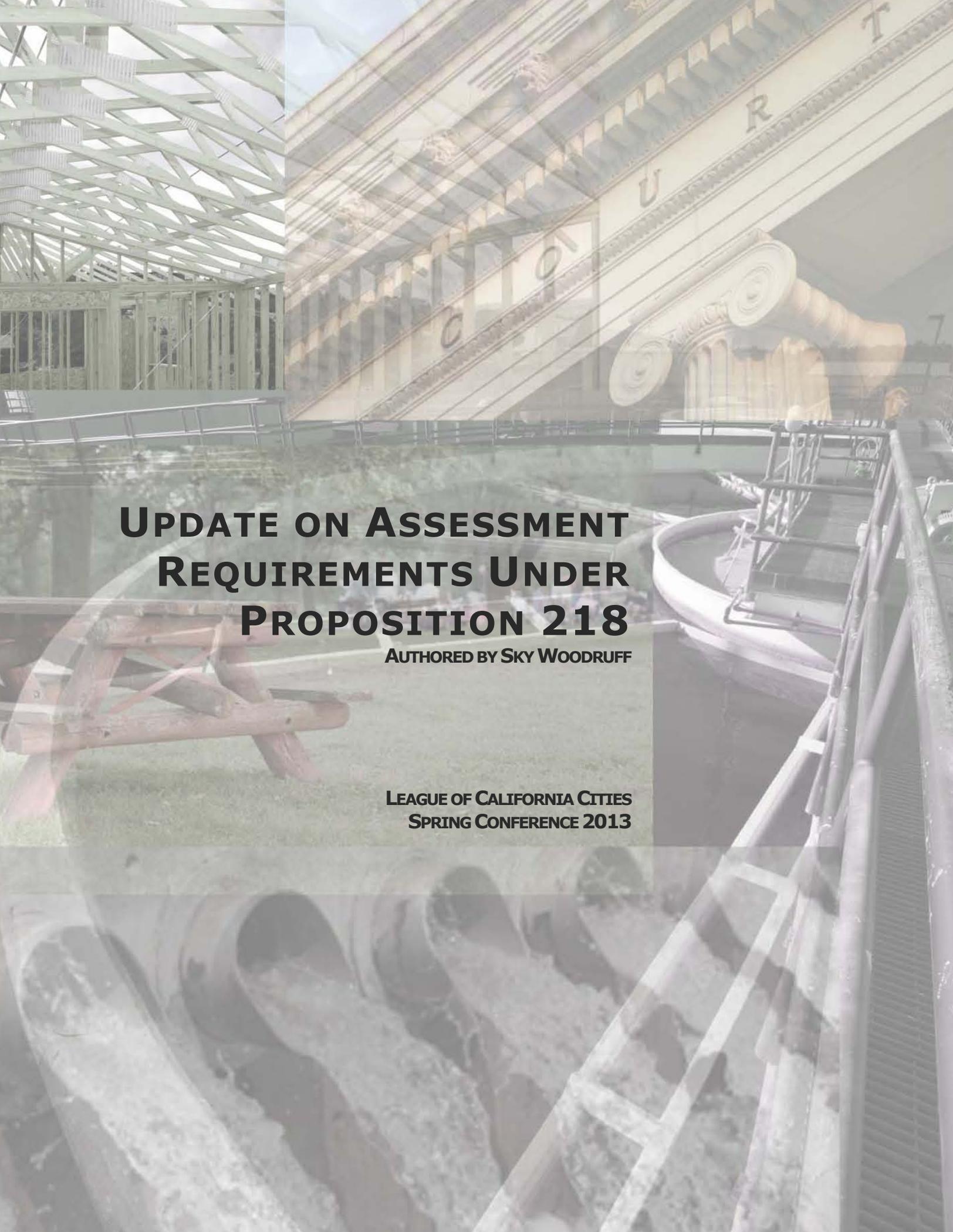




Update on Assessment Requirements Under Proposition 218

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UPDATE ON ASSESSMENT REQUIREMENTS UNDER PROPOSITION 218

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The combined effect of judicial decisions and the downturn in the economy appear to have decreased the rate of formation of new assessment districts to fund services and infrastructure in the last five or six years. Whether that remains a long-term trend remains to be seen, but the seeming trajectory of the case law will likely continue to give cities pause before pursuing assessments as a creative means of financing local needs. Since the dissolution of redevelopment, cities have shown renewed interest in business improvement districts (“BID”), but provisions of Proposition 26 raise a number of questions about whether they will be a future target of legal challenges. This paper will discuss the procedural and substantive requirements for assessments, recent developments in the case law regarding assessments, and the nature of BID’s and the benefits and potential legal pitfalls of using them.

WHAT IS AN ASSESSMENT?

