



**California Special  
Districts Association**

*Districts Stronger Together*

# Proposition 218 Guide for Special Districts



**A GUIDE TO UNDERSTANDING THE IMPACTS OF PROPOSITION 218 ON SPECIAL DISTRICTS.**



## Introduction

The nature of the services provided by a special district will generally dictate what types of revenue sources the special district will use to fund its services. For example, special districts that provide water, sewer and solid waste disposal rely primarily on fees and charges imposed on the property owners or tenants who directly receive those services.

Special districts are limited special purpose local governments that are separate from cities and counties. Within their jurisdictions, special districts provide particular public services such as water, sewer, sanitation, fire protection, emergency medical services, parks and recreation, cemeteries, resource conservation, flood control, and mosquito abatement, among others. Special districts fund these services and generate revenue from several sources, including property taxes, special assessments, fees and charges.

The nature of the services provided by a special district will generally dictate what types of revenue sources the special district will use to fund its services. For example, special districts that provide water, sewer and solid waste disposal rely primarily on fees and charges imposed on the property owners or tenants who directly receive those services. As described in the following pages, these are now referred to as “property-related fees and charges.” Other special districts that provide more generalized services to communities, such as fire protection and emergency medical services, public cemeteries, mosquito abatement, and flood control rely primarily on real property taxes, special taxes or special assessments to fund their services.



On November 5, 1996, California voters approved Proposition 218, the so-called “Right to Vote on Taxes Act.”

On November 5, 1996, California voters approved Proposition 218, the so-called “Right to Vote on Taxes Act.” Proposition 218 amended the California Constitution by adding articles XIII C (“Article XIII C”) and XIII D (“Article XIII D”), which affect the ability of special districts and other local governments to levy and collect existing and future taxes, assessments, and property-related fees and charges. Article XIII C established voter approval requirements for general and special taxes and provided the initiative power to voters to reduce or repeal any local tax, assessment, fee or charge. It further made the power of initiative applicable to all local governments. Article XIII D established a new category of fees and charges, referred to as “property-related fees and charges.”<sup>1</sup> Additionally, Article XIII D established new procedural requirements for levying assessments and imposing new, or increasing existing, property-related fees and charges, and it placed substantive limitations on the use of the revenues collected from assessments and property-related fees and charges, as well as on the amount of the assessment, fee, or charge that may be imposed on each parcel.

Proposition 218 can best be understood against its historical background, beginning with the adoption of Proposition 13 in 1978. Proposition 13 added Article

XIII A to the California Constitution. Billed as a property-taxpayer relief measure, it included an “interlocking package” comprised of a real property tax rate limitation (Article XIII A, § 1), a real property assessment limitation (Article XIII A, § 2), a restriction on state taxes (Article XIII A, § 3), and a restriction on local taxes (Article XIII A, § 4). Additionally, Article XIII A, section 4 limited local governments by establishing a two-thirds voter approval requirement for any special tax to be imposed by cities, counties, and special districts.

*Proposition 218’s findings and declarations provide further clarification of its purposes:*

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 measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.<sup>2</sup>



Proposition 218 was thus intended to bolster Proposition 13's limitations on ad valorem property taxes and special taxes by placing new restrictions on the imposition of taxes, assessments, fees, and charges.<sup>3</sup>

This guide addresses the requirements for the adoption of taxes under Article XIII C, explains the substantive limitations on—and procedural requirements for—imposing any new, or increasing any existing, assessment or property-related fee or charge. It also addresses court cases interpreting Proposition 218's provisions. While this guide is designed to help special districts interpret and comply with the current requirements of Proposition 218, future court decisions, constitutional amendments, and clarifying legislation adopted by the state Legislature may impose different compliance requirements. It is not possible to predict how courts will further interpret Article XIII C and Article XIII D, and what, if any, further implementing legislation will be enacted.



### **Important**

All special districts should consult their respective legal counsel for further clarification and compliance with these constitutional provisions and specific statutory provisions governing their agency that may be implicated by the adoption of a tax, assessment or property-related fee or charge. This guide is only meant to be an overview.

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## Taxes (Article XIII C)

Article XIII C is divided into three sections.

Article XIII C is divided into three sections. Section 1 provides the definitions of specific terms applicable to Article XIII C. Section 2 establishes local government tax limitations. Section 3 establishes the initiative power to reduce or repeal local taxes, assessments, and fees and charges.

### **Definitions**

Section 1 provides definitions of the terms “general tax,” “local government,” “special district,” and “special tax.”

- A “general tax” is defined as “any tax imposed for general governmental purposes.”<sup>4</sup>
- A “special tax” is defined as “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.”<sup>5</sup> Parcel taxes are special taxes.<sup>6</sup>
- “Local government” is defined as “any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.”<sup>7</sup>
- “Special district” is defined as “an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.”<sup>8</sup>



Significantly, all taxes imposed by special districts are by definition special taxes because they are imposed for specific purposes.

### **Local Government Tax Limitation**

Article XIII C, section 2 establishes local government tax limitations by characterizing all taxes as either general or special taxes.<sup>9</sup> By definition, a tax is a general tax only if its revenues are placed into the general fund of a local agency and made available for any and all governmental purposes. A local government may not impose, extend, or increase a general tax unless and until the tax is submitted to the electorate and approved by a majority vote of the qualified electors voting in the election.<sup>10</sup> The election to approve a general tax must be “consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.”<sup>11</sup>

Significantly, all taxes imposed by special districts are by definition special taxes because they are imposed for specific purposes.<sup>12</sup> Article XIII C, section 2(a) provides that “[s]pecial purpose districts or agencies, including school districts, shall have no power to levy general taxes.”<sup>13</sup> However, special districts are specifically authorized to impose a special tax pursuant to California Government Code section 50077.<sup>14</sup> A special district may not impose, extend, or increase any special tax unless and until the tax is submitted to the electorate and approved by two-thirds of the votes cast by the qualified voters voting

on the proposition.<sup>15</sup> “The revenues from any special tax shall be used only for the purpose or service for which [the tax] was imposed, and for no other purpose whatsoever.”<sup>16</sup>

*What does it mean to impose, extend, or increase a tax?*

- A tax is “imposed” when (1) a special district adopts the ordinance or resolution enacting the tax and establishing the legal obligation of the taxpayer to pay the tax; and (2) the tax is collected.<sup>17</sup> This means that a tax is imposed anew each time it is collected.<sup>18</sup>
- A tax is “extended” when a special district makes a decision to change the stated effective period for the tax, including any amendment or removal of a sunset provision or expiration date.<sup>19</sup>
- A tax is “increased” when a special district makes a decision that either (1) increases any applicable rate used to calculate the tax; or (2) revises the methodology<sup>20</sup> by which the tax is calculated, if that revision results in an increased amount being levied on any person or parcel.<sup>21</sup> A tax is not deemed increased when a special district makes a decision that either (1) adjusts the

## Taxes (Article XIII C) continued

amount of a tax in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996; or (2) implements or collects a previously approved tax, so long as the rate is not increased beyond the level previously approved by the special district, and the methodology previously approved by the special district is not revised so as to result in an increase in the amount being levied on any person or parcel.<sup>22</sup>

A proposed special tax may state a range of rates or amounts.<sup>23</sup> If the range of rates is approved by the voters, the governing body of the special district may impose the tax at any rate or amount that is less than or equal to the maximum amount approved.<sup>24</sup> Alternatively, any proposed special tax may provide for inflationary adjustments to the rate or amount pursuant to a clearly defined formula,<sup>25</sup> *unless* the special tax is to be determined by using a percentage calculation.<sup>26</sup> If the amount or rate of a tax is determined using a percentage calculation, the ordinance or resolution establishing the tax may not provide that the percentage will be adjusted for inflation.<sup>27</sup> Additionally, if approved by the voters, the legislative body of the special district may thereafter impose the special tax at any rate that is less than or equal to the inflation-adjusted maximum amount authorized by the voter-approved ordinance.<sup>28</sup> These same

provisions apply to any ordinance presented for voter approval pursuant to Article XIII D.

Because of these requirements, when adopting any special tax a special district should consider including escalators and maximum rate provisions in the tax ordinance submitted for voter approval, in order to avoid having to seek voter approval for any future tax increases.

### ***Initiative Power for Local Taxes, Assessments, Fees, and Charges***

There are two ways in which a measure may be placed on a local ballot. A local legislative body has the ability to place tax measures, bond measures, charter measures, and proposed changes in law on the ballot.<sup>29</sup> Alternatively, local voters can put an initiative or a referendum on the ballot. Article XIII C, section 3 extends the initiative power to reduce or repeal any local tax, assessment, fee or charge. This section of the Constitution is applicable to all local governments, including special districts. This extension of the initiative power is not limited to taxes imposed on or after November 6, 1996 (the effective date of Proposition 218), and could result in retroactive repeal or reduction in any existing taxes, assessments, fees and charges, subject to overriding federal and state constitutional principles relating to the impairment of contracts. Moreover, neither the state Legislature or any local government charter may impose a signature requirement higher than that applicable to statewide statutory initiatives.<sup>30</sup>



In *Bighorn-Desert View Water Agency v. Verjil*, the California Supreme Court held that under Article XIII C, section 3, a public agency’s water fees and charges may be reduced by the initiative process.<sup>31</sup> However, the court also recognized that there is nothing in Article XIII C that authorizes initiative measures that impose voter-approval requirements for future increases in fees or charges.<sup>32</sup> The court declined to determine whether the electorate’s initiative 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 bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due.”<sup>33</sup>

As of May 2013, the courts have still not addressed the question of whether an initiative measure to reduce taxes, assessments, and fees and charges is limited by a public agency’s rate setting or contractual obligations, including outstanding bonds and other forms of indebtedness.

