

Comments

Is Nothing Certain but Death? The Uncertainty Created by California's Proposition 218

By MONA PATEL*

ON NOVEMBER 5, 1996, California voters approved Proposition 218, the "Right to Vote on Taxes Act" ("Act" or "Proposition 218").¹ One provision of the Act requires voter approval before imposing or increasing fees for property related services.² Proposition 218 is the most recent development in the California taxpayers' revolt, which began almost twenty years prior with Proposition 13. Proposition 13 marked the beginning of California taxpayers' expression of disapproval over rising taxes.³ Proposition 13 limited government authority to raise property taxes and prevented local governments from enacting any special taxes without voter approval.⁴ Thus, a struggle began between property owners wishing to exercise greater control over their property taxes and local governments responsible for providing services to the community.⁵ This struggle has resulted in the expenditure of considerable time, energy, and money by local governments attempting to fulfill the requirements of the various property tax propositions.⁶ Another effect has been voter rejection of some taxes and fees submitted by local governments for financing certain services and

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1. See PROPOSITION 218 RIGHT TO VOTE ON TAXES ACT § 1 (1996) (adding Article XIII C and Article XIII D to the California Constitution).

2. See CAL. CONST. art. XIII D, § 6(c).

3. See JACK CITRIN & FRANK LEVY, *THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13*, 3-8 (George G. Kaufman & Kenneth T. Rosen eds., 1981).

4. See CAL. CONST. art. XIII A, §§ 1-4.

5. See CITRIN & LEVY, *supra* note 3, at 7.

6. See ROGER L. KEMP, *COPING WITH PROPOSITION 13*, 5-6 (1980).

improvements,⁷ which has meant the possibility of discontinuing essential services, such as street lighting, in those communities rejecting the fees.⁸

Before fulfilling the requirements imposed by the propositions and the possible voter rejection of fees that will finance vital services, local governments must first determine whether the fee they seek to impose is subject to the stringent requirements of the related proposition.⁹ Local governments and California courts are currently confronted with the issue of how to define a fee "incident of property ownership,"¹⁰ commonly referred to as a "property related fee," for the purpose of applying the requirements of Proposition 218.¹¹ The difficulty in defining the term "property related fee" stems from the broadness of the term, which lends itself to endless interpretation. Because Proposition 218 does not provide a definition,¹² the California courts and the California Legislature are left to sort out the resulting confusion.¹³ This Comment focuses on the confusion created by Proposition 218.

Proposition 218 can best be understood in the context of two similar initiatives: Proposition 13¹⁴ and Proposition 62.¹⁵ Part I of this

7. See Charles F. Bostwick, *Residents Seeking Revote on Assessments*, DAILY NEWS OF L.A., May 12, 1998, at AV1 (reporting on homeowners requesting a second election to vote on a fee to pay for maintaining the public greenery around their neighborhoods following rejection of the fee one year earlier, noting "[s]ituations in which fees were approved by homeowners in one tract and rejected by those in the tract next door have led to a peculiar appearance for the landscaped corridors along some streets: green lawns for one block, then brown, foot-high grass and weeds").

8. See Maria Alicia Gaura, *Lights May Go Out in Some Towns in Santa Clara County*, S.F. CHRON., Feb. 17, 2000, at A19 (reporting that a second vote on a tax for street lighting was held after the first vote failed by a margin of 0.4%, noting that "[t]echnically, the lights should have been turned out at that time"); see also Patrick McGreevy, *When the Streets Go Dark, Neighbors Will Now Know Why*, L.A. TIMES, May 31, 2000, at B5 (reporting that approximately sixty-two streets lights have been turned off after residents voted against paying taxes for the electricity bills).

9. See CAL. CONST. art. XIIIID, § 6.

10. *Id.* § 6(b)(3).

11. See Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles, 01 C.D.O.S. 209 (Cal. Jan. 8, 2001); Teyssier v. City of San Diego, 97 Cal. Rptr. 2d 100 (Ct. App. 2000), review granted and opinion superceded, 8 P.3d 338 (Cal. 2000); Action Apartment Ass'n v. Santa Monica Rent Control Bd., Nos. B116056 and B117325 (Cal. Ct. App. Aug. 5, 1998).

12. See CAL. CONST. art. XIIIID, § 2.

13. See ELIZABETH G. HILL, LEGISLATIVE ANALYST'S OFFICE, UNDERSTANDING PROPOSITION 218, at 18-19 (1996).

14. CAL. CONST. art. XIII A.

15. CAL. GOV'T CODE §§ 53720-53730 (West 1997).

Comment discusses the history of the taxpayers' revolt¹⁶ beginning with the passage of Proposition 13 in 1978, continuing with Proposition 62 in 1982, and ending, for the time being, with Proposition 218.¹⁷ Part II discusses the confusion surrounding the application of Proposition 218, beginning by analyzing the language of Proposition 218 itself. Part III explains why the courts should expand upon the test the California Supreme Court used in *Apartment Ass'n of Los Angeles County v. City of Los Angeles*¹⁸ to determine whether an inspection fee imposed on owners of residential rental properties was subject to Proposition 218's requirements.¹⁹ An expansion of the test would broaden its scope so that all types of fees could be analyzed under it. Under a broader test, the courts should give some deference to the construction of the term "property related fee" adopted by the agency charged with implementing Proposition 218.²⁰ Adoption of this test would simultaneously preserve the voter intent behind Proposition 218, resolve the uncertainty surrounding property related fees, and enable local governments to structure a definition of the fee charged to meet the changing needs of California's communities. This Comment concludes that property related fees should be defined by determining the directness of the relationship to property ownership.

16. "Taxpayers' revolt" is a term used by many authors to describe the phenomenon whereby taxpayers overwhelmingly vote for propositions which constrict the ability of government to spend money and raise revenue by imposing taxes and fees. See generally Jonathan Schwartz, Note, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183 (1997); Jonathan Throckmorton, *What is a Property-Related Fee? An Interpretation of California's Proposition 218*, 48 HASTINGS L.J. 1059 (1997).