Assessments have long been associated with new residential and commercial development. Because development frequently creates a need for new or additional services and facilities, the benefits conferred on property owners by those services and facilities provided a justification for requiring property owners to pay a share of the associated costs. A common example of such services is the maintenance of parks, median landscaping, and street lighting constructed and installed as part of new development projects. Thus, it has historically been common to see new assessment districts formed or properties annexed to existing districts as part of the development process. Assessments are not limited to new development situations, however, and local government agencies have proposed them to residential and commercial property owners for both common public services and facilities and for more innovative programs.

In 1996, the California electorate approved Proposition 218, which added Articles XIII C and XIII D to the California Constitution. Proposition 218 was adopted, in part, as a response to case law exempting assessments and fees from the restrictions on general and special taxes imposed by Proposition 13. Proposition 218 specifically defines the assessments that are subject to its procedural and substantive requirements in Article XIII D. It also defined an assessment as “any levy or charge upon real property by an agency for a special benefit conferred upon the real property. ‘Assessment’ includes, but is not limited to, ‘special assessment,’ ‘benefit assessment,’ ‘maintenance assessment’ and ‘special assessment tax.’”¹

Courts still occasionally struggle to differentiate assessments from taxes and fees, so the differences can be unclear in many cases. As a practical matter, one way to understand assessments is that they are generally imposed on property owners as a result of a determination that the services or facilities that the assessment pays for provide special benefits to affected property owners. Additionally, they are not (necessarily) charged for a service provided directly to property owners. Unlike the ad valorem property tax, they are not calculated based on the value of the property. And, for general law cities, they are authorized by a specific statute.

¹ Cal.Const., art. XIII D, § 2(b).

STATUTES AUTHORIZING ASSESSMENTS FOR SERVICES AND FACILITIES

A number of statutes authorize cities to levy assessment for specific services and facilities. General law cities considering assessments are limited to the services and facilities types listed in each statute. Charter cities may levy assessments for any kind of service or facility,² as long as they comply with the substantive and procedural requirements in Article XIII D of the California Constitution, added by Proposition 218, and the Proposition 218 Omnibus Implementation Act (“Omnibus Act”).³ Those requirements are discussed below.

The following are some of the most commonly used authorizing statutes for assessments and the kinds of services and facilities for which they can be used:

- **Landscaping and Lighting Act of 1972⁴:** Authorizes assessments for such things as the installation, construction, and maintenance of landscaping; ornamentation; street lighting, including traffic signals; curbs, gutters, sidewalks, and drainage; parks and recreational facilities; community centers, auditoriums, and public performance space.
- **Benefit Assessment Act of 1982⁵:** Authorizes assessments for the maintenance of drainage; flood control; street lighting; and streets, roads, or highways.
- **Improvement Act of 1911 (“1911 Act”)⁶:** Authorizes assessments for a variety of public improvements, such as streets and sidewalks, including decorative features; sewers; storm drains; lighting; pipes and hydrants for fire protection; levees and walls for the protection of streets and to prevent beach erosion or promote accretion to beaches; water supply; gas supply; bomb shelters; trees and landscaping; mooring; land stabilization improvements. It also allows assessment revenue to be used for limited acquisition of land related to the authorized improvements.
- **Municipal Improvement Act of 1913 (“1913 Act”)⁷:** Generally authorizes assessments for the acquisition of land and construction of a wide array of public works and improvements, including but not limited to utilities. It also allows for the financing of some improvements to private property, such as seismic strengthening and fire safety.

² See *J.W. Jones Companies v. City of San Diego*, 157 Cal. App. 3d 745, 756.

³ Gov. Code §§ 53750-53756.

⁴ Sts. & Hy. Code §§ 22500-22679.

⁵ Gov. Code §§ 54703-54720.

⁶ Sts. & Hy. Code §§ 5000-6794.

⁷ Sts. & Hy. Code §§ 10000-10706. Also authorizes the issuance of bonds to finance the improvements.

- **Park and Playground Act of 1909**⁸: Authorizes the use of the 1911 Act, 1913 Act, and 1915 Act to levy assessments for public parks, urban open-space lands, playgrounds, or libraries, as well as for land necessary for those improvements.
- **Tree Planting Act of 1931**⁹: Authorizes assessments for the planting, maintenance, and removal of trees.

It is also worth noting that Health and Safety Code section 5471 authorizes a city to impose standby charges related to its water and sewer facilities and services. Since the approval of Proposition 218, however, standby charges are treated as assessments.¹⁰ As a result, new, increased, or extended standby charges must comply with the substantive and procedural requirements in Article XIII D and the Omnibus Act. If a city approved standby charges in compliance with section 5471 prior to Proposition 218, it may continue to impose the charges at the previously approved rates by an ordinance adopted by two-thirds of its city council.

Finally, the Improvement Bond Act of 1915¹¹ is often discussed in the context of assessments. It does not itself authorize the levy of assessments but does authorize the issuance of assessment bonds secured by assessments authorized by such statutes as the Landscape and Lighting Act and the 1913 Act.

SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR ASSESSMENTS

As discussed in more detail below in the summary of *Silicon Valley Taxpayers*, Proposition 218 imposes a significant substantive requirement on all assessments to which it applies. In calculating an assessment, a city must first determine the entire cost of the facility or service to be funded. It must then separate the benefits of the service or facility to the general public from the benefits to property owners who will be subject to the assessment. That means, in part, determining the proportionate special benefit that each parcel subject to the assessment derives from the service or facility. Finally, the assessment imposed on each parcel cannot exceed the cost of the special benefit conferred on the parcel.¹² In the event of a legal challenge, the city will bear the burden of demonstrating that “the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.”¹³

⁸ Gov. Code §§ 38000-38011.

⁹ Sts. & Hy. Code §§ 22000-22202.

¹⁰ Cal. Const. art. XIII D, § 6(b)(4).

¹¹ Str. & Hy. Code §§ 8500-8887.

¹² Cal. Const. art. XIII D, § 4(a).

¹³ *Id.* § 4(f).

It is also worth noting that, if there are parcels within an assessment district that are owned by other local government agencies, the State of California, or the United States, then a city may exempt those parcels from the proposed assessment **only if** the city can demonstrate by clear and convincing evidence that those parcels receive no special benefit from the services or facilities to be funded.¹⁴

Some of the statutes listed above that authorize assessments have their own particular procedural requirements for adoption. Proposition 218 has additional procedural requirements that apply generally. The two must be integrated in determining what the proper procedure is for any particular assessment.

1. **Identify the property subject to the assessment.** All property that will receive a special benefit from the assessment must be included in the proposed assessment district.¹⁵
2. **Segregate out any “general benefits.”** Special assessments may only be imposed for special benefit. Proposition 218 requires that general benefits be segregated out and paid from a different source of funds.¹⁶
3. **Apportion or “spread” the special benefit.** Determine the proportionate benefit derived by each parcel in the assessment district. The proportionate benefit is an individual parcel’s share of the cost of the improvement or maintenance to be financed by the assessment.
4. **Prepare an engineer’s report.** The assessment must be supported by a detailed engineer’s report prepared by a registered professional engineer certified by the State of California.¹⁷
5. **Mail notice of the proposed assessment and ballot.** Notice must be sent to the record owners of each affected parcel 45 days prior to the assessment hearing. The notice must include all of the following:
 - The amount of the assessment for the particular parcel [the amount of assessment may be a range, but in no event may the assessment exceed the top end of the range. The amount of the assessment may be increased automatically each year by an inflation formula, as long as that is disclosed to property owners and included in the enacting legislation.
 - The total amount of the assessment.

¹⁴ *Id.* § 4(a).

¹⁵ *See* Cal. Const. art. XIII D sec. 4(a).

¹⁶ *Id.*

¹⁷ *Id.*

- The duration of the assessment.
 - The basis for the calculation of the assessment.
 - The reason for the assessment.
 - The date, time, and place of the public hearing on the assessment.
 - An explanation of the procedures for the mailed ballot.
 - The effect of a majority protest. The notice must include a ballot which allows the property owner to indicate support or opposition to the assessment.
6. **Conduct the public hearing.** The ballot does not supplant or take the place of the public hearing. At the conclusion of the public hearing the city must tabulate ballots to determine whether or not a majority protest exists.
7. **Determine whether there is a majority protest.** Only those ballots that are returned prior to the close of the hearing are counted. Of those ballots returned, if a majority of the ballots oppose the assessment, a majority protest exists and the assessment may not be imposed. In determining a majority protest, ballots are tabulated according to the proportionate financial obligation of the properties. In other words, ballots are weighted so that parcels proposed to have a larger assessment count more. It is not a “one parcel, one vote” proceeding. Unless a majority of weighted ballots are in favor of the proposed assessment, a city may not impose the assessment.¹⁸

RECENT CASE LAW

Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority

The most significant case law development regarding assessments is the establishment of independent judicial review of whether asserted special benefits are in fact special as required by Proposition 218.¹⁹ In *Silicon Valley*, the Santa Clara Open Space Authority (“OSA”) had proposed and received property owner approval for an assessment to fund the acquisition and improvement of open space. The engineer’s report prepared in support of the assessment found that all property owners, residents, customers, and employees would benefit from increased property values; recreational opportunities; views, scenery, and environmental quality; and

¹⁸ Cal. Const. art. XIIIID, §§4(a), (c)-(e).