Taxes, assessments, fees, and charges may be pledged to repay bonds or other forms of indebtedness. In general, bonds and other public securities constitute contracts that fall within the purview of state and federal constitutional prohibitions against impairing the obligations of contracts.<sup>34</sup> Most public lawyers therefore believe that the impairment of contracts provisions of the state and federal constitutions would seem to preclude an initiative that reduces or repeals taxes, assessments, fees, or charges pledged as the source of payment of a bonded indebtedness if the initiative would impair the obligations of the agency to the bond holders.<sup>35</sup>

**Table 1**

Type of Tax	Voter Approval
General Tax <sup>(1)</sup>	Majority
Special Tax	Two-thirds

(1) Cities and Counties only.





## Assessments, Fees and Charges (Article XIII D)

Article XIII D is divided into six sections.

Article XIII D is divided into six sections. Section 1 governs the application of Article XIII D to all assessments, fees, and charges, whether imposed pursuant to state statute or local government charter authority. Article XIII D, section 1 provides that nothing in Article XIII C or Article XIII D shall be construed to:

- provide any new authority to any agency to impose a tax assessment, fee or charge;
- affect existing laws relating to the imposition of fees or charges as a condition of property development; or
- affect existing laws relating to the imposition of timber yield taxes.<sup>36</sup>

Section 2 provides the definitions of certain terms applicable to the imposition of assessments and property-related fees and charges under Article XIII D. Those definitions are as follows:

- “Agency” means any local government, as defined in subdivision (b) of Section 1 of Article XIII C.
- “Assessment” means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. “Assessment” includes, but is not limited to, “special assessment,” “benefit assessment,” “maintenance assessment” and “special assessment tax.”

## Assessments, fees and charges continued

- “Capital cost” means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.
- “District” means an area determined by an agency to contain all parcels that will receive a special benefit from a proposed public improvement or property-related service.
- “Fee” or “charge” means any levy other than an ad valorem tax, a special tax, or an assessment, 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.
- “Maintenance and operation expenses” means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
- “Property ownership” includes tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.
- “Property-related service” means a public service having a direct relationship to property ownership.
- “Special benefit” means 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.”<sup>37</sup>

Section 3 provides an exclusive list of the types of levies that may be imposed on property. According to this section, no tax, assessment, fee, or charge may be assessed by any agency upon any parcel or property or upon any person as an incident of property ownership except:

- the ad valorem property tax imposed pursuant to Article XIII and Article XIII A;
- any special tax receiving a two-thirds vote pursuant to Article XIII A, section 4;
- assessments adopted pursuant to Article XIII D, section 4; and
- fees or charges for property-related services adopted pursuant to Article XIII D, section 6.<sup>38</sup>

Section 3 specifically exempts fees and charges imposed by local governments for the provision of electrical or gas service from the provisions of Article XIII D, section 6, which govern property-related fees and charges.<sup>39</sup> However, fees and charges for the provision or gas or electrical services are subject to the provisions of Article XIII C, section 1(e), as amended by Proposition 26, which was adopted in November 2010. Sections 4 and 5 of Article XIII D affect the imposition of assessments. Sections 4 and 5 are described in greater detail in the following section.





## Assessments (Article XIII D, Sections 4 and 5)

Assessments are levied pursuant to statutory authority or, in some instances charter city authority. Of significance is the requirement that the property must be specially benefitted by the improvements or services for which the assessment is imposed.

As noted previously, Article XIII D, section 2 defines “assessment” as any levy or charge upon real property by an agency for a special benefit conferred upon the real property. Assessments are sometimes referred to as “special assessments” or “special benefit assessments,” and are not to be confused with a tax assessment or special tax.<sup>40</sup> Taxes are generally imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.<sup>41</sup> An assessment, however, is a charge levied and imposed on property to pay for special benefits that parcels receive from local government improvements (e.g., water facilities, sewer facilities, undergrounding of utilities, or landscape improvements) or services (e.g., maintenance of storm water facilities, landscape improvements, or street lighting improvements). Assessments are levied pursuant to statutory authority or, in some instances charter city authority. Of significance is the requirement that the property must be specially benefitted by the improvements or services for which the assessment is imposed.

Beginning July 1, 1997, with a few limited exceptions, all existing,<sup>42</sup> new, or increased assessments must comply with the substantive limitations and procedural requirements of Article XIII D, section 4, including the requirement that public agencies must hold a public hearing and provide property owners with an opportunity to protest any proposed new assessment or increase to an existing assessment. An overview of these substantive and procedural requirements follows.

### ***Compliance with the Substantive Provisions of Article XIII D, Section 4***

Before imposing an assessment, a public agency must first identify all parcels that will receive a special benefit from the proposed improvements or services for which the assessment is proposed to be levied.<sup>43</sup> The assessments must be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.<sup>44</sup> Only special benefits are assessable, and local governments may not impose assessments to pay for the cost of providing a general benefit to the community.<sup>45</sup> If a proposed project provides both special benefits and general benefits, the assessment engineer's report must separate the benefits, and only the special benefits may be assessed.<sup>46</sup> The requirement that a public agency separate the general benefits from the special benefits helps ensure that the special benefit requirement is met.<sup>47</sup> Moreover, every parcel that receives a special benefit from the proposed improvements or services must be assessed, including any parcels owned or used by a public agency, the State of California, or the United States.<sup>48</sup>

The assessment engineer's report must quantify the proportionate special benefit derived by each identified parcel<sup>49</sup> subject to the proposed assessment in relationship to the entirety of the capital cost of the public improvements or services being provided, and must calculate the amount of the assessment to be imposed on each identified parcel.<sup>50</sup> Additionally, no assessment may be imposed that exceeds the reasonable cost of the proportional special benefit that is conferred on a parcel.<sup>51</sup>

The special benefit and proportionality requirements are perhaps best understood as being interrelated, not separate, requirements. The proportionality requirement ensures that the *aggregate* assessment imposed on *all* parcels is distributed *among* all assessed parcels in *proportion* to the special benefits conferred on *each parcel*. The special benefit requirement is thus part and parcel of the proportionality requirement.<sup>52</sup>

## Assessments (Article XIII D, Sections 4 and 5) continued

### **Special Benefit Analysis: “If everything is special, then nothing is special”**

The Supreme Court’s decision in *Silicon Valley Taxpayers Association v. Santa Clara Open Space Authority* best illustrates the issues that a special district should consider in determining whether a proposed assessment complies with the special benefit and proportionality requirements of Article XIII D, section 4.<sup>53</sup> Prior to the adoption of Proposition 218, the Santa Clara Open Space Authority formed an assessment district in 1992 pursuant to the Landscape and Lighting Act of 1972 (California Streets & Highways Code sections 22500 *et. seq.*) for the purpose of acquiring and preserving open space land within Santa Clara County. In 2000, Santa Clara Open Space Authority determined it needed additional funding to purchase open space land and considered forming a second assessment district for this purpose.

All property within Santa Clara County was proposed to be assessed. The assessment engineer’s report prepared in connection with the proposed assessment set the assessment for all single-family residences at the same rate and provided a formula for estimating the special benefit that other properties received. The specific properties to be acquired for open space were not identified in the assessment engineer’s report. Based on the weighted ballots submitted, the assessment was approved by a majority of the property owners.

The assessments were challenged on the ground that Santa Clara Open Space Authority failed to satisfy the special benefit and proportionality requirements of Article XIII D, section 4.

The California Supreme Court acknowledged that Article XIII D, section 4 requires that the general enhancement of property value is not a special benefit and that “general benefit” includes benefits conferred generally on real property located within an assessment district.<sup>54</sup> The court, however, refined the definition of “special benefit” by determining that “under the plain language of article XIII D, a special benefit must affect the assessed property in a way that is particular and distinct from its effect on other parcels and that real property in general and the public at large do not share.”<sup>55</sup> By way of example, the court recognized that if an assessment district is narrowly drawn, the fact that a benefit is conferred throughout the district does not make it general rather than special. In that circumstance, the characterization of a benefit may depend on whether the parcel receives a direct advantage from the improvement through its direct relationship to the locality of the improvement (e.g., proximity to a park) or receives an indirect, derivative advantage resulting from the overall public benefits of the improvement (e.g., general enhancement of the district’s property values).<sup>56</sup>





...an assessment to be imposed on parcels must be based on the entirety of the cost of the improvement or services.

In *Silicon Valley*, the court noted that “[a]lthough it is reasonable to conclude that ‘quality-of-life’ to people living in, working in, and patronizing businesses in the district will, in turn, benefit property in the district, such derivative benefits are only ‘general benefits conferred on real property located in the district or to the public at large.’”<sup>57</sup> The court concluded that the assessment engineer’s report had failed to recognize that the “public at large” means all members of the public and not just transient visitors.<sup>58</sup> Further, the report assumed that people and property in the district would receive no general benefit and only special benefits. “But under these circumstances, ‘[i]f everything is special, then nothing is special.’”<sup>59</sup>

The court also found that the assessment engineer’s report did not show any distinct benefits to particular parcels of property beyond the benefits of the general public using and enjoying the open space received. The report did not identify any specific open space to be acquired with the proposed assessment, and thus the report did not demonstrate any specific special benefits that assessed parcels would receive from their direct relationship to the locality of the improvement. Hence, the court concluded the assessment was invalid because the report failed to demonstrate that the assessed properties received a particular and distinct special benefit over and above that shared by the district’s property in general or the public at large.<sup>60</sup>

### **Proportionality Analysis**

In making determinations of proportionality, the courts have determined that the amount of the assessment to be imposed on parcels must not be based on a desired budget or on a property-by-property basis. Instead, an assessment to be imposed on parcels must be based on the entirety of the cost of the improvement or services. Two cases demonstrate how an assessment may fail the proportionality requirements of Article XIII D, section 4(a).

