made based upon the evidence established during the hearing of the legislative body and not extra-record evidence.

The issue of the burden of proof is presently before the Supreme Court in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2005) 130 Cal.App.4th 1295, review granted 2005, S136468.

In a prior decision, the Court of Appeal stated the standard of review as follows:

> "A court 'will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed [or that the agency has failed to demonstrate that the property or properties in question receive a special benefit over and above the benefits

> conferred on the public at large].'" (*Not About Water Com. v. Bd. of Supervisors* (2002) 95 Cal. App.4th 982, 994.)

The court went on to say, "we look to the record made before the water district to determine if it met its burden of proving the existence of a special benefit flowing to petitioners' properties by the formation of assessment district No. 1." (*Id*. at p. 995.)

The decision in *Not About Water Committee* was criticized by another Court of Appeal in *Dahms v. Downtown Pomona Property & Business Improvement Dist.* (2006) 138 Cal.App.4th 115. The *Dahms* court suggested that the standard of review adopted by the court in *Not About Water Committee* was too deferential to the local agency. Instead, it said,

> "We conclude that the City's determinations that the affected properties will receive special benefits and that the assessment is proportional to the benefits conferred on those properties must be affirmed if they are supported by substantial evidence. The substantial evidence standard is highly deferential and thus comports with the constitutional separation of powers and the legislative character of the determinations at issue. But the substantial evidence standard also conforms to Proposition 218's placement of the burden of proof on the City, because (1) the determinations at issue are factual, and (2) factual determinations are ordinarily reviewed under the substantial evidence standard on appeal regardless of which party bore the burden of proof in the trial court. (See, e.g., *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461.)" (*Dahms*, 138 Cal.App.4th at p. 119.)

Although the Supreme Court denied review of the *Not About Water* case, it granted review in the Dahms case. It also said that further action on the Dahms case "is deferred pending consideration and disposition of a related issue in *Silicon Valley Taxpayers' Assn. v. Santa Clara County Open Space Authority*, S136468." Thus, the standard of review remains an unsettled question pending the outcome of the *Silicon Valley* case.

Legal Challenges to Assessments

Statutes authorizing special assessments typically contain very short statutes of limitations and may also require that a challenge be brought by means of a validation or reverse validation proceeding under Code of Civil Procedure section 860 et seq. (E.g., Sts. & Hy. Code, § 10601; *Allis-Chalmers v. City of Oxnard* (1980) 105 Cal.App.3d 876.) Article XIII D establishes requirements for the levy of assessments, but does not alter procedures for challenging assessments. (See *Bonander v. Town of Tiburon* (Jan. 31, 2007, A112539) ___ Cal. App.4th ____ [2007 Cal.App. Lexis 233, *48 – 49]; *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 816.)

Notice of Assessment

Government Code section 53754 specifies a notice of special assessment that must be provided in certain instances when proceeds of special assessments are used to pay bonds secured by those assessments.

Chapter 4 – Judicial Review

Introduction

This chapter discusses judicial challenges to public agency assessments, fees and charges imposed under Proposition 218. This chapter also addresses the requirements associated with claims for refunds of assessments and fees, given that such claims proceedings are often a necessary pre-cursor to any judicial challenges involving refunds. (Note: Judicial review of initiatives involving taxes, assessments and fees will not be discussed in this section, but will be discussed in detail in Chapter 5 of these guidelines.)

Type of Action

Most Proposition 218 and Proposition 13 lawsuit challenges are brought as actions for declaratory, injunctive or writ of mandate relief, and not as actions for refunds or money damages. (See, e.g., *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809; *Knox v. City of Orland* (1992) 4 Cal.4th 132; *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86; *Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2005) 130 Cal.App.4th 1295, review granted 2005, S136468.)

In addition, specific statutory provisions may require that lawsuits regarding agency assessments and fees be brought as validation actions pursuant to the so-called validation statutes. (Code Civ. Proc., §§ 860-870.5.) The validation statutes allow a public agency (via a validation action) or any interested party (via a reverse validation action) to file a lawsuit to determine the validity of a matter that is subject to validation. (See *Bonander v. Town of Tiburon* (Jan. 31, 2007, A112539) ___ Cal. App.4th___ [2007 Cal.App. Lexis 233, *37 380] [holding that the validation act procedure for challenging an assessment under California's Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 et seq.) applies to challenge based upon Proposition 218]; for others, see cross-references at beginning of Code Civ. Proc., part 2, title 10, ch. 9, § 860 et seq.) Similarly, specific enabling act provisions governing a particular local agency may mandate that lawsuits regarding agency assessments, fees and charges be brought as validation actions. (E.g., Monterey County Water Resources Agency Act, Deering's Ann. Wat.–Uncod. Acts, Act 5064, § 39; West's Ann. Wat.–Appen. § 52-39.)

Trial Considerations

Statute of Limitations

It is important to initially determine if there is a specific statute of limitations governing the particular tax, assessment, fee or charge that is in dispute. Some specific statutes of limitations apply to tax and assessment challenges (e.g., Sts. & Hy. Code §§ 5660 (1911 act assessment), 10400 (1913 act assessment) and 22675 (landscaping and lighting assessment); Gov. Code, § 53341 (Mello-Roos special tax); Code Civ. Proc., § 338, subd. (m) (special parcel tax), or to challenges against assessment decisions by specific agencies (e.g., Deering's Ann. Wat.–Uncod. Acts, Act 5064, § 39; West's Ann. Wat.–Appen. § 52-39 ["Any judicial action . . . to . . . challenge the validity or legality of . . . any assessment rate, or charge of the

agency . . . shall be commenced within 60 days of the effective date thereof."].)

Generally, for most water districts, there is no short statute of limitations governing the period of time within which to challenge new and increased water service charges. Challenges against water and sewer connection charges and the capacity charge component of water and sewer service charges must be filed within 120 days from the effective date of the ordinance or resolution. (Gov. Code, § 66022.) (A "capacity charge" means a charge for facilities in existence at the time it is imposed or charges for new facilities to be constructed that benefit the person or property being charged. Gov. Code, § 66013, subd. (b) (3).) This 120 day statute of limitations could bar a challenge to the capacity charge component of water and sewer service charges. (*Utility Cost Management v. Indian Wells Valley Water District* (2001) 26 Cal.4th 1185.) For the balance of water service charges, however, there generally is no short limitations period, unless, as noted above, one is specified in a special act applicable to a specific district.

If there is no specific statute of limitations (which, except for the limited applicability of Government Code section 66022, is usually the case with water district service charges), and if the action does not involve a refund proceeding, then the applicable statute of limitations may be as long as three years. (Code Civ. Proc., § 338, subd. (a); *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809, 820-825.) However, it is possible that the claim filing requirements of Government Code section 900 et seq. apply if the action seeks the recovery of monies or damages from the local public entity, thereby giving rise to the shorter one-year limitation period of Government Code section 911.2. If the three-year limitations period applies, it accrues or commences after payment and collection of any tax, assessment or fee, regardless of whether more than three years have passed since the measure was adopted. In other words, the continued imposition and collection of invalid fees constitutes an ongoing violation and the limitations period for a declaratory relief and mandate action begins anew with each collection. There is a continuous accrual of the cause of action with each billing cycle. (*Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809, 820-825.) A challenger could also seek a refund of service charges that have been paid under protest. These refund actions are discussed below.