¹⁹ See *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority*, 44 Cal. 4th 431 (Cal. 2008) (“*Silicon Valley*”).

economic activity and employment opportunities. It also found that open space promotes health and reduces crime. The California Supreme Court did not question that the open space provided by the assessments would result in those benefits. Instead, it found the engineer's report legally deficient because it asserted that essentially everyone living, working, or residing within the OSA's boundaries would receive those benefits, and that it therefore failed to tie those benefits to any particular property. The court concluded that only properties adjoining or near the open space could receive the described special benefits.²⁰

The court similarly found the report's calculation of the amount of the assessment legally deficient. The OSA asserted that all residential properties could be assessed the same amount because the OSA intended to acquire property evenly throughout its boundaries, thereby providing equal benefits to all residential properties. The engineer's report described a program of land acquisition and improvement, but according to the court, it only recommended acquisitions every five years; nothing compelled the OSA to actually acquire and improve open space on that schedule. Thus, according to the court, the report failed to identify the specific facilities that the assessment would pay for, the cost of those facilities, or the connection between the proportional costs and benefits.²¹

With regard to each issue, the court substituted its judgment for that of the engineer who prepared the report. Two subsequent cases have taken the same approach. Although there might well have been technical flaws in the manner of preparing the report, which cities could avoid in support of their own assessments, the larger issue to be concerned about is that the courts are now free to: (i) undertake their own independent evaluation of whether general and special benefits have been separated and (ii) whether the assessment amounts have been calculated to appropriately represent each property's proportionate share of the cost of the services or facilities that the assessments would fund. As a result, obtaining property owner approval is no longer sufficient, because cities must always be concerned that a court will find the supporting engineer's report inadequate.

Town of Tiburon v. Bonander ("Bonander II")

The Town of Tiburon proposed the formation of an assessment district under the 1913 Act to move utility lines from overhead to underground. After affected property owners approved the district and the assessments, but before undergrounding work had begun, the town concluded that the approved assessments would be insufficient to pay for the total costs of construction, in light of significant increases in those costs in the interim. The town council decided to proceed with a proposed supplementary assessment district to fund the difference. The engineer's report for the supplemental district concluded that all of the benefits of the undergrounding were

²⁰ See *id.* at 453-55. The court also rejected the method by which the engineer's report separated general from special benefit. In calculating the ratio of general to special benefit, the report defined general benefits as benefits to those living and working outside of the OSA's boundaries and special benefits as benefits to those within the OSA's boundaries (10% general, 90% special). The court found that to be in conflict with the text of article XIID, which says that general benefits can be conferred on property "located in the district or to the public at large." Cal. Const. art. XIID, § 2(i).

²¹ See *id.* at 456-57.

special, so all of the costs could be assigned to the affected properties; it also used the same formula as the original district to calculate each parcel's special benefit. Like the original district, the supplemental district was carved into three zones. The overall vote on the formation of the supplemental district was affirmative, but in one of the zones, a weighted majority of votes were against. The town council approved the formation of the supplemental district and filed a validation action. Property owners within the zone that voted against the supplemental district sought to have it invalidated on two grounds: (1) that the town had not demonstrated special benefits to the affected property owners, and (2) that the assessment amounts were not proportional to the special benefits received. Following the direction of *Silicon Valley* to undertake independent evaluation of the issues analyzed in the engineer's report, the court disagreed with the first contention but ruled in favor of the property owners on the second.²²

The engineer's report assigned each property within the supplemental district up to three "points," one each for aesthetics, safety, and service reliability. The property owners argued that the engineer's report failed to tie aesthetic benefits to each property individually, and that undergrounding utility lines did not provide safety or reliability benefits, since the system had functioned adequately overhead. Thus, the property owners asserted that there were no special benefits. The court disagreed, pointing out that parcels were assigned an aesthetic point only if adjacent to an overhead line; according to the court, it did not matter whether a view was affected by the line. The court found self-evident the safety and reliability benefits. The court also found that there was no evidence to believe that unaffected property owners or the general public would benefit from undergrounding, so treating all of the benefit as special and assigning all of the costs to affected properties was appropriate.²³

The court rejected the manner of apportioning costs among properties, however. In creating three zones within the district, the engineer's report calculated the costs of undergrounding in each zone. The costs of undergrounding varied significantly among the zones. Thus, the assessment for a property in one zone might end up being a third as much as the assessment for a property in another zone, even though both properties were assigned three points. The court ruled that the total cost of undergrounding across the district must be spread based upon the relative benefit of each parcel, without regard to the different costs in each zone. The court conceded that there could be some circumstances in which a "zone" approach was appropriate but concluded that it was not appropriate in this case because, in the court's view, relative costs were being made part of the calculation of relative benefit.²⁴

Beutz v. County of Riverside

The County of Riverside proposed the formation of an assessment district to fund park improvements described in a park master plan, which included the rehabilitation of three existing parks and the development of a new fourth park. The engineer's report included some

²² See *Town of Tiburon v. Bonander*, 180 Cal. App. 4th 1057, 1064-72 (Cal. App. 1st Dist. 2009)

²³ See *id.* at 1077-80.

