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Implementing Proposition 218: Will the Curtain Finally Close on Property Tax Reform in California?

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Code Sections Affected

Elections Code § 4000 (amended); Government Code §§ 53739, 53750, 53751, 53752, 53753, 53753.1, 53753.2, 53753.3, 53753.4, 53753.5 (new), §§ 5854, 54954.6 (amended); Streets and Highways Code § 9525 (amended).

SB 919 (Rainey); 1997 STATS. Ch. 38

(Effective July 1, 1997)

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I. INTRODUCTION

Proposition 218—dubbed the “Right to Vote on Taxes Initiative”—attempted to close loopholes created by courts and used by local governments to obviate the restrictive anti-tax provisions of Proposition 13.¹ Chapter 38, implementation legislation for Proposition 218, addresses many of the uncertainties left open by the enactment of the proposition.²

Chapter 38 is the product of a working group convened by the Legislative Analyst’s Office.³ The group was comprised of local agency representatives, taxpayer advocates, the public finance community, legislative representatives, and developers.⁴ All of the provisions of Chapter 38 were supported by a consensus of the working group.⁵ However, due to a recent deadline for local agencies to comply with the requirements of Proposition 218, issues upon which the group could not reach consensus were left for future legislation.⁶

Proposition 218 is a further endeavor in an area of law that has been given considerable political and judicial attention in California.⁷ The purpose of this legislative note is to explain how Chapter 38 deals with many of the textual and interpretative issues that arose in the wake of the enactment of this landmark anti-tax measure. In addition to discussing the numerous legislative amendments contained in Chapter 38, this legislative note also provides a brief discussion of Propositions 13 and 62 and the important case law dealing with each.⁸ This information is important to put Proposition 218 in its proper historical and legal context.

1. See SECRETARY OF STATE, NOVEMBER, 1996 CALIFORNIA VOTER PAMPHLET 76 [hereinafter 1996 VOTER PAMPHLET] (stating that proponents believe that after Proposition 13 was passed, politicians created a loophole in the law that allowed them to call taxes “assessments” and “fees”).

2. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SENATE BILL 919, at 1 (Apr. 21, 1997) (noting that public finance experts argued that Proposition 218 was unclear with respect to the types of revenues it affected, the procedures it required to obtain voter approval, and the exemptions to its provisions); *id.* (explaining that interested parties expressed confusion over how to implement the initiative’s provisions after approved by voters).

3. *Id.*

4. *Id.*

5. *Id.* at 2.

6. See ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF SB 919, at 2 (June 25, 1997) (stating that the bill enacting these new changes needed to be sent to the governor by July 1, 1997, because of the deadline imposed by Proposition 218 for compliance with its provisions); *id.* (noting that trailer legislation might be sponsored on an omitted provision from the bill at a future date).

7. See *infra* Part II (discussing the history of property tax reform in California from Proposition 13 to Proposition 218).

8. See *infra* Part II (discussing Propositions 13 and 62 and the case law dealing with each). For a more thorough treatment of this area of the law, see generally Joseph T. Henke & Miles A. Woodlief, *The Effect of Proposition 13 Court Decisions on California Local Government Revenue Sources*, 22 U.S.F.L. REV. 251, 251-92 (1988); Julie K. Koyoyama, Note, *Financing Local Government in the Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources*, 22 PAC. L. J. 1333-1369 (1991); Kenneth A. Ehrman & Sean Flavin, 1 TAXING CALIFORNIA PROPERTY § 2:37-39 (3d ed. 1988).

II. LEGAL BACKGROUND: PROPERTY TAX REFORM IN CALIFORNIA FROM PROPOSITION 13 TO PROPOSITION 218

The courts did not treat Proposition 13—the hallmark of the California “tax revolt”—kindly.⁹ Property tax reform supporters argue that politicians have used loopholes created by the courts to obviate the tough provisions of Proposition 13.¹⁰ Accordingly, three property tax reform initiatives were proposed since the passage of the landmark initiative in 1978; one initiative failed,¹¹ another arguably does not to apply to chartered cities,¹² and the third, Proposition 218, is the latest attempt to undo some of the damage caused by judicial interpretation.¹³

A. Act I: Proposition 13

1. The Law

Passed by ballot initiative in 1978, Proposition 13 was hailed nation-wide as a “tax revolt.”¹⁴ It severely restricted the ability of state and local governments to raise revenue through property taxes.¹⁵ Proposition 13 enacted Article XIII A of the California Constitution¹⁶ which places a 1% limit on any ad valorem¹⁷ tax on the full cash value¹⁸ of any real property within the State.¹⁹ However, the 1% limit imposed by Article XIII A does not apply to any ad valorem tax or special

9. See *infra* notes 26-84 and accompanying text (discussing the judicial treatment of Proposition 13).

10. See 1996 VOTER PAMPHLET, *supra* note 1, at 76 (stating that proponents believe that after Proposition 13 was passed, politicians created a loophole in the law that allowed them to call taxes “assessments” and “fees”); see also SECRETARY OF STATE, NOVEMBER, 1986 CALIFORNIA VOTER PAMPHLET 42 [hereinafter 1986 VOTER PAMPHLET] (noting that one of the provisions of Propositions 13 controlling tax increases was “twisted” by the California Supreme Court).

11. See generally SECRETARY OF STATE, NOVEMBER, 1984 CALIFORNIA BALLOT PAMPHLET 42-45, 66-67, 76-77 (describing Proposition 38, not approved by the voters, which would have added further restrictions on property tax rates, additional restrictions on benefit assessments, new restrictions on inflation adjustments in the method of property taxes, and would have changed appraisal methods for the valuation of property).

12. See *infra* Part II.B (discussing the judicial treatment of Proposition 62).

13. See *infra* Part II.C (explaining the provisions of Proposition 218).

14. See, e.g., Koyoyama, *supra* note 8, at 1336 (noting that Proposition 13 was widely characterized as a “taxpayer’s revolt”).

15. See *infra* notes 16-25 and accompanying text (discussing the tough provisions of Proposition 13).

16. See generally CAL. CONST. art. XIII A, §§ 1-6 (setting forth the provisions enacted by Proposition 13).

17. See BLACK’S LAW DICTIONARY 51 (6th ed. 1991) (defining “ad valorem tax” as “a tax imposed on the value of property”).

18. CAL. CONST. art. XIII A, § 2(a) (explaining that the “full cash value” means the county assessor’s valuation of real property as shown on the 1975-76 tax bill under “full cash value” or, thereafter, the appraised value of real property when subsequently purchased, constructed or when ownership changes).

19. *Id.* § 1(a); see *id.* (declaring that the 1% tax is to be collected by the counties and apportioned according to law to the districts within the counties).

assessment to pay for indebtedness approved by voters prior to 1978 or to any such indebtedness approved by two-thirds of local voters after 1978.²⁰

Once enacted, property taxes were frozen at their 1975 rates and are now allowed to increase only when property is subsequently sold or transferred.²¹ Property taxes may also increase for inflation, but may not exceed 2% in any one year.²²

Proposition 13 requires a supermajority of the State Legislature to raise new taxes.²³ In addition, it provides that local special taxes can be enacted if approved by two-thirds of the local voters.²⁴ However, cities, counties, and special districts are prohibited from imposing ad valorem taxes or transaction or sales tax on the transfer of land.²⁵

2. Court Imposed Limitations on Proposition 13

Shortly after its passage, Proposition 13 survived a major constitutional attack in *Amador Valley Joint Union High School District v. State Board of Equalization*.²⁶ In *Amador Valley*, the court upheld Proposition 13 on a number of constitutional grounds, holding among other things that the proposition's roll-back of assessed property valuation for taxation purposes and the two-thirds voter approval requirement for local taxes did not deny equal protection of the law.²⁷ While supporters of

20. *Id.* § 1(b); *see id.* (stating that the 1% limit on ad valorem taxes does not apply to any indebtedness approved by the voters prior to July 1, 1978).