If a validation action is authorized by statute, then generally the action must be filed within 60 days after the date of the existence of the matter (usually the adoption of the resolution or ordinance taking the final action), unless the statute authorizing the validation action sets a different time period. (Code Civ. Proc., §§ 860, 863.) If the lawsuit must be brought as a validation action, and an interested party fails to file an action within 60 days, then any lawsuit seeking to invalidate the matter is barred by the 60 day limitations of sections 860 and 863. (*Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 645.) The validation statutes and the corresponding 60 day limitations period apply only if some other law makes it applicable. For example, the validation statutes apply to actions to determine the validity of public agency bonds, warrants, obligations, evidences of indebtedness, and certain contracts that are an integral part of a financing or are of such a nature that the agency's ability to operate would be substantially impaired absent

prompt validation. (Gov. Code, § 53511; *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal. App.3d at pp. 639-646.) In addition, the validation statutes apply to an action to determine the validity of water and sewer connection charges and the capacity charge component of water and sewer service charges; however, there is a special 120 day statute of limitations. (Gov. Code, § 66022.)

Claims for Refunds

Refunds of overpaid assessments, fees and charges may be available if the charge was erroneously or illegally assessed, levied or collected. The applicable refund statute governing the procedure to seek a refund from an agency depends upon the particular tax, assessment or fee. In addition, agencies may have adopted an applicable local agency refund ordinance that governs how any such refund claims are processed.

For taxes and assessments collected on the county tax roll, the refund and judicial review procedures are set forth at California Revenue and Taxation Code sections 5096-5149.5. These procedures are applicable to city, county and special district taxes and assessments collected on the county tax roll. (Rev. & Tax. Code, §§ 136, 4801; *Hanjin International Corp. v. Los Angeles County Metropolitan Transportation Authority* (2003) 110 Cal.App.4th 1109.) The general procedure is as follows: (i) first pay the challenged charge; (ii) file a claim within four years after payment of the charge sought to be refunded (§ 5097); and (iii) any lawsuit must be filed within six months after a claim is rejected (§ 5141).

For taxes and assessments not collected on the county tax roll, and for other service charges, it is important to check for a specific statute or local ordinance that may apply. For instance, for sewer and other charges adopted pursuant to Health and Safety Code sections 5470-5474.10, refund actions are subject to the same Revenue and Taxation Code procedure as for taxes and assessments. (Health & Saf. Code, § 5472.)

It is also important to determine whether the Government Claims Act (also known as the Tort Claims Act, Gov. Code, § 900 et seq.) applies to any claim for a refund. This act is the principal state law that governs claims against public agencies, and if applicable, requires the filing of a claim with the agency before filing a lawsuit. This act applies to all claims for money or damages (including tort, breach of contract, and all other claims and actions), unless exempt under the act. In this regard, tax, assessment and fee refund claims are exempt from the Government Claims Act if there is a specific state statute prescribing procedures for the refund. (Gov. Code, § 905, subd. (a).) If there is no specific statute governing the particular refund claim, then the act governs the refund claim proceeding. (Gov. Code, § 905, subd. (a); *Volkswagen Pacific, Inc. v City of Los Angeles* (1972) 7 Cal.3d 48, 61 63; *Bainbridge v. County of Riverside* (1959) 167 Cal.App.2d 418, 421; 57 Ops. Cal.Atty.Gen. 635 (1974).) Refund claims under the Government Claims Act must be filed within one year from date of payment of the challenged charge. (Gov. Code, § 911.2; *Bainbridge v. County of Riverside* (1959) 167 Cal.App.2d 418, 422.) Lawsuits must be filed within six months from the claim rejection notice. (Gov. Code, § 945.6.) There is generally no specific statute governing

refunds of water rates, so the claim-filing requirement of the Government Claims Act would apply in most instances.

In addition, the Government Claims Act authorizes public agencies to adopt a local claims ordinance or regulation governing claims for money or damages that are exempt from the Act. (Gov. Code, § 935.) Claim filing and other deadlines under a local claims ordinance or regulation must be the same as those provided by the Act. It is generally recommended that all public agencies adopt a local claims ordinance or regulation. In this regard, cities are vested with broad police powers, and may have authority to craft special refund claim ordinances. (See, e.g., *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444.) Special districts, however, must rely on specific statutory authority and any special district claim ordinance or regulation must be consistent with section 935, and the Government Claims Act deadlines.

Exhaustion of Administrative Remedies

Generally, where an administrative remedy is available, plaintiffs must seek relief from the administrative body prior to filing a lawsuit. (*Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal. App.4th 1424, 1428.) If the action is for money damages or a refund, before seeking judicial review the plaintiffs are required to first exhaust their administrative remedies through the administrative refund claim process. If the action is for declaratory relief, an injunction or a writ of mandate, the exhaustion of administrative remedies generally is not required. (*Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809, 822; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 319-320; *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86; *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424; *Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal.App.4th 637, 639.) However, two recent cases involving cities with detailed administrative tax refund ordinances have rejected declaratory relief actions, and instead required plaintiffs to first pursue an administrative tax refund action. (*Flying Dutchman, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129; *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal. App.4th 475.)

Venue

Under most circumstances, the proper venue for judicial challenges to articles XIII C and XIII D will be in the county where the assessed land and the defendant agency are situated. Because public property is subject to assessments levied under article XIII D, section 4, however, there may be instances where local agencies would challenge the assessments imposed by another local agency, city or county. Under these circumstances, Code of Civil Procedure section 394, subdivision (a) allows a plaintiff city, county or local agency to bring the action in, or change venue to, a neutral county. In addition, because many county-affiliated agencies are empowered to levy assessments, or otherwise impose charges or fees for county-related services, individual plaintiffs may be motivated to attempt to change venue to a neutral county. There are very limited situations under which such a change of venue may be proper, however, and as a result, agencies should be able to keep venue in their "home" county if they so desire. (See Code Civ. Proc., § 397.)

Standard of Review

Agency decisions to impose assessments, fees or charges in accordance with Proposition 218 are considered quasi-legislative acts. The standard of review generally applicable to such acts is the substantial evidence standard. Under the "substantial evidence" test, the party bearing the burden of proof must set forth relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575; *Desmond v. County of Contra Costa* (1993) 21 Cal. App.4th 330; *Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307.) Substantial evidence" has been defined as "evidence of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*Young v. Gannon* (2002) 97 Cal. App.4th 209, 225, internal quotes omitted; *Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41, 47.) "Substantial evidence is not synonymous with 'any' evidence." (1 Cal. Administrative Mandamus (Cont.Ed.Bar Apr. 2005 Update) § 6.171, p. 285, citing *Newman*.) "[O]pinion testimony of expert witnesses does not constitute substantial evidence when it is based upon conclusions or assumptions not supported by evidence in the record" (*Hongsathavij v. Queen of Angels/ Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1137).

There is a question, however, whether the substantial evidence standard of review is applied in the same manner if the challenge involves an assessment imposed under article XIII D, section 4, versus fees and charges imposed under article XIII D, section 6. As noted in Chapter 3, article XIII D, section 4, subdivision (f) includes an express provision imposing the burden of proof on the agency to demonstrate both the special benefit conferred and the proportionality of the benefit conferred on the assessed parcels. Notably, article XIII D, section 6 does not include any provision regarding the burden of proof. (See *Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2005) 130 Cal.App.4th 1295, 1337, review granted 2005, S136468 (dis. opn. of Bamattre-Manoukian, J.) [noting that "[c]ourts must therefore independently review local agency decisions that are governed by express constitutional requirements"]; see also *Hale v. Bohannon* (1952) 38 Cal.2d 458, 471; *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 79.)

With regard to assessments, in cases decided prior to the enactment of Proposition 218, California courts applied a version of the "substantial evidence" standard of review to special assessment challenges. Under this standard, a court would invalidate a special assessment if ". . . it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties." (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685.) Article XIII D's imposition of the burden of proof upon the assessing agency raises the issue of whether article XIII D, section 4, subdivision (f) changed certain aspects of the standard of judicial review for special assessments.