²⁴ See *id.* at 1081-84.

statements that the plaintiff interpreted as restricting the assessments to the maintenance of the landscaping in the parks. Based on this interpretation, plaintiff asserted that the general/special calculation must be based upon the costs of landscape maintenance alone, not the entire cost of the master plan. He also argued that the report failed to calculate the assessments in proportion to each property's share of the costs of the services. The court rejected the first argument, finding that article XIII D, section 4(a) specifically requires public agencies to determine the proportionate special benefit based upon the entire cost of the facilities or services to be funded. The court accepted the second argument, however.

According to the court, the engineer's report assumed that the county's contribution toward the acquisition of the parks and their refurbishment would "offset" the maintenance costs to be paid by assessed property owners. Thus, the report concluded, the county had essentially paid the equivalent of the general benefits from another source and assessed property owners would only be required to pay the equivalent of the special benefit. The court found that approach constitutionally insufficient. Citing *Silicon Valley*, the court stated that it must undertake an independent review of the engineer's report, and that no deference to legislative findings of the local government agency must be paid. According to the court's independent judgment, the report failed to analyze the quantity or extent of park usage or benefit by the general public and assessed property owners, respectively. Additionally, the court believed that the report failed to analyze how the special benefits would accrue to specific assessed properties.²⁵

Golden Hill Neighborhood Assn., Inc. v. City of San Diego

The City of San Diego proposed the formation of an assessment district to finance a variety of activities, including landscape maintenance, graffiti removal, trash and debris pick up, and sidewalk maintenance. The engineer's report concluded that the general benefit of the services would be minimal so assigned all of the cost to the affected property owners. It also assigned a portion of the special benefit to the city's own properties, resulting in the city receiving ballots to be voted. A majority of weighted ballots were voted in the affirmative, and the city council approved formation of the district. Plaintiff argued, among other things, that the engineer's report did not explain how the special benefit to the city's properties was calculated, and that the city's ballots were overweighted. Plaintiff also argued that the failure to separate even minimal general benefit from special benefit violated Proposition 218. Applying its independent judgment, the court agreed with both allegations.²⁶

Regarding the first issue, the city argued that it had applied the same method of calculating the special benefit to the its own properties as had been applied as to other properties; its properties simply required more services. The court concluded that the city had failed to meet its burden of showing that amounts charged were proportional to the special benefit. As a result, the court agreed with plaintiff that the city had overstated its own benefit, thereby assigning its own ballots more weight than could be justified, giving its votes undue weight in the ballot counting.

²⁵ See *Beutz v. County of Riverside*, 184 Cal. App. 4th 1516, 1532-34 (Cal. App. 4th Dist. 2010).

²⁶ See *Golden Hill Neighborhood Assn., Inc. v. City of San Diego*, 199 Cal. App. 4th 416, 424-26 (Cal. App. 4th Dist. 2011)

On that basis, the court ruled that the balloting had been conducted improperly and overturned the result.²⁷

The court also found that the engineer's report was deficient with regard to the separation of general and special benefit. The report stated that the services to be provided would have no benefit to the properties outside the district, and that any benefit to the general public within and without the district would be minimal. The court found that approach did not comport with the standard enunciated in *Beutz*, that general benefit must be separated and quantified. The engineer's determination of "minimal" general benefit was insufficient, so the report failed to comply with the requirements of article XIII D.²⁸

Dahms v. Downtown Pomona Property & Business Improvement Dist.

This case involves a Property and Business Improvement District, a topic discussed more below, but was formed in procedural compliance with article XIII D and treated by the court as an assessment case. The City of Pomona formed the district and assessed properties within it to fund security, streetscape maintenance, marketing, promotion, and special events. Plaintiff challenged the district on several grounds, all of which the court rejected.

First, the assessments were calculated to charge nonprofit organizations less than the total amount than would otherwise apply based on the formula outlined in the engineer's report. The formula in the engineer's report looked at three factors in determining the amount of the assessment for each property: street frontage, lot size, and building size. Plaintiff argued that the discounted rate charged to nonprofit organizations violated the requirement of article XIII D, section 4(a) that assessments be proportional to and not more than the proportional cost of the special benefit conferred. The court held that that text does not preclude a local government agency from levying an assessment *less* than the maximum that would be allowed.²⁹

Second, the court sustained the engineer's report's approach of counting only the street frontage of a property on the street of its address.³⁰

Third, the court upheld the approach the engineer's report used to separate general and special benefit. According to the court, the engineer's report found that all of the benefit of the services would accrue to the assessed properties. Thus, there was no general benefit, and the total cost

²⁷ See *id.* at 430-36.

²⁸ See *id.* at 436-39.

