

# Staff Report

for the Regular Meeting of the Board of Directors on December 12, 2018

**TO:** Board of Directors

**FROM:** Dustin Cooper, District Legal Counsel  
Remleh Scherzinger, PE, MBA, General Manager

**DATE:** December 5, 2018

**SUBJECT:** Proposition 218 Right to Vote on Taxes Act and Proposition 26  
Supermajority Vote to Pass New Taxes and Fees

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## *ADMINISTRATION*

**RECOMMENDATION:**

Hear an overview of Proposition 218 and Proposition 26.

**BACKGROUND:**

Legal Counsel will provide an overview of Proposition 218 Right to Vote on Taxes Act and Proposition 26 Supermajority Vote to Pass New Taxes and Fees.

**BUDGETARY IMPACT:**

None at this time

[West's Annotated California Codes](#)

[Constitution of the State of California 1879 \(Refs & Annos\)](#)

[Article XIIIID. \[Assessment and Property Related Fee Reform\] \(Refs & Annos\)](#)

West's Ann.Cal.Const. Art. 13D, § 6

§ 6. New or existing increased fees and charges; procedures and requirements; voter approval

Currentness

Sec. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

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

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with [Section 4](#).

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

### Credits

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

West's Ann. Cal. Const. Art. 13D, § 6, CA CONST Art. 13D, § 6  
Current with urgency legislation through Ch. 13 of 2018 Reg.Sess

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Proposed Legislation

[West's Annotated California Codes](#)

[Constitution of the State of California 1879 \(Refs & Annos\)](#)

[Article XIII C. \[Voter Approval for Local Tax Levies\] \(Refs & Annos\)](#)

West's Ann.Cal.Const. Art. 13C, § 1

§ 1. Definitions

Effective: November 3, 2010

[Currentness](#)

SECTION 1. Definitions. As used in this article:

- (a) "General tax" means any tax imposed for general governmental purposes.
- (b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.
- (c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.
- (d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.
- (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
- (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
  - (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

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

#### Credits

(Added by [Initiative Measure \(Prop. 218, § 3, approved Nov. 5, 1996\)](#). Amended by [Initiative Measure \(Prop. 26, § 3, approved Nov. 2, 2010, eff. Nov. 3, 2010\)](#).)

West's Ann. Cal. Const. Art. 13C, § 1, CA CONST Art. 13C, § 1  
Current with urgency legislation through Ch. 13 of 2018 Reg.Sess

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**MINASIAN, MEITH, SOARES  
SEXTON & COOPER, LLP**

Propositions 218 & 26

Minasian, Meith, Soares,  
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# “TAX” LIMITATIONS

- Proposition 13 (1978)
  - Real property tax and assessment limitations
- Proposition 4 (1979)
  - Limits new ad valorem taxes by limiting growth in appropriations
- Proposition 218 (1996)
  - Closes the Proposition 13 “loophole”
- Proposition 26 (2010)
  - Defines all state and local government revenue sources as “taxes” unless exempt

# PROPOSITION 218

- Imposes Procedural Requirements and Substantive Limitations on the Imposition, Increase or Extension in Taxes, Assessments, Fees and Charges
- California Constitution, Article XIII D, Section 6
  - “New or existing increased fees and charges; procedures and requirements; voter approval”

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# PROCEDURAL REQUIREMENTS

## Article XIII D, Section 6, Subdivision (a)

1. Identify the parcels upon which a fee or charge is proposed for imposition;
2. Calculate the amount of the fee proposed to be imposed on each parcel;
3. Provide written notice by mail to the “record owner of each identified parcel”;
4. Conduct a public hearing on the proposed fee not less than 45 days after mailing;
5. Consider “all protests against the proposed fee or charge”; and
6. If written protests against the fee are presented by a “majority of owners of the identified parcels”, the fee cannot be imposed.