17. Proposition 37, which qualified for the November 2000 Ballot, would have added another chapter to the taxpayers' revolt if it had passed. The proposition, which proposed an amendment to the Proposition 218 language in the California Constitution, "would [have] classifi[ed] as 'taxes' some charges that government otherwise could impose as 'fees'" and thus be subject to the voter approval requirements of Proposition 13. CAL. SEC'Y OF STATE, CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE 29 (Aug. 14, 2000). The fees that Proposition 37 attempted to reclassify are fees imposed for the "primary purpose of addressing health, environmental, or other 'societal or economic' concerns." *Id.* "This proposition's primary fiscal effect would be to make it more difficult for government to impose new regulatory charges on businesses and individuals to pay for certain programs." *Id.* Proposition 37 was a response to the California Supreme Court's ruling in *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350 (Cal. 1997). See CAL. SEC'Y OF STATE, *supra*, at 29. Proposition 37 failed with 52.2% of voters rejecting the proposition and 47.8% voting in favor. See Linda Haugsted, *California Votes No on Fee Reform*, MULTICHANNEL NEWS, Nov. 13, 2000, at 66.

18. 01 C.D.O.S. 209 (Cal. Jan. 8, 2001) [hereinafter *Apartment Ass'n of Los Angeles II*].

19. See *id.* at 210-12.

20. See *id.*; see also *Amador Valley Joint Union Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978).

Resolution of the issue will provide much needed guidance to local governments in determining whether and how much time, energy, and money they should devote to fulfilling the requirements of Proposition 218.

I. Background: Property Tax Initiatives

A. Proposition 13: The Taxpayers' Revolt Begins

A substantial two-to-one majority of California voters²¹ approved Proposition 13 on June 6, 1978 as an amendment to the California Constitution.²² This marked the beginning of the taxpayers' revolt in California.²³ Proposition 13, also known as the Jarvis-Gann initiative,²⁴ was seen as an outcry against "big and more expensive government."²⁵ Taxpayers were frustrated with the government's inability to provide services at a reasonable cost.²⁶ As stated at the time of its passage:

Many taxpayers feel that garbage is seldom collected on schedule, law enforcement is lax, schools fail to teach children how to read, street potholes seem to multiply . . . traffic congestion makes driving an ordeal, and at times city hall seems incapable of answering even the most elementary questions.

Underlying this public disaffection with inadequate government performance is the view that as government performance decreases, taxes increase.²⁷

When Proposition 13 was passed, taxes in California were growing more rapidly than in other states.²⁸ Although taxpayers in California wanted cutbacks in government spending and taxes, they did not want fewer government services.²⁹ Rather, people generally opposed cutbacks in the police and fire departments, education, public transportation, and recreational facilities.³⁰ However, voters felt that the

21. See ROBERT LAMB & STEPHEN P. RAPPAPORT, MUNICIPAL BONDS: THE COMPREHENSIVE REVIEW OF TAX-EXEMPT SECURITIES AND PUBLIC FINANCE 20 (Kiril Sokoloff & Chet Gottfried eds., 1980). The final vote was 65% in favor and 35% against Proposition 13. See KEMP, *supra* note 6, at 6.

22. CAL. CONST. art. XIII A.

23. See CITRIN & LEVY, *supra* note 3, at 1.

24. See LAMB & RAPPAPORT, *supra* note 21, at 20.

25. *Id.*

26. *See id.*

27. *Id.* at 20-21.

28. See Schwartz, *supra* note 16, at 185-86 (noting that "had Proposition 13 failed, the homeowners' property tax bill would have almost doubled between 1974 and 1978").

29. See CITRIN & LEVY, *supra* note 3, at 14-15. Fifty-eight percent of voters favored spending cuts in less than four of fifteen spending areas. *See id.* at 15. Half of these voters supported Proposition 13. *See id.* Forty-seven percent of voters that favored spending more in at least three areas voted for Proposition 13. *See id.*

30. See Schwartz, *supra* note 16, at 186.

government could provide the same level of services even with a significant reduction in taxes.³¹ With the passage of Proposition 13, local governments were faced with the difficult task of providing adequate services to their constituents with shrinking revenue streams.³² Following Proposition 13's implementation, the revenue generated by the property tax dropped by 52.5%, to \$5.561 billion in fiscal year 1978-79.³³ Local governments were under pressure to find ways to finance the services that were once provided with a much larger budget.³⁴ Accordingly, spending levels for a variety of programs were dramatically reduced; to meet smaller budgets, 1,100 out of 2,150 library branches throughout California were closed due to Proposition 13.³⁵

Voters approved Proposition 13 as an amendment to the California Constitution, with its provisions incorporated into Article XIII A.³⁶ Its principal provisions limit ad valorem property taxes³⁷ to one percent of a property's assessed valuation³⁸ and limit increases in the assessed valuation to two percent per year unless there is a change in ownership of the property.³⁹ In addition, Proposition 13 prevents local governments from circumventing the above limitations by prohibiting counties, cities, and special districts from enacting any "special tax" without a two-thirds vote of the electorate.⁴⁰

Confusion arose over the term "special tax" in section 4 of Article XIII A.⁴¹ In *City and County of San Francisco v. Farrell*,⁴² the California Supreme Court held that "special taxes" were to be construed to mean taxes levied for a specific purpose as opposed to taxes placed in the general fund for general governmental purposes.⁴³ In *Farrell*, San Francisco, a charter city and county, imposed a tax on the payrolls or

31. See CITRIN & LEVY, *supra* note 3, at 7.

32. See KEMP, *supra* note 6, at 5; see also Schwartz, *supra* note 16, at 190.

33. See STATE ASSEMBLY REVENUE & TAXATION COMMITTEE, THE PROPERTY TAX FOUR YEARS AFTER PROPOSITION 13, at 3 (1982).

34. See KEMP, *supra* note 6, at 5; see also Schwartz, *supra* note 16, at 190.

35. See Schwartz, *supra* note 16, at 190 n.36.

36. CAL. CONST. art. XIII A.

37. An ad valorem property tax is "[a] tax based on the value . . . of property." VIRGINIA L. HORLER, GUIDE TO PUBLIC DEBT FINANCING IN CALIFORNIA 247 (1987).

38. See CAL. CONST. art. XIII A, § 1 (requiring the "maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property").

39. See CAL. CONST. art. XIII A, § 2(a)-(b).

40. See CAL. CONST. art. XIII A, § 4.

41. See *City and County of San Francisco v. Farrell*, 648 P.2d 935, 936 n.1 (Cal. 1982).

42. 648 P.2d 935 (Cal. 1982).