Not About Water Committee v. Solano County Board of Supervisors (2002) 95 Cal.App.4th 982 was the first post-Proposition 218 appellate case to directly

discuss the standard of review for challenges to special assessments. There, the court explained that "recent events appear to have worked a modification of the *Dawson/Knox* standard of review." (*Not About Water*, 95 Cal.App.4th at p. 994.) *Not About Water* goes on to quote the shifted burden of proof under article XIII D, section 4, subdivision (f), and states it is "required by this provision, and its modification in the allocation of the burden of proving a special benefit, to restate the standard announced in *Dawson* . . . ." (*Ibid.*) *Not About Water* articulated its amended formulation of the *Dawson* standard with the following language:

> A court "will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed [, or that the agency has failed to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large]." (*Id.* at p. 994, brackets in original.)

Not About Water implies, therefore, that the applicable standard of review as to special benefits determination is a modified version of the "substantial evidence" test. (*Id*. at p. 986 ["We . . . review the petitioners' remaining contentions under the substantial evidence rule."].)

In the *Silicon Valley Taxpayers* case (which currently is being reviewed by the California Supreme Court), the courts are reviewing a challenge by two taxpayer organizations and several individual taxpayers to a special assessment levied for the purposes of funding the acquisition of additional open space in Santa Clara County. (*Silicon Valley Taxpayers*, 130 Cal.App.4th at p. 1301.) The Court of Appeal upheld the special assessment, and explained its views on the standard of review applicable to "any legal challenge to the validity of a special assessment." (*Id.* at p. 1310.) The standard of review set forth in the *Silicon Valley Taxpayers* decision is broader than the standard explained in *Not About Water Committee*, 95 Cal. App.4th at page 994. In any event, the California Supreme Court's review and disposition of the *Silicon Valley Taxpayers* decision should provide further clarification on the proper standard of review in Proposition 218 challenges.

In summary, special assessment determinations in the post-Proposition 218-era remain quasi-legislative in nature. Given the procedures mandated by Proposition 218 and the explicit shifting of the burden of proof, however, judicial review of these assessment determinations may afford less deference than for the review of other quasi-legislative decisions. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-576 [appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with non-reviewability at one end and independent judgment at the other].) In addition, it bears emphasis that courts have not hesitated to invalidate a legislative act related to taxes or fees, including those enacted by bodies other than the State Legislature, that clearly violate the constitution. (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178; *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208; *Beaumont Investors v. Beaumont-Cherry Val-*

ley Water Dist. (1985) 165 Cal.App.3d 227; *City of Oakland v. Digre* (1988) 205 Cal.App.3d 99.)

Burden of Proof

As noted above, article XIII D, section 4, subdivision (f) expressly imposes the burden of proof upon the agency in assessment challenges to demonstrate the special benefit conferred, and the proportionality of the benefit conferred, on the assessed parcels. In addition, for publicly owned property that is subject to an assessment, article XIII D, section 4, subdivision (a) states that such property may not be exempted from the assessment "unless the agency can demonstrate by clear and convincing evidence that those publicly owed parcels in fact receive no benefit." This burden of proof is higher than the usual preponderance of the evidence standard applied in civil cases. Article XIII D, section 6 imposes a burden on the agency in an action contesting the validity of a fee or charge, "to demonstrate compliance with this article."

Extra-Record Evidence

Notwithstanding the additional procedural and substantive requirements of article XIII D, agency decisions to impose assessments, charges and fees are quasi-legislative actions. Accordingly, judicial review of such legislative actions is generally limited to and based upon the record before the agency at the time of the decision, and not extra-record evidence. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570-574; *Not About Water*, 95 Cal.App.4th at p. 994.) There are, however, limited exceptions to this general rule. In traditional mandamus actions, the extra-record evidence rule may be excepted to allow the introduction of evidence that "could not [have been] produced at the administrative level 'in the exercise of reasonable diligence.'" (*Western States Petroleum*, 9 Cal.4th at p. 578.) The California Supreme Court has stated that this exception is to be "very narrowly construed" and is limited to,

"[t]hose rare instances in which (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." (*Id.* (emphasis in original).)

This exception, however, does not allow a court to admit evidence either that the agency itself developed after the conclusion of the administrative proceeding, or that challengers produced after the closing of the administrative record in order to contradict the agency's administrative record. (See *Fort Mojave Indian Tribe v. Dept. of Health Services* (1995) 38 Cal.App.4th 1574, 1591.)

Post-Trial Considerations

Upon the issuance of a trial court decision in a Proposition 218 challenge, the parties will determine whether to exercise their rights of appeal. If the agency loses at the trial court level, the agency could, of course, appeal the court's decision or take actions to comply with the trial court's directives. Agencies should also consider the possibilities of entering into a stipulated judgment that could comply with the court's decision, and meet the concerns of the challengers and the agency. In this regard, there may be opportunities to craft a stipulated judgment that provides for reductions in the fees or assessments imposed upon certain proper-

ties, without resulting in the outright rescission of the challenged assessment, fee or charge. The possibility for such a resolution will be dependent upon the facts and circumstances of the given case, but it is important to recognize this as a potentially available post-trial option.

Chapter 5 – Initiatives

Introduction

The initiative "is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8.) Any "person who is a voter or who is qualified to register to vote in this state may circulate an initiative," pursuant to the provisions of the California Elections Code. (Elec. Code, § 102.)

Prior to the passage of Proposition 218, some districts of the Court of Appeal had held that municipal or local initiative powers could not be used to invalidate municipal or other local tax measures. (See, e.g., *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 630.) But in 1995, the California Supreme Court signaled a change in that trend with its decision in *Rossi v. Brown* (1995) 9 Cal.4th 688. Observing that, in some jurisdictions, the "local initiative power may be even broader than the initiative power reserved in the Constitution," the *Rossi* court held that a local initiative could be used prospectively to repeal taxes in certain circumstances. (*Id*. at 711, 715-716.)

Passed just one year later, Proposition 218 sought to constitutionalize the rule in *Rossi v. Brown*, and made it clear that the initiative power could be used to affect local taxes, assessments, and property-related fees and charges enacted by local governments such as water agencies:

> "Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives." (Cal. Const., art. XIII C, § 3.)

The initiative power applies to the reduction and repeal of "any local tax, assessment, fee or charge." These terms are not defined in article XIII C. The definition of fee and charge in article XIII D applies "as used in" article XIII D, and it does not expressly apply to article XIII C. (Cal. Const., art. XIII D, § 2.) Consequently, the scope of fees and charges subject to initiative in article XIII C may be broader than the property-related fees and charges subject to article XIII D.

In *Bighorn-Desert View Water Agency v. Verjil*, (2006) 39 Cal.4th 205, the Supreme Court held that the initiative could be used to reduce the rate that a public water district charges for domestic water service. (*Id.* at p. 209.) But, the *Bighorn* court also left several issues pertaining to local agency funding open, and it placed limits on the use of the initiative power as well. (*Id.*) Similarly, and notwithstanding article XIII C, section 3, other statutory, constitutional, and case law limits exist on the use of the initiative power. Accordingly, this chapter will set forth the procedural and substantive parameters of the initiative provisions of Proposition 218, as well as the corresponding provisions of the Elections Code; and it will discuss the effect of the initiative power on water agency funding.

Voter Approval of Taxes, Assessments and Property-Related Fees

Under articles XIII A, C and D of the Constitution, taxes, assessments and certain fees and charges are subject to some type of voter approval for adoption. These approval requirements are addressed elsewhere in these guidelines. By contrast, under article XIII C, section 3 it appears that any kind of tax, fee, assessment or charge is subject to reduction or repeal via the initiative process – and only a majority vote is required to do so. If such an initiative is successful, under current statutes governing initiatives, the agency generally cannot then increase the same tax, special tax, assessment or property related fee or charge without voter approval, unless the initiative itself provides otherwise. This rule has the potential to impose a voter requirement that would not otherwise exist, or is different from the requirement established for the initial imposition of the tax, assessment or charge.