21. *See id.* § 2(a) (setting forth a valuation system wherein the "full cash value" of property for taxation purposes is valued either at the assessment shown during the 1975-76 tax year or, thereafter, the assessment from the year when the property was last sold, transferred or a change of ownership occurred).

22. *Id.* § 2(b); *see id.* (stating that the consumer price index or comparable data for the area under the taxing jurisdiction is used to determine inflation).

23. *Id.* § 3; *see id.* (explaining that the two-thirds voting requirement applies to any changes in state taxes enacted for the purpose of increasing revenues collected whether by increased rates or by a change in methods of computation for taxation purposes); *see also* *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 870, 937 P.2d 1350, 1351, 64 Cal. Rptr. 2d 447, 448 (1997) (holding that the two thirds approval requirement in Section 3 was not applicable to a regulatory fee imposed pursuant to the Legislative Childhood Prevention Act of 1991, passed by a simple majority of the members of the State Legislature).

24. CAL. CONST. art. XIII A, § 4.

25. *Id.*

26. 23 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

27. *See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 233, 583 P.2d 1281, 1292, 149 Cal. Rptr. 239, 250 (1978) (holding that the provision of Article XIII A providing for a roll-back of assessed valuation did not deny equal protection of the law); *id.* at 237, 583 P.2d at 1295, 149 Cal. Rptr. at 253 (declaring that the two-thirds voter approval requirement of Article XIII A did not infringe on the Equal Protection clause of the United States Constitution); *see also* *Nordlinger v. Hahn*, 505 U.S. 1, 12-13 (1992) (holding that system under Article XIII A did not violate equal protection clause because there was a rationale basis for such system provided by the state's interest in local neighborhood preservation, continuity and stability, and the determination that the new owner at the time of acquiring property does not have the same reliance interest warranting protection against higher taxes as do existing neighbors); *Amador Valley*, 22 Cal. 3d at 238, 583 P.2d at 1295, 149 Cal. Rptr. at 253 (stating that the constitutional right to travel was not impaired by Article XIII A); *R. H. Macy & Co. v. Contra Costa County*, 226 Cal. App. 3d 352, 358, 276 Cal. Rptr. 530, 533 (1991) (explaining that the fact

Proposition 13 had much to cheer about after the constitutionality of the proposition was upheld, their efforts would later be frustrated by a series of court interpretations limiting the reach of the new law.²⁸

Noting that the language of Article XIII A was “imprecise and ambiguous,”²⁹ the *Amador Valley* court nevertheless decided that the new law was “not so vague and uncertain in its essential terms as to render it void and inoperable.”³⁰ The court declared that the various uncertainties of the law could be resolved according to commonly accepted rules of construction.³¹ The court further noted 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.”³² In light of this statement, the ensuing deference given to the interpretations of local bodies significantly watered down the law according to its supporters.³³ *Amador Valley* thus set the stage for the restrictive cases that followed.³⁴

The courts that later interpreted Article XIII A wrestled with questions concerning the meaning of “special district”³⁵ and “ad valorem tax” under the law;³⁶ whether a given tax was considered “special” or “general” requiring either a majority or two-thirds approval by local voters respectively,³⁷ and whether special assessments and fees were covered by the law.³⁸ The watering down of nearly all of the significant provisions of Proposition 13 in these opinions fueled the drive for the subsequent reform which culminated in Proposition 218.³⁹

that a commercial store owner paid a ration of 2.5 to 1 compared to competitors in property taxes under Article XIII A did not violate Equal Protection Clause of the United States Constitution).

28. See *infra* notes 40-84 and accompanying text (discussing judicial treatment of the various provisions of Proposition 13).

29. *Amador Valley*, 22 Cal. 3d at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 257.

30. *Id.* at 247, 583 P.2d at 1301, 149 Cal. Rptr. at 259.

31. *Id.* at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 257.

32. *Id.* at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 258.

33. See 1996 VOTER PAMPHLET, *supra* note 1, at 76 (stating that proponents of Proposition 218 believed that after Proposition 13 was passed, politicians created a loophole in the law that allowed them to call taxes “assessments” and “fees”); 1986 VOTER PAMPHLET, *supra* note 10, at 42 (quoting from supporters of Proposition 62, passed in 1986, that while Proposition 13 “returned the power to control tax increases to the people, where it belongs,” the State Supreme Court “took away [the voters’] right to vote on city and county tax increases”); *id.* at 43 (arguing that Proposition 62 would bring back the rights taken away by the Supreme Court decision).

34. See *Amador Valley*, 22 Cal. at 247, 583 P.2d at 1301, 149 Cal. Rptr. at 259 (declining to address the various interpretations of Proposition 13 set forth by the Legislature and State Board of Equalization against the new law in favor of waiting for an actual controversy to arise).

35. See *infra* Part II.A.2.a (discussing judicial treatment of “special districts” under Proposition 13).

36. See *infra* Part II.A.2.c (explaining the court interpretation of “ad valorem tax” as used in Proposition 13).

37. See *infra* Part II.A.2.b (describing the differences between “general” and “special” taxes).

38. See *infra* Part II.A.2.d (discussing the judicial treatment of special assessments and fees under Proposition 13).

39. See *supra* note 1 and accompanying text (discussing the view of supporters of Proposition 218 that the initiative was needed to fix the court-created “loopholes” in Proposition 13).

a. *What is a Special District?*

Article XIII A, Section 4 prohibits special districts from imposing any ad valorem tax on real property or any transaction tax or sales tax on the sale of real property within the district.⁴⁰ In *Los Angeles County Transportation Commission v. Richmond*,⁴¹ the court upheld the validity of a sales tax approved by a majority, but not two-thirds, of local voters.⁴² Construing the language of Section 4, the court held that only those districts previously empowered to levy taxes on property were special districts within the meaning of Section 4 and thus subject to the two-thirds voter approval requirement for new taxes.⁴³ In reaching this decision, the court found such a limitation on the meaning of special district implicit in the language of Section 4 “[i]n view of the fundamental undemocratic nature” of a two-thirds approval requirement for new taxes.⁴⁴

While the *Los Angeles County Transportation Commission* case was certainly a blow to supporters of Proposition 13, subsequent cases interpreting the meaning of special district have been more sympathetic.⁴⁵ Unlike the deference shown by courts to the attempts of local agencies to circumvent other provisions of Article XIII A,⁴⁶ the courts have articulated an “essential control” test to determine whether a city or county has created a new special district solely to replace revenue lost in the wake of Proposition 13.⁴⁷ From its inception, the test has been used to apply to

40. CAL. CONST. art. XIII A, § 4.

41. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

42. *Los Angeles County Transp. Comm'n v. Richmond*, 31 Cal. 3d 197, 208, 643 P.2d 941, 947, 182 Cal. Rptr. 324, 330 (1982).

43. *Id.* at 206-07, 643 P.2d at 946-47, 182 Cal. Rptr. at 329-30.

44. *See id.* at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328 (stating that “in view of the fundamentally undemocratic nature of the requirement for an extraordinary majority and the matters discussed above, the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting voters of . . . ‘special districts’ to enact ‘special taxes’ by a majority rather than a two-thirds vote”).

45. *See infra* notes 47-50 and accompanying text (discussing the approach taken by courts toward determining whether a district is a special district for the purposes of avoiding the provisions of Proposition 13).

46. *See infra* Part II.A.2-4 (discussing restrictive Proposition 13 case law dealing with taxes, the ad valorem taxation limit, and special assessments and fees).

47. *See Rider v. San Diego*, 1 Cal. 4th 1, 11, 820 P.2d 1000, 1006, 2 Cal. Rptr. 2d 490, 496 (1991) (holding that a “special district” includes any agency created to raise funds for city or county purposes as a means of raising revenue lost because of the restrictions of Proposition 13); *id.* (stating that court may infer the intent of a city or county to create an agency to replace revenue lost by Proposition 13 when the new tax agency is “essentially controlled by one or more cities or counties that otherwise would have had to comply with the supermajority provision of section 4”); *id.* at 11-12, 820 P.2d at 1006, 2 Cal. Rptr. at 496 (explaining that a variety of considerations are relevant in applying the essential control test:

the presence or absence of (1) substantial municipal control over agency operations, revenues or expenditures, (2) municipal ownership or control over agency property or facilities, (3) coterminous physical boundaries, (4) common or overlapping governing boards, (5) municipal involvement in the creation or formation of the agency, and (6) agency performance of functions customarily or historically performed by municipalities and financed through levies of property taxes).