43. See *id.* at 940.

gross receipts of businesses operating in the city.⁴⁴ The proceeds of the tax were to be placed in the city's general fund to be used for general governmental expenditures.⁴⁵ The San Francisco Board of Supervisors placed an initiative measure on the ballot proposing to extend the expiration date of an increase in the tax rate, which was approved by 55% of voters.⁴⁶ If the tax imposed by San Francisco constituted a "special tax," then the measure would have failed under Proposition 13 because less than two-thirds of the electorate approved the tax.⁴⁷ The city's controller, Farrell, refused to certify that the funds from the tax were available for expenditure because he believed the tax was a "special tax" and thus did not meet the voter approval requirement.⁴⁸ The city petitioned the California Supreme Court for a writ of mandate to compel Farrell to certify that funds were available for expenditure.⁴⁹ The court issued a peremptory writ of mandate, finding that the payroll and gross receipt taxes were general taxes not subject to Proposition 13's voter approval requirements.⁵⁰ The California Supreme Court stated: "There can be no doubt that the term 'special taxes' is ambiguous in the sense that it has been interpreted to mean different things in different contexts."⁵¹ The court attempted to clarify the term and construed "special taxes . . . to mean taxes . . . levied for a specific purpose rather than . . . a levy . . . to be utilized for general governmental purposes."⁵²

The California Supreme Court also established that the term "special tax" did not include special assessments.⁵³ A special assessment is a compulsory charge placed by government upon real property within a district for the financing of a permanent public improvement within the district.⁵⁴ "A special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.'"⁵⁵ The ra-

44. *See id.* at 936.

45. *See id.*

46. *See id.* at 937.

47. *See* CAL. CONST. art. XIII A, § 4.

48. *See Farrell*, 648 P.2d at 937.

49. *See id.*

50. *See id.* at 940.

51. *Id.* at 938.

52. *Id.* at 940.

53. *See Knox v. City of Orland*, 841 P.2d 144, 149 (Cal. 1992) (noting the courts of appeal have uniformly held that Article XIII A's tax limitations do not apply to legitimate special assessments).

54. *See Spring St. v. City of Los Angeles*, 148 P. 217, 219 (Cal. 1915).

55. *Knox*, 841 P.2d at 150 (quoting *Solvang Municipal Improvement Dist. v. Board of Supervisors*, 169 Cal. Rptr. 391, 396 (Ct. App. 1980)).

tionale behind charging a special assessment rather than imposing a tax is that the assessed property has received a greater benefit than the general public, and thus the owner of the benefited property should pay more than the general public.⁵⁶ The California Supreme Court found that in contrast to a special assessment, a tax, including a special tax, confers benefits to the public generally.⁵⁷ The court reasoned that because a special assessment is different from a special tax, a two-thirds vote of the electorate was not required to impose a special assessment.⁵⁸ The result of the California Supreme Court's exclusion of special assessments from Proposition 13's requirements was an increase in the use of special assessments by local governments, which were faced with constraints on generating sources of revenue.⁵⁹

Eighteen years after Proposition 13's approval, proponents of Proposition 218 would claim "[s]pecial districts have increased assessments by over 2400% over 15 years. Likewise, cities have increased utility taxes 415% and raised benefit assessments 976%, a ten-fold increase."⁶⁰ In addition, a variety of levies, fees, and "hidden taxes" such as the sales tax were increased to make up for the sharp drop in revenues from property taxes.⁶¹

After Proposition 13, politicians became creative in their hunt for new sources of revenue to keep government running. They added parking meters and began charging soccer leagues for use of public parks Above all, they created hundreds of new special districts to tax property owners in exchange for providing services from lighting streets to fighting fires.⁶²

Attempts by local governments to finance services with alternative sources of revenue following Proposition 13 would be thwarted by further taxpayer resistance.

56. *See id.*

57. *See id.*

58. *See id.* at 149.

59. *See* STATE ASSEMBLY REVENUE & TAXATION COMMITTEE, *supra* note 33, at 4 (noting that with the growth in assessments property tax revenues grew from \$5.561 billion in the fiscal year following Proposition 13's passage to \$7.976 billion in fiscal year 1982-83).

60. CAL. SEC'Y OF STATE, NOVEMBER 5, 1996 CALIFORNIA BALLOT PAMPHLET 76 (Aug. 12, 1996).

61. *See* Schwartz, *supra* note 16, at 193-94; *see also* Stephanie Simon, *20 Years Later, Prop. 13 Still Has Big Impact*, L.A. TIMES, May 26, 1998, at A1 (noting that California homeowners have saved billions of dollars since 1978, but no one can say exactly how much because of proliferating fees).

62. Simon, *supra* note 61, at A1.

B. Proposition 62

Taxpayers approved Proposition 62 in November of 1986.⁶³ This initiative further restricted the ability of local government to levy taxes.⁶⁴ The proposition was placed on the ballot in response to the California Supreme Court's interpretation of Proposition 13, which supporters of Proposition 62 claimed took away the voter's right to vote on city and county tax increases by creating "loopholes" in Proposition 13.⁶⁵

In *Santa Clara County Local Transportation Authority v. Guardino*,⁶⁶ the California Supreme Court declared a sales tax invalid under Proposition 62.⁶⁷ The Santa Clara Local Transportation Authority proposed a sales tax to fund certain transportation projects.⁶⁸ A majority approved the tax, but less than two-thirds of the voters.⁶⁹ The Santa Clara Local Transportation Authority filed for a writ of mandate to validate the tax contending the imposition of the tax did not violate Proposition 62.⁷⁰ The court felt that a review of Proposition 62's history was fundamental to understanding its language.⁷¹

The manifest purpose of Proposition 62 as a whole was to increase the control of the citizenry over local taxation by requiring voter approval of all new local taxes imposed by all local governmental entities: the measure defines broadly and inclusively both the taxes ([section] 53721) and the entities ([section] 53720) to which it applies.⁷²

Proposition 62⁷³ states that all taxes are either general taxes or special taxes.⁷⁴ Special and general taxes are given the same definitions the California Supreme Court used in *Farrell*.⁷⁵ Special taxes are

63. Proposition 62 was a statutory initiative, codified at CAL. GOV'T CODE §§ 53720-53730 (West 1997).

64. See CAL. GOV'T CODE § 53722 (West 1997).

65. See *Santa Clara County Local Transp. Auth. v. Guardino*, 902 P.2d 225, 234 (Cal. 1995); see also Throckmorton, *supra* note 16, at 1065.

66. 902 P.2d 225 (Cal. 1995).