²⁹ *Dahms v. Downtown Pomona Property & Business Improvement Dist.*, 173 Cal. App. 4th 1201, 1208-11 (Cal. App. 2d Dist. 2009). In so holding, the court also found that "where subdivision (f) of section 4 of article XIII D says that the 'agency imposing an assessment bears the burden of proving that 'the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question,' what it means is that the agency must prove that the assessment imposed on a parcel does not 'exceed[] the reasonable cost of the proportional special benefit conferred on that parcel.' (Art. XIII D, § 4, subd. (a).) In short, it means that the defendant bears the burden of proving that the assessment meets the substantive requirements imposed by subdivision (a)." *Id.* at 1210.

³⁰ See *id.* at 1212-13.

of the services could be apportioned among the assessed properties. The court characterized plaintiff as arguing that the services provided would have indirect benefits to the general public and that the value of those benefits had to be deducted from the costs before the assessments could be calculated. The court disagreed, arguing that because the services were provided directly to the properties within the district—and not to the general public within or without the district—and because the amount of the assessment was calculated for each property, the district was distinguishable from the one at issue in *Silicon Valley*.³¹

Although the *Dabms* decision provides some basis for believing that the courts will not be as uniformly hostile to special assessments as suggested by the other decisions described, because it takes a minority view on several issues, practitioners remain uncertain about the strength of its precedential value.

Concerned Citizens for Responsible Government v. West Point Fire Protection Dist. (not citable)³²

The West Point Fire District proposed special assessments to fund additional fire suppression services, particularly the retention of additional staffing, in response to a significant increase in calls for service. The engineer's report calculated the cost of the services and allocated the total cost to properties within the district in flat amounts per parcel type (i.e. improved, unimproved, and exempt). The court concluded that the report failed to separate general and special benefit, and that all of the benefit was general because of the nature of fire suppression services. Additionally, the report was straightforward about its purpose: to raise the necessary funds for additional staffing, not providing additional services that would benefit only the properties subject to the assessments.³³

Even if that were not the case, the court concluded that the district had failed to apportion the costs in compliance with article XIII D. Among other deficiencies, the court noted that the report did not explain the basis for the three classes of properties or the different assessment rates. It also noted several examples in which a property receiving greater or equal benefit from the services would pay a much lower assessment.³⁴

Bonander v. Town of Tiburon ("Bonander I")

After affected property owners approved the original assessment district and the assessments discussed above in the summary of *Bonander II*, two property owners challenged their individual

³¹ See *id.* at 1214-17.

³² This case is listed as not currently citable as a result of review being granted by *Concerned Citizens for Responsible Government v. West Point Fire Protection District* (2011) 132 Cal.Rptr.3d 615, 2011 Cal.LEXIS 10773. It is still useful as an example of recent judicial thinking about the topic of assessments.

³³ *Concerned Citizens for Responsible Government v. West Point Fire Protection Dist.*, 196 Cal. App. 4th 1427, 1431-32, 1437-39 (Cal. App. 3d Dist. 2011).

³⁴ See *id.* at 1440-41.

assessments, arguing among other things, that the amount of the assessment did not accurately reflect their special benefit from undergrounding the utility lines. The town asserted that the plaintiffs should have to satisfy the procedural requirements for validation actions set for in Code of Civil Procedure sections 860 through 870.³⁵ The California Supreme Court held that the authority granted to local government agencies in the 1913 Act to have assessments validated does not impose procedural requirements on property owners seeking to challenge assessments.³⁶

BUSINESS IMPROVEMENT DISTRICT ASSESSMENTS

There are two³⁷ primary laws used for the establishment and operation of BID's: the Property and Business Improvement District Law of 1994³⁸ (the "1994 Act") and the Parking and Business Improvement District Law of 1989³⁹ (the "1989 Act"). The 1989 Act authorizes assessments only against businesses in the district, whereas the 1994 Act authorizes assessment against both businesses and property in the district. The two types of BID's have significant procedural and substantive overlap, but they also differ in significant ways. As noted in the introduction to this paper, since the dissolution of redevelopment, many cities have taken a fresh look at BID's to fund activities and improvements formerly paid for by a redevelopment agency. In light of the case law described above, there are reasons for caution in pursuing the formation of either type of BID.

It is also worth bearing in mind that, as with other assessments, charter cities have the authority to create their own rules for establishing a local version of BID's, subject to the requirements of the California Constitution discussed throughout this paper.

[continued on next page]

³⁵ Among other things, the validation statute requires notice of a validation action by newspaper publication. Code. Civ. Proc. § 861.

³⁶ See *Bonander v. Town of Tiburon*, 46 Cal. 4th 646, 657-58 (Cal. 2009)

³⁷ Other statutes that authorize BID's include the Parking and Business Improvement Area Law of 1989 (Sts. & Hy. Code §§ 36000-36081) and the Multifamily Improvement District Law (Sts. & Hy. Code §§ 36700-36745). The latter is interesting because it authorizes assessments to help fund improvements and activities similar to business improvement districts but for multifamily residential areas.