In *Silicon Valley Taxpayers’ Association*, discussed above, the California Supreme Court found that the assessment engineer’s report failed the proportionality requirements of Proposition 218, largely because the special assessment was based on the Santa Clara Open Space Authority’s projected annual budget for its open space acquisition and maintenance program rather than on a calculation or estimation of the cost of the particular public improvement to be financed with the assessment.<sup>61</sup> The purpose of assessments is to require that properties receiving a special benefit from public improvements pay for the public improvements, not to fund an agency’s ongoing budget.<sup>62</sup> Ultimately, the court found that the assessment engineer’s report failed to identify with sufficient specificity the “permanent public improvement” that the assessment would finance, failed to estimate or calculate the cost of improvements, and failed to directly connect the proportionate

## Assessments (Article XIII D, Sections 4 and 5) continued

costs and benefits received from the “permanent public improvement” to the specific assessed properties.<sup>63</sup> “[A]n assessment calculation that works backward by starting with an amount taxpayers are likely to pay, and then determines an annual budget based thereon, does not comply with the law governing assessments, either before or after Proposition 218.”<sup>64</sup>

In *Town of Tiburon v. Bonander*, the Town of Tiburon formed an assessment district for the purpose of undergrounding utilities.<sup>65</sup> The assessment engineer’s report created three benefit zones for which the construction costs were determined and separately apportioned. The court found that the benefit zones were not based on differential benefits enjoyed within each zone, but instead were based largely on variances in the costs of placing the utilities underground in each of the zones. The court concluded that this apportionment methodology resulted in properties that received identical special benefits paying vastly different assessments, and therefore did not proportionately allocate the assessments within the district according to relative special benefit.<sup>66</sup>

The court reasoned that

an assessment is not measured by the precise amount of special benefits enjoyed by the assessed property. Instead, an assessment reflects costs allocated to relative benefit received. As a general matter, an assessment represents the entirety of the cost of the improvement or property-related service, less any amounts attributable to general benefits (which may not be assessed), allocated to individual properties in proportion to the relative special benefit conferred on the property. Proportional special benefit is the “equitable, nondiscriminatory basis” upon which a project’s assessable costs are spread among benefited properties. Thus, the “reasonable cost of the proportional special benefit,” which an assessment may not exceed, simply reflects an assessed property’s proportionate share of total assessable costs as measured by relative special benefits.<sup>67</sup>

Furthermore, “proportionate special benefit is a function of the total cost of a project, not costs determined on a property-by-property or a neighborhood-by-neighborhood basis.”<sup>68</sup>

Finally, the Town excluded certain properties from the district even though the excluded properties would receive special benefits. By excluding those properties from the district, the assessments on properties included in the district necessarily exceeded the proportional special benefit conferred on them. In effect, the assessed properties were subsidizing the special benefit enjoyed by the non-assessed properties.<sup>69</sup>



...an assessment to be imposed on parcels must be based on the entirety of the cost of the improvement or services.

As a consequence of these court decisions, a special district that is considering the formation of an assessment district must carefully identify with sufficient specificity: (1) the specific services or improvements to be funded by the assessment; (2) the special benefit that properties within the proposed assessment district will receive from the services or improvements; (3) an estimate or calculation of the cost of the services or improvements; and (4) the direct connection of any proportionate costs of and special benefits received from the services or improvements to the specific assessed properties in relation to the entirety of the cost of the improvements or services. The special benefit must affect the parcels to be assessed in a way that is particular and distinct from its effect on other parcels and that real property in general and the public at large do not share. The assessment engineer's report must measure and reflect the special benefits that will accrue to each particular parcel within the assessment district. Consequently, an assessment that is levied at the same rate for all parcels of property within an assessment district in some circumstances may not meet the proportionality requirements of Article XIII D, section 4.

### ***Compliance with the procedural requirements of Article XIII D, Section 4(b)***

#### ***Notice and Ballots***

In order to impose an assessment on a property, a special district must hold a public hearing, mail advance notice of the public hearing to the record owner<sup>70</sup> of each parcel proposed to be assessed, and conduct a ballot protest proceeding.<sup>71</sup> The assessment ballot protest proceeding is not an election or a vote for purposes of California Constitution Article II, nor is it subject to the limitations and requirements of the California Elections Code governing elections.<sup>72</sup>

The notice must be mailed not less than forty-five calendar days prior to the public hearing, and must include the following information:

- the amount of the proposed assessment to be imposed on the identified parcel;
- the total amount to be imposed in the entire assessment district;
- the duration of the assessment;
- the reason for the assessment;
- the basis upon which the assessment was calculated;
- the date, time, and location of the public hearing on the proposed assessment;
- a ballot; and
- a summary of the procedures applicable to the completion, return, and tabulation of the ballots, including a disclosure statement that if the ballots opposing the proposed assessment exceed the ballots submitted in favor of the assessment (referred to as a majority protest), the assessment may not be imposed.<sup>73</sup>

## Assessments (Article XIII D, Sections 4 and 5) continued

Because an assessment is imposed on property, electors residing within an existing or proposed assessment district who do not own property within the assessment district are not entitled to submit a ballot.<sup>74</sup> The face of the envelope mailed to the property owner with the ballot and notice must contain, in at least sixteen-point type, the following statement in substantially the following form: "OFFICIAL BALLOT ENCLOSED."<sup>75</sup> The ballot must include the special district's address for the receipt of any completed ballot and a place for the property owner to indicate his or her name, a reasonable identification of the parcel subject to the proposed assessment, and his or her opposition to or support for the proposed assessment.<sup>76</sup>

The ballot must be in a form that conceals its contents once it is sealed and delivered by the person submitting the ballot.<sup>77</sup> To be tabulated, a ballot must be:

- signed by the record owner or his or her authorized representative;
- mailed or otherwise delivered to the address indicated in the notice; and
- received by the special district *prior to the close of the public hearing.*<sup>78</sup>

All assessment ballots must remain sealed until the conclusion of the public hearing,<sup>79</sup> but any person who submitted a ballot may change or withdraw the ballot prior to the close of the public hearing.<sup>80</sup>

### **Public Hearing**

The public hearing must be conducted on the date and time stated in the notice and must not be held less than forty-five calendar days after the notice of the proposed assessment and public hearing is mailed to the record owner(s) of each identified parcel.<sup>81</sup> The day of mailing is excluded from computation of the forty-five day mailing period.<sup>82</sup> At the public hearing, the special district must consider all objections or protests to the proposed assessments,<sup>83</sup> but should consider only valid ballots when determining whether a majority protest exists. The public hearing may be continued from time to time.<sup>84</sup>

The agency's governing body may also continue the tabulation of the ballots to a different time and location accessible to the public, provided that the it announces the time and location of the continued tabulation at the public hearing.<sup>85</sup>

### **Determining Whether There Is a Majority Protest**

At the conclusion of the public hearing, an impartial person designated by the agency—someone who does not have a vested interest in the outcome of the proposed assessment—must tabulate the ballots that were submitted and not withdrawn.<sup>86</sup> An impartial person includes the clerk or secretary of the agency.<sup>87</sup> If the agency uses its personnel to tabulate the ballots, or if it contracted with a vendor for the tabulation and the vendor or its affiliates participated in the research, design, engineering, public education, or promotion of the assessment, the

ballots must be unsealed and tabulated in public view at the conclusion of the public hearing.<sup>88</sup> All interested persons must have an opportunity to meaningfully monitor the tabulation process.<sup>89</sup>

As noted above, the tabulation of the assessment ballots may be continued to a different time or location accessible to the public if the governing body of the special district announces the time and location at the public hearing.<sup>90</sup> The person tabulating the ballots may use technological methods such as punch cards or optically readable (e.g., bar-coded) ballots.<sup>91</sup>

A majority protest exists if, at the conclusion of the public hearing, the ballots submitted and not withdrawn opposing the assessment exceed the ballots submitted in favor of the assessment.<sup>92</sup> The ballots must be weighted according to the proportional financial obligation of each affected property.<sup>93</sup> By way of example, if property owner A's assessment is \$10 and he submits a ballot in opposition to the proposed assessment, and property owner B's assessment is \$1 and she submits a ballot in support of the assessment, property owner A's ballot would be weighted ten times more than property owner B's ballot.

If more than one record owner of a parcel subject to the proposed assessment submits a ballot, the amount of the proposed assessment must be allocated to each ballot submitted in proportion to

the respective record ownership interests, or, as established to the satisfaction of the special district, by documentation provided by the record owners.<sup>94</sup> If a majority protest exists, the assessments may not be imposed.<sup>95</sup>

### **Public Records**

During and after the tabulation, assessment ballots and the information used to determine their weight are considered to be disclosable public records.<sup>96</sup> The ballots must be preserved for a minimum of two years, after which they may be destroyed.<sup>97</sup>

### **Meeting the Burden of Proof**

In the event of a challenge to the validity of an assessment, the burden is on the public agency to demonstrate compliance with the substantive and procedural requirements of Article XIII D, section 4. Prior to the adoption of Proposition 218, in cases challenging assessments, the courts gave great deference to local legislative bodies' determinations regarding what lands were benefited and what amount of benefits should be assessed against the parcels of land within a proposed assessment district.<sup>98</sup> In accordance with that deferential standard of review, special assessments prior to Proposition 218 were presumed to be valid and the burden was on the person challenging the assessment to demonstrate that the record before the legislative body did not clearly demonstrate special benefit or proportionality.<sup>99</sup>

## Assessments (Article XIII D, Sections 4 and 5) continued

In *Silicon Valley Taxpayers Association*,<sup>100</sup> discussed previously, the California Supreme Court acknowledged that Proposition 218 targeted this deferential standard of review. Because special assessment law prior to Proposition 218 was primarily statutory, the court reasoned that the doctrine of constitutional separation of powers served as the foundation for a more deferential standard of review by the courts. With the adoption of Article XIII D, section 4, the validity of an assessment became a constitutional question. A local agency acting in a legislative capacity is prohibited from exercising its discretion in a way that violates the constitution or undermines the constitution's effect, and a court is charged with enforcing the constitution in order to effectuate its purposes. More specifically, Article XIII D, section 4(f) shifted the burden of demonstrating special benefit and proportionality in any legal action contesting the validity of an assessment to the agency establishing the assessment. The court recognized, however, that the provisions of Article XIII D, section 4(f) do not specify the scope of the burden now placed on public agencies. Consequently, the court concluded that courts should exercise their independent judgment in reviewing local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Article XIII D, section 4.