67. See *id.* at 228.

68. See *id.* at 229.

69. See *id.*

70. See *id.*

71. See *id.* at 234 (stating that "on this question we agree with Justice Holmes that 'a page of history is worth a volume of logic'" (citing *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

72. *Id.*

73. See CAL. GOV'T CODE §§ 53720-53730 (West 1997).

74. See CAL. GOV'T CODE § 53721 (West 1997).

75. See *Guardino*, 902 P.2d at 232. The court stated: "Proposition 62 defines 'special' and 'general' taxes in the terms we used in *Farrell*. . . section 53721 provides that 'all taxes are either special taxes or general taxes. General taxes are taxes imposed for general gov-

taxes levied for a specific purpose rather than a tax to be used for general governmental purposes.⁷⁶ Proposition 62 requires two-thirds approval by local voters of any special tax.⁷⁷ However, only a majority approval is required for increases in general taxes.⁷⁸ The *Guardino* court reasoned that the narrowness of the purpose of the Santa Clara Local Transportation Authority's tax fit the definition of a special tax.⁷⁹ Therefore, Proposition 62's broad terms governed its approval.⁸⁰ Due to the fact that the requisite two-thirds vote was not obtained, the tax was declared invalid.⁸¹

The *Guardino* court also reviewed the decisions of two separate appellate courts that found portions of Proposition 62 unconstitutional for providing illegal referendums on taxes under the California Constitution.⁸² The referendum is the power of the electors to approve or reject statutes or parts of statutes.⁸³ The California Constitution prohibits subjecting tax statutes to a referendum.⁸⁴ The *Guardino* court expressly overruled one of these decisions and found Proposition 62 constitutional.⁸⁵ The court reasoned that Proposition 62 "is a condition precedent to the enactment of each [proposed] tax statute to which it applies, while the constitutional referendum may be invoked only after the statute has been enacted."⁸⁶ Also, "a statute subject to Proposition 62 does not become law until [it has been approved by voters], while a statute subject to referendum automati-

ernmental purposes. Special taxes are taxes imposed for specific purposes." *Id.* (quoting CAL. GOV'T CODE § 53721 (West 1997)).

76. See CAL. GOV'T CODE § 53721.

77. See CAL. GOV'T CODE § 53722 (West 1997).

78. See CAL. GOV'T CODE § 53723 (West 1997).

79. See *Guardino*, 902 P.2d at 232 (citing CAL. PUB. UTIL. CODE § 180001(c) (West 1991), stating that the purpose of the tax at issue was funding local transportation maintenance and improvement needs "with the proceeds of the tax specifically allocated to the construction, improvement, and operation of local transportation facilities").

80. See *id.*

81. See *id.* at 228.

82. See *City of Woodlake v. Logan*, 282 Cal. Rptr. 27 (Ct. App. 1991) (holding that Proposition 62's requirement of majority approval for the imposition of general taxes was an unconstitutional referendum on taxes); *City of Westminster v. County of Orange*, 251 Cal. Rptr. 511 (Ct. App. 1988) (holding that Proposition 62's "window period" provision, which required that any local taxes imposed in the sixteen months prior to the effective date of the proposition be submitted for approval by a majority of the voters, was an unconstitutional referendum on taxes).

83. See CAL. CONST. art. II, § 9.

84. See *id.*

85. See *Guardino*, 902 P.2d at 241 (finding the decision in *Woodlake* erroneous and disapproving of it).

86. *Id.* at 237.

cally becomes law unless the voters themselves take the initiative and petition to disapprove it.”⁸⁷ Thus, the court found Proposition 62 was not an unconstitutional referendum.⁸⁸

Although Proposition 62 successfully closed the general tax loophole of Proposition 13, assessments and fees remained unaffected by its provisions.⁸⁹ Therefore, assessments and fees became an attractive alternative for raising local government revenues.⁹⁰

C. Proposition 218

Dissatisfied with the increase in assessments,⁹¹ on November 6, 1996, California voters approved Proposition 218, entitled the “Right to Vote on Taxes Act,” adding articles XIIC and XIID to the California Constitution.⁹² Proposition 218 stated:

The people of the State of California . . . 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 . . . frustrate the purposes of voter approval for tax increases⁹³

The purposes of Proposition 218 were to limit the “methods by which local governments exact revenue from taxpayers without their consent”⁹⁴ and prevent local governments from “frustrat[ing] the purposes of voter approval for tax increases” as contemplated by Proposition 13.⁹⁵

Supporters of Proposition 218 argued that after voters passed Proposition 13, “politicians created a loophole in the law that allow[ed] them to raise taxes without voter approval by calling taxes ‘assessments’ and ‘fees.’ Once this loophole was created, one lawyer working with the politicians wrote, assessments ‘are now limited only by the limits of human imagination.’”⁹⁶ Proposition 218 was, therefore, seen as guaranteeing citizens the right to vote on local tax in-

87. *Id.*

88. *See id.* at 237–38.

89. Proposition 62 only applies to special and general taxes. *See* CAL. GOV'T CODE §§ 53720–53730 (West 1997).

90. *See* FREDERICK D. STOCKER, PROPOSITION 13: A TEN YEAR RETROSPECTIVE 2 (1991); *see also* KEMP, *supra* note 6, at 6.

91. *See State Propositions*, S.F. CHRON., Nov. 7, 1996, at A21.

92. CAL. CONST. arts. XIIC, XIID.

93. CAL. CONST. art. XIIC, § 1 historical notes (West Supp. 2001).

94. *Id.*

95. *Id.*

96. CAL. SEC'Y OF STATE, *supra* note 60, at 76.

creases “even when they are called something else, like ‘assessments’ or ‘fees’ and imposed on homeowners.”⁹⁷

Not everyone was persuaded by the lure of Proposition 218’s right to vote on taxes. One critic warned: “Beware of wild claims for new ‘constitutional rights’ and people who pretend concern about widows and orphans. Read Proposition 218 yourself and see how large corporations, big landowners and foreign interests gain more voting power than YOU.”⁹⁸ Proposition 218 was seen by opposition groups as reducing the voting power of the average citizen as well as reducing the services provided for by government.⁹⁹ Opponents condemned Proposition 218 by claiming that it “cuts more than \$100 million from local services, yet wastes tens of millions each year by changing the Constitution to require 5,000 local elections even if local citizens don’t want an election . . . even if the election cost is more than the potential revenue.”¹⁰⁰ Despite this criticism, Proposition 218 was approved by fifty-six percent of California voters.¹⁰¹