³⁸ Sts. & Hy. Code §§ 36600 *et seq.*

³⁹ Sts. & Hy. Code §§ 36500 *et seq.*

Improvements and Activities That 1989 and 1994 Act BID's Can Fund

1989 Act - Authorized Improvements⁴⁰

The acquisition, construction, installation, or maintenance of any tangible property with an estimated useful life of five years or more including, but not limited to, the following:

- 1) Parking facilities
- 2) Benches

- 3) Trash Receptacles
- 4) Street Lighting
- 5) Decorations
- 6) Parks
- 7) Fountains

1994 Act - Authorized Improvements⁴¹

The acquisition, construction, installation, or maintenance of any tangible property with an estimated useful life of five years or more including, but not limited to, the following:

- 1) Parking facilities
- 2) Benches, booths, kiosks, display cases, pedestrian shelters and signs
- 3) Trash receptacles and public restrooms
- 4) Lighting and heating facilities
- 5) Decorations
- 6) Parks
- 7) Fountains
- 8) Planting Areas
- 9) Closing, opening, widening, or narrowing of existing streets
- 10) Facilities or equipment, or both, to enhance security of persons and property within the area
- 11) Ramps, sidewalks, plazas, and pedestrian malls
- 12) Rehabilitation or removal of existing structures

1989 Act - Authorized Activities⁴²

- 1) Promotion of public events which benefit businesses in the area and which take place on or in public places within the area
- 2) Furnishing of music in any public place in the area
- 3) Promotion of tourism within the area
- 4) Activities which benefit businesses located and operating in the area

1994 Act - Authorized Activities⁴³

- 1) Promotion of public events which benefit businesses or real property in the district
- 2) Furnishing of music in any public place within the district
- 3) Promotion of tourism within the district
- 4) Marketing and economic development, including retail retention and recruitment
- 5) Security, sanitation, graffiti removal, street and sidewalk cleaning, and other supplemental municipal services
- 6) Activities which benefit businesses and real property located in the district

⁴⁰ *Id.* § 36510.

⁴¹ *Id.* § 36610.

⁴² *Id.* § 36513.

⁴³ *Id.* § 36613.

Procedures for the Formation of a 1989 Act BID

The City Council may initiate the formation of a 1989 Act BID. The procedures are generally described below. For more details, please refer to the statute and to Government Code section 54954.6.

1. The Council must adopt a “resolution of intention” to establish a business improvement district. The resolution must contain all of the information listed in the statute, including a statement that a business improvement district is proposed to be established pursuant to the 1989 Act and a description of the boundaries of the territory proposed to be included in the district. If the City intends to establish separate benefit zones within the district, those boundaries need to be identified as well. It must describe the improvements and activities for which the assessment revenue will be used. It must also contain a description of the proposed method and basis of levying the assessment in sufficient detail to allow each business owner to estimate the amount of the assessment to be levied against his or her business.
2. The resolution of intention must be delivered, by first-class mail, to each business owner in the district within seven days of the Council’s adoption of the resolution. However, the Act provides an exception if the district is being “established primarily to promote tourism.” If so, a copy of the resolution need only be mailed to the owner of each business which will be subject to assessment.
3. The City must schedule and properly notice a public meeting and a public hearing to consider the establishment of the business improvement district. Both the meeting and hearing are noticed at the same time in the same document at least 45 days prior to the date of the public hearing.
4. The City Council conducts a public meeting at which it must allow public testimony regarding the proposed new assessment.
5. The City Council conducts a public hearing to hear and consider all protests against the (i) establishment of the district, (ii) extent of the district, or (iii) furnishing of specified types of improvements or activities within the district. A protest may be made orally or in writing by any interested person but only written protests are counted towards determining whether 50 percent or more business owners object.
6. At the conclusion of the public hearing, if there is not a majority protest, the City Council may adopt, revise, change, reduce, or modify the proposed assessment or the type or types of improvements and activities to be funded with the revenues from the assessments. The Council can only (i) change the boundaries of the proposed district in order to exclude territory which will not benefit from the

proposed improvements or activities and (ii) change the proposed assessment by reducing it.

Procedures for the Formation of a 1994 Act BID

A BID under the 1994 Act can only be established by the submission of a written petition signed by the property or business owners in the proposed district who will pay more than 50 percent of the assessments. However, in order to prevent a single large property or business owner from establishing a BID on its own, any property or business owner that would pay more than 40 percent of the assessments in a proposed district may not be included in calculating the 50 percent.⁴⁴ The petition must include a management plan for the district that describes the proposed boundaries and the uses of the assessment revenue and the estimated costs.⁴⁵

If a 1994 Act BID will assess property, then a city must follow the procedures described above for any other property-based assessment. If a 1994 Act BID will assess businesses, a city must follow the procedures described above for a 1989 Act BID. If a 1994 Act BID will assess both businesses and property, then a city must follow both procedures.⁴⁶

Management and Renewal of BID's

Assessments authorized under the 1989 Act and business-based assessments authorized under the 1994 Act are generally collected with the business license tax. Property-based assessments authorized under the 1994 Act are generally collected on the property tax roll like other assessments.