### **Exemptions (Article XIII D, Section 5)**

Any assessment existing on November 6, 1996 that falls within one of four exceptions is exempt from the procedures and ballot protest approval process of Article XIII D, section 4 described above.<sup>101</sup> The four exceptions are as follows:

- Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets,<sup>102</sup> sewers, water,<sup>103</sup> flood control, drainage systems, or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in section 4.
- Any assessment 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. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in section 4.<sup>104</sup>
- Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.
- Any assessment that previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.



**Any assessment existing on November 6, 1996 that falls within one of four exceptions is exempt from the procedures and ballot protest approval process of Article XIII D, section 4.**

Pursuant Government Code section 53753.5, if an agency has complied with the notice, protest, and hearing requirements of Government Code section 53753, or if an agency is not required to comply with those requirements because it falls within one of the four exceptions identified above, then those requirements do not apply in subsequent fiscal years *unless*: (1) the assessment methodology is changed to increase<sup>105</sup> the assessment; or (2) the amount of the assessment is proposed to exceed an assessment formula or range of assessments adopted by the agency in accordance with Article XIII D, section 4 or Government Code section 53753.<sup>106</sup>

**Table 2**

<b>Special Benefit Assessments</b>		
<b>Purpose</b>	<b>Procedural Requirements<sup>(1)</sup></b>	<b>Approval</b>
Fund facilities and services, e.g., water and sewer facilities, landscape and lighting facilities and services, park facilities and services	(1) Hold noticed public hearing. (2) Written notice of public hearing and ballots must be mailed to property owners at least 45 days prior to protest hearing. (3) Notice must provide: (a) the total amount chargeable to the entire district; (b) the amount chargeable to the owner's parcel; (c) the duration of the payments; (d) the reason for the assessment and the basis upon which it was calculated; (e) the date, time, location of the public hearing; (f) a ballot; (g) a summary of the procedures for returning and tabulating the ballots; (h) a statement that if a majority protest exists the assessment will not be imposed. (4) The resolution authorizing the special benefit assessment may (a) state a range of rates or amounts; or (b) provide that rate may be adjusted for inflation pursuant to defined formula.	If a majority of the property owners protest the levy of the assessment, the assessment may not be imposed. Ballots are weighted based on the financial obligation of each property owner.

(1) Additional procedures may be required depending on the statutory authority for adopting the specific assessment.







## Property-Related Fees and Charges (Article XIII D, Section 6)

Any special district proposing to adopt a new, or increase an existing, property-related fee or charge must therefore comply with both the substantive and procedural requirements of Article XIII D, section 6.

No property-related fee or charge may be extended,<sup>107</sup> imposed, or increased by a special district without first complying with the provisions of Article XIII D, section 6. Article XIII D, section 2(e) defines “fee” or “charge” as “any levy other than an ad valorem tax, special tax or assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service.” Collectively, these are referred to as “property-related fees and charges.” Water, wastewater, solid waste disposal, and stormwater service fees have been determined to be property-related fees and charges within the meaning of Article XIII D, and are therefore subject to the substantive limitations and procedural requirements related thereto.<sup>108</sup> Any special district proposing to adopt a new, or increase<sup>109</sup> an existing, property-related fee or charge must therefore comply with both the substantive and procedural requirements of Article XIII D, section 6.

### ***Compliance with the Substantive Provisions of Article XIII D, Section 6***

The substantive provisions of Article XIII D appear in sections 6(b)(1)-(5). In accordance with these provisions, a property-related fee must meet all of the following requirements:

- revenues derived from the fee must not exceed the funds required to provide the property-related service;
- revenues derived from the fee must not be used for any purpose other than that for which the fee is imposed;
- the amount of a fee 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;

## Property-related fees and charges continued

- the fee may not be imposed for a service unless the service is actually used by, or immediately available to, the owner of the property subject to the fee. Fees based on potential or future use of a service are not permitted, and stand-by charges must be classified as assessments subject to the ballot protest and proportionality requirements for assessments; and
- 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.<sup>110</sup>

In order for a special district to adopt rate increases to its water, wastewater, solid waste, and stormwater service fees, it must comply with the substantive requirements of Article XIII D. The five substantive requirements in Article XIII D, section 6(b) outlined above are structured to place limitations on (1) the use of the revenue collected from property-related fees and charges; and (2) the allocation of the fee or charge, to ensure that it is proportionally allocated in accordance with the cost of providing the service attributable to each parcel. The five substantive requirements imposed upon property-related fees and charges are similar to existing requirements contained in the California Constitution and state statutes.<sup>111</sup> Since these constitutional and statutory provisions were adopted, the courts have carefully examined the administrative records and actions of legislative bodies to determine whether

certain fees reasonably allocate the costs necessary to provide the service for which they were imposed, or whether they constitute a special tax requiring a two-thirds voter approval. These cases demonstrate the actions a special district must take in order to ensure that the proposed rate structures for its water, wastewater, solid waste disposal, and stormwater service fees comply with the substantive provisions of Article XIII D, section 6(b). A review of these constitutional and statutory provisions and the cases interpreting them follows.

Proposition 13 added article XIII A, section 4 to the California Constitution (“Article XIII A”). Article XIII A provides that cities may impose special taxes approved by a two-thirds vote of the electorate.<sup>112</sup> To implement the authorizations granted to cities, counties, and districts in Article XIII A, the Legislature enacted California Government Code sections 50075 and 50076.<sup>113</sup> California Government Code section 50075 provides that it is the intent of the Legislature to provide all cities, counties and districts with the authority to impose special taxes pursuant to the provisions of Article XIII A.<sup>114</sup> In language similar to that provided in Article XIII D, section 6(b), California Government Code section 50076 excludes from the definition of special tax “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.”<sup>115</sup> In effect, if a special district’s property-related

fees exceed the costs of providing the services for which the fees are imposed, those fees may be deemed to be a special tax and therefore subject to a two-thirds vote of the electorate.<sup>116</sup>

In *Beaumont Investors v. Beaumont-Cherry Valley Water District*,<sup>117</sup> a real estate developer challenged a facilities fee imposed by a water district, claiming, among other things, that the fee was a special tax imposed without voter approval as required pursuant to Article XIII A. The water district sought to impose the facilities fee on the developer before it could connect to the district's water system. The Court of Appeal analyzed the record of the adoption of the facilities fee and concluded that the water district failed to make a sufficient showing that the facilities fee was reasonably related to the cost of providing the service. At a minimum, the court concluded, the water district should have introduced reports or other

evidence of (1) the estimated construction costs of the proposed water system improvements, and (2) the District's basis for determining the amount of the fee allocated to plaintiff, i.e., the manner in which defendant apportioned the contemplated construction costs among the new users, such that the charge allocated to plaintiff bore a fair or reasonable relation to plaintiff's burden on, and benefits from, the system.<sup>118</sup>

Article XIII D, section 6(b) expands upon the criteria established in California Government Code section 50076 to ensure that a property-related fee or charge does not exceed the costs of providing the service and is proportionally allocated. This additional criteria suggests that a more rigorous documentation of expenses being paid for with the fee and a more rigorous documented nexus between the fee and the parcel-specific allocation of costs are required. Additionally, Article XIII D, section 6(b)(5) places the burden on the agency to "demonstrate compliance with this article."

Building upon the cases analyzing Proposition 13 and its progeny, in *Howard Jarvis Taxpayers Association v. City of Roseville*<sup>119</sup> and *Howard Jarvis Taxpayers Association v. City of Fresno*<sup>120</sup> the courts addressed what documentation is required of a public agency to ensure compliance with the substantive provisions of Article XIII D, section 6(b) when adopting fees and charges. In each case, the city had adopted an in lieu fee imposed upon its enterprise utilities to compensate the city for expenses related to the utilities.

The courts concluded in each case that under Article XIII D, section 6(b), the city could collect a fee to recover costs attributable to its water, wastewater, and solid waste disposal utilities based upon an analysis of actual costs, but in each case the court determined that the fee violated the provisions of Article XIII D, section 6(b) because neither city had

## Property-related fees and charges continued

analyzed or documented the actual costs required for the city to provide the services for which it charged the in lieu fee. The court in *City of 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.<sup>121</sup>

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

Cities are entitled to recover all of their costs of utility services through user fees. The manner in which they do so, however, is restricted by another portion of Proposition 218: "The amount of the fee or charge imposed...shall not exceed the proportional cost of the service attributable to the parcel."

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 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.<sup>122</sup>

Prior to the adoption of Proposition 218, courts gave great deference to the determinations of the legislative bodies that approved property-related fees. In *Brydon v. East Bay Municipal Water District*, the court articulated this standard of review, stating that "[g]iven the quasi-legislative nature of [a public agency's] enactment of the rate structure design, review is appropriate only by means of ordinary mandate where the court is limited to a determination of whether [the public agency's] actions were arbitrary, capricious or entirely lacking in evidentiary support."<sup>123</sup> In *City of Palmdale v. Palmdale Water District*, however,

the court determined that, with the adoption of Proposition 218, the validity of property-related fees has become a constitutional question that the courts are obligated to enforce.<sup>124</sup> Consequently, courts should exercise their independent judgment in reviewing local agency decisions on property-related fee matters.<sup>125</sup>

Based on the foregoing case analyses, and as a consequence of the requirement that a public agency has the burden of demonstrating compliance with Article XIII D, section 6, when establishing rates for property-related fees, a special district must fairly allocate in a fair and reasonable manner the costs of providing the property-related services among all of the parcels served by those services, and must document the methodology used and the justification for the allocation of costs among the various types of properties and users located within the special district. The procedural requirements for adopting new or increasing existing rates for property-related fees follows.