Id.

school districts,⁴⁸ a regional justice commission,⁴⁹ and to a county-created improvement agency.⁵⁰ As courts have prevented local governments from obviating this provision of Proposition 13, this line of cases has not achieved the same “loophole” status as those discussed below.

b. Special Taxes and General Taxes Distinguished

Section 4 provides that cities, counties, and special districts may impose special taxes with a two-thirds vote by local voters.⁵¹ In *City and County of San Francisco v. Farrell*,⁵² the court interpreted Section 4 to define “special taxes” to include only those taxes levied for a specific purpose.⁵³ In contrast, “general taxes” are those taxes placed in a general fund and used for general government purposes.⁵⁴ In reaching this decision, the *Farrell* court reasoned that because the drafters of Proposition 13 used the word “any” in Section 3, which prohibited an increase in taxes by the state legislature unless approved by a two-thirds vote of both houses, but did not use the same word in Section 4, not all local taxes were meant to fall under the auspices of the two-thirds voter approval requirement.⁵⁵ Moreover, the legislative analysis accompanying the text of Proposition 13 noted only that “certain non-property taxes” would require voter approval.⁵⁶ Based on these points, the *Farrell* court chose not to read the word “special” out of the two-thirds approval requirement for “special taxes” thus rendering the requirement applicable to all taxes.⁵⁷

Subsequent courts have held various taxes to be general taxes not subject to the two-thirds voter approval requirement.⁵⁸ Specifically, courts have exempted from

48. See *Hoogasian Flowers v. State Bd. of Equalization*, 23 Cal. App. 4th 1264, 1279, 28 Cal. Rptr. 2d 686, 695 (1994) (concluding that school districts are special districts under Article XIII A); *id.* at 1279, 28 Cal. Rptr. 2d at 695-96 (declaring that a taxing agency created and controlled by school districts is subject to section 4 of Article XIII A).

49. See *Howard Jarvis Taxpayer's Ass'n v. State Bd. of Equalization*, 20 Cal. App. 4th 1598, 1604, 25 Cal. Rptr. 2d 330, 333 (1993) (providing that regional justice commission was a special district because the primary purpose of a sales tax levied by such commission was to fund the construction and operation of jails and courthouses—functions historically performed by municipalities and financed through property tax levies).

50. See *Monterey Taxpayers Ass'n v. County of Monterey*, 8 Cal. App. 4th 1520, 1533, 11 Cal. Rptr. 2d 188, 195 (1992) (stating that a county-created improvement agency was under the essential control of county because the agency had “no power over its own identity and destiny” and was “the County’s surrogate tax collector” that existed “to do the supervisors’ bidding”).

51. CAL. CONST. art. XIII A, § 4.

52. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).

53. *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982).

54. *Id.*

55. *Id.* at 56-57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

56. *Id.* at 55, 648 P.2d at 939, 184 Cal. Rptr. at 717.

57. *Id.* at 56-57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

58. See *infra* notes 59-62 (discussing cases in which courts have held various taxes to be not subject to two-thirds voter approval).

this requirement an airport maintenance fee,⁵⁹ a school facilities fee imposed on new residential development,⁶⁰ and a municipal block rate structure for state-mandated water conservation requirements.⁶¹ Courts that have found a challenged tax to be a special tax have followed *Farrell* by doing so only where it was clear that the tax was not to be deposited in a general fund for general city or county purposes.⁶² This generally restrictive line of cases inspired the reform of Proposition 13's taxation provisions in both Propositions 62 and 218.⁶³

c. *The Meaning of "Ad Valorem Tax" as Used in Article XIII A*

In *Heckendorn v. City of San Marino*,⁶⁴ the court upheld a voter-approved ordinance levying a special tax for police and fire services imposing a graduated tax on real property based on city zoning classifications.⁶⁵ The court rejected the argument that this violated Article XIII A's prohibition on ad valorem taxes exceeding 1% of the property's full cash value.⁶⁶ The court held that "ad valorem tax," as used in Section 2 of Article XIII A, means any source of revenue derived from applying a property tax rate to the assessed value of property.⁶⁷ Since the particular

59. See *Alamo Rent-a-Car v. Board of Supervisors*, 221 Cal. App. 3d 198, 205, 272 Cal. Rptr. 19, 23-24 (1990) (holding that an airport maintenance fee was not a special tax where the fee was not imposed to recoup monies lost after Proposition 13, was not compulsory, and was reserved for commercial users of the facility as opposed to local taxpayers).

60. See *Garrick Dev. v. Hayward Unified Sch. Dist.*, 3 Cal. App. 4th 320, 331, 4 Cal. Rptr. 2d 897, 903 (1992) (concluding that a school facilities fee imposed on new residential development did not exceed the reasonable cost of the facilities provided by the district and did not therefore constitute a special tax enacted without voter approval).

61. See *Brydon v. East Bay Mun. Util. Dist.*, 24 Cal. App. 4th 178, 190, 29 Cal. Rptr. 2d 128, 134 (1994) (stating that an inclining block rate structure adopted by a municipal utility district in response to state-mandated water conservation requirements was not a special tax subject to the provisions of Proposition 13).

62. See *Rider*, 1 Cal. 4th at 13-14, 820 P.2d at 1008, 2 Cal. Rptr. at 493 (noting that tax revenues collected for the special and limited purpose of constructing a county justice facility were special taxes despite being deposited in the taxing agency's general fund); *Monterey Taxpayers Ass'n*, 8 Cal. App. 4th at 1533, 11 Cal. Rptr. 2d at 195 (holding that a sales tax designed to benefit 27 different projects was not a general tax); *id.* at 1535, 11 Cal. Rptr. at 196-97 (explaining that "[a] single tax with certain amounts earmarked for specific projects is categorically different from revenues that are deposited in the general fund and available for expenditure for any and all governmental purposes"); *id.* at 1535, 11 Cal. Rptr. at 196 (declaring a special district to be subject to the approval requirement for special taxes because such district lacked the discretion to determine what projects to complete or to set the maximum amount it can spend on any project).

63. See *infra* Part II.B (discussing Proposition 218); Part II.C.3 (explaining the taxation provisions under Proposition 218).

64. 42 Cal. 3d 481, 723 P.2d 64, 229 Cal. Rptr. 324 (1986).

65. *Heckendorn v. City of San Marino*, 42 Cal. 3d 481, 489, 723 P.2d 64, 69, 229 Cal. Rptr. 324, 329 (1986).

66. See *id.* at 487, 723 P.2d at 67-68, 229 Cal. Rptr. at 327 (rejecting the requirement that ad valorem should be broadly construed to include any tax or assessment imposed on property, including any special ad valorem assessment).

67. *Id.* at 483, 723 P.2d at 64-5, 220 Cal. Rptr. at 324.

ordinance was based on a flat rate, applicable to all parcels within a zoning classification, it was not prohibited under Section 2.⁶⁸

d. Assessments and Fees: When is a Tax Not a Tax?