Before the first provisions of Proposition 218 became effective on July 1, 1997, the California Legislature adopted the Proposition 218 Omnibus Implementation Act¹⁰² (“Omnibus Act”). The legislature felt emergency legislation was necessary to clarify some of the provisions of Proposition 218 so local governments could adopt their budgets for the 1997–98 fiscal year without “needless confusion, duplication of effort, and uncertainty” over the proposition’s effect on the funding of local services.¹⁰³ The emergency legislation included a list of definitions that applied to both Article XIII C and Article XIII D of the California Constitution and to the provisions of the Omnibus

97. *Id.*

98. *Id.*

99. *See id.* Proposition 218 provided that, as an alternative to imposing a new fee or increasing an existing fee by a vote of the local electorate, the agency seeking the new fee could submit it for approval to the property owners of the property subject to the fee. *See* CAL. CONST. art. XIII D, § 6(c). If a majority of the property owners approved the fee, the fee would be imposed. *See id.*

100. CAL. SECRETARY OF STATE, *supra* note 60, at 77.

101. *See State Propositions*, S.F. CHRON., Nov. 7, 1996, at A21.

102. *See* CAL. GOV’T CODE §§ 53750–53753.5 (West Supp. 2001). The Proposition 218 Omnibus Implementation Act clarifies any of Proposition 218’s inconsistencies with numerous preexisting statutes. *See* CAL. GOV’T CODE § 53750 historical notes. The Act includes a list of definitions for terms used, but not defined in Proposition 218. *See id.* § 53750. The Act outlines the notice, protest, and hearing procedures an agency must follow when leaving or increasing assessments. *See* CAL. GOV’T CODE § 53753. Also included in the Act is a list of assessments exempt from the procedures mentioned. *See* CAL. GOV’T CODE § 53753.5.

103. CAL. GOV’T CODE § 53750 historical notes.

Act.¹⁰⁴ However, the legislature did not define “property related fee” in the Omnibus Act,¹⁰⁵ nor did it provide any guidance on the requirements for a property related fee.¹⁰⁶

II. Problem

The lack of definition for the term “property related fee” means that local governments must play a guessing game as to whether they must submit a fee to a vote each time they wish to impose one.¹⁰⁷ To date, there is no consensus as to which fees are property related and thus subject to the requirements of Proposition 218.¹⁰⁸ “[T]he definition of this term will be an important and sensitive issue for the Legislature and the courts.”¹⁰⁹

A. The Language of Proposition 218

The first step toward resolving the confusion is to clarify the language of Proposition 218 itself. Article XIII D of the California Constitution provides: “Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees, and charges, whether imposed pursuant to state statute or local government charter authority.”¹¹⁰ An “assessment” is defined as “any levy or charge upon real property . . . for a special benefit conferred upon the real property.”¹¹¹ In order to constitute a fee, a levy must be imposed as an incident of property ownership.¹¹²

Unfortunately, the authors of Proposition 218 did not define “an incident of property ownership.”¹¹³ The lack of definition has created confusion and uncertainty for local governments who must determine whether they need to follow the requirements set forth in section 6 of Article XIII D.¹¹⁴ The requirements with which a local government

104. See CAL. GOV'T CODE § 53750.

105. See *id.*

106. See CAL. GOV'T CODE §§ 53753–53753.5 (explaining that the guidance provided in the Act only applies to assessments).

107. See HILL, *supra* note 13, at 8.

108. See *id.* at 18.

109. *Id.* at 19.

110. CAL. CONST. art. XIII D, § 1.

111. CAL. CONST. art. XIII D, § 2(b).

112. See *id.* § 2(e). “Fees” and “charges” are defined as “any levy other than an ad valorem tax, a special tax, or an assessment, imposed . . . upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for property related service.” *Id.*

113. See CAL. CONST. arts. XIIC, XIII D.

114. See CAL. CONST. art. XIII D, § 6(a).

must comply when imposing a fee that is “an incident of property ownership” include: (1) notice to identified property owners who would be subject to the fee or charge; (2) a public hearing on the fee or charge; and (3) rejection of the fee or charge if written protests against the proposal are presented by a majority of the property owners who will be subject to the fee or charge.¹¹⁵ As an alternative to receiving approval by a majority of the property owners, the agency imposing the fee may opt to submit the fee to the electorate residing in the affected area.¹¹⁶ The fee must receive approval of two-thirds of the electorate in order to be imposed.¹¹⁷ The requirements impose a considerable undertaking of time, energy, and money by an agency.¹¹⁸ Thus, it is understandable that local governments would like resolution of what constitutes a fee imposed as an incident of property ownership.¹¹⁹

B. Proposition 218 Omnibus Implementation Act

The legislature’s failure to define “property related fee” in the Omnibus Act has left many local governments without definitive guidance on which fees are subject to the requirements of Proposition 218. Some analysts, including the drafters of Proposition 218, argue that property related fees “include most fees commonly collected on monthly bills to property owners, such as those for water delivery, garbage service, sewer service, and storm water management fees.”¹²⁰ Others argue fees that vary by level of service (for example, a fee for metered water usage) should not be considered a property related fee under Proposition 218 because the fee is based on service usage, rather than property ownership.¹²¹ There has been no guidance from

115. *See id.*

116. *See id.* § 6(c).

117. *See id.*

118. *See* Gaura, *supra* note 8, at A19. In her article, Gaura quotes Andrea Flores, an aide to Santa Clara County Supervisor Blanca Alvarado frustrated with Proposition 218: “Think of all the tax dollars spent on this process, all to debate a (\$14) fee. It makes no sense.” *Id.*

119. *See* David Danelski, *Ruling May Aid Cities’ Centers; An Appellate Court’s Decision to Allow Collection of Business Improvement District Fees Could Be a Boost for Downtowns*, THE PRESS-ENTERPRISE (Riverside, California), May 21, 1999, at B01 (following one local government’s confusion created by Proposition 218’s unclear language, Corona City Manager Bill Workman said, “I have in the past looked at these business improvement districts [fees] and scratched my head as to whether Proposition 218 applied to those things.”).