### ***Compliance with the Procedural Requirements of Article XIII D, Section 6***

#### ***Written Notice of the Public Hearing***

Article XIII D, section 6(a)(1) requires that the public agency proposing to impose a new or increase an existing property-related fee or charge provide written notice by mail<sup>126</sup> to the record owner<sup>127</sup> of each parcel upon which the fee or charge will be imposed. The notice must contain the following information:

- the amount of the fees or charges proposed to be imposed;
- the basis upon which the fees or charges were calculated;
- a statement regarding the reason for the imposition of the new, or increases to the existing, fees or charges; and
- the date, time, and location of the public hearing at which the legislative body will consider the new fees or charges or proposed increases to the existing fees or charges.<sup>128</sup>

Article XIII D, section 6(a)(2) further requires that the public hearing to consider adoption of the rate increases be held not less than forty-five calendar days after the mailing of the notice.<sup>129</sup>

Article XIII D, section 6(a)(2) provides that a property-related fee or charge may not be imposed or increased if a majority of “owners of identified parcels” submit written protests. However, these sections, when read with the definitional provisions of Article XIII D, section 2, make clear that the procedural and substantive provisions of Article XIII D, section 6 were intended to apply to more than just the “record owner” of a parcel upon which the fee or charge is proposed to be imposed, and include any tenants who are directly liable for the payment of the fee or charge (i.e., customers of record).<sup>130</sup> Notwithstanding the foregoing requirements, if a special district collects a property-related fee or charge on the tax roll, or allows only property owners to be customers of record,

## Property-related fees and charges continued

the special district need only send notice of proposed rate increases to the property owners of the parcels upon which the fees or charges will be imposed.

Government Code section 53755 was adopted to clarify the provisions of Article XIII D that govern the notice, protest, and hearing procedures for imposing new or increasing existing property-related fees or charges. Specifically section 53755 was intended to address how notice may be mailed, rather than determine who should receive notice pursuant to Article XIII D, section 6(a). Accordingly, section 53755 provides that if a public agency is currently providing an existing property-related service, the agency may give the notice required pursuant to Article XIII D, section 6(a)(1) of an increase to an existing fee or charge by including the notice in (1) the agency's regular billing statement for the fee or charge; or (2) any other mailing by the agency to the address to which the billing statement for the fee or charge is customarily mailed.<sup>131</sup> If a public agency is proposing to impose a new fee or charge, notice may be provided in the same manner as for an increase to an existing fee or charge if the public agency is currently providing a property-related service at that same address.<sup>132</sup>

It is important to note that an additional mailing may still be required when a special district chooses to include a notice in its billing statement or any other mailing that it regularly sends to its customers. Although the provisions of Government Code section 53755 are intended to address

how to mail the written notice, section 53755's requirements indirectly impact who receives, or more importantly does not receive, the written notice required by Article XIII D, section 6(a)(1). Article XIII D, section 6(a)(1) explicitly requires that notice must be provided to the "record owner."<sup>133</sup> In some instances, the record owner may not reside at the address to which the billing statement for a property-related service or other mailer is customarily mailed. In that situation, if notice is sent only to the service address, the public agency will have failed to provide the required notice to the record owner. Thus, in order to ensure that the property owner of record receives written notice,<sup>134</sup> the notice may be mailed in the billing statement or other mailer as authorized by California Government Code section 53755(a), *and* should also be mailed to the property owner of record at the address identified for such property owner on the last equalized secured property tax assessment roll, if that address is different from the service address.<sup>135</sup>

### ***Multi-Year Rate Increases and Pass Through Charges***

California Government Code section 53756 provides that a public agency adopting an increase to a property-related fee or charge may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation if the schedule complies with all of the following:



**The schedule of inflationary adjustments and any pass-through increases must be included in the notice of the public hearing and may only be authorized for five years.**

- the schedule of fees or charges for a property-related service may not exceed five years;<sup>136</sup>
- the schedule of fees or charges may include a schedule of adjustments, including a clearly defined formula for adjusting for inflation, provided that the property-related fee or charge, as adjusted for inflation, does not exceed the cost of providing the service;<sup>137</sup> and
- if an agency purchases wholesale water, sewage treatment, or wastewater treatment from a public agency, the schedule of fees or charges may provide for automatic adjustments that pass through any increases or decreases in the wholesale water charges adopted by the other agency.<sup>138</sup>

The schedule of inflationary adjustments and any pass-through increases must be included in the notice of the public hearing and may only be authorized for five years. After the five years has elapsed, a public agency must comply with the procedural requirements of Article XIII D, section 6(a) for any additional rate increases.

An agency is not required to follow the forty-five day notice provisions of California Constitution article XIII D, section 6(a) when implementing any adjustment made pursuant to a schedule of fees or charges as authorized pursuant to California Government Code section 53756. However, the agency must provide written notice of the adjustment *not less than thirty calendar*

*days* prior to the effective date of the adjustment. The agency may provide the required notice, as provided in California Government Code section 53755(a), by including the notice in the agency's regular billing statement for the fee or charge (if there is one), or by any other mailing by the agency to the address to which the agency customarily mails the billing statement for the fee or charge.<sup>139</sup>

***Public Hearing and Majority Protest***

The next step in the process is the public hearing and determination of whether there is a majority protest against the property-related fee or charge. The public hearing must be conducted on the date and time stated in the notice, but in any event shall not be less than forty-five days after the notice of the proposed fees or charges and public hearing is mailed.<sup>140</sup> At the public hearing, the agency must hear and consider all public comments regarding the fees,<sup>141</sup> but only written protests submitted prior to the close of the public hearing should be considered when determining whether a majority protest against the imposition of the fees exists. Upon the conclusion of the public hearing, if written protests against proposed new, or increases to the existing, property-related fees or charges are not presented by a majority of property owners of the identified parcels upon which the rates and charges are proposed to be imposed and any tenants directly liable for the payment of the fees, the legislative body may proceed with imposing the fees or charges.<sup>142</sup>

## Property-related fees and charges continued

This provision of Article XIII D does not, however, provide public agencies with direction regarding how to determine what constitutes a majority protest. That calculation may be impacted by multiple ownership interests in property, and is further complicated if tenants are provided the opportunity to protest in addition to the record owner(s) of affected parcels.

California Government Code section 53755(b) simplifies the process for determining whether a majority protest exists. It provides that one protest per parcel, filed by an owner or a tenant of a parcel subject to the fee or charge, "shall be counted in calculating a majority protest to a proposed new or increased fee or charge subject to the requirements of" Article XIII D, section 6.<sup>143</sup>

### ***Voter Approval of New or Increased Property-Related Fees and Charges Other Than for Water, Sewer, and Solid Waste Disposal***

Water, sewer, and solid waste disposal service fees are required to comply with the notice and majority protest hearing and procedures described above only for the imposition of a new service fee or an increase to an existing service fee. All other property-related fees, including stormwater service fees, must comply with an additional voter approval process, which Article XIII D, section 6(c) refers to as an "election."<sup>144</sup> The election is held only if, after mailing notice and conducting the majority protest hearing as discussed above, there is not a majority protest. The election must be conducted not

less than forty-five days after the majority protest hearing.<sup>145</sup>

Article XIII D provides a limited description of the process for conducting property-related fee and charge elections. It requires that the fee or charge must be submitted to and approved by (1) a majority vote of the property owners of the property subject to the fee; or, *at the option of the agency*, by (2) a two-thirds vote of the electorate residing in the affected area.<sup>146</sup> In the conduct of elections to approve rates for property-related fees and charges, an agency may adopt procedures similar to those for increasing assessments.<sup>147</sup> The procedures for increasing assessments are outlined in California Constitution article XIII D, section 4 and California Government Code section 53753 and are more particularly described above.<sup>148</sup> These procedures include, among others, mailing a ballot to the affected property owners.<sup>149</sup>

Although the approval process for the adoption of property-related fees and charges under Article XIII D, section 6(c) is called an "election," the proceedings for the adoption of assessments fee elections do not constitute an election or voting for purposes of California Constitution article II or the California Elections Code.<sup>150</sup> Any procedures adopted by a special district for the adoption of property-related fees and charges are therefore not required to comply with the voter secrecy requirements of California Constitution article II or other election requirements established under the California Elections Code.



In *Greene v. Marin County Flood Control and Water Conservation District*,<sup>151</sup> the California Supreme Court considered what it means in a property-related fee or charge election to adopt procedures similar to those for increases in assessments. To answer that question, the court identified the kinds of election or balloting procedures set forth in Article XIII D, section 4, governing approval of assessment increases to determine which of these procedures may have been incorporated into Article XIII D, section 6 elections. The court noted that the procedures in Article XIII D, section 4 pertaining to the conduct of voting on assessments may be separated into three categories:

- (1) Procedures specifying the manner in which the affected property owners will be notified of the assessment (Article XIII D, section 4(c)).
- (2) Procedures prescribing the basic content of the ballot and requiring voter self-identification (Article XIII D, section 4(d)).
- (3) Procedures prescribing the manner in which a public hearing should be conducted, during which the ballots are tabulated (Article XIII D, section 4(e)).

The notice provisions of Article XIII D, section 4(c) are similar to those provided in Article XIII D, section 6(a)(1). The court acknowledged that Article XIII D, section 6(a)(2) has rules for conducting a public hearing at which protests will be considered before an election that are similar to those set forth in Article XIII D, section 4(e). But Article XIII D, section 6 does not contain any provision regarding the composition of the ballot to be

sent to property owners in the event of an election. The court therefore concluded that the plain language of the article provides the reasonable inference that procedures similar to those for increases in assessments in the conduct of elections under Article XIII D, section 6(c) include the use of a ballot for property owner fee elections that is similar to the ballot used to register assessment protests, as set forth in Article XIII D, section 4(d), including identification of both the voter's name and the property.<sup>152</sup>

Notably, the court rejected the argument that "procedures similar to those for increases in assessments in the conduct of elections" for property-related fees refers only to the procedures to conduct the election exclusively by mail, and not the contents or features of the ballot.<sup>153</sup> Consequently, property owners submitting ballots in an election to approve property-related fees or charges may be required to indicate their names, provide reasonable identification of their parcels, and sign the ballot.<sup>154</sup> That information is important for purposes of verifying whether the person submitting a ballot is a property owner authorized to submit a ballot.