Section 1(a) of Article XIII A provides that the maximum amount of any ad valorem tax on real property may not exceed 1% of the full cash value.⁶⁹ Section 1(b) states that the limitation in Section 1(a) does not have to apply to any ad valorem taxes or *special assessments* either approved by local voters prior to 1978 or approved by two-thirds of the local voters thereafter.⁷⁰ One of the most vexing issues faced by the courts in interpreting Proposition 13 was why Section 1(b) exempted special assessments as well as ad valorem taxes when Section 1(a) contained only language limiting ad valorem taxes.⁷¹

In *County of Fresno v. Malmstrom*,⁷² the court upheld an assessment on property owners for street and roadway improvements in the face of a challenge that such assessment exceeded the mandatory 1% cap on ad valorem taxes.⁷³ In reaching its decision, the court distinguished special assessments from property related special taxes by noting that assessments cannot exceed the benefits the assessed property receives from the improvement whereas a special tax on property is not so limited.⁷⁴ Accordingly, statutory and constitutional limitations on taxes have no logical application to special assessments financing improvements that benefit special parcels of property within a taxing jurisdiction.⁷⁵

The court in *Solvang Municipal Improvement District v. Board of Supervisors*⁷⁶ agreed with the *Malmstrom* rationale. In that case the court held that the restriction in section 1 that the amount of any ad valorem tax shall not exceed 1% did not apply to a special assessment that had not received prior voter approval.⁷⁷ Indeed, the inclusion of "special assessments" in Section 1(b) was found to be surplusage.⁷⁸ In reaching its decision, the court explained that because assessed property is said to have a direct benefit conferred upon it, an assessment is the way to recoup the cost of the public improvement made on that particular property.⁷⁹ This is different from a tax, the proceeds of which benefit all property owners within a taxing dis-

68. *Id.*

69. CAL. CONST. art XIII A, § 1(a).

70. *Id.* § 1(b).

71. See *Solvang Mun. Improvement Dist. v. Board of Supervisors*, 112 Cal. App. 3d 545, 550, 169 Cal. Rptr. 391, 394 (1980) (describing Section 1 as incongruous).

72. 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979).

73. *County of Fresno v. Malmstrom*, 94 Cal. App. 3d. 974, 985, 156 Cal. Rptr. 777, 784 (1979).

74. *Id.* at 984, 156 Cal. Rptr. at 783.

75. *Id.* at 982, 156 Cal. Rptr. at 782.

76. 112 Cal. App. 3d 545, 169 Cal. Rptr. 391 (1980).

77. *Id.* at 556, 169 Cal. Rptr. at 398.

78. *Id.*

79. *Id.* at 553, 169 Cal. Rptr. at 396.

trict.⁸⁰ Thus, the rationale for treating special assessments and taxes differently is the notion that “[t]he general public should not be required to pay for special benefits for the few, and the few specially benefitted should not be subsidized by the general public.”⁸¹

Subsequent cases following *Solvang Municipal* and *Malmstrom* have generally followed this distinction.⁸² A separate but similar line of cases has emerged holding that certain fees and charges are not subject to the two-thirds voter approval requirement of Section 4.⁸³ The restrictive holdings in these cases are the primary reason for the passage of Proposition 218.⁸⁴

80. *Id.* at 552, 169 Cal. Rptr. at 395.

81. *Id.*; *see id.* at 557, 169 Cal. Rptr. at 398 (cautioning agencies not to use the legally recognized distinction between “special assessments” and “special taxes,” as construed by the court, to help them meet their general expenses and to construct facilities designed to serve the public).

82. *See Evans v. City of San Jose*, 3 Cal. App. 4th 728, 739, 4 Cal. Rptr. 2d 601, 608 (1992) (holding that an assessment on businesses for downtown promotion was not considered a special tax such that it was subject to the two-thirds voter approval requirement of Article XIII A); *J.W. Jones v. City of San Diego*, 157 Cal. App. 3d 745, 755, 203 Cal. Rptr. 580, 587 (1984) (stating that a city ordinance imposing a present lien on undeveloped property to pay for the costs of public facilities for future residents was not a tax, special or otherwise, subject to Article XIII A); *American River Flood Control Dist. v. Sayre*, 136 Cal. App. 3d 347, 352, 186 Cal. Rptr. 202, 205 (1982) (declaring that a special assessment levied by a flood control district was not subject to the voter approval requirement of Article XIII A).

83. *See Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1758, 19 Cal. Rptr. 2d 468, 481 (1993) (holding that an ordinance requiring developer to pay a fee in lieu of placing art in a development was not subject to two thirds voter approval requirement under Article XIII A); *see also Knox v. City of Orland*, 4 Cal. 4th 132, 145, 841 P.2d 144, 152, 14 Cal. Rptr. 159, 167 (1992) (rejecting the claim that public parks do not provide special benefit to property such that park maintenance fees are not exempt from the two-thirds voter approval requirement of Article XIII A); *id.* at 142, 841 P.2d at 150, 14 Cal. Rptr. at 165 (explaining that the distinction between special taxes and special assessments is that a special assessment must confer a benefit upon the property assessed beyond that conferred generally whereas a special tax may simply be levied for a specific purpose); *Carlsbad Mun. Water Dist. v. QLC Co.*, 2 Cal. App. 4th 479, 491, 3 Cal. Rptr. 318, 325 (1992) (declaring that a water district resolution imposing a fee on a new development was not subject to the voter approval requirement of Article XIII A); *Russ Bldg. Partnership v. City and County of San Francisco*, 199 Cal. App. 3d 1496, 1506, 246 Cal. Rptr. 21, 26 (1987) (holding that a transit fee was not a special tax requiring two-thirds voter approval under Article XIII A); *Terminal Plaza Co. v. City and County of San Francisco*, 177 Cal. App. 3d 892, 907, 223 Cal. Rptr. 379, 387 (1986) (stating that a city ordinance requiring hotel owners to provide relocation assistance to residents prior to conversion of hotel to another use was not a special tax subject to Article XIII A); *Mills v. County of Trinity*, 108 Cal. App. 3d 656, 663, 166 Cal. Rptr. 674, 678 (1980) (holding that a fee for land-use regulatory activity was not a special tax covered by Article XIII A). *But see Bixel Assocs. v. City of Los Angeles*, 216 Cal. App. 3d 1208, 1220, 265 Cal. Rptr. 347, 355 (1989) (holding that a fire hydrant fee imposed on new developers did not pass constitutional requirements to exempt such fees from being “special taxes”); *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.*, 165 Cal. App. 3d 227, 234, 211 Cal. Rptr. 567, 570 (1985) (holding that a facilities fee enacted by water district was a special tax under Proposition 13).

84. *See infra* Part II.C (explaining the new provisions of Proposition 218).

B. Act II: Attempting to Close the Gap: Proposition 62

In response to the California Supreme Court's *Farrell* decision, Proposition 62 was placed on the ballot in November, 1986.⁸⁵ According to its supporters, the decision "twisted the language of Proposition 13" causing over 108 cities at the time to impose over \$300,000 in new taxes without any vote of the people.⁸⁶

Proposition 62 defined and differentiated special taxes from general taxes.⁸⁷ Under Proposition 62, no district⁸⁸ or local government⁸⁹ can impose a special tax unless such tax received two-thirds approval by local voters.⁹⁰ No general taxes can be imposed unless such tax is approved by a majority of local voters.⁹¹ Before being sent to voters, general taxes first require a two-thirds approval by the legislative body of the city, county or district where they are to be imposed.⁹²

These portions of Proposition 62 were challenged in court as providing for illegal referendums under the California Constitution. While one Court of Appeal has ruled that the portion of Proposition 62 providing for voter approval of all general taxes is an unconstitutional referendum on taxes,⁹³ the Supreme Court has disapproved of this reasoning in another case upholding the validity of the voter approval requirement for special taxes.⁹⁴ Proposition 218 attempts to remedy this problem by writing the applicability of this tax provision into the State Constitution.⁹⁵

85. 1986 VOTER PAMPHLET, *supra* note 10, at 42 (stating that while Proposition 13 "returned the power to control tax increases to the people, where it belongs," the State Supreme Court in *Farrell* "took away [the voter's] right to vote on city and county tax increases"); *id.* at 43 (arguing that Proposition 62 would bring back the rights taken away by the Supreme Court in *Farrell*).

86. *Id.*

87. See CAL. GOV'T CODE § 53721 (West 1997) (providing that all taxes are either general taxes or special taxes); *id.* (defining "general taxes" as those taxes imposed for general governmental purposes); *id.* (explaining that "special taxes" means taxes imposed for specific purposes); *id.* § 53724(e) (West 1997) (providing that the revenues from any special tax may not be used for any other purpose than for that which they were approved); see also discussion *supra* Part II.A.2.b (discussing the judicial treatment of general and special taxes after Proposition 13).

