

Update on the Law of Municipal Finance

League of California Cities
Annual Conference
September 14, 2018
Long Beach, CA

8/28/2018

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Business License Taxes

- *Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924
 - DCA concluded Prop. 218 does not require 2/3-voter approval of tax imposed by initiative, only of taxes proposed by government; Supreme Court affirmed
 - Dispute over scope of decision
 - Portions hold article XIII C, § 2 does not apply to voter-initiated taxes, and some argue this means all parts of § 2 do not apply
 - Other parts suggest only parts of § 2 – specifically, that requiring an election on a general tax at a general election – does not apply
 - Court identified “loophole” that might allow governing body to adopt taxes without public vote

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Business License Taxes

- Following *Upland*, SF City Attorney opined that special taxes proposed by initiative could be approved by simple majority
- June 2018 SF ballot included Propositions C and D, nearly identical taxes on commercial landlords.
- C purports to require a simple majority vote, D required 2/3
- C passed with 50.87%, D failed with 55.07%
- Litigation expected

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Business Licenses Tax

- *Quill Corp. v. North Dakota* (1992) 504 U.S. 298 requires physical contacts between retailer and state for sales taxes to apply
- This rule makes less sense in the internet economy and states are seeking to tax businesses which sell into their jurisdiction.
- *Crutchfield Corp. v. Testa*, 2016 WL 6775765, ___ NE3d ___ (Ohio, 11/17/16) allowed a tax on gross receipts
- *Capitol One Auto Finance Inc. v. Dept. of Revenue*, 2016 WL 7429522 (Or. Tax Regular Div'n) did the same

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Sales & Use Taxes

South Dakota v. Wayfair (USSC 6/21/18)

- Abandoned *Quill's* physical contacts requirement
- Tax jurisdiction now requires only "significant nexus" – meaning significant participation in a jurisdiction's marketplace
- So. Dakota limited duty to collect use tax to vendors w/ \$100k in receipts or 200 transactions per year

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Sales & Use Taxes

Implications of *Wayfair*:

Short-term: better collection of use taxes, should enhance revenues to cities, counties and the State

Longer-term: new taxes can take advantage of the larger tax jurisdiction to reach out-of-jurisdiction vendors with meaningful role in local market

Exception for small vendors advisable, both legally and politically

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Property Tax

Williams & Fickett v. Co. of Fresno (2017) 2 Cal.5th 1258

- DCA held usual duty to exhaust administrative remedies by seeking reassessment does not apply when assessment is a “nullity” because the taxpayer does not own it, it does not exist, or the property is tax-exempt
- Supreme Court held taxpayer must exhaust assessment appeal process to escape tax

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Property Tax

- *Jetsuite, Inc. v. County of Los Angeles* (2017) 16 Cal.App.5th 10
 - Upheld LA County decision to tax entire value of Jetsuite's fleet because no proof another state had acquired situs over the aircraft



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Property Tax

- *Machavia, Inc. v. County of Los Angeles* (2017) 19 Cal.App.5th 1050
 - Taxpayer action challenge property tax assessment on aircraft
 - County successfully defended on basis of failure to exhaust administrative remedies
 - Fact bills initially sent to incorrect address did not estop County to defend on exhaustion
 - Nor would County have been estopped to defend on exhaustion by an affirmative misrepresentation to taxpayer b/c County issued new corrected bills thereafter



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Property Tax

- *Time Warner Cable, Inc. V. County of Los Angeles* (2018) 25 Cal.App.5th 457
 - CATV franchise disputed property tax assessment of its franchise
 - DCA concluded County properly included income attributed to broadband and telephony services, and not just cable TV service
 - Turns on Rev & Tax Code sections governing assessed valuation of franchises in rights of way

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Parcel Taxes

- 2016's AB 1891 (Dababneh, D-Van Nuys)
 - Gov. Code § 50079 requires school parcel taxes that exempt low-income seniors to allow seniors to qualify for exemption once and to maintain the exemption thereafter
 - Effective 1/1/17