One open question the court did not resolve is how the ballots should be tabulated for a property-related fee election. Article XIII D, section 6(c) refers to the fees being submitted to and approved by a majority vote of the affected property owners, thereby suggesting one-parcel, one-vote and that only property

## Property-related fees and charges continued

owners may participate in such an election. “On the other hand, the reference in [Article XIII D, section 6(c)] to ‘procedures similar to those for increases in assessments in the conduct of elections’... may arguably include weighted voting procedures.”<sup>155</sup> The weighted voting procedures of Article XIII D, section 4 provide that the ballots submitted are weighted according to the proportional financial obligation of the affected property.<sup>156</sup> Under this scenario, and by way of example, if Property Owner A had an annual stormwater service fee of \$200 and Property Owner B had an annual stormwater service fee of \$100, Property Owner A’s ballot would be accorded twice the weight of Property Owner B’s ballot. The district in *Greene*, however, did not use a weighted ballot procedure in tabulating the ballots. It is reasonable to conclude, therefore, that one-person, one-vote is a reasonable means for tabulating ballots in a property-related fee election, but as noted below, a weighted ballot procedure may also be followed.

Beginning July 1, 2014, additional procedures are required for conducting property-related fee elections. Senate Bill 553 added section 53755.5 to the Government Code. This section provides that where a special district opts to submit a proposed fee to the registered voters residing in the affected area for approval, the election shall be conducted by the special district’s elections official or its designee.<sup>157</sup> If the special district opts to submit the proposed property-related fee for approval by a majority vote of property owners who will be subject to the fee, then in addition

to the procedures required under Article XIII D, section 6, the following procedures must be followed:

- the face of the envelope mailed to the property owner with the ballot and notice must contain, in at least sixteen-point type, the following statement in substantially the following form: “OFFICIAL BALLOT ENCLOSED” and may be repeated in a language other than English;
- the ballot shall include the special district’s address for return of the ballot, the date and location where the ballots will be tabulated, and a place where the person returning it may indicate his or her name, a reasonable identification of the parcel, and his or her support or opposition to the proposed fee;
- the ballots must be tabulated in a location accessible to the public;
- the ballot must be in a form that conceals its content once it is sealed by the person submitting it;
- the ballot must remain sealed until the ballot tabulation commences.<sup>158</sup>

At the conclusion of the public hearing, an impartial person designated by the agency—someone who does not have a vested interest in the outcome of the proposed assessment—must tabulate the ballots that were submitted. An impartial person includes the clerk or secretary of the agency. If the agency uses its personnel to tabulate the ballots, or if it contracted with a vendor for the tabulation and the vendor or its affiliates



**A special district must preserve the ballots for a minimum of two years, after which they may be destroyed.**

participated in the research, design, engineering, public education, or promotion of the fee, the ballots must be unsealed and tabulated in public view.<sup>159</sup>

The ballot tabulation may be continued to a different time or location accessible to the public, provided that the time and location are announced at the location at which the tabulation commenced and posted by the agency in a location accessible to the public. Additionally, the impartial person may use technological methods to tabulate the ballots, including, but not limited to, punchcard or optically readable (bar-coded) ballots. This section also provides that during and after the tabulation, the ballots and, if applicable, the information used to determine the weight of each ballot, are public records, subject to public disclosure and must be made available for inspection by any interested person. With the reference to a “weighted ballot,” this section confirms that a special district may use a weighted ballot procedure for property-related fee elections similar to that used for assessments. A special district must preserve the ballots for a minimum of two years, after which they may be destroyed.<sup>160</sup>

There is a separate authorization in the Government Code governing inflationary adjustments and multi-year rate increases for property-related fees that are subject to voter approval.<sup>161</sup> Government Code section 53739 provides that an ordinance or resolution presented for voter approval of a property-related fee or charge pursuant to Article XIII D, section 6 may state a range of rates or amounts.<sup>162</sup> If the ordinance or resolution is approved by the voters, a legislative body may thereafter impose the fee or charge at any rate or amount that is *less* than or equal to the *maximum* amount authorized by the voter-approved ordinance or resolution.<sup>163</sup> Section 53739 further provides that the voter-approved ordinance or resolution may provide that the property-related fees and charges may be adjusted for inflation pursuant to a clearly defined formula stated in the ordinance or resolution.<sup>164</sup> Once approved by the voters, the legislative body may impose the property-related fee or charge at any rate or amount that is *less* than or equal to the inflation-adjusted *maximum* amount authorized by the voter approved ordinance or resolution.<sup>165</sup> However, if the amount or rate of the property-related fee or charge is determined by using a percentage calculation, the ordinance imposing the fee or charge *may not* provide that the percentage will be adjusted for inflation.<sup>166</sup>

Because the authorization under Government Code section 53739 provides that inflationary adjustments and increases based on percentages may only be increased by an amount that is less than or equal to the *maximum* amount authorized in the voter-approved ordinance or resolution, the ordinance or resolution submitted to the voters should include a cap or establish a not-to-exceed amount for any automatic adjustments to its rates. It is important to note that Government Code section 53739, unlike Government Code section 53755, does not require a public agency to mail notice thirty days in advance of any authorized inflationary adjustment, nor does it limit the automatic adjustments to five years.

## Property-related fees and charges continued

**Table 3**

<b>Property-related Fees and Charges</b>		
<b>Type of Fee or Charge</b>	<b>Procedural Requirements</b>	<b>Approval</b>
Water, Sewer, and Trash	<p>(1) Hold noticed public hearing.</p> <p>(2) Notice of public hearing must be mailed to property owners of record and tenants directly responsible for the fee at least 45 days prior to the public hearing.</p> <p>(3) Notice must contain (a) the amount of the fee or charge proposed to be imposed; (b) the basis upon which it was calculated; (c) the reason for the fee or charge; (d) the date, time, and location of the public hearing.</p> <p>(4) May adopt a schedule of fees with automatic adjustments that pass through increases in wholesale charges for water, sewer treatment, and wastewater treatment from another public agency or adjustments for inflation; provided, (a) the adjustments are for a period not to exceed 5 years; (b) adjustments for inflation must have a clearly defined formula and any adjustment must not exceed the cost of providing the service; (c) notice of any adjustment pursuant to the schedule shall be given not less than 30 days before the effective date of the adjustment.</p>	<p>(1) If a majority of the affected property owners submit written protests prior to the close of the public hearing to the increase to the property-related fee or charge, it may not be increased. (2) Only one written protest per parcel, filed by an owner or a tenant of the parcel, shall be counted in calculating a majority protest.</p>
All other property-related fees and charges other than water, sewer and trash, e.g., stormwater service fees and charges	<p>(1) Hold noticed public hearing.</p> <p>(2) Notice of public hearing must be mailed to property owners of record and tenants directly responsible for the fee at least 45 days prior to the public hearing.</p> <p>(3) If there is not a majority protest, then must conduct an election of either the affected property owners or the electorate residing in the affected area. Election shall be conducted not less than 45 days after the majority protest public hearing.</p>	<p>(1) If a majority of the affected property owners submit written protests prior to the close of the public hearing to the increase to the property-related fee or charge, it may not be increased. (2) Only one written protest per parcel, filed by an owner or a tenant of the parcel, shall be counted in calculating a majority protest. If there is no majority protest, then the fee or charge must be approved by:</p> <p>(1) a majority vote of the property owners of the property subject to the fee; or, at the option of the special district,</p> <p>(2) a 2/3 vote of the electorate residing in the affected area.</p>



## Conclusion

Since its adoption in 1996, Proposition 218 has been and is likely to continue to be the subject of ongoing litigation, judicial interpretation, constitutional amendment, and statutory clarification. To avoid challenges to any future taxes, assessments, and property-related fees and charges, special districts should consult their legal counsel to determine if there have been any subsequent changes in the law that may impact them. Additionally, a special district should be prepared to identify in its administrative record for the adoption of any tax, assessment, or property-related fee or charge, that it has complied with the provisions of Article XIII C or Article XIII D for the adoption of the tax, assessment, or property-related fee or charge.



## Endnotes

- 1 *Amador Valley Joint Union High Sch. Dist. v. St. Bd. of Equalization*, 22 Cal. 3d 208, 231 (1978) (internal quotations omitted).
- 2 Proposition 218, §2 (1996), 1996 Stats. A-295, available at [http://library.uchastings.edu/ballot\\_pdf/1996g.pdf](http://library.uchastings.edu/ballot_pdf/1996g.pdf).
- 3 *Howard Jarvis Taxpayers Ass'n. v. City of Riverside*, 73 Cal. App. 4th 679, 681-62 (1999).
- 4 Cal. Const. art. XIII C, § 1(a). Although not the subject of discussion in this guide, it is worth noting that Article XIII C was amended in November 2010 as a result of the adoption by the California voters of Proposition 26. The Article XIII C was amended by adding section 1(e), which defined the term “tax”:
  - (e) As used in this article, “tax” means any levy, charge, or exaction of any kind imposed by a local government, except the following:
    - (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
    - (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
    - (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
    - (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
    - (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
    - (6) A charge imposed as a condition of property development.
    - (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

- 5 *Id.* § 1(d).  
6 Cal. Const. art. XIII D, § 3(a); *Nielson v. City of Cal. City*, 133 Cal. App. 4th 1296, 1308 (2005).  
7 Cal. Const. art. XIII C, § 1(b).  
8 *Id.* § 1(c).  
9 *Id.* § 2(a); Cal. Gov't Code § 53721.  
10 *Id.* § 2(b); Cal. Gov't Code § 53723.  
11 Cal. Const. art. XIII C, § 2(b).  
12 *See Rider v. Cnty. of San Diego*, 1 Cal. 4th 1, 11 (1991) (“[A] ‘special district’ would include any local taxing agency created to raise funds for city or county purposes to replace revenues lost by reason of the restrictions of Proposition 13.”).  
13 Notably, article XIII C, section 2(a) uses the term “special purpose districts or agencies” rather than the term “special district” as defined in Article XIII C, section 1(c). It is not clear whether the drafters intended this limitation to mean all special districts, whether created by special act or under general law, or only those that have a very limited purpose such as the agency created in the *Rider* case noted above.  
14 Some special districts have other specific statutory authority in their enacting legislation to impose special taxes. These sections should be examined to determine whether there are any other statutory limitations or requirements for the imposition of special taxes.  
15 Cal. Const. art. XIII C, § 2(d); Cal. Gov't Code §§ 50077(a), 53722.  
16 Cal. Gov't Code § 53724(e).  
17 *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal. 4th 809, 815, 824-25 (2001).  
18 *Id.*  
19 Cal. Gov't Code § 53750(e).  
20 “Methodology” has been defined by the courts as “a mathematical equation for calculating taxes that is officially sanctioned by a local taxing entity.” *A.B. Cellular LA, LLC v. City of Los Angeles*, 150 Cal. App. 4th 747, 763 (2007).  
21 Cal. Gov't Code § 53750(h)(1).  
22 *Id.* § 53750(h)(2); Cal. Const. art. XIII C, § 2(d).  
23 Cal. Gov't Code § 53739(a).  
24 *Id.*  
25 *Id.* § 53739(b)(1).  
26 *Id.* § 53739(b)(2).  
27 *Id.*  
28 *Id.* § 53739(b)(1).  
29 *See* Cal. Elections Code 9300 *et seq.*; Cal. Const. art. II, § 11.