88. See CAL. GOV'T CODE § 53720(b) (West 1997) (providing that "'district' means any agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries").

89. See *id.* (defining "local government" as any county, city, city and county, including a chartered city or county, or any public or municipal corporation).

90. *Id.* § 53722 (West 1997).

91. *Id.* § 53723 (West 1997).

92. *Id.* § 53724(b) (West 1997).

93. See *City of Woodlake v. Logan*, 230 Cal. App. 3d 1058, 1065, 282 Cal. Rptr. 27, 31 (1991) (stating that portions of Proposition 62 requiring voter approval of all taxes provided an unconstitutional referendum requirement on the taxing power of local government).

94. See *Santa Clara County Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 254, 45 Cal. Rptr. 2d 207, 228 (1995) (holding that portion of Proposition 62 providing for voter approval of special taxes does not violate the constitutional ban on subjecting tax statutes to referendum); *id.* at 246, 45 Cal. Rptr. 2d at 223 (disapproving the reasoning from *Woodlake* as "erroneous").

95. See *infra* Part II.C.3 (explaining the new taxation provisions under Proposition 218).

Proposition 62 also required any tax enacted after August 1, 1985, but prior to the adoption of the initiative, to be subject to local majority approval.⁹⁶ Challenged in courts, this portion of Proposition 62 was struck down as unconstitutional insofar as it provided for an illegal referendum on local taxes.⁹⁷

To enforce compliance with its provisions, Proposition 62 contained a tough penalty for local governments or districts which violated its requirements. For every one dollar in which these local governments or districts collected in excess of the amount allowed under the new law, the property tax allocated to that local government or district from was to be reduced by one dollar.⁹⁸ However, this provision was struck down because it violated the California Constitution.⁹⁹

In addition, the courts found that the provision in Proposition 62 prohibiting local governments or districts from imposing transaction or sales taxes on real property did not merit a sufficient statewide concern.¹⁰⁰ The California Constitution requires that legislation affecting chartered cities must be of a sufficient statewide interest.¹⁰¹ Because no such showing could be made under this provision of Proposition 62, a statutory initiative, the provision did not apply to chartered cities.¹⁰²

C. Proposition 218: The Final Act?

Proposition 218¹⁰³ was enacted to close the “loophole” that allows “[politicians] to raise taxes without voter approval by calling taxes ‘assessments’ and ‘fees.’”¹⁰⁴ Significantly, Proposition 218 contains new constitutional provisions curtailing the ability of local governments to raise revenues from almost any source.¹⁰⁵

96. CAL. GOV'T CODE § 53727(b) (West 1997); *see id.* § 53726 (West 1997) (declaring that Proposition 62 was not intended to repeal or affect any statute enacted prior to August 1, 1985 which authorized the imposition of a special tax).

97. *See City of Westminster v. City of Orange*, 204 Cal. App. 3d 623, 628, 251 Cal. Rptr. 511, 513 (1988) (finding that the provision of Proposition 62 requiring voter approval of previously enacted taxes was an unconstitutional referendum on such local taxes).

98. CAL. GOV'T CODE § 53728 (West 1997).

99. *See Woodlake*, 230 Cal. App. 3d at 1069, 282 Cal. Rptr. at 34 (stating that this provision of Proposition 62 was unconstitutional).

100. *See Fielder v. Los Angeles*, 14 Cal. App. 4th 137, 146, 17 Cal. Rptr. 2d 630, 635 (1993) (explaining that § 53725(a) of the Government Code does not prevent a city from enacting a general transfer tax because the city is a chartered city and the policy regulating ad valorem taxes was not of a substantial statewide nature); *Fisher v. County of Alameda*, 20 Cal. App. 4th 120, 130-31, 24 Cal. Rptr. 2d 384, 389-90 (1993) (holding that the limitation on real estate transfer taxes under Proposition 62 are not applicable to charter cities).

101. *See* CAL. CONST. art. XI, § 5 (providing that “any city charter [may] provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs . . . and in respect to other matters they shall be subject to general laws”).

102. *See supra* note 100 (discussing the *Fisher* and *Fielder* holdings in this regard).

103. *See generally* CAL. CONST. art. XIII (setting forth provisions of Proposition 218); art. XIII D (setting forth provisions of Proposition 218).

104. 1996 VOTER PAMPHLET, *supra* note 1, at 76.

105. *See infra* Part II.C.1-3 (explaining the provisions of proposition 218 that relate to assessments, fees and charges, and taxes).

I. Assessments

In order to levy an assessment,¹⁰⁶ Article XIID provides that an agency¹⁰⁷ must identify which parcels will benefit from the assessment and must notify each owner of the proposed assessment.¹⁰⁸ Each owner must be given a ballot and a vote on the assessment proportional to the size of their property compared to the size of the total assessed valuation.¹⁰⁹ After a public hearing has been held, a majority protest exists if a majority of the owners who submit ballots object to the assessment.¹¹⁰ If there is a majority protest the assessment fails.¹¹¹

Article XIID provides that a local government must estimate the amount of special benefit¹¹² landowners receive or would receive from a project or service.¹¹³ The local government may then only charge for the amount of special benefit to land or buildings received.¹¹⁴ Any general public benefit that may be conferred must

106. See CAL. CONST. art. XIID, § 2(b) (providing that “assessment” means any levy or charge upon real property by an agency for a special benefit conferred upon the real property”); *id.* (stating that assessment includes, but is not limited to, “special assessment,” “benefit assessment,” “maintenance assessment,” and “special assessment tax”).

107. See *id.* (defining “agency” as any local government defined in section 1(b) of Article XIIC); *id.* § 1(b) (defining “local government” as any county, city, city and county, including a charter city or county, any special district, or any other regional governmental entity).

108. CAL. CONST. art. XIID, § 4(a).

109. See *id.* § 4(c) (providing that the amount of the proposed assessment for each identified parcel must be measured and notice by mail must be given to the record owner of such property detailing the total amount of the assessment chargeable to the entire district, the amount chargeable to the owner’s particular parcel, the duration of the payments, the reason for the assessment, and the basis upon which the amount of the proposed assessment was calculated); *id.* (requiring the inclusion of the date, time, and place of a public hearing on the proposed assessment in the notice as well as instructions for completing the ballot and a disclosure statement that a majority protest will effectively kill a proposed assessment); *id.* § 4(d) (stating that each notice must be accompanied by a ballot with the return address of the agency affixed and a way for an owner to indicate his or her support or opposition to a proposed assessment).

110. See *id.* § 4(e) (requiring an agency to conduct a public hearing on a proposed assessment not less than 45 days after mailing notice of the proposal); *id.* (providing that the agency must consider all protests against a proposed assessment at a public hearing); *id.* (stating that a majority protest exists if, at the conclusion of the hearing, more ballots are submitted in opposition to the assessment than those in favor); *id.* (stating that ballots are to be weighted according to the proportional financial obligation of each affected parcel of property in tabulation of the support or opposition to a proposed assessment).

111. *Id.*

112. *Id.* § 1(i); see *id.* (defining “special benefit” as a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large); *id.* (declaring that general enhancement of property does not constitute special benefit).

113. *Id.* § 4(a); see *id.* (stating that the proportionate special benefit derived by each parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided); *id.* § 2(f) (defining “maintenance and operation expenses” as the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain permanent public property); *id.* § 2(h) (stating that “property related service” includes any public service having a direct relationship to property ownership).