General Taxes and Special Taxes

Proposition 13, approved in 1978, added articles XIII A and B to the California Constitution. Article XIII A limits the property tax to 1% of value and prohibits cities, counties, and special districts from imposing local *ad valorem* real property taxes on the sale of real property. At the state and local level, article XIII A also requires a 2/3 majority vote for changes in taxes and imposition of special taxes, respectively. (Cal. Const., art. XIII A, §§ 3, 4.) Later, the voters approved limited amendments to article XIII A to make it easier to approve bonds and impose taxes for school purposes.

When Proposition 218 was passed, it imposed further limitations on the power of local governments to pass general taxes. Specifically, it decreed that all taxes imposed by any local government shall be deemed to be either general taxes or special taxes; and special purpose districts or agencies shall have no power to levy general taxes. (Cal. Const., art. XIII C, § 2, subd. (a).) Any general tax passed after July 1, 1997, must be levied in compliance with article XIII C, section 2, subdivision (b) and must be approved by a simple majority vote.

In addition to imposing restrictions on *ad valorem* real property taxes, Proposition 13 also prohibited local government from enacting any special tax without a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4.) This requirement was reiterated in Proposition 62 (Gov. Code, §§ 53720-53730), and Proposition 218, article XIII C, section 3 of the Constitution.

Unless the vote is held on an emergency basis, the vote on a general tax will be consolidated with a regularly scheduled general election for members of the governing body of the local government. (Cal. Const., art. XIII C, § 2, subd. (b).) Proposition 218 is silent about elections on special taxes, so agencies must look to Proposition 62 for guidance. Government Code section 53724 provides that the election on any general or special tax "proposed pursuant to this article shall be consolidated with a statewide primary election, a statewide general election, or a regularly scheduled local election at which all of the electors of the local government or district are entitled to vote." (Gov. Code, § 53724, subd. (c).) That being said, "the legislative body of the local government or district may provide that the election on any tax proposed

pursuant to . . . [Proposition 62] shall be held at any date otherwise permitted by law." (Gov. Code, § 53724, subd. (d).)

If a citizen proposes by initiative an ordinance to reduce or repeal a general or special tax, the initiative will pass with a simple majority vote.

Assessments

Assessments are now subject to approval by a majority special benefit vote. The assessment approval process is not an election. The detailed constitutional process for assessments that local agencies must follow prior to levying one is set forth in Chapter 3.

Like taxes and special taxes, assessments are subject to repeal or reduction via the initiative power. Repeal or reduction may be accomplished with a majority vote. It is not clear whether a new assessment may be imposed by simply following the assessment procedure, but given the unique nature of assessments, the answer is likely yes. Standby charges are deemed to be assessments and are subject to the same rules as assessments.

Property-Related Fees and Charges

Prior to adopting any property-related fees and charges, a specific public hearing and majority protest apply, and except for water, sewer and refuse collection services, either a two-thirds majority electoral vote or a majority property-owner vote is required. The public hearing procedure, and the timing requirements associated with it for hearings and elections, is discussed in Chapter 2. Once again, repeal or reduction of an agency's property-related fees and charges requires a simple majority vote.

Initiatives to Repeal or Reduce Taxes, Assessments or Fees and Charges

The procedural requirements pertaining to initiatives for county, municipality and district elections are set forth in separate sections of the Elections Code: municipal elections (§ 9200 et seq.), county elections (§ 9100 et seq.), and district elections (§ 9300 et seq.). However, all of these separate sections have very similar (if not directly analogous) provisions. Unless otherwise noted, this chapter focuses on Elections Code section 9300 et seq., the rules pertaining to district elections. Other references, such as the Municipal Law Handbook, published by the League of California Cities and American Legal Publishing Corporation, focus on municipal elections, while still others focus on county elections. (See, e.g., Durkee et al., Ballot Box Navigator (Solano Press Books (2003).)

Petition Contents, Notice of Intention and Statement, and Affidavit

Section 9302 of the Elections Code requires that the proponents of the initiative publish a notice of intention to circulate the initiative, which shall not exceed 500 words and which states the reasons for the proposed action. Elections Code section 9303 sets forth the requirements for publishing and posting the notice of the intention to circulate the initiative; and section 9304 requires that the proponent file a copy of the notice and statement as published or posted, together with an affidavit, with the district elections official.

Number of Signatures

Elections Code section 9310, subdivision (a) specifies the number of signiatures initiative proponents are required to collect:

- In districts where the total number of registered voters is less than 500,000, the number of signatures must equal 10% of the registered voters in the district.
- In districts where the total number of registered voters is 500,000 or more, the number of signatures must equal not less than 5% of the registered voters in the district.

All signatures and petitions must be filed within 180 days of the publication or posting, or both, of the notice of intention and statement. (Elec. Code, § 9306.) Failure to comply with this requirement voids the petition.

Procedures Following Submission

Upon receiving the initiative, the district elections official is required to perform certain administrative duties, including examining the petition, determining the number of valid signatures, and then submitting it to the agency. (Elec. Code, § 9308.) As a practical matter, some smaller districts might work closely with county governments to carry out such functions.

Elections Code sections 9310, subdivision (a), and 9311 allow a district board to do either of the following, for a petition requesting a regular or special election:

- Adopt the ordinance, without alteration, either at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented; or
- Immediately order that the ordinance be submitted to the voters, without alteration.

If the district decides to submit the ordinance attached to the initiative petition to the voters, a number of procedures must be followed.

Timing, Initiatives Requesting Regular Elections

Generally, "the election for a county, municipal, or district initiative that qualifies pursuant to [Elections Code] Section 9116, 9214, or 9310 [respectively,] shall be held not less than 88 nor more than 103 days after the date of the order of election." (Elec. Code, § 1405, subd. (a).) "The election for a county initiative that qualifies pursuant to Section 9118 shall be held at the next statewide election occurring not less than 88 days after the date of the order of election. The election for a municipal or district initiative that qualifies pursuant to Section 9215 or 9311 shall be held at the jurisdiction's next regular election occurring not less than 88 days after the date of the order of election." (Elec. Code, § 1405, subd. (b).)

Timing, if the Initiative Requests a Special Election

The procedures for such elections are governed by Elections Code section 1045, subdivision (a) (2)-(4). Those sections state:

- Subdivision (a) (2): When it is legally possible to hold a special election on an initiative measure that has qualified pursuant to section 9116, 9214, or 9310 during the period between a regularly scheduled statewide direct

primary election and a regularly scheduled statewide general election in the same year, the election on the initiative measure may be held on the same date as, and be consolidated with, the statewide general election.

- Subdivision (a) (3): To avoid holding more than one special election within any 180-day period, the date for holding the special election on an initiative measure that has qualified pursuant to section 9116, 9214, or 9310, may be fixed later than 103 days but at as early a date as practicable after the expiration of 180 days from the last special election.
- Subdivision (a) (4): Not more than one special election for an initiative measure that qualifies pursuant to section 9116, 9214, or 9310 may be held by a jurisdiction during any period of 180 days.

Printing the Proposed Ordinance

The district elections official is responsible for printing the proposed ordinance. Additional specifications, such as the font in which the proposed ordinance must be printed, are set forth at Elections Code section 9312.