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Parcel Taxes

- 2016's AB 2476 (Daly, D-Anaheim)
 - Gov. Code, § 54930 requires mailed notice of new parcel tax before election
 - Amount or rate
 - Method, frequency, and duration of collection
 - Point of contact for additional information
 - Effective 1/1/17

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Parcel Taxes

- *Borikas v. Alameda USD* (2013) held that statutes required parcel taxes to be uniform and disallowed common structure of \$x / dwelling unit and \$y / sq. ft. of non-residential
- *Dondlinger v. LA County Regional Park & Open Space Dist.* (2d DCA No. B284932) challenges November 2016's Measure A on this theory, trial court judgment for County, plaintiffs appealed. Reply brief due 9/12/18

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Gas Tax

City of Bakersfield v. West Park HOA (2016) 4 CA5th 1199

- Invalidated lease revenue financing backed by gas tax without voter approval as violation of Constitution, article XIX, § 6 limiting pledges of gas tax to 25% of revenues
- No violation of the constitutional debt limit due to “special fund” rule

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Documentary Transfer Tax

926 No. Ardmore Ave. v. County of LA (2017) 3 Cal.5th 319

- “Does R&T 11911 authorize county to impose documentary transfer tax based on a change in ownership or control of a legal entity that directly or indirectly holds title to real property?” – Answer: Yes
- Written instrument conveying interest in legal entity owning real property may be taxable even w/out reference to real property
- Legislation or Auditor-Controller Guidelines may be needed to implement new authority

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Mello-Roos Special Taxes

- *Building Industry Assn. v. City of San Ramon* (2016) 4 CA5th 62
 - Citywide CFD to fund supplemental municipal services did not violate Mello Roos Act
 - LCC provided amicus brief for City
 - Petition for certiorari in USSC denied

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Sales & Use Taxes

- Prop. 64 and Sales Taxes on Marijuana
 - Medical marijuana sales are exempt from sales and use taxes, both state and local
 - Prop. 64 does not appear to apply to local sales taxes, but the CDTFA reads it that way
 - Recreational sales are not exempt
- CDTFA published a "Tax Guide for Medical Cannabis Businesses" available at:
cdtfa.ca.gov/industry/cannabis.htm

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Measure A / Measure B Taxes

- *Coleman v. Co. of Sta. Clara* (1998) 64 CA4th 662 allows general tax to be combined with advisory measure; did not apply Prop. 218, but result should be the same

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Measure A / Measure B Taxes

Johnson v. County of Mendocino, 2018 WL 3750338 (1st DCA filed 8/8/18)

- *Coleman* rule survives Prop. 218
- Courts do not look to legislative motive, but to language of legislation to determine its legal effect
- HJTA's 2017 annotation of Prop. 218 is not authority for its construction
- Very nice statement of how deferential is the Equal Protection test of tax distinctions

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Hotel Bed Taxes

- *BHR Operations, LLC dba Crowne Plaza v. San Francisco*, 1st DCA Case No. A147368
 - Hotels unsuccessfully challenged TOT on stays under contracts with airlines, arguing these are not “transient” occupancies under SF’s ordinance
 - Settled on appeal 12/4/17

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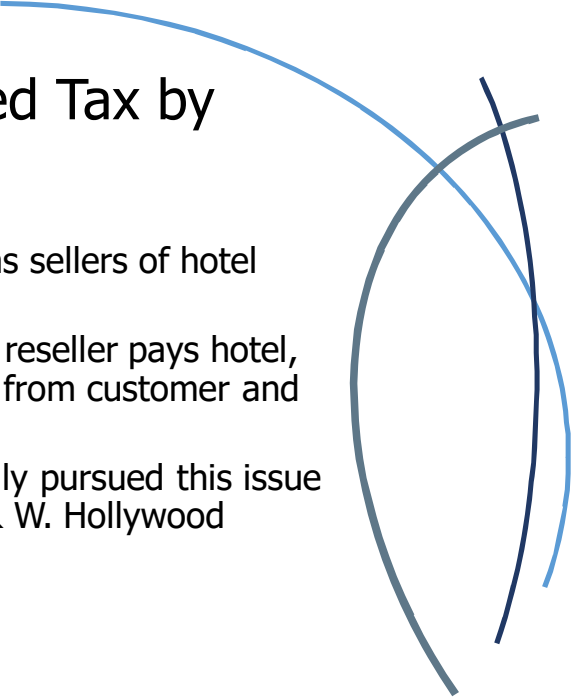
Under-Collection of Bed Tax by Online Resellers