114. See *id.* § 4(a) (explaining that only special benefits are assessable).

derive from some other source providing general revenues.¹¹⁵ Article XIID further provides that no assessment may be imposed on property that exceeds the reasonable cost of the proportional special benefit conferred on that parcel.¹¹⁶

Article XIID exempts various assessments from its provisions.¹¹⁷ However, Article XIID does not exempt any parcels owned by any agency of the State of California from paying for their share of assessments.¹¹⁸ As noted by the Legislative Analysis of Proposition 218, this will apply to school districts.¹¹⁹

These new assessment provisions are an attempt to close the "loophole" created by the *Malmstrom* and *Solvang Municipal Improvement District* cases.¹²⁰ Despite claims by the initiative's supporters to the contrary,¹²¹ these provisions stand in stark contrast to assessment law as it has been historically written in the codes.¹²² Under Proposition 218, for instance, homeowners are automatically given a ballot to protest a proposed assessment that requires only that more ballots be submitted in opposition to the proposed assessment than those in favor for a majority protest to exist.¹²³ Traditional assessment law, on the other hand, requires that a majority of the assessed valuation must protest against a proposed assessment and further gives the legislative body proposing the assessment a veto power over the majority protest.¹²⁴ It is likely that, because of these differences, the drafters of Proposition

115. *See id.* (providing that an agency must separate the general benefits from the special benefits conferred on a parcel).

116. *Id.*

117. *See id.* § 5(a) (exempting any assessment imposed exclusively to finance the capital cost or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control until such assessments are proposed to be increased); *id.* (stating that any assessment imposed pursuant to a petition by the persons owning all parcels subject to the assessment at the time the assessment is imposed until such assessments are proposed to be increased); *id.* (declaring that any assessments the proceeds of which are used to pay indebtedness in which failure to pay would violate the Contracts Clause of the United States Constitution are exempt); *id.* (exempting any assessment which received prior voter approval on the issue of the assessment until proposed to be increased).

118. *Id.* § 4(a); *see id.* (providing that an agency must demonstrate by clear and convincing evidence that publicly owned parcels do not receive special benefit to remain exempt from assessment).

119. *See* 1996 VOTER PAMPHLET, *supra* note 1, at 74 (noting that schools will be charged their share of assessments under Proposition 218).

120. *Id.* at 76.

121. *See id.* (stating that "[c]urrent law already allows property owners, including nonresidents, to act on property assessments based on the assessment amount the pay. This is NOT created by Proposition 218.").

122. *See infra* note 124 and accompanying text (discussing some of the differences in traditional assessment law). *See generally* CAL. STS. & HIGH. CODE §§ 5000-6794 (West 1969 & Supp. 1997) (setting forth the Improvement Act of 1911); *id.* §§ 10000-10706 (West 1969 & Supp. 1997) (setting forth the Municipal Improvement Act of 1913). These are not the only assessment laws on the books. However, they are the ones most traditionally used. *See* Trena Hardin Burger, *New Developments in Special Assessment Law*, 11 U.C. DAVIS L. REV. 43, 44 (1978) (noting that the 1911 and 1913 are those most commonly used by local governments to levy special assessments).

123. *See infra* notes 109-11 and accompanying text (explaining the majority protest proceedings under Proposition 218).

124. *See* CAL. STS. & HIGH. CODE §§ 5220, 13100 (West 1969) (providing that under the 1911 and 1913 Acts, any owner of property within the territory of a proposed assessment may file a written protest with the legislative body proposing the assessment); *id.* §§ 5222, 13111 (West Supp. 1997) (stating that if the legislative body finds that owners representing a majority of the land within the proposed territory have protested the proposed assess-

218 foresaw a possible “One Person, One Vote” equal protection challenge to the initiative.¹²⁵ This is exemplified by the drafting of a saving clause which provides that a two-thirds vote of all qualified electors shall be required in addition to approval by a majority of property owners for new assessments if the majority protest provisions are held unconstitutional.¹²⁶

2. Fees and Charges

In order to increase or impose new fees or charges,¹²⁷ agencies have two options. They can give notice and provide ballots to affected property owners much like they must do to impose a new assessment.¹²⁸ Alternatively, they can seek approval for the new fee or charge by a two-thirds majority of the voters.¹²⁹

All local property-related fees must comply with certain restrictions.¹³⁰ Among these, no property owner’s fee may be more than the cost to provide service to that property owner’s land.¹³¹ No fee may be charged for services widely available to the public, including fire, police, ambulance, and library services.¹³² No fee revenue may be used for any purpose other than providing property-related services,¹³³ and

ment, the assessment fails); *id.* (allowing the legislative body to overrule a majority protest by four-fifths vote of the body based on a finding that the public health and safety require that the improvements to be derived from the assessment be made).

125. The ballot statements submitted in opposition asserted that Proposition 218 “REDUCES YOUR VOTING POWER and gives huge voting power to corporations, foreign interests and wealthy land owners.” 1996 VOTER PAMPHLET, *supra* note 1, at 77. Opponents argued that Proposition 218 “[b]locks 2 million Californians from voting on tax assessments. The struggling young couple renting a small home, WILL HAVE NO VOTE on the assessments imposed on the house they rent.”). *Id.* at 76.

126. CAL. CONST. art XIIIID, § 4(g).

127. *Id.* § 2(e) (defining “fee” or “charge” as “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”).

128. *See id.* § 6(a)(1) (declaring that an agency must identify the parcels upon which a fee or charge are to be imposed); *id.* (requiring an agency to calculate the amount of the fee or charge to be imposed on each parcel); *id.* (stating that the agency must provide notice by mail of the proposed fee or charge to the record owner of each party); *id.* (providing that notice must include the amount of the fee or charge proposed, the basis upon which the fee or charge is calculated, the reason for the fee or the charge, and the date, time and location of a public hearing on the proposed fee or charge); *id.* § 6(a)(2) (requiring an agency to conduct a public hearing 45 days after sending notice); *id.* (stating that the agency must consider all protests at the hearing on the proposed assessment); *id.* (preventing the imposition of the fee or charge if there is a majority protest).

129. *Id.* § 6(c) (providing that an agency has the option to submit a proposed fee or charge to be approved by a majority of property owners or to hold an election requiring approval by two-thirds of local voters); *id.* (providing that an election, if held, must occur after a public hearing).

130. *See infra* notes 131-36 and accompanying text (explaining the restrictions applicable to property-related fees and charges).

131. CAL. CONST. art. XIII A, § 6(b)(1).

132. *Id.* § 6(b)(5).

133. *Id.* § 6(b)(2).

fees may only be charged for services immediately available to property owners.¹³⁴ The amount of the fee imposed as an incident of property ownership¹³⁵ may not exceed the proportional cost of the service attributable to the parcel.¹³⁶

Like the new provisions dealing with assessments, these provisions also attempt to close the loopholes created by judicial interpretation.¹³⁷

3. Taxes

Articles XIII C provides that all taxes imposed by any local government¹³⁸ must be deemed either general or special.¹³⁹ Because of the new definition of "local government," this includes chartered cities.¹⁴⁰ A new, extended, or proposed increase in a general tax¹⁴¹ is subject to a majority vote by the voters¹⁴² while a new, extended or proposed increase in a special tax¹⁴³ is subject to a two-thirds vote by the voters.¹⁴⁴ However, special purpose districts, including school districts, have no power to levy general taxes.¹⁴⁵ Accordingly, this means that such districts must seek two-thirds voter approval for proposing to create or increase a tax as they may only enact special taxes.

4. Additional Provisions

Article XIII C states that the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or

134. *Id.* § 6(b)(4); *see id.* (stating that fees or charges based on potential or future use of a service are not permitted); *id.* (providing that standby charges shall be classified as assessments and not imposed unless the new requirements imposed under Proposition 218 are not met).

135. *Id.* § 2(g) (stating that "'property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question").

136. *Id.* § 6(b)(3).

137. 1996 VOTER PAMPHLET, *supra* note 1, at 76.

138. *See* CAL. CONST. art. XIII C, § 1(b) (defining "local government" as "any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity").

139. *Id.* § 2(a).

140. *Id.*; *see* 1996 VOTER PAMPHLET, *supra* note 1, at 74 (explaining that Proposition 218 applies to chartered cities, whereas under Proposition 62, it is unclear if the provisions pertaining to the imposition of "general" taxes applies to such cities).

141. *See* CAL. CONST. art. XIII C, § 1(a) (defining "general tax" as "any tax imposed for general governmental purposes").