Analysis of the Proposed Ordinance

The county counsel, or, if there is no county counsel, the district attorney, must prepare an impartial analysis of the measure, showing the effect of the measure on existing law and the operation of the measure. (Elec. Code, § 9313.) Whenever any petition is submitted to the voters of a water district, there is a separate provision set forth at Elections Code section 9314, and the ordinance must be analyzed by legal counsel for the water district. (Elec. Code, § 9314.)

Arguments for and Against the Ordinance

District boards may submit a 300-word argument against the ordinance, and a 250-word rebuttal argument. Proponents may do so as well. These arguments must be submitted within a reasonable time so that there can be a 10-calendar-day public examination for any election. (See Elec. Code, §§ 9315, 9316, 9317; see also, § 9380 et seq. (art. 4) (for procedures pertaining to examinations).)

How Many Votes are Needed to Pass an Initiative and Effective Date?

As noted above, a simple majority is needed. (Elec. Code, § 9320.) The ordinance goes into effect 10 days after it is declared adopted by the board. (*Id.*)

Public Agency Communications During Elections

As set forth above, public agencies may in fact submit arguments for and against a particular initiative. An agency may also adopt a resolution officially endorsing or opposing an initiative, and may prepare and distribute neutral, informational materials about an initiative. (See Gov. Code, § 54964.)

That being said, there are limitations on a public agency's participation in a campaign for or against and initiative. For example, there is some tension between Government Code section 54964 and Elections Code sections 9315-9317. As set forth

above, the Elections Code authorizes a district to prepare arguments for and against a ballot measure, but Government Code section 54964 prohibits any "officer, employee, or consultant of a local agency" from expending or authorizing the expenditure "of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters." (Gov. Code, § 54964.)

There also are significant case law limitations on the permissible scope of a public agency's participation in a campaign on an initiative ballot measure. (See, e.g., *Stanson v. Mott* (1976) 17 Cal.3d 206; *League of Woman Voters v. Countywide Criminal Justice Coordination Committee* (1988) 203 Cal.App.3d 529; *Fair Political Practices Comm. v. Suitt* (1979) 90 Cal.App.3d 125.) Thus, an agency should proceed cautiously before deciding to specifically come out in favor of or against a particular initiative. At the time this publication was being prepared, the California Supreme Court was considering a case that may set the parameters for what governmental bodies can say about ballot measures. (*Angelina Vargas et al. v. City of Salinas et al.*, S140911.)

Challenging An Initiative

So what happens if an agency is faced with an ordinance, submitted via initiative, which purports to reduce or repeal certain of its taxes, assessments, or property-related fees and charges and the agency does not desire to enact the proposed ordinance? Depending on the legality of the proposed ordinance and whether the circulators of the petition followed the rules, the agency has four possible choices: (1) it can refuse to put it on the ballot, and possibly commence an action to challenge the initiative; (2) it can put it on the ballot and challenge the initiative prior to the election by bringing an action to have it removed from the ballot; (3) it can put it on the ballot and then do nothing and/or impose other fees and charges if the initiative passes; or (4) it can put it on the ballot, wait and see whether the initiative passes by a majority vote, and then challenge the measure if it believes it is not proper.

Refusal to Put the Initiative on the Ballot

While there is some split of authority on the proper procedure, most courts have stated that a government agency has a ministerial duty to place all duly certified initiatives on the ballot and then ask a court for an order to remove it if the measure is invalid. (*Save Stanislaus Area Farm Economy v. Board of Supervisors of the County of Stanislaus* (1993) 13 Cal.App.4th 141, 147-148).) This makes sense in light of the mandatory language of the Elections Code. (Elec. Code, §§ 9310, 9311.) There may be reasons not to place the matter on the ballot. For example, the signatures may not have been valid or all the procedures followed under California law. And if there is a violation of federal law in the way the petition was circulated, that might justify leaving the measure off the ballot since the state law restrictions discussed above might not apply. Or, the agency could put the measure on the ballot and then bring a challenge to it.

Placing the Initiative on the Ballot and Challenging the Initiative Before the Election

As stated, if the agency wishes to challenge pre-election, the courts usually conclude that the bet-

ter practice is to place the matter on the ballot, and then sue to have the pre-election validity determined. If a pre-election challenge is brought, however, the agency can expect that opponents might argue a challenge should have to wait until after the election. While courts often indicate a desire to hear challenges to initiatives after, rather than prior to, an election (See *Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142, 1153), there are exceptions to this rule. One example is where the electorate lacks the power to adopt the proposed measure in the first instance because of procedural or jurisdictional infirmities, and another is where the substantive provisions of the proposal are legally invalid. (*Id.; deBottari v. City Council of the City of Norco* (1985) 171 Cal.App.3d 1204, 1209-1210.) Also, if the petition lacks the proper number of signatures it cannot be placed on the ballot. (Elec. Code, § 9310, subd. (a).) Generally, the kind of challenge that should be brought prior to an election is termed a "procedural" challenge. Pre- versus post-election challenges are further discussed below.

Placing the Initiative on the Ballot for the Voters to Decide

As discussed above, an agency could actually adopt an ordinance proposed by an initiative. Alternatively, if it simply wanted to follow the voters, an agency could put the measure on the ballot and then accept the vote as conclusive. If it did so, the agency would then reduce the charges, and reduce the corresponding services and budget to be consistent with the new revenue stream. At least one Attorney General opinion, 89 Ops.Cal.Atty.Gen. 148 (2006), sanctions this approach. However, if the initiative forces a reduction in service so far below a basic level that the government entity is no longer carrying out the obligations required of it by the state law creating it, then that raises different questions. Indeed, *Bighorn* reserved this question for another day, implying that it might create an insurmountable conflict of state and local laws if such an initiative were proposed. (*Bighorn*, 39 Cal.4th at p. 221.) After an initiative reducing fees and charges passes, the agency could raise other fees or impose other charges if necessary. Chapter 2 discusses imposing fees and charges.

Challenging the Initiative After the Election

The agency could challenge the initiative on substantive grounds after the election is held. These types of challenges are set forth in detail below.

Procedures to Challenge an Initiative

There are several procedural vehicles that could be available to an agency wishing to challenge an initiative: a validation action (Code Civ. Proc., § 860 et seq.); a complaint for declaratory relief (Code Civ. Proc., § 1060 et seq.); a petition for writ of mandate (Code Civ. Proc., § 1084 et seq.); and a complaint for an injunction (Code Civ. Proc., § 525 et seq.). In part, the decision about which type of action to file will be based upon the kind of initiative at issue, and what it purports to do. The type of challenge will also depend upon the underlying causes of action – which in turn depend upon whether the challenge is brought before or after the electorate votes on the initiative.

Validation Action

Code of Civil Procedure section 860 allows a public agency, "upon the existence of any matter which under any other law is authorized to be determined" under the validation statutes, to file a lawsuit to determine the validity of the matter at issue. (Code Civ. Proc., § 860.) If available, a validation action should generally be brought after an initiative passes, to determine the validity of the ordinance attached to the initiative as compared to the validity of the tax, assessment or charge already in place. (See, e.g, *Rincon Del Diablo Municipal Water Dist. v. San Diego County Water Authority* (2004) 121 Cal.App.4th 813, 818 [suit to invalidate water rate brought after ordinance increasing rate passed].)

Declaratory Relief

An action for declaratory relief can be brought "in cases of actual controversy relating to the legal rights and duties of the respective parties," to determine the "rights and duties" of the parties with respect to each other. (Code Civ. Proc., § 1060.) Depending upon the circumstances, an action for declaratory relief could be filed prior to the time the initiative is passed, to determine whether the initiative can be placed on the ballot at all. Or, an action for declaratory relief can be brought afterward to determine the rights of the parties and the "predominance" of the agency's tax, assessment or charge vis-a-vis the ordinance attached to the initiative.