# PROCEDURAL REQUIREMENTS

## Identifying the Parcels

- Generally determine area subject to fee and identify all record parcels in that area
- Complexities:
  - Fee based on customers, not necessarily parcel ownership (e.g., tenants)
  - NID accounts may not match legal parcels
  - One legal parcel with multiple meters
  - One meter serving multiple parcels
- Conservative approach is to mail notice to record owners and to customers at service address (e.g., along with NID bill)

# PROCEDURAL REQUIREMENTS

## Amount of Fee & Who is the “Record Owner”

- Notice must include details on proposed fee change
- Record owner is owner
  - “whose name appears on the last equalized secured property tax assessment role”; or
  - The representative of public entities, such as other districts, California, United States

# PROCEDURAL REQUIREMENTS

## Majority Protest Procedure

- Example: 100 notices sent; 51 or more protest in writing = majority protest and NID may not implement the proposed fee change
- No legal requirement to notify of right to protest or to include protest form, but generally recommended
- Consider resolution setting forth protest rules before issuing notices
- Either record owner or tenant may protest, but only one protest per parcel counts
- Need not hold separate counts when adopting multiple rates (e.g., treated water v. raw water)

# **SUBSTANTIVE REQUIREMENTS**

## **Article XIII B, Section 6, Subdivision (b)**

1. Revenues from the fee must not exceed the cost of service;
2. Revenues from the fee must not be used for any purpose other than that for which the fee is imposed;
3. Amount of fee must not exceed “proportional cost of service attributable to the parcel”
4. Fee for service must be actually used by or “immediately available” to owner of property
5. No fee for general governmental services, e.g., police, fire, libraries

# SUBSTANTIVE REQUIREMENTS

## Cost of Service Limitation

- While not legally required, a cost of service analysis is highly recommended
- Can rely on ratemaking principles, such as those developed by American Water Works Association's "Principles of Water Rates, Fees, and Charges: Manual of Water Supply Practices M1"
- Occasional disputes as to what is the "service", e.g., debt service or building reserves

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# **SUBSTANTIVE REQUIREMENTS**

## **Use of 218 Fee Revenue**

- Revenue from fees may not be used for any purpose other than that for which they are imposed
- E.g. “lifeline rates” or low-income rate assistance programs utilizing Proposition 218 revenue are not permitted

# SUBSTANTIVE REQUIREMENTS

## Proportionality

- Cases diverge on requirement that fee not exceed “the proportional cost of service attributable to the parcel”
  - Cost differences must drive differential pricing (e.g., conservation or tiered rates)
- Cost of Service Study should clearly demonstrate through data and computations the methodology used and justification of allocation of costs amongst customer classes



# **SUBSTANTIVE REQUIREMENTS**

## **“Immediately available”**

- Requirement focuses on NID’s conduct, not a property owner’s voluntary decision to make use of service connection
- Fees may be used to plan/fund future services
  - E.g., future supply enhancement and/or demand reduction efforts

# VOTER APPROVAL REQUIREMENTS

## The 218 “two-step”

- If no majority protest, then majority vote election within 45 days after public hearing
- This second voter approval process does not apply to fees for “sewer, water, and refuse collection”

# PROPOSITION 26

- Response to growing use of “regulatory fees” outside tax limitations of Propositions 13 and 218
- Defines all state and local agency revenue sources as “taxes”, unless expressly exempt under one or more of seven exemptions
- Local government bears burden of “proving by a preponderance of the evidence” that fee or charge is not a tax

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# PROPOSITION 26

## EXCEPTIONS 1 & 2

- Fees for benefits conferred and privileges granted, services and products provided
  - Must be granted directly to payor
  - Not provided to those not charged (no free-riders)
  - Not exceed reasonable costs of providing benefit, service, etc.
- Examples: gas and electric utility rates, park and recreation service fees, municipal bus services

# PROPOSITION 26

## EXCEPTION 3

- Charges imposed for the reasonable regulatory costs to a local government for issuing licenses, permits, investigations, inspections, etc.
- Examples: building permits, fees for fire inspections, water rights fees [?]

# PROPOSITION 26

## EXCEPTION 4

- Charges imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property
- Exception does not include “reasonable costs” limitation; nor is exception limited to real property
- Examples: Slip/dock fees, lease of NID real property

# PROPOSITION 26

## EXCEPTIONS 5 & 6

- A fine, penalty or other monetary charge imposed by the judicial branch of local government as a result of a violation of law
  - Violation of water conservation program???
- A charge imposed as a condition of property development
  - Examples: development impact fees, capacity fees, permit and inspection fees

# PROPOSITION 26 EXCEPTION 7

- Assessments and property-related fees “imposed in accordance with” the provisions of Proposition 218
- Failing to follow requirements of Proposition 218 frequently results in violating Proposition 26

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