Both the 1989 Act and 1994 Act contain a number of requirements for the operation, management, and renewal of BID's, which should be reviewed prior to undertaking the formation of a new district. One important feature to note about each of them is their respective initial terms.

A 1989 Act BID must be renewed annually. Either before or after formation of the district, the council must appoint an advisory board, which is responsible for making annual recommendations about the improvements and activities to be undertaken in the following fiscal year, as well as the calculation of assessments for that year. The council then adopts a resolution of intention to levy the annual assessment, and the city provides notice of a public hearing at which the council will consider approving the assessments. After the public, if there is not a majority protest by affected business owners, the council may approve the proposed assessments.⁴⁷

⁴⁴ *Id.* § 36621.

⁴⁵ *Id.* § 36222.

⁴⁶ *Id.* § 36623.

⁴⁷ *Id.* §§ 36530-42.

In contrast, the initial term of 1994 Act BID can be up to 5 years and can subsequently be renewed for an unlimited number of 10-year terms. The process for renewal is the same as for establishment.⁴⁸

Implications of *Silicon Valley* and Proposition 26 for BID's

Both *Silicon Valley* and Proposition 26, approved by the voters in 2010, have practical implications for cities considering new BID's and administering existing BID's under both the 1989 Act and the 1994 Act.

As discussed above, *Silicon Valley* and subsequent cases have held that courts should review independently the separation of general from special benefit for property-based assessments and the calculation of such assessments to ensure that affected property owners are only paying for the special benefits received. The 1994 Act authorizes property-based assessments for activities and improvements that have benefits for local businesses, but as noted in the discussion of *Dahms*, a BID assessment is subject to an argument that the activities and improvements also benefit the general public to some degree and benefit properties outside of the district. It has historically been common for 100% of the costs of the activities and improvements to be charged to the properties in a 1994 Act district. Otherwise, outside funding would have to be provided. Since the prevailing view was that the improvements and activities were undertaken to promote the businesses in the district, it did not seem appropriate to use the general fund or other city sources to pay any of the costs. The *Dahms* court supported that view, finding that all of the benefits accrued to the assessed properties, all of the benefit was special, and therefore all of the costs could be charged to the properties. In light of the seemingly contradictory holdings in the other decisions described above, the strength of the precedential value of *Dahms* is uncertain. Therefore, in pursuing new and renewing existing 1994 Act BID's, cities should exercise caution regarding the separation of general and special benefit and the spread of costs among the properties proposed to be assessed.

Proposition 26 created a different set of issues for business-based assessments. Prior to the approval of Proposition 26, business-based assessments were not subject to the substantive and procedural requirements in article XIII D.⁴⁹ Proposition 26 amended the definition of "tax" in article XIII C to mean "any levy, charge, or exaction of any kind imposed by a local government."⁵⁰ It included several exceptions, and unless a business-based assessment fits into one of them, it would meet the definition of a tax. One of the exceptions that might apply to such assessments is for "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"⁵¹

⁴⁸ *Id.* § 36660.

⁴⁹ *Howard Jarvis Taxpayers Ass'n v. City of San Diego* 72 Cal. App. 4th 230 (1999).

⁵⁰ Cal. Const. art. XIII C, § 1(e).

⁵¹ *Id.* § 1(e)(1).

As a result of several aspects of the particular wording of that exception, it is uncertain whether it would apply to 1989 Act and other business-based assessments. First, the improvements and activities funded by the assessment must confer a benefit “directly” to the payor. Prior to Proposition 26, it was sufficient to sustain an assessment if a city could show that those affected received special benefits from the services and facilities funded. Until there is a judicial ruling or implementing legislation on this issue, it will remain unclear whether those benefits are sufficiently “direct” to qualify for the exception. Second, the benefits conferred must be “specific.” Perhaps “specific” means the same as “special,” in that it is particular and distinct from the benefits conferred on other properties and the general public. Again, until a judicial ruling or implementing legislation, the issue is uncertain. Finally, to qualify for the exception, the benefits conferred cannot be “provided to those not charged.” There are often incidental or indirect benefits of the activities and improvements funded by an assessment. If an aggrieved business can show that such indirect or incidental benefits exist, will that be sufficient to disqualify a business-based assessment from using the exception? For now, the answer is uncertain. Thus, cities taking action to renew an existing business-based assessment or to adopt a new one should carefully consider these issues. For more discussion, please refer to the League of California Cities’ *Proposition 26 Implementation Guide* (2011).⁵²

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⁵² <http://www.cacities.org/UploadedFiles/LeagueInternet/e1/e195192d-9641-4edb-834c-1be10da30270.pdf> (visited April 8, 2013).

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