Writ of Mandate

Pursuant to Code of Civil Procedure section 1085, a petition for writ of mandate may be brought to "compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the enjoyment of a right or office to which the party is entitled." (Code Civ. Proc., § 1085, subd. (a).) Like an action for declaratory relief, a writ of mandate petition can be brought after or before the initiative passes. However, if an agency decides to challenge the placement of the initiative on the ballot, this is the preferred way to proceed – and often the only way to proceed given the limited types of challenges an agency can bring to a pre-election initiative. Also, if the agency decides not to put the initiative on the ballot, it may face a petition for writ of mandate from the proponents of the initiative to compel the agency to put the initiative to a vote.

Injunction

"An injunction is a writ or order requiring a person to refrain from a particular act." (Code Civ. Proc., § 525.) California Code of Civil Procedure section 526 sets forth the standards for when an injunction may be issued. Generally, an injunction may not be issued unless there is an inadequate legal remedy and the act about which the plaintiff complains will cause immediate, irreparable harm. (Code Civ. Proc., § 526.) Thus if an initiative were to reduce an agency's fees below the level at which it could fulfill its statutory mandates, or if the ordinance were unconstitutional, an agency might file a lawsuit to enjoin the placement of the initiative on the ballot. If the ordinance passes, then the agency might file an injunction to prevent the ordinance from going into effect.

Specific Types of Legal Challenges

This section sets forth some of the primary constitutional, statutory and judicially created (or case law) challenges an agency or district might bring to an initiative. This list is not intended to be exhaustive. Any agency or district seeking to challenge an initiative should seek the advice of counsel.

Constitutional Challenges

There are many constitutional challenges that an agency might bring if faced with an initiative reducing or repealing fees and charges, or assessments and taxes. However, those challenges brought pursuant to another provision of the California Constitution (as opposed to the U.S. Constitution) will all be subject to the following caveat: Proposition 218 specifically states that "[n]otwithstanding any other provision of this Constitution, . . . the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." (Cal. Const., art. XIII C, § 3.) With respect to all of the challenges discussed below, arguably this could mean that article XIII C, section 3 overrides any other provisions of the Constitution or statutory law or court decisions that might otherwise place limits on the initiative power. This issue has not yet been explored by the courts. This is explained more fully in some of the subsections below, but the issue could potentially apply to all of them.

Single Subject Rule

Under California Constitution, article II, section 8, subdivision (d), initiative measures which "embrace[] more than one subject may not be submitted to the electors or have any effect." (Cal. Const., art. II, § 8, subd. (d).) Adopted in 1948, the single-subject rule is a "constitutional safeguard adopted to protect against multifaceted measures of undue scope," which may otherwise confuse or mislead voters. (*Jones*, 21 Cal.4th at p.1158.)

Although it appears straightforward, "the single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship." (*Id*. at p. 1157.) Rather, an initiative measure will not violate the single-subject rule if, despite its varied collateral effects, all of its parts are "reasonably germane" to each other. (See *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208; Jones, 21 Cal.4th at p. 1157.) Therefore, if the initiative measure "fairly disclose[s] *a reasonable and common sense relationship among . . . [its] various components in furtherance of a common purpose*," then courts will uphold it. (*Jones, supra*, 21 Cal.4th at p. 1157 [emphasis in original].) "Numerous provisions, *having one general object*, if fairly indicated in the title, may be united in one act. [Likewise,] [p]rovisions governing projects so related and interdependent as to constitute *a single scheme* may be properly included within a single act." (*Amador*, 22 Cal.3d at p. 230 [emphasis in original].) Accordingly, courts are reluctant to invalidate initiatives under the single subject rule unless the proposed law seeks to encompass two or more obviously disparate subjects – and such challenges are difficult to maintain. (See, e.g., *Chemical Specialties Manufacturers Assn. Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 671 [invalidating initiative that sought to do many disparate things, including reducing toxic pollution, protecting

seniors from fraud and deceit in the issuance of insurance policies, preserving the integrity of the election process, and fighting apartheid].) "[A]ny reasonable doubts" about whether an initiative violates the single subject rule are resolved "in favor of the exercise of the right or initiative." (*San Mateo County Coastal Landowners'Assoc. v. County of San Mateo* (1995), 38 Cal.App.4th at p. 554.)

Arguably, Proposition 218 could be interpreted to "override" this rule, because of the "notwithstanding" language in section 3 identified above. However, it is doubtful that courts would sanction an initiative that tried to do two different things at once, for example: simultaneously reduce or repeal an agency's water charges, and also require the agency to reduce its retirement benefits and/or employee salaries. Rather, two separate initiatives would likely have to be circulated to avoid voter confusion. Rejection of an initiative on this grounds would not necessarily be contrary to Proposition 218; the courts would not be prohibiting the initiative power, only requiring that it be carried out legally.

Exclusion of Political Subdivisions

Article II, section 8, subdivision (e) of the California Constitution prohibits initiatives that include or exclude any political subdivision of the state from application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure by the electors of that political subdivision. (Cal. Const., art. II, § 8, subd. (e).) Again, arguably, Proposition 218 nullifies this provision of the Constitution, however, because it says "notwithstanding" any other provision of the Constitution, "the initiative power shall not be prohibited or otherwise limited in the matters of reducing or repealing" taxes. (Cal. Const., art. XIII C, § 3.)

Alternative or Cumulative Provisions

Article II, section 8, subdivision (f) of the California Constitution prohibits initiatives that "contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure." If the initiative violates this constitutional provision then it could be challenged prior to the election.

U.S. and California Constitutions' Impairment of Contracts Clauses

Article I, section 10 of the U.S. Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." There is an analogous provision in the California Constitution, article I, section 9. These clauses may preclude enactment of an initiative which reduces or repeals fees or charges pledged as the source of future money for an agency's activities. The article XIII C, section 3 "notwithstanding" clause would presumably not apply here because the federal constitution "trumps" the California constitution. But this raises a conundrum under California law that has not been addressed by the courts. Any contractual action taken now might be argued to have been taken with knowledge of – that is, subject to – the existing law, including article XIII C. If article XIII C, section 3 means that the initiative can be used to lower fees or taxes at any time, then arguably all new contracts are entered into with the understanding that the revenue source for repayment could be adversely affected at any time.

This principle might become very important in the cases of bonded indebtedness. For example, if an initiative were to reduce or repeal fees or charges or other taxes pledged as payment of a bonded indebtedness, it could impair the obligations of the agency to the bond holders, and therefore violate the impairment of contracts clause in the federal constitution. This is because bond indentures frequently contain a covenant that the issuer will set rates and charges sufficient to cover the payments plus a margin. An initiative repealing or substantially reducing those rates and charges would therefore violate the impairment of contracts limitation of the United States Constitution. The success of a defense based on this principle may depend on when the bonds were issued. It may be more difficult for an agency to rely on the principle if the bonds were issued after November 5, 1996. A bond covenant which purports to cut off or limit the initiative power of the electorate might be held to be invalid because it would run afoul of article XIII C, section 3's prohibition on reducing or repealing any local tax, assessment fee or charge. (See *Bighorn*, 39 Cal.4th at p. 221; but see discussion in the section of this chapter entitled, "Other Challenges – Judicial or 'Case Law' Challenges," *infra*.)

Other State or Federal Constitutional Violations

An initiative is subject to constitutional requirements like any other statute. (*Rossi*, 9 Cal.4th at p. 696.) For example, in *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009, the Court of Appeal invalidated an initiative which discriminated between voters in the city and voters in the county by concluding this scheme violated equal protection. (*Id.* at p. 1020.) In this regard, it should be noted that a local initiative cannot impose a vote requirement that conflicts with provisions of the California Constitution. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374 [holding that initiative amendment to San Diego charter seeking to increase the vote necessary to enact general taxes from a simple majority to 2/3 vote violated article XIII C, section 2, subdivision (b), which requires only a majority vote].)