142. *Id.* § 2(b); *see id.* (explaining that a general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate approved); *id.* § 2(c) (stating that any general tax extended, imposed or increased on or after January 1, 1995, and prior to July 1, 1997, was required to be submitted to a majority vote of local voters).

143. *See id.* § 1(d) (providing that "'special tax' means any tax imposed for specific purposes, including a tax imposed for specific purposes which is placed into a general fund").

144. *Id.* § 2(d); *see id.* (explaining that a general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate approved).

145. *Id.* § 2(a).

charge.¹⁴⁶ This power of initiative is applicable to all local governments and neither the legislature nor any local government may impose a signature requirement on any such initiative that is higher than that applicable to statutory initiatives.¹⁴⁷

In an action contesting the validity of an assessment, fee or charge, Article XIIIID places the burden of proof on the agency to show compliance with its provisions.¹⁴⁸ Prior to enactment of Proposition 218, courts generally showed deference to local governments in their determination of fee and assessment amounts.¹⁴⁹ Under Proposition 218, however, it will be easier for taxpayers to prevail in lawsuits challenging local governments as these governments will now have the burden on proof on issues involving fees and assessments.¹⁵⁰

III. CHAPTER 38

Chapter 38 is emergency legislation entitled the "Proposition 218 Omnibus Implementation Act." It is the product of a working group convened by the Legislative Analyst working on a consensual basis.¹⁵¹ The Act itself notes that Proposition 218 is "inconsistent with numerous preexisting statutes affecting government finance."¹⁵² Accordingly, the legislation was necessary to "clarify the law so that local governments can adopt budgets for the 1997-98 fiscal year to provide essential local services in compliance with Proposition 218 without needless confusion, duplication of effort, and uncertainty."¹⁵³ Included among these clarifications are definitions for many terms left undefined by Proposition 218.¹⁵⁴

146. *Id.*

147. CAL. CONST. art. XIIIIC, § 3.

148. *See id.* § 4(f) (providing that the burden shall be on the agency to demonstrate that property or properties in question receive a special benefit beyond the benefits conferred to the public at large in any legal action contesting the validity of any assessment); *see id.* § 5(b)(5) (stating that the burden is on an agency to demonstrate that a "fee" or "charge" complies with the restrictions on such things).

149. *See* 1996 VOTER PAMPHLET, *supra* note 1, at 74 (stating that, according to the Legislative Analyst, courts currently allow local governments significant flexibility in determining fee and assessment amounts).

150. *Id.*

151. ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF SB 919, at 2 (June 25, 1997).

152. 1997 Cal. Legis. Serv. 257 (West).

153. *Id.*

154. *See infra* note 162 (defining how an assessment is "increased" for the purposes of determining the application of Proposition 218); *see infra* note 163 (providing a definition of "assessment"); *see infra* note 167 (explaining the meaning of "agency"); *see infra* note 168 (stating the meaning of "notice by mail"); *see infra* note 169 (defining "record owner"); *see infra* note 170 (providing the meaning of "identified parcel").

A. *Assessment Ballot Proceedings*

Chapter 38 specifies that a proceeding to increase or implement a new assessment, fee or charge is an “assessment ballot proceeding” and not an election.¹⁵⁵ Accordingly, typical election procedures—including the provision of a ballot pamphlet, pro and con arguments, and rebuttal arguments—are not required.¹⁵⁶ This provision thus clears up any uncertainty that would be encountered by an agency in determining the process to follow for obtaining voter approval for new or increased assessments as required by Proposition 218.¹⁵⁷

B. *Proposal for New or Increased Assessments, Taxes, Property-Related Fees or Property-Related Charges*

Chapter 38 specifies that a local agency may propose a range of rates for any tax, assessment, property-related fee, or property-related charge that is to be approved by voters.¹⁵⁸ If enacted, the agency may thereafter impose a rate that is less than or equal to the maximum amount authorized by the voter approved ordinance or resolution.¹⁵⁹ Proposition 218 did not specify whether local agencies could submit a range of rates for assessments, property-related fees and charges, or taxes. Accordingly, this gives local agencies more flexibility in offering assessment, fee or tax proposals to property owners.

Chapter 38 also specifies that an ordinance or resolution may allow for inflation so long as the tax, assessment, fee or charge is not collected on a percentage

155. CAL. ELEC. CODE § 4000(c)(9)(A) (added by Chapter 38); *see id.* § 4000(c)(9) (added by Chapter 38) (stating that an election pursuant to either Article XIII C or XIII D is an election that may be conducted wholly by mail); *id.* § 4000(c)(9)(B) (added by Chapter 38) (stating that ballots shall be denominated “assessment ballots”); *see also* CAL. GOV’T CODE § 53753(e)(4) (added by Chapter 38) (providing that majority protest proceedings as described under the new provisions in Chapter 38 do not constitute an election for voting pursuant to relevant portions of the California Constitution or Elections Code).

156. *See generally* CAL. ELEC. CODE §§ 4100-4108 (West 1996) (setting forth the law governing the conduct of mail ballot elections); *see also* ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF SB 919, at 2 (June 25, 1997) (stating that typical election procedures are not required to be followed).

157. Proposition 218 contains no language specifying whether proceedings concerning assessments must follow the procedures and regulations governing elections. *See generally* CAL. CONST. art. XIII D, § 4 (setting forth no such provisions). However, a portion of the initiative that deals with proceedings concerning property-related taxes and charges states that “an agency may adopt procedures similar to those for increases in assessments in the conduct of elections” under the provisions pertaining to fees and charges. CAL. CONST. art. XIII D, § 6(c) (emphasis added). Whether this language can be construed to mean that assessment proceedings were to be conducted as elections is unclear. The point is no longer relevant since this clarification to Chapter 38 was agreed to on a consensual basis. *See supra* note 4 and accompanying text (noting that Chapter 38 was the product of a working group operating on a consensual basis).

158. CAL. GOV’T CODE § 537390(a) (added by Chapter 38).

159. *Id.*

basis.¹⁶⁰ Without such language in the text of Proposition 218, local agencies would conceivably have to justify assessments, fees, or taxes previously enacted pursuant to Proposition 218 solely on the grounds that they have not kept up with inflation.

C. Notice, Protest, and Hearing Requirements

In order to increase¹⁶¹ or levy a new assessment,¹⁶² or to continue an existing assessment that is subject to Section 4 of Article XIII D of the California Constitution, Chapter 38 requires that specific provisions regarding notice, majority protest, and hearings be met.¹⁶³

Chapter 38 supersedes the Brown Act¹⁶⁴ by enacting new provisions governing public meetings in which assessment ballot proceedings take place pursuant to Proposition 218.¹⁶⁵ The new provisions require that an agency¹⁶⁶ must send notice

160. *Id.* § 53739(b)(1)-(2) (added by Chapter 38); *see id.* § 53739(b)(1) (added by Chapter 38) (stating that an ordinance or resolution presented for voter approval pursuant to Proposition 218 may provide the tax, assessment, or fee or charge be adjusted for inflation); *id.* § 53739(b)(2) (added by Chapter 38) (providing that the adjustment for inflation is not allowed if the amount of the tax, assessment, fee or charge is based on a percentage calculation).

161. *Id.* § 53750(h)(1)(A)-(B) (added by Chapter 38) (providing that “increased,” when applied to a tax, assessment, or property-related fee, means a “decision by an agency either to increase any applicable rate used to calculate the tax, assessment, fee or charge,” or a decision by an agency “to revise 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”); *id.* § 53750(h)(2)(A)-(B) (added by Chapter 38) (stating that a tax, fee, or charge is not deemed to be “increased” by an agency if it either or both “adjusts the amount of a tax or fee or charge in accordance with a schedule of adjustments, including inflation;” or if it

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); *id.* § 53750(h)(3) (added by Chapter 38) (explaining that a tax, assessment, or fee is not deemed to be increased in the case in which 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 density, intensity or nature or use of land).