## ENDNOTES CONTINUED

- 30 Cal. Const. art. XIII C, § 3.  
31 *Bighorn-Desert View Water Agency v. Verjil*, 29 Cal. 4th 205, 220 (2006).  
32 *Id.*  
33 *Id.* at 221.  
34 U.S. const. art. I, § 10; Cal. Const. art. I, § 9.  
35 The State Legislature restated this position in California Government Code section 5854, which provides that

Section 3 of Article XIII C . . . shall not be construed to mean that any owner or beneficial owner of a municipal security . . . assumes the risk of, or in any way consents to, any action by initiative measure that constitutes an impairment of contractual rights protected by Section 10 of Article I of the U.S. Constitution.

- 36 Cal. Const. art. XIII D, § 1.  
37 *Id.* § 2.  
38 *Id.* § 3(a).  
39 *Id.* § 3(b).  
40 *See Spring St. Co. v. City of Los Angeles*, 170 Cal. 24, 29 (1915) (“[A] special assessment is not, in the constitutional sense, a tax at all.”).  
41 *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 874 (1997).  
42 An “existing assessment” is any assessment levied by a legislative body of a local government on or before November 6, 1996.  
43 Cal Const. art. XIII D, § 4(a).  
44 *Id.* § 4(b). A “registered professional engineer” is defined as “an engineer registered pursuant to the Professional Engineers Act (Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code).” Cal. Gov’t Code § 53750(k).  
45 *Id.* § 4(a); *City of Saratoga v. Hinz*, 115 Cal. App. 4th 1202, 1223 (2004).  
46 Cal. Const. art. XIII D, § 4(a); *Beutz v. Cnty. of Riverside*, 184 Cal. App. 4th 1516, 1532 (2010) (“[S]eparating the general from the special benefits of a public improvement project and estimating the quantity of each in relation to the other is essential if an assessment is to be limited to the special benefits.”) (emphasis removed). Thus, if special benefits represent fifty percent of the total benefits, a local agency may only levy an assessment for that half of the project or services. *Golden Hill Neighborhood Ass’n v. City of San Diego*, 199 Cal. App. 4th 416, 439 (2011) (holding that, because Article XIII D, section 4 allows only special benefits to be assessed, even minimal general benefits must be separated from the special benefits and quantified so that the costs of general benefits can be deducted from the cost assessed against the properties).  
47 Cal. Const. art. XIII D, § 4(a); *Silicon Valley Taxpayers’ Ass’n v. Santa Clara Cnty. Open Space Auth.*, 44 Cal. 4th 431, 443 (2008) (“Because only special benefits are assessable, and public improvements often provide both general benefits to the community and special benefits to a particular property, the assessing agency must first ‘separate the general benefits from the special benefits conferred on a parcel’ and impose the assessment only for the special benefits.”).  
48 Cal. Const. art. XIII D, § 4(a). Notwithstanding Article XII D, section 4(a), the federal government is exempt from assessment because of the Supremacy Clause of the United States Constitution, U.S.



Const. art. VI, cl. 2, and the Act for Admission of California into the Union, 9 Stat. 452, § 3 (1850). The federal government may ignore an assessment levied without authorization by an act of Congress. *Novato Fire Prot. Dist. v. United States*, 181 F. 3d 1135, 1138 (9th Cir. 1999); *Palm Springs Spa, Inc. v. Cnty. of Riverside*, 18 Cal. App. 3d 372, 376-77 (1971).

49 “Identified parcel” is defined in California Government Code section 53750(g) to mean “a parcel of real property that an agency has identified as having a special benefit conferred upon it and upon which a proposed assessment is to be imposed, or a parcel of real property upon which a proposed property-related fee or charge is proposed to be imposed.”

50 Cal. Const. art. XIII D, §4(a).

51 *Id.*

52 *Beutz*, 184 Cal. App. 4th at 1522 (citations omitted) (citing *Town of Tiburon v. Bonander*, 180 Cal. App. 4th 1057, 1080-85 (2009)).

53 *Silicon Valley Taxpayers’ Ass’n*, 44 Cal. 4th 431.

54 *Id.* at 443.

55 *Id.* at 452 .

56 *Id.* at 452 n.8.

57 *Id.* at 454 (emphasis removed) (quoting Cal. Const. art. XIII D, § 2(i)).

58 *Id.* at 455.

59 *Id.* (quoting *Ventura Group Ventures, Inc. v. Ventura Port Dist.*, 24 Cal. App. 4th 1089, 1107 (2001)).

60 *Id.* at 455-58.

61 *Id.*

62 *Id.* at 457.

63 *Id.*

64 *Id.*

65 *Town of Tiburon v. Bonander*, 180 Cal. App. 4th 1057, 1063 (2009).

66 *Id.* at 1081-82.

67 *Id.* at 1081 (citations and internal quotation marks omitted).

68 *Id.* at 1083.

69 *Id.* at 1068.

70 “Record owner” is defined 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 known to the agency.” Cal. Gov’t Code § 53750(j). “Notice by mail” is defined as “any notice required by Article XIII C or XIII D of the California Constitution that is accomplished through a mailing, postage prepaid, deposited in the United States Postal Service and is deemed given when so deposited. Notice by mail may be included in any other mailing to the record owner that otherwise complies with Article XIII C or XIII D of the California Constitution and this article, including, but not limited to the mailing of a bill for the collection of an assessment or a property-related fee or charge.” Cal. Gov’t Code § 53750(i).

71 Cal. Gov’t Code § 53753.

72 Cal. Gov’t Code § 53753(e)(6); Cal. Elec. Code § 4000(c)(8); *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277 (2010).

73 Cal. Const. art. XIII D, § 4(c)-(d); Cal. Gov’t Code § 53753(b)-(d).

74 Cal. Const. art. XIII D, § 4(g).

## ENDNOTES CONTINUED

- 75 Cal. Gov't Code § 53753(b). This statement may also be provided in a language other than English. *Id.*
- 76 Cal. Const. art. XIII D, § 4(d); *id.* § 53753(c).
- 77 *Id.* § 53753(c).
- 78 Cal. Gov't Code § 53753(c).
- 79 *Id.* A special district may provide an envelope for the return of the ballot, provided that, if the return envelope is opened by the agency prior to the tabulation of the ballots, the ballot must remain sealed. *Id.*
- 80 *Id.*
- 81 Cal. Const. art. XIII D, § 4(e); Cal. Gov't Code § 53753(b).
- 82 *Dahms v. Downtown Pomona Prop. & Bus. Improvement Dist.*, 174 Cal. App. 4th 708, 714-15 (2009).
- 83 Cal. Gov't Code § 53753(d).
- 84 *Id.*
- 85 *Id.* § (e)(2).
- 86 *Id.* § (e)(1).
- 87 *Id.*
- 88 *Id.*
- 89 *Id.*
- 90 *Id.* § 53753(e)(2).
- 91 *Id.*
- 92 Cal. Const. art. XIII D, § 4(e); Cal. Gov't Code § 53753(e)(4).
- 93 Cal. Const. art. XIII D, § 4(e); Cal. Gov't Code § 53753(e)(4).
- 94 Cal. Gov't Code § 53753(e)(3).
- 95 Cal. Const. art. XIII D, § 4(e); Cal. Gov't Code § 53753(e)(5).
- 96 Cal. Gov't Code § 53753(e)(2).
- 97 Cal. Gov't Code § 53753(e)(2).
- 98 *See, e.g., Knox v. City of Orland*, 4 Cal. 4th 132, 145-49 (1992); *Dawson v. Town of Los Altos Hills*, 16 Cal. 3d 676, 648-85 (1976).
- 99 *See Knox*, 4 Cal. 4th at 149; *Dawson*, 16 Cal. 3d at 684-85.
- 100 *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Auth.*, 44 Cal. 4th 431 (2008).
- 101 Cal. Const. art. XIII D, § 5.
- 102 In *Howard Jarvis Taxpayers Association v. City of Riverside*, 73 Cal. App. 4th 679, 685-86 (1999), the court of appeal concluded that streetlights fall within the definition of "streets" for purposes of Article XIII D, section 5(a), which exempts an assessment imposed solely for "street purposes."
- 103 Standby charges are classified as assessments pursuant to Article XIII D, section 6(b)(4). *See Keller v. Chowchilla Water Dist.*, 80 Cal. App. 4th 1006, 1011-12 (2000).
- 104 Cal. Const. art. XIII D, § 5.
- 105 "Increase" is defined in Government Code section 53750(h). See footnote 109 below.
- 106 Cal. Gov't Code § 53753.3.
- 107 California Government Code section 53750(e) provides that the term "'extended,' when applied to an existing tax or fee or charge, means a decision by an agency to extend the stated effective period for the tax or fee or charge, including, but not limited to, amendment or removal of a sunset provision or expiration date."
- 108 *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277 (2010); *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 217 (2006); *Richmond v. Shasta Cmty. Servs. Dist.*, 32 Cal. 4th 409, 426 (2004); *Howard Jarvis Taxpayers Ass'n*, 98 Cal. App. 4th at 1354-55.