These types of issues are further discussed in the section of this chapter entitled, "Other Challenges – Judicial or 'Case Law' Challenges," under the subheadings titled, "Preemption" and Impairment of Essential Governmental Functions."

Statutory Challenges

In addition to the California and federal constitutions, the California Elections Code places several statutory limitations on the way in which initiatives must be presented to the public. Proponents of the initiative are responsible for complying with the Elections Code. Failure to comply with the code is grounds for the election official to refuse to place the initiative on the ballot. (See, e.g., *Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, 1233.) But while any failure to comply with the provisions of the Elections Code could be fatal to a particular initiative slated for a particular election, that initiative could be revived and slated for another election if the proponents comply with the Elections Code the second time around.

Notices of Intention and Publications and Postings

If a proponent fails to comply with Elections Code sections 9302 and 9303, the initiative could be challenged before the election is conducted via a

writ of mandate and/or an action for declaratory relief. The writ of mandate would seek an order prohibiting the district elections official from placing the ordinance on the ballot. The declaratory relief action would seek a declaration that the initiative was procedurally defective.

False Statements or Misrepresentations

Any circulator who intentionally either misrepresents or makes false statements concerning the contents, purpose or effect of the petition is guilty of a misdemeanor. (Elec. Code, § 18600.) This could be either a pre- or post-election challenge, depending on when the misrepresentations come to light.

Signatures

Proposition 218 prohibits local government charters from imposing a signature requirement higher than that applicable to statewide statutory initiatives. (Cal Const., art. XIII C, § 3.) This means that any initiative proponent must gather the following number of signatures: 10% of the registered voters, or 5% of the voters if there are more than 500,000 registered voters in the district. (Elec. Code, § 9310, subd. (a).)

If the proponents of the initiative fail to gather the requisite signatures, and if the signatures are not filed within 180 days of the publication and/or posting of the notice of intention, then the initiative petition and its sections "shall be void for all purposes." (Elec. Code, § 9306; see also § 9305.) The signatures must be verified and examined by the district elections official before the initiative can be placed on the ballot. If the petition is insufficient, the district elections official cannot place it on the ballot. (Elec. Code, § 9308.) Again, if the proponent of the initiative fails to comply with these provisions, then the agency can challenge the placement of the initiative on the ballot – or the district election official can refuse to place the initiative on the ballot. In the former case, the agency would have to sue the district elections official to prevent placement of the initiative on the ballot; in the latter case, the district official would likely be sued to place the initiative on the ballot. In either case, the lawsuit would likely be styled as one for a petition for writ of mandate to compel the elections official to comply with his or her mandatory duty to either place or refuse to place the initiative on the ballot.

Full Text Requirement

Section 9301 of the Elections Code states that "[a]ny proposed ordinance may be submitted to the governing board of the district by an initiative petition filed with the district elections official." (Elec. Code., § 9301.) Section 9301 differs substantively from its statutory analogs, section 9201, which is applicable to municipalities, and section 9101, applicable to counties. Specifically, unlike sections 9101 and 9201, there is no requirement in section 9301 that, at the time the initiative petition is submitted to the board, it "contain a full and correct copy of the notice of intention and accompanying statement including the *full text* of the proposed ordinance." (Elec. Code, § 9101 [emphasis added].) That being said, it is possible that a court would require the full text of the proposed initiative to be submitted to the governing board of the district prior to the time it is placed on the ballot. Additionally, the full text must be available to those signing the petition, and it must

also be filed with the appropriate elections official. (See, e.g., *Mervyn's v. Reyes* (1998) 69 Cal.App.4th at pp. 97, 104-105 [holding that city council had ministerial duty to reject initiative petition that affected general policies plan, general policies map, and supporting policies of city of Hayward, where these documents were not attached to it at the time it was submitted to the city to be certified and placed on the ballot].) If the initiative proponents fail to do this, it is arguable that they have failed to comply with this requirement and the initiative may be challenged prior to the election.

Miscellaneous Issues

In addition to the issues identified and discussed above, other potential issues pertaining to initiatives may arise that could affect the validity of the initiative, but are outside the scope of this chapter. For example, there has been litigation, unresolved to date, over whether initiative petitions in certain counties might have to comply with sections 5 and 203 of the Federal Voting Rights Act, which require certain jurisdictions to seek preclearance before enacting a voting change, and to provide bilingual voting materials, respectively. (See 42 U.S.C. § 1973c; U.S.C. §§ 1973b(f)(4), 1973aa-1a(c); 28 C.F.R. § 55 et seq.) (See *Padilla v. Lever*, (9th Cir. 2006) 463 F.3d 1046, 1048 [holding "that § 1973aa-1a(c) does not apply to such recall petitions because they are not 'provide[d]' by the State or its subdivision."].) Other federal laws might cause an initiative to be illegal, however.

Finally, it should be noted that, generally, an initiative would override any local ordinances or resolutions, and article XIII C, section 3 would override any state limitations on the initiative power. However, it is possible a local initiative could run afoul of a state statute or a federal one, and so all potential challenges must be explored by the agency's or the district's counsel.

Other Challenges – Judicial or "Case Law" Challenges

Impairment of Essential Governmental Functions

Arguably, one of the biggest issues left open by the Bighorn case is whether a citizens' initiative can be used to reduce or repeal taxes, fees or charges in a manner that makes it impossible for an agency to fulfill its statutorily mandated duties. Indeed, courts have repeatedly held that the power of initiative and referendum does not extend to "essential government functions." (See, e.g., *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466, 470; *Dare v. Lakeport City Council* (1970) 12 Cal. App.3d 864, 868; see also, *Simpson v. Hite* (1950) 36 Cal.2d 125, 134.) This doctrine might apply to taxes, assessment and fees subject to Proposition 218 because Proposition 218 does just that: It specifically allows the initiative to be used to reduce or repeal taxes, assessments and charges – without any regard as to whether the agency's essential governmental functions will be affected. The applicability of this common law ground for challenge will likely depend on the facts, in particular, the amount of the reduction and whether it would effectively prohibit the agency from functioning.

That being said, the statutory authority under which most public water agencies operate usually requires the legislative body of the agency to set rates and charges which will generate revenues sufficient to pay the operating expenses of the agency. Case authority indicates that the power of

initiative is coextensive with, and no greater than, the power of the legislative body of the agency to which the initiative applies. (*Bldg. Industry Assn. v. Camarillo* (1986) 41 Cal.3d 810, 821; *Hermosa Beach Stop Oil Coalition v. Hermosa Beach* (2001) 86 Cal.App.4th 534, 549.) If the legislative body is required by statutes to set rates sufficient to cover costs, then an initiative which reduces rates below the level necessary to cover costs would be in excess of the electorate's power. If an initiative were to pass it might be possible to enjoin it from becoming effective until the issue of whether it meets the statutory mandate is litigated. The *Bighorn* court expressly left this issue open, stating that it was "not determining whether the electorate's power is subject to the statutory provision requiring that water service charges be set at a level that will pay the operating expenses of the agency, provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions and enlargements, pay the interest on any bonded debt, and provide a sinking fund or other fund for the payment of the principal of such debt as it may become due." (*Bighorn*, 39 Cal.4th at p. 221.) But case law to date indicates this could be a successful challenge. In *Rossi*, the Supreme Court explained: "The scope of the initiative and referendum powers . . . is limited to control over municipal affairs. The state has plenary authority over matters of statewide concern and, in areas in which the Legislature has specifically and exclusively delegated authority in those matters to a local legislative body, may bar exercise of either referendum or initiative." (*Rossi*, 9 Cal.4th at p. 698.) How this might be resolved in light of the "notwithstanding" clause in article XIII C is unclear. Although it seems once again that the plain language of article XIII C, section 3 might override this doctrine, the Supreme Court has yet to resolve this issue.