162. *See id.* § 53750(b) (added by Chapter 38) (defining “assessment” as any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided); *id.* (stating that “‘assessment’ includes, but is not limited to, ‘special assessment,’ ‘benefit assessment,’ ‘maintenance assessment,’ and ‘special assessment tax’”).

163. *See infra* notes 165-83 (discussing the requirements that must be met).

164. *See generally* CAL. GOV’T CODE §§ 54950-54962 (West 1997) (setting forth the “Ralph M. Brown Act”).

165. *See id.* § 54954.6(h) (amended by Chapter 38) (stating that any new or increased assessment subject to Article XIII C or XIII D of the California Constitution is not subject to the notice and hearing requirements of the section of the Brown Act dealing with proposals to create or increase any tax or assessment); *id.* § 53753(a) (added by Chapter 38) (providing that the notice, protest, and hearing requirements set forth in the new chapter of the Government Code added by Chapter 38 supersede any statutory provisions applicable to the levy of a new or increased assessment); *id.* (declaring that an agency that complies with the notice, protest, and hearing requirements set forth in the new section shall not be required to comply with any other statutory provisions governing notice, protest and hearings for assessments). *But see id.* (stating that, if there is a levy of a new assessment pursuant to § 3100 of the Streets and Highways Code, an agency must meet both the notice, hearing and protest requirements of

by mail¹⁶⁷ to the record owner¹⁶⁸ of each identified parcel¹⁶⁹ covered under the proposed assessment.¹⁷⁰ Notice must contain an assessment ballot and must include the total amount of the proposed assessment chargeable to the entire district, the amount chargeable to the record owner, the duration of the payments, the reason for the assessment, and the date, time and place of a public hearing on the proposed assessment.¹⁷¹ In addition, a statement must be included stating that an assessment shall not be imposed if more ballots are submitted in opposition to the assessment than those in favor, with ballots weighted according to the proportional financial obligation of the affected property.¹⁷² Along with the ballot, instruction for filling out and returning the ballot must be included.¹⁷³ This notice must be given at least 45 days prior to the date of the hearing on the proposed assessment.¹⁷⁴

A public hearing must be held for each assessment wherein the agency shall consider all objections or protests to the assessment, if any exist.¹⁷⁵ Any interested person is allowed to present written or oral testimony at the hearing.¹⁷⁶

Prior to the close of testimony at the hearing, a property owner may submit, change, or withdraw their ballot.¹⁷⁷ If more than one owner of a multiply-owned parcel submits a ballot, the agency is required to weigh each vote in proportion to the respective ownership interests.¹⁷⁸ Once the time for testimony is closed, the

that section as well as the new section added by Chapter 38).

165. *Id.* § 53750(a) (added by Chapter 38) (defining “agency” as any local government as defined in subdivision (b) of Section 1 of Article XIII C of the California Constitution”).

167. *Id.* § 53750(i) (added by Chapter 38) (providing that “notice by mail” means 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 deposited); *id.* (stating that “[n]otice 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).

168. *Id.* § 53750(j) (added by Chapter 38) (defining “record owner” 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, means the representative of that public entity at the address of that entity known to the agency”).

169. *Id.* § 53750(g) (added by Chapter 38) (providing that “identified parcel” means a parcel of real property that an agency has identified as having a special benefit conferred upon it and upon which the 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”).

170. CAL. GOV’T CODE § 53753(b) (added by Chapter 38).

171. *Id.* § 53753(b) (added by Chapter 38).

172. *Id.*

173. *Id.*; *see id.* § 53753(c) (added by Chapter 38) (requiring that an assessment ballot include the agency’s address for receipt of the form and a place where the person returning the assessment ballot may indicate his or her name, a reasonable identification of the parcel, and his or her support or opposition to the proposed assessment).

174. *Id.*

175. *Id.* § 53753(d) (added by Chapter 38).

176. *Id.*

177. *Id.* § 53753(c) (added by Chapter 38); *see id.* (stating that, regardless of the method of delivery, all ballots must be signed and received at the return address indicated on the ballot in order to be included in the tabulation of a majority protest).

178. *Id.* § 53753(e)(1) (added by Chapter 38).

agency must tabulate the assessment ballots submitted at the end of the hearing.¹⁷⁹ In so doing, the agency may use technological tabulation methods, including punch card or bar-coded assessment ballots.¹⁸⁰ A majority protest exists if the ballots submitted in opposition to a proposed assessment exceed those submitted in favor.¹⁸¹ If a majority protest is found to exist, the agency may not increase or impose the proposed assessment.¹⁸²

In sum, the hearing, notice and majority protest provisions of Chapter 38 provide better guidance to local agencies for ensuring their compliance with the overall thrust of Proposition 218. Once an agency has complied with these requirements, Chapter 38 then provides that it no longer needs to undergo the same procedures in subsequent years for an assessment unless it changes the assessment methodology, increases an assessment, or exceeds a formula or range adopted in accordance with this new law.¹⁸³

D. Certain Assessments Exempt

Chapter 38 exempts certain assessments existing on the effective date of Article XIII D of the California Constitution.¹⁸⁴ Such exemptions shall only remain exempt until they are proposed to be increased.¹⁸⁵ Since Proposition 218 exempted these provisions until proposed to be increased, Chapter 38 does the same.

E. Bondholder Risk

Chapter 38 specifies that Section 3 of Article XIII C shall not be construed in a way to hold that any owner or beneficial owner of any municipal security purchased before or after the date in which Proposition 218 was implemented assumed the risk of, or consented to, any action by initiative measure which impairs con-

179. *Id.*

180. *Id.*

181. *Id.* § 53753(e)(3) (added by Chapter 38).

182. CAL. GOV'T CODE § 53753(e)(4) (added by Chapter 38).

183. *Id.* § 53753.5(a) (added by Chapter 38).

184. *See id.* § 53753.5(b)(1) (added by Chapter 38) (exempting any assessment imposed exclusively to finance the capital cost or maintenance or operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems, and vector control); *id.* § 53753.5(b)(2) (added by Chapter 38) (exempting any assessment imposed pursuant to a petition signed by persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed); *id.* § 53753.5(b)(3) (added by Chapter 38) (exempting any assessment the proceeds of which are exclusively used to pay bonded indebtedness the failure to pay which would violate the Contracts Clause of the United States Constitution); *id.* § 53753.5(b)(4) (added by Chapter 38) (exempting any assessment that previously received majority voter approval from the voters voting in an election on the issue of assessment).

185. *Id.* § 53753.5(b) (added by Chapter 38); *see id.* (excepting from requiring voter approval once proposed to be increased any assessment the failure to pay which would violate the Contracts Clause of the United States Constitution).

tractual rights protected under the Contracts clause of the United States Constitution.¹⁸⁶ Proposition 218 did not address this issue.

IV. CONCLUSION

If the track record is any indication, it is doubtful that the curtain will close on property tax reform in California with the passage of Proposition 218. Because of the significant effects on the ability of local governments to raise revenue, both Proposition 13 and 62 generated significant litigation. Proposition 218 is no less significant.

Courts that interpreted Proposition 13 found its important provisions vague and unclear, giving rise to unsympathetic decisions that, in the eyes of its supporters, twisted the meaning of the landmark initiative.¹⁸⁷ After the supporters of Proposition 13 passed Proposition 62, the same courts found some of the provisions of the new initiative to be unconstitutional.¹⁸⁸ Now, with the passage of Proposition 218, have the proponents of property tax reform finally got it right?

Chapter 38 attempted to resolve many of the inconsistencies with existing law created by Proposition 218. Nevertheless, this comes after a long line of significant cases and subsequent attempts to "get it right" at the ballot box. It should be hoped that local governments with strapped budgets will not be forced into future litigation and judicial resources will not be squandered on an area that has already been given considerable attention. Unfortunately, if the past is any indication, it is doubtful that the curtain has finally closed.

186. *Id.* § 5854 (added by Chapter 38).

187. *See supra* note 1 and accompanying text (discussing opposition by property tax reform opponents to judicial treatment of Proposition 13).

188. *See supra* note 98-99 and accompanying text (discussing portions of Proposition 62 that have been found unconstitutional).