120. HILL, *supra* note 13, at 18–19.

121. *See id.* at 19.

the legislature on how to determine which fees are within the scope of Proposition 218.¹²²

C. Direction from the Attorney General's Office

Various agencies have looked to the California Attorney General for clarification on whether the requirements of Article XIII D apply to the fees they are looking to impose.¹²³ In examining the question of whether a fee is imposed as an incident to property ownership, the Attorney General has analyzed the issue in terms of whether the fee is a charge for a property related service.¹²⁴ This definition is borrowed from the definition of "fee" found in section 2(e) of Article XIII D.¹²⁵

A "property related service" is defined as "a public service having a direct relationship to property ownership."¹²⁶ Therefore, in rendering an opinion on whether a fee has been imposed as an incident of property ownership, the Attorney General determines whether a fee has a direct relationship to property ownership.¹²⁷ For example, the California Attorney General has determined that "[a] water charge that is based upon the ownership of land and calculated based upon the amount of land involved must be said to have a 'direct relationship to property ownership.'"¹²⁸ Therefore, such a water charge would be subject to the requirements of Article XIII D.¹²⁹

"On the other hand, a water charge that is imposed whether the purchaser is a landowner or not, such as upon construction companies for filling their water tank trucks . . . would not have a 'direct

122. The Proposition 218 Omnibus Implementation Act did not address property related fees. See CAL. GOV'T CODE §§ 53750-53753.5 (West Supp. 2001).

123. See 82 Cal. Op. Att'y Gen. 43 (1999); 81 Cal. Op. Att'y Gen. 104 (1998); 80 Cal. Op. Att'y Gen. 183 (1997). Although attorney general opinions are not binding on the courts, they have been accorded great weight where controlling authority construing the provision is absent. See *San Diego Union v. City Counsel of the City of San Diego*, 196 Cal. Rptr. 45, 49 (Ct. App. 1983); see also *Corey v. Knight*, 310 P.2d 673, 678 (Cal. Ct. App. 1957). The court in *Corey* stated:

where the attorney general has interpreted a law in a written opinion and that position has been adopted by an administrative agency, the "administrative application of an act is entitled to respect by the courts, and unless clearly erroneous is a significant factor to be considered in ascertaining the meaning of a statute."

Id. (quoting *Mudd v. McColgan*, 183 P.2d 10 (Cal. 1947)).

124. See 80 Cal. Op. Att'y Gen. 183 (1997).

125. See CAL. CONST. art. XIII D, § 2(e) (defining a fee as "any levy . . . 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").

126. *Id.* § 2(h).

127. See 80 Cal. Op. Att'y Gen. 183, 185 (1997).

128. *Id.*

129. See *id.* at 183-84.

relationship to property ownership.' At most, the relationship would be indirect in such circumstances."¹³⁰ Therefore, this type of fee based only on usage, regardless of ownership, should not be subject to the requirements of Article XIID.¹³¹ According to the Attorney General, "fees for water that are based upon metered amounts used are not 'imposed . . . as an incident of property ownership' and do not have a 'direct relationship to property ownership.' Consequently, such fees would not be governed by Article XIID of the Constitution."¹³²

If the Attorney General's guidance is followed, whether a fee is imposed as an incident of property ownership would be determined by the directness of the relationship to property ownership. If a fee is directly related to property ownership because it is based solely on the fact that one owns property, then the fee will be subject to the requirements of Proposition 218.¹³³ If a fee is only indirectly related to property ownership, such as a fee based on service regardless of ownership, then the fee will not be subject to the requirements of Proposition 218.¹³⁴ Although the determination of directness to property ownership may clearly guide certain instances of imposing a fee, confusion still abounds due to the indeterminable nature of certain fees.

D. Conflict in the Courts

The lack of clarity over what constitutes a fee imposed as an incident of property ownership for the purposes of Proposition 218 has created confusion and conflict in the courts of appeal. For example, two contradictory opinions were announced by two separate divisions of the Second Appellate District of the Court of Appeal regarding the applicability of Article XIID to the imposition of similar fees upon rental property.¹³⁵

130. *Id.* at 185 (citation omitted).

131. *See id.* at 186.

132. *Id.* *See also* 81 Cal. Op. Att'y Gen. 104, 107 (1998) (opining that because a "storm drainage system is intended to serve directly the property within the drainage area" the monthly fees on the system would be "property related"); 82 Cal. Op. Att'y Gen. 43, 46 (1999) (opining that a "District's per-acre charge for delivering irrigation water to land-owners is a fee for a property-related service [and] is imposed as an incident of property ownership").

133. *See generally* 82 Cal. Op. Att'y Gen. 43 (1999); 81 Cal. Op. Att'y Gen. 104 (1998).

134. *See* 80 Cal. Op. Att'y Gen. 183, 185 (1997).

135. *See Apartment Ass'n of Los Angeles I*, 88 Cal. Rptr. 2d 255 (Ct. App. 1999), *rev'd*, 01 C.D.O.S. 219 (Cal. Jan. 8, 2001); *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, Nos. B116056 and B117325 (Cal. Ct. App. Aug. 5, 1998).

In *Action Apartment Ass'n v. Santa Monica Rent Control Board*,¹³⁶ Division Seven of the Second Appellate District held that “[a]n annual fee assessed by a rent control board against owners of rental units, used entirely to defray regulatory costs, is imposed only because property is used for rental and is not ‘incident to property ownership.’”¹³⁷ The court concluded the fee was not, therefore, subject to the requirements of Proposition 218.¹³⁸ The court reasoned that “[a] regulatory fee charged to persons engaged in a regulated business, and used only to cover the expenses of the regulator, is not a . . . fee incident to the ownership of property.”¹³⁹ The court noted that the fees were only charged to a small subset of property owners (those who operate rental businesses) and not to all property owners in general.¹⁴⁰ The court relied on *Pennell v. City of San Jose*,¹⁴¹ where the California Supreme Court held that a fee charged to cover the costs of operation of a San Jose rent control ordinance, and not used to raise general revenue, was not subject to taxation limits added to the California Constitution by Proposition 13.¹⁴² Therefore, according to Division Seven of the Second Appellate District, regulatory fees charged to those in a business are not property related fees.¹⁴³

Division One of the Second Appellate District rendered a contradictory opinion regarding a similar type of fee in *Apartment Ass'n of Los Angeles County I*.¹⁴⁴ The City of Los Angeles imposed the fee on owners of all residential rental properties with two or more dwellings for the financing of an inspection program to eradicate substandard housing.¹⁴⁵ The court held that the fee was “imposed ‘upon a parcel or upon a person as *an incident of property ownership*’ and [was], therefore, subject to the procedural requirements of Proposition 218.”¹⁴⁶ Unlike the *Action Apartment Ass'n* court, the court in *Apartment Ass'n of Los Angeles I* disregarded the trial court’s distinction that such a fee was “not one ‘imposed by virtue of ownership *per se*’ and, therefore not one within the reach of Proposition 218—because it [was] imposed

136. Nos. B116056 and B117325 (Cal. Ct. App. Aug. 5, 1998).

137. *Id.* at 31.