Preemption

This is another of the "big issues" left open by *Bighorn*. Specifically, the California Supreme Court has held that neither the initiative nor the referendum power can "be used in areas in which the local legislative body's discretion was largely preempted by statutory mandate." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776.) This is important because many of the enabling acts establishing water agencies or districts specify that rates for water and water services shall be set to cover certain expenses. (See, e.g., Wat. Code, §§ 31007, 60245.) Thus, it is arguable that the Legislature has established a statewide policy mandating that water agencies set water rates and other consumer charges in amounts sufficient to ensure the continuing operation of the enterprise, and this policy cannot be overridden by the initiative. This argument is further bolstered by the principles that an initiative can only propose such legislation as the local legislative body has the power to enact, (*Bagley v. City of Manhattan Beach* (1979) 18 Cal.3d 22, 26), and that exclusive delegation of a discretionary power – such as rate setting to a board of directors – precludes exercise or limitation of that power by initiative. (*City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th 465, 474-479.)

But while this avenue of attack may be open to initiatives that affect agency functions generally, it is unclear that an agency could argue that its fees, taxes and charges were exempt from the initiative process because article XIII C, section 3 expressly allows the electorate to use the initiative to attack

these funds. This is particularly true in light of *Bighorn*, where the California Supreme Court held that, despite the intent of the State Legislature to allow water districts such as Bighorn-Desert View to establish their water rates, article XIII C granted local voters a right to use the initiative power to reduce those rates. (*Bighorn*, 39 Cal.4th at p. 221.)

Legislative Acts

The power of initiative applies "only to legislative acts by a local governing body," and not to adjudicatory acts (*Yost v. Thomas* (1984) 36 Cal.3d 561, 569). Generally, an initiative that directly reduced a fee or tax would be a legislative act, but if the initiative *directed* an agency to reduce a fee or tax to reflect certain concepts in the ordinance, it might be invalid. (See, e.g., *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509 [invalidating an initiative which directed the city council to revise the plan and zoning ordinances to reflect the concepts expressed in the measure].) Thus an agency wishing to challenge an initiative prior to an election should consider the nature of the law proposed and whether it is legislative in nature. If it is adjudicatory in nature, the initiative might be subject to pre-election attack. Imposing taxes, assessments, fees, charges and rates is generally considered a legislative act of a local government agency, so this ground for challenge would appear to have little applicability to an initiative brought under article XIII C.

Initiatives To Require Voter Approval of Future Increases And Charges

In *Bighorn*, the Supreme Court upheld the trial court's ruling keeping the initiative off the ballot because the provision requiring voter approval of *future* increases and new charges made the initiative fatally defective in light of the provisions of article XIII D, section 6, subdivision (c), which exempts water service fees and charges from voter approval. (*Bighorn*, 39 Cal.4th at p. 221.) The Court also held that an initiative under article XIII C, section 3 is limited to reducing or repealing existing fees and charges and cannot impair the agency's ability to impose a new and different fee or charge to make up the revenues lost. (*Id*., at p. 228.) Exactly what such new fees or charges could be is unclear, however.

Arbitrary Exercise of Police Power

In *Arnel Development Co. v. City of Costa Mesa*, (1981) 126 Cal.App.3d 330, the Court of Appeal held that an initiative to pass a zoning ordinance was arbitrary and capricious, and therefore invalid. (*Id*. at p. 337.) The zoning classification in the ordinance "was selected purely capriciously without consideration of appropriate planning or land use criteria," and it was not rationally related to the general public welfare. (*Id*.) This could apply, for example, to an initiative that reduced water fees and charges for one area, but left them intact for another, without any rational relation to public welfare or other legitimate purpose.

Pre- or Post-Election Challenges

Whether an agency should bring a pre- or post-election challenge will depend upon the nature of the initiative itself. Generally, however, pre-election challenges are disfavored by the courts. As the California Supreme Court recently explained, "it is usually more appropriate to review constitutional and other challenges to ballot propositions

or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029-1030; see also, *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1005; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4-5.)

Nevertheless, "this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative, and that the rule does not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because the measure is not legislative in character or because it amounts to a constitutional revision rather than an amendment. . . . preelection review of an initiative measure may be appropriate when the challenge is not based on a claim that the substantive provisions of the measure are unconstitutional, but rests instead on a contention that the measure is not one that properly may be enacted by initiative." (*Independent Energy Producers Assn., supra*, 38 Cal.4th at pp. 1029-1030 [holding that pre-election review of claim that the California Constitution permits only the Legislature, and not the people through the initiative process, to confer additional authority upon the PUC, is not necessarily or presumptively improper], quoting *Costa*, 37 Cal.4th at p. 1005.)

Other challenges which are best brought prior to the election include violations of the Elections Code sections 9302 and 9303 (notices of intent and publication); 9310, subdivision (a) (signature requirement); the full text requirement; the single subject rule (see *Costa*, 37 Cal.4th at p. 1005); and possibly, Federal Voting Rights Act challenges. A good rule of thumb is that, if an initiative has failed to "satisf[y] the constitutional or statutory procedural prerequisites necessary to qualify it for the ballot," a pre-election challenge is appropriate. (*Costa*, 37 Cal.4th at p.1006.) "Unlike a challenge to the substantive validity of a proposed measure, it cannot be properly suggested that it would be premature to consider such a claim prior to the election, because the focus of the issue is solely upon whether the measure has qualified for the ballot, and not upon the validity or invalidity of the measure were it to be approved by the voters." (*Id.*)

Agency New Fees or Charges After an Initiative

In the course of explaining its ruling, the *Bighorn* court stated that, although voters "may decrease a public water agency's fees and charges for water service" by exercising the initiative power, the "agency's governing board may then raise other fees or impose new fees without prior voter approval." (*Bighorn*, 39 Cal.4th at p. 220.) While this may be true for fees and charges that are not subject to article XIII D, such as capacity charges for new capital charges or hookup fees (see, e.g., *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419-429), fees and charges, such as those for ongoing water service that are subject to article XIII D, would need to be adopted in accordance with the procedural requirements discussed above, including the majority protest procedure. Moreover, under Elections Code section 9323, "voter approval is required before a local district's governing board may amend an ordinance adopted by initiative, unless

the ordinance provides otherwise." (*Bighorn*, 39 Cal.4th at pp. 228-229; Elec. Code, § 9323.)

Thus, following a successful initiative, state statute may impose a voter approval requirement on fees and charges that are otherwise exempt from voter approval under article XIII D. The upshot of Proposition 218, section 9323, and *Bighorn* appears to be this: For property-related fees and charges, assessments and taxes, the agency must comply with Propositions 13, 62 and 218 – and it will in some cases have to obtain a 2/3 majority vote for adoption of a tax and comply with article XIII D's requirements for hearing and majority protest with respect to such fees, charges and assessments. By contrast, an initiative reducing or repealing a tax, assessment, fee or charge need only pass by a simple majority vote.

Conclusion

After *Bighorn* all local taxes, special taxes, assessments, fees and charges are likely subject to reduction or repeal by initiative. (Cal. Const., art. XIII C, § 3.) However, *Bighorn* does not allow initiatives that require voter approval of future increases in charges or fees for water, sewer and refuse collection services. (*Bighorn*, 39 Cal.4th at p. 218; Cal. Const., art. XIII D, § 6, subd. (c).) *Bighorn* leaves open the question of whether the initiative could be used to reduce agency rates and charges below the level necessary to maintain its essential operations.

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