

PROPOSITION 218

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Presented by:

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PROPOSITION 218 – THE BASICS

OVERVIEW

Proposition 218, also known as the “Right to Vote on Taxes Act,” was approved by the California voters in 1996. The Act added Article 13C and 13D to the California Constitution, and these sections allow voters to repeal or reduce taxes, assessments, fees and charges through the initiative process; reiterates requirement for voter approval for local “special” and “general” taxes, and imposes restrictions and requirements on real property assessments and certain types of fees. The stated intent of Proposition 218 was to limit the methods by which local governments exact revenue from taxpayers without their consent.

TAXES

Under the Act, all taxes are defined as either “special (purpose)” or “general (purpose)” taxes. A special tax requires a 2/3 vote; all taxes of “special purpose” districts are special taxes.

A tax is a charge legislatively imposed for public purposes. A tax is not a charge to pay for improvements that provide a special benefit to particular properties (an “assessment”), or a charge reimbursing a public entity for use of a commodity or a service or mitigate an impact of the payer’s activities on the community (a “fee”).

Process: 2/3-voter approval. Special districts rarely impose taxes. Consult your legal counsel.

ASSESSMENTS

A special assessment is a charge imposed on particular real property for a local public improvement of direct benefit to that property, for example a street improvement, lighting improvement, irrigation improvement, sewer connection, drainage improvement. The assessed property receives a benefit over and above that received by the general public, the general public should not be required to pay for the special benefits of the few, and the few specially benefited should not be subsidized by the general public. Publicly owned property within an assessment district must also be assessed.

Certain assessments in place prior to November 6, 1996 are exempt from the procedural requirements (hearing and protest proceedings discussed below) until increased (check with your legal counsel concerning specifics). Proposition 218 requirements apply whenever a district wishes to create or increase an assessment. An assessment is "increased" when the agency either increases the rate used to calculate the assessment or revises the methodology by which the rate is calculated which results in an increased amount.

"Standby" charges: Under Proposition 218 these are classified as assessments and must be adopted or increased pursuant to these requirements. A standby charge (or fee) is a compulsory charge levied upon real property within a predetermined district to defray in whole or in part the expense of providing, operating or maintaining public improvements. The charge is imposed for the benefit accruing to the property by virtue of having water available to it, even though the water might not be used at the present time. Beginning July 1, 1997, these charges must be treated as assessments. Standby charges must be imposed on an annual basis. Note that there is a new case, *Paland v. Brooktrails Township Community Services District Board of Directors*, 176 Cal.App.4th 158 (2009), in reference to standby fees. The plaintiff in that case asserted that the minimum monthly base rates (not based on actual usage) were in the nature of a standby fee and should be enacted and treated as assessments under Proposition 218. The Court found that these rates, applied to properties within the district that were already connected to the district's utility systems (including plaintiff's), were properly classified as property-related water service fees (see below for how these are treated under the law). This case should not be read to mean that standby fees are no longer considered "assessments."

Process: Before imposing an assessment, Districts must identify all parcels that will have a special benefit conferred upon them, and determine the "proportionate special benefit" to each property in relationship to the entire cost of acquiring or constructing the improvement or the maintenance and operation of the improvement. While this does not require mathematical certainty/precision, the apportionment must be reasonable and should be justified by an engineer's report. The District must hold a public hearing(s) (in some cases, more than one) and provide for a majority protest proceeding. The District must mail notice to the record owners of each parcel to be subject to the assessment, at least 45 days in advance of the public hearing where the protest proceeding will be conducted. The Notice must include 1) the total assessment for the entire assessment district; 2) the assessment chargeable on the owner's parcel; 3) the duration of the proposed assessment; 4) the reason for the assessment; 5) the basis on which the amount was calculated; 6) the date, time and place of the public hearing; and 7) a summary of the voting procedures and the effect of a majority protest.

A ballot must accompany the Notice described above. Property owners may express their support or opposition to a proposed assessment on the ballot. Ballots must be returned before the end of the public hearing, and, as of January 1, 2010, must be tabulated at the public hearing in open view unless the tabulation is performed by a private vendor hired only for that purpose. No assessment may be imposed if the ballots submitted in opposition exceed the ballots submitted in favor of the assessment. The vote is weighted according to the proportional financial obligation of the affected property. NOTE THIS IS DIFFERENT THAN THE PRIOR LAW THAT REQUIRED 50% OR MORE OF THE PROPERTY (DETERMINED BY ACREAGE) TO FILE A WRITTEN

PROTEST IN ORDER TO ESTABLISH A "MAJORITY PROTEST." Furthermore, the legislative body can no longer override a majority protest.