138. *See id.*

139. *Id.* at 32.

140. *See id.*

141. 721 P.2d 1111 (Cal. 1986).

142. *See id.* at 1118.

143. *See Action Apartment Ass'n*, Nos. B116056 and B117325, at 32.

144. 88 Cal. Rptr. 2d 255 (Ct. App. 1999), *rev'd*, 01 C.D.O.S. 219 (Cal. Jan. 8, 2001).

145. *See id.* at 257.

146. *Id.* at 258 (quoting CAL. CONST. art. XIIIID, § 2(e)) (alteration in original).

only on the owners of rental units, not on all property owners.”¹⁴⁷ Rather, the appellate court found that the “fee [fell] squarely within the four corners of Proposition 218.”¹⁴⁸

Our task begins and ends with the determination that it is the intent of the voters who adopted this constitutional provision that must control. Where, as here, that intent is apparent from the words of Proposition 218, there is no need for construction, and no need for further analysis. By imposing a fee upon all “residential rental properties with two or more dwellings,” the City has imposed a new fee upon the property or its owner “as an incident of property ownership, [as] a user fee or charge for a property related service.”¹⁴⁹

The fee was declared invalid because the city failed to follow the procedures set forth in section 6 of Article XIID.¹⁵⁰

The Fourth Appellate District issued an opinion similar in rationale to the Second Appellate District’s decision in *Action Apartment Ass’n*, holding that a municipal rental unit tax assessed against rental property owners based on their use of their properties was not subject to the requirements of Proposition 218.¹⁵¹ In *Teyssier v. City of San Diego*,¹⁵² the court reasoned that the city imposed its charge on the business of renting residential property, rather than taxing the ownership of property.¹⁵³ The property owner can avoid taxation by not engaging in the privilege taxed.¹⁵⁴ Thus, the court interpreted the phrase “fee or charge . . . imposed . . . upon a person as an incident of property ownership” to mean “fees that a person must pay solely because that person owns property and for no other reason.”¹⁵⁵ The court found that by its very language, Proposition 218 applies only to “fees

147. *Id.* (quoting the trial court).

148. *Id.* at 259.

149. *Id.* (quoting CAL. CONST. art. XIID, § 2(e)) (alteration in original).

150. *See id.*

151. *See Teyssier v. City of San Diego*, 97 Cal. Rptr. 2d 100 (Ct. App. 2000), *review granted and opinion superceded*, 8 P.3d 338 (Cal. 2000). The *Teyssier* court distinguished the tax before it from the tax challenged in *Apartment Ass’n of Los Angeles I*, stating:

There, all residential rental properties with two or more dwellings were subject to regular inspection; the annual service fee was imposed regardless of whether the unit was rented or empty In contrast, the [tax] here is neither a user nor a service fee, but rather a residential rental component of the business tax. It is expressly not intended for regulation.

Id. at 109 n.12.

152. 97 Cal. Rptr. 2d 100 (Ct. App. 2000), *review granted and opinion superceded*, 8 P.3d 338 (Cal. 2000).

153. *See id.* at 105.

154. *See id.*

155. *Id.* at 106.

levied strictly as an incident of property ownership, without any additional condition precedent."¹⁵⁶

In *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*,¹⁵⁷ Division Four of the Second Appellate District affirmed an order of dismissal because the plaintiffs failed to show the challenged water usage fee constituted a property related fee or tax.¹⁵⁸ The plaintiffs claimed that payments for water services are essentially property related fees or special taxes and are thus subject to Proposition 218's requirements.¹⁵⁹ The appellate court rejected this argument.¹⁶⁰ The court reasoned that "the supply and delivery of water does not require that a person own . . . the property where the water is delivered."¹⁶¹ Rather, the charges are based upon the amount of water used.¹⁶² Thus, the fee is "not incident to or directly related to property ownership."¹⁶³ The court held "[t]hese usage rates are basically commodity charges which do not fall within the scope of Proposition 218."¹⁶⁴

As these cases exemplify, due to the confusing and vague language of Proposition 218, there are conflicting views as to what the term "incident of property ownership" actually means. There must be resolution of the construction of the term so that the local government and its citizens do not have to forego services.

E. Some Guidance from the California Supreme Court

On January 8, 2001, the California Supreme Court reversed the decision of Division One of the Second Appellate District in *Apartment Ass'n of Los Angeles County I*,¹⁶⁵ and held that a municipal regulatory fee imposed on the owners of rental property was not a fee imposed on property ownership and, therefore, not subject to Proposition 218's provisions.¹⁶⁶ The court reasoned that "the inspection fee is not

156. *Id.* at 107.

157. 101 Cal. Rptr. 2d 905 (Ct. App. 2000). The plaintiffs in *Howard Jarvis* were two non-profit corporations, the Howard Jarvis Taxpayers Association and the Apartment Association of Los Angeles County, Inc., and three individuals, Ivan Shinkle, Harold Greenberg, and Mark Dolan. *See id.* at 905-06. They brought a class action lawsuit on behalf of all individuals and entities who paid for water services in the City of Los Angeles. *See id.* at 906.

158. *See id.* at 909.

159. *See id.* at 906.

160. *See id.* at 908.

161. *Id.*

162. *See id.*

163. *Id.*

164. *Id.*

165. *See supra* text accompanying notes 144-156.

166. *See Apartment Ass'n of Los Angeles II*, 01 C.D.O.S. 209, 209 (Cal. Jan. 8, 2001).

imposed solely because a person owns property. Rather, it is imposed because the property is being rented."¹⁶⁷ The court found crucial to the city's case the fact that the fee would cease if the business operation (renting the property) ceased, regardless of who owned the property.¹⁶⁸

In this case . . . the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.¹⁶⁹

The court further reasoned that the business of renting apartments is not an incident of property ownership.¹⁷⁰ Although apartments cannot be rented without owning them as property, it is possible to own apartments and not rent them. The court interpreted "as an incident of property ownership" as plainly meaning that Proposition 218 "applies only to exactions levied solely by virtue of property ownership."¹⁷¹

The court also looked to the directness of the relationship between the fee and property ownership as additional evidence that the fee imposed by the city was not included within Proposition 218's scope.¹⁷²

It may be recalled that among the fees or charges covered by Article XIID, section 2, subdivision (e), is "a user fee or charge for a property-related service." Such a service "means a public service having a direct relationship to property ownership." In this case, the relationship between the city's inspection fee and property ownership is indirect—it is overlain by the requirement that the landowner be a landlord.¹⁷³

The California Supreme Court found the indirectness of this fee to property ownership removed the fee from the requirements of Proposition 218.¹⁷⁴

167. *Id.*

168. *See id.*

169. *Id.* at 211.