109 The term “increase” is defined in California Government Code section 53750(h) to mean a decision by an agency that does either of the following:

- (A) Increases any applicable rate used to calculate the tax, assessment, fee or charge.
- (B) Revises the methodology by which the tax, assessment, fee or charge is calculated, if that revision results in an increased amount being levied on any person or parcel.  
... A tax, fee, or charge is not deemed to be “increased” by an agency action that does either or both of the following:
  - (A) Adjusts the amount of a tax or fee or charge in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996.
  - (B) Implements or collects a previously approved tax, or fee or charge, so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel.  
... A tax, assessment, fee or charge is not deemed to be “increased” in the case in which the actual payments from a person or property are higher than would have resulted when the agency approved the tax, assessment, or fee or charge, if those 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.

110 Cal. Const. art. XIII D, §§ 6(b)(1)-(5).

111 See Cal. Const. art. XIII A & XIII B; Cal. Gov’t Code §§ 50076, 66013, 66016.

112 California Constitution article XIII C, section 1(d) defines “special tax” as “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.” Article XIII C, section 2(d) restates the requirements of Article XIII A, that any imposition of a special tax must be supported by a two-thirds vote of the electorate.

113 *Mills v. Cnty. of Trinity*, 108 Cal. App. 3d 656, 662 (1980).

114 Cal. Gov’t Code § 50075.

115 *Id.* § 50076 (emphasis added); see also Cal. Const. art. XIII B (generally imposing an appropriations limit, which limits the amount of “proceeds of taxes” that each local agency may appropriate in a given year); Cal. Const. art. XIII B, § 8(c) (providing that “proceeds of taxes” include user fees to the extent that the proceeds of the user fees exceed the costs reasonably related to providing the service).

116 It is worthwhile noting that, in cases examining fees other than property-related fees, the California Supreme Court has recognized that “[s]imply because a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is charged does not transform it into a tax.” *Barratt Am., Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685, 700 (2005). These cases were further cited by the California Supreme Court in a recent case determined after the adoption of Proposition 26. The court noted that “a regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors.” *Cal. Farm Bureau Fed’n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 438 (2011). Significantly, the court noted that “[t]he question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.” *Id.*

117 *Beaumont Investors v. Beaumont-Cherry Water Valley Dist.*, 165 Cal. App. 3d 227 (1985).

## ENDNOTES CONTINUED

- 118 *Id.* at 234-35.
- 119 *Howard Jarvis Taxpayers Ass’n v. City of Roseville*, 97 Cal. App. 4th 637 (2002).
- 120 *Howard Jarvis Taxpayers Ass’n v. City of Fresno*, 127 Cal. App. 4th 914 (2005).
- 121 *City of Roseville*, 97 Cal. App. 4th at 647-48 (citations omitted).
- 122 *City of Fresno*, 127 Cal. App. 4th at 922-23 (citations omitted).
- 123 *Brydon v. E. Bay Mun. Water Dist.*, 24 Cal.App.4th 178, 196 (1994) (internal quotations and citations omitted).
- 124 *City of Palmdale v. Palmdale Water Dist.*, 198 Cal. App. 4th 926, 933 (2011).
- 125 *Id.* In applying its independent judgment to determine if the water service fees complied with the substantive limitations of Article XIII D, section 6(b), the *City of Palmdale* court relied on the decision of the California Supreme Court in *Silicon Valley Taxpayers Association v. Santa Clara Open Space Authority*, 44 Cal. 4th 431 (2008). In *Silicon Valley*, a special benefit assessment was challenged under the substantive provisions of California Constitution article XIII D, section 4. Before the adoption of Proposition 218, courts reviewed quasi-legislative acts of public agencies, such as formation of an assessment district, under a deferential abuse of discretion standard of review. In *Silicon Valley*, the California Supreme Court held that the drafters of Proposition 218 specifically targeted the deferential standard of review for change. Prior to the adoption of Proposition 218, special assessment laws were generally statutory, and the separation of powers doctrine served as a foundation for a more deferential standard of review by the courts. But after the adoption of Proposition 218, an assessment’s validity is now a constitutional question. “Neither the separation of powers nor property owner consent justifies allowing a local legislative body or property owners (both bound by the state Constitution) to usurp the judicial function of interpreting and applying the constitutional provisions that now govern assessments.” *Id.* at 449. Consequently, the courts will now exercise their independent judgment in determining whether assessments comply with the substantive provisions of Proposition 218. *Id.*
- 126 “Notice by mail” is defined in California Government Code section 53750(i) as any notice required by Article XIII C or XIII D of the California Constitution that is accomplished through a mailing, postage prepaid, deposited in the United States Postal Service and is deemed given when so deposited. Notice by mail may be included in any other mailing to the record owner that otherwise complies with Article XIII C or XIII D of the California Constitution and this article, including, but not limited to, the mailing of a bill for the collection of an assessment or a property-related fee or charge.
- 127 Senate Bill 919, adopted as urgency legislation in July 1997 and referred to as the Proposition 218 Omnibus Implementation Act, attempted to clarify certain provisions of Proposition 218. This legislation, among other things, added Article 4.6 (commencing with section 53750) to the California Government Code. California Government Code section 53750(j) provides that for purposes of Article XIII C and XIII D, the term “record owner” means “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, means the representative of that public entity at the address of that entity known to the agency.” California Government Code section 53750(i) defines “notice by mail” to include providing notice via a utility bill for a fee or charge, which in some instances may be mailed to a utility customer rather than the record owner of the parcel where the service is provided.
- 128 Cal. Const. art. XIII D, § 6(a)(1).

- 129 Although not required under Article XIII D, section 6(a), it is recommended that the notice also contain an explanation of the process for submitting a protest to the proposed rates and any additional requirements for submitting a written protest, such as that the notice must contain the name, address and signature of the person submitting the protest. For a further discussion of the protest process, see the discussion under the heading “Determining Whether There is a Majority Protest.”
- 130 Article XIII D, section 2(e) defines “fee” or “charge” as “any levy other than an ad valorem tax, special tax or assessment, imposed by an agency upon a parcel or upon a person as an incident of *property ownership*, including user fees or charges for a property related service.” (Emphasis added.) “Property-related service” is defined in Article XIII D, section 2(h) to mean “a public service having a direct relationship to *property ownership*.” (Emphasis added.) In each instance, the phrase “property ownership” is a significant component of the defined term. Finally, Article XIII D, section 2(g) defines “property ownership” to “include tenancies of real property where *tenants are directly liable* to pay the assessment, fee, or charge in question.” (Emphasis added.)
- 131 Cal. Gov’t Code § 53755(a)(1).
- 132 *Id.* § 53755(a)(2).
- 133 The broader reading of “record owner” requires that notice also be mailed to any tenant directly liable for the payment of the fee or charge.
- 134 Identification of the property owner for each parcel upon which fees and charges will be imposed may be obtained from the respective county assessor’s office.
- 135 A special district may use a mail-merge system or other method to eliminate duplicate notices being sent to a property.
- 136 Cal. Gov’t Code § 53756(a).
- 137 *Id.* at § 53756(b).
- 138 *Id.* at § 53756(c).
- 139 *Id.* at § 53756(d).
- 140 Cal. Const. art. XIII D, §6(a)(2).
- 141 *Id.*
- 142 *Id.*
- 143 By way of example, if a special district sends a notice in accordance with Article XIII D, section 6(a) with respect to a rate increase for its water service fees, and receives protests from a husband and wife who both have a property ownership interest in a parcel of property subject to the service fee, the special district is only required to count one protest for the identified parcel to which the service is provided. By way of further example, if the special district received a written protest to the same water rate increase from one property owner of record for an identified parcel subject to the rate increase, and a written statement in support of the rate increase from another property owner of record for the same parcel of property, the special district would be required to accept the written protest and count it as one written protest for that parcel of property. Written protests against the adoption of a rate increase and written statements in support of a rate increase do not cancel each other out. Only written protests are considered in determining whether a majority protest exists.
- 144 Cal. Const. art. XIII D, § 6(c).
- 145 *Id.*
- 146 *Id.*
- 147 *Id.*

## ENDNOTES CONTINUED

148 Article XIII D, section 4 requires that a public agency hold a public hearing and mail notice of the public hearing to each property owner subject to the proposed assessment. “Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency’s address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.” Subdivision (e) provides:

The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

No such weighted ballot process is required for the adoption of property-related fees such as stormwater service fees.

- 149 Cal. Const. art. XIII D, § 4(d) (providing ballot requirements); Cal. Gov’t Code § 53753(c) (providing notice requirements); *see also* Cal. Elec. Code § 4000 (providing that assessment ballots may be conducted exclusively by mail).
- 150 *See* Cal. Gov’t Code § 53753(e)(6); *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277 (2010); Cal. Gov’t Code § 53755.5 (effective July 1, 2014).
- 151 *Greene*, 49 Cal. 4th 277.
- 152 *Id.* at 292.
- 153 *Id.* at 292-93.
- 154 *Id.* at 287-94.
- 155 *Id.* at 293.
- 156 Cal. Const. art XIII D, § 4(e). In accordance with Government Code section 53753(e)(3), in the event that more than one of the record owners of a parcel submits an assessment ballot, the amount of the proposed assessment to be imposed upon the parcel shall be allocated to each ballot submitted in proportion to the respective ownership interests.
- 157 Cal. Gov’t Code § 53755.5(a).
- 158 *Id.* § 53755.5(b)(1).
- 159 *Id.* § 53755.5(b)(1) (All interested persons must have an opportunity to meaningfully monitor the tabulation process.)
- 160 *Id.* § 53755.5(b)(1) (Ballots must be preserved as provided in California Government Code sections 26202, 34090, and 60201.)
- 161 *See* discussion under the heading “Voter Approval of New or Increased Property-Related Fees and Charges Other Than for Water, Sewer, and Solid Waste Disposal” for a more in-depth discussion of the voter approval requirements for stormwater service fees.
- 162 Cal. Gov’t Code § 53739(a).
- 163 *Id.*
- 164 *Id.* § 53739(b)(1).
- 165 *Id.*
- 166 *Id.* § 53739(b)(2).



*Special thanks to our contributor and Best Best & Krieger LLP*

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