Proposition 218 is viewed as a supplement to the assessment district formation process that is provided by various assessment statutes. In other words, it must be read in conjunction with any other applicable law out there concerning a particular type of assessment. Take care to consult your legal counsel prior to imposing, increasing, or modifying a particular assessment. Additionally, there are very particular processes and requirements set forth in the law concerning the mailing and form of the ballots (and even font size).

PROPERTY RELATED FEES AND CHARGES

By far the most common area where Districts will encounter issues concerning Proposition 218 relate to the adoption and increase in property related fees and charges. Under the law, property related fees or charges are a "levy imposed on a parcel or upon a person as an incident of property ownership including a user fee or charge for a property-related service." [Cal. Const. Article 13D, Section 2(e).] This definition includes all charges for water or other utility delivery. This does *not* include utility connection and capacity fees, because these fees are contingent upon some voluntary action by the property owner. [However, other statutes regulate the imposition of these fees.] Also note that "property ownership" include tenancies if the tenant is directly liable for the fee (in other words a direct customer of the district).

Other examples of property related fees: utility services excluding gas and electric charges; domestic water service, even if volumetric based; sewer charges, even if volumetric based; refuse collection service fees; storm water drainage fees.

Examples of fees that are not "property related" and therefore not subject to the requirements of Proposition 218: service fees not related property tenancy or ownership, such as a fee for water delivered by truck for construction dust control; development impact fees; connection fees; inspection or plan checking fees; certain regulatory components (incentives/penalties such as inclining water service fees for the purpose of water conservation or drought management) of fees otherwise classified as property related (best to clearly delineate/separate these); recycling fees.

Substantive requirements for all fees that fall under this section: The fees imposed must not exceed the cost of the providing the service. The revenues generated from collection of the particular fee may not be used for any other purpose other than that for which the fee was imposed. The amount of the fee may not exceed the proportional cost of the service attributable to the parcel.

Process: When adopting or increasing a property related fee, districts must 1) identify the parcels upon which a fee or charge is proposed; 2) calculate the amount of the fee proposed for each parcel; 3) provide written notice by mail to the "record owner of each identified parcel" (but see below); 4) conduct a public hearing on the proposed fee not less than 45 days after the mailing of the notice; and 5) consider all protests against the fee or charge. If the written protests against the fee are presented by a majority of the owners of the parcels, the fee cannot be imposed. Note that the threshold requirements are much higher for this protest proceeding than the assessment protest proceedings.

In the case of fees, silence = support for the proposed new or increased fee.

For notices, the district may send the notices required under this section to the person or entity that requests or receives the services for which the fee is levied, rather than the record owner. If the fees are collected via the property tax roll, notices should be sent to the owner as shown on the last equalized secured property tax roll. This was clarified by changes to the law in 2007. It should be noted that the new law provides that the agency must give notice to both the record owner and the person with the direct relationship with the district, if the agency desires to preserve any authority it may have to record or enforce a lien on the parcel to which the service is provided. If notice to the actual owner of record was required, that owner is the only individual entitled to file a protest. However, because of some confusion created by the law, the agency can choose to allow protests from either the owner as shown on the tax roll and the "customer," but allow only one protest to count per parcel.

FOR WATER, SEWER AND REFUSE FEES, THE PROCESS IS CONCLUDED WITH THE MAJORITY PROTEST PROCEEDING.

Voter Approval: For all other fees, even if there is no majority protest, the proposed fee/increase must receive voter approval, in an election conducted not less than 45 days after the public hearing. The election can be conducted in a manner similar to the proceedings required for assessments. However, there is a recent case finding that secret ballots may be required (currently up on appeal). An all mail ballot election is authorized under State law. The voters may either be the property owners (requiring majority vote approval), or the electorate residing in the affected area (requiring 2/3 voter approval). There is no requirement to weight the ballots according to financial obligation of the affected property ("one parcel, one vote").

FEE "INCREASES": A fee is increased when an agency makes a decision that increases any applicable rate used to calculate the fee, or revises the methodology by which the fee is calculated if the revision results in an increased amount to be levied. "Increase" does not include adjustments made in accordance with a schedule approved in accordance with Proposition 218, including a clearly defined formula for inflation. However, AB 3030, effective Jan. 1, 2009, requires that these adjustments can only be for a period not exceeding five years. Notice of any adjustment must be provided at least 30 days before the effective date of the adjustment.

CONCLUSION

When a district wishes to impose or increase any assessment or fee, it is critical that the district comply with the requirements of Proposition 218. Please consult your legal counsel early in the process to ensure compliance.