170. *See id.* at 212.

171. *Id.*

172. *See id.*

173. *Id.* (quoting CAL. CONST. art. XIID, § 2(e), (h)).

174. *See id.*

III. Solution

A. Identifying the Purpose of Fees

The test used by the California Supreme Court in *Apartment Ass'n of Los Angeles County II* should be broadened, so that all types of fees may be analyzed under it. Therefore, to determine whether a fee is property related for the purposes of Proposition 218, a court must first look to the purpose of the fee.

If there is no purpose for the fee other than to raise revenue from property owners, then the fee is property related and those who seek to impose it must follow Proposition 218's requirements. However, if the fee is levied based on something other than mere property ownership, the court must determine the directness of the relationship between the fee and property ownership. If the relationship is determined to be direct, then the fee is property related and must adhere to Proposition 218. But if the fee is only indirectly related to the fact a person owns property, such as fees based upon the operation of a business on the property or upon using property in a certain manner, then the fee should not be subject to Proposition 218's requirements. A characteristic of fees that are indirectly related is that they are imposed because of the way property is being used and will cease when that particular use ceases. Unlike the limited holding in *Apartment Ass'n of Los Angeles II*, which only determined the status of regulatory fees imposed on owners of rental property, a test based upon the directness of the fee's relationship to the property ownership allows for the determination of whether Proposition 218 applies to various types of fees. Allowing local governments to determine whether a fee is likely to be deemed property related prior to imposing a fee will provide greater certainty in the provision of public services.

B. Use the Contemporaneous Construction of Local Governments

If there is doubt as to whether the fee's relationship to property ownership is direct or indirect, courts should use the contemporaneous construction of the agency charged with meeting Proposition 218's requirements.¹⁷⁵ In determining the scope of the term "incident to property ownership," courts must use the rule of construction of

175. See *Amador Valley Joint Union Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978).

vague terms established by the California Supreme Court in *Amador Valley Joint Union School District v. State Board of Equalization*.¹⁷⁶

In *Amador Valley*, the supreme court was confronted with multiple constitutional challenges to Article XIII A of the California Constitution.¹⁷⁷ One of the challenges by the Amador Valley Joint Union School District, and numerous governmental agencies as amici, was that Article XIII A was void for vagueness.¹⁷⁸ The court, however, found that Article XIII A was not so vague as to render it void.¹⁷⁹ In the course of its analysis, the court enunciated several principles regarding the construction of constitutional terms.¹⁸⁰ The court held that constitutional enactments “‘must receive a liberal, practical common-sense construction’ which will meet ‘changed conditions and the growing needs of the people.’”¹⁸¹ The court reasoned that constitutional amendments “should be construed in accordance with the natural and ordinary meaning of its words. The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.”¹⁸² Thus, because a court is allowed to liberally construe a constitutional enactment, the court may disregard the literal language of the enactment.¹⁸³

The court in *Amador Valley* then proceeded to allow some deference to the interpretation by local agencies of ambiguous terms in constitutional enactments.¹⁸⁴ The court advised that, “[m]ost importantly, apparent ambiguities frequently may be resolved by the contemporaneous construction of the legislature or of the administrative agencies charged with implementing the new enactment.”¹⁸⁵ In addition, the court in *Amador Valley* held that when the enactment follows voter approval, “the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language.”¹⁸⁶

176. 583 P.2d 1281 (Cal. 1978).

177. *See id.* at 1299. Article XIII A sets forth the requirements imposed by Proposition 13. *See* CAL. CONST. art. XIII A; *see also* discussion *supra* Part I.A.

178. *See Amador Valley*, 583 P.2d at 1299.

179. *See id.* at 1300.

180. *See id.* at 1299–1300.

181. *Id.* at 1300 (quoting *Los Angeles Metro. Transit Auth. v. Pub. Utils. Comm’n*, 382 P.2d 583, 586 (Cal. 1963)).

182. *Id.* (citation omitted).

183. *See id.*

184. *See id.*

185. *Id.*

186. *Id.*

Under *Amador Valley*, when a fee is challenged a court should give deference to the judgment of the agencies charged with implementing Proposition 218 in determining whether it must satisfy the procedural requirements of Proposition 218 before imposing or increasing a particular fee.¹⁸⁷ According deference to these local agencies will allow them to meet changed conditions and the growing needs of the people.¹⁸⁸ The rules of construction set forth in *Amador Valley* provide for the liberal construction of the terms of constitutional enactments like Proposition 218. Indeed, by its very terms, Proposition 218 is to be “liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.”¹⁸⁹ Although local agencies may be granted deference in their judgment of whether a fee must meet the procedural requirements of Proposition 218, the agency must still make that judgment by construing the terms of Proposition 218 in a manner that accords with the natural and ordinary meaning of the words.¹⁹⁰ Agencies must therefore remain cautious in distinguishing between fees based only on ownership of property and other fees indirectly related to property ownership. Thus, the language of Proposition 218 is preserved, the intent of the voters is preserved, and local agencies may determine whether a fee is subject to the requirements of Proposition 218 with greater certainty.

Conclusion

Voters passed Proposition 218 so that property owners could exercise greater control over the amount of money they pay to the government in connection with the ownership of their properties. However, Proposition 218’s failure to define a fee incident of property ownership has created confusion and uncertainty over what fees must meet the Proposition’s requirements. In order for local governments to both provide services and fulfill the intent of voters, the California Supreme Court should adopt a test that focuses on the directness of the relationship between the fee and ownership of property. If there is doubt about the directness of the fee to property ownership, the contemporaneous construction of the local government should be given deference. If such a test is adopted, perhaps there will again be certainty to death *and taxes* in California.

187. *See id.*

188. *See id.*

189. CAL. CONST. art. XIII C, § 1 historical notes (West Supp. 2001).

190. *See Amador Valley*, 583 P.2d at 1300.