- Resellers are subject to bed tax as sellers of hotel nights
- Hotels pay tax on wholesale rent reseller pays hotel, reseller collects tax on retail rent from customer and pockets the difference
- Class action counsel unsuccessfully pursued this issue for LA, SF, San Diego, Anaheim & W. Hollywood

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Under-Collection of Bed Tax by Online Resellers

- *In re Transient Occupancy Tax Cases (San Diego v. Hotels.com)* (2016) 2 C5th 131
 - San Diego's TOT did not oblige online resellers of hotel rooms to collect and remit tax
 - LCC provided amicus brief for City
 - Likely controls in most other cities and counties because ordinance language is similar
- Divided CO S Ct reached opposite result in *Denver v. Expedia, Inc.*, 2017 CO 32 (4/24/17)

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Under-Collection of Bed Tax by Online Resellers

- *City of San Antonio v. Hotels.com* (5th Cir. 2017) 876 F.3d 717
 - Applying TX law, excluded online resellers service fees from tax base
- *City of Houston v. Hotels.com* (Tx. 2011) 357 S.W.3d 706
 - Same

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Under-Collection of Bed Tax by Online Resellers

- *In re Transient Occupancy Tax Cases: Los Angeles v. Hotels.com, L.P.* (2d DCA Case No. B253197) (unpublished, 3/28/18)
 - DCA ruled for OTCs against San Francisco, which argued:
 - OTCs were “operators” under ordinance
 - All rent paid for occupancy was taxable, even if retained by OTC
 - DCA concluded hotel need only collect tax on rent it received
 - Petition for review, with League & CSAC amicus support, pending 8/18/18, decision on review due 9/4/18

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Under-Collection of Bed Tax by Online Resellers

- Options for Cities & Counties
 - Let the money go
 - Seek voter approval of an amended ordinance
 - Enforce your existing ordinance provisions requiring disclosure to hotel guests of taxes paid

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Bed Taxes on Short-Term Rentals

San Francisco v. Homeaway.Com, Inc. (2018) 21 Cal.App.5th 1116

- SF subpoenaed Homeaway's records to identify illegal short-term rentals, Homeaway resisted and City obtained court order, affirmed on appeal
- Federal Stored Communications Act was not an obstacle to City's information gathering
- Homeaway lacked standing to assert privacy rights of its customers
- No violation of rights of free association
- Subpoena was not overbroad

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Utility Users Taxes

- Trial court challenges to UUTs on natural gas service
 - *Lavinsky v. LA*: class action challenge to including state surcharges in tax base
 - *Engquist v. LA*: class action challenge to including monthly customer charge in tax base

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Telephone Taxes

Gonzalez v. City of Norwalk (2017) 17 Cal.App.5th 1295

- Bush administration abandonment of much of the base of the Federal Excise Tax on Telephony led to challenges to California TUTs (*Ardon, McWilliams*)
- Many cities and counties adopted ordinances without voter approval to clarify they intended to maintain the earlier tax base
- This case upholds their doing so, finding no need for voter approval

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Telephone Taxes

2016's SB 1481 amends Rev & Tax Code §42010, providing for CDTFA collection of telephone taxes on prepaid mobile telephony

- Allows sellers of <\$15k a year to avoid tax
- Allows those who move out of CA but keep a CA number to apply for tax exemption

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Streaming Video Taxes

- Many UUTs apply to cable and use broad language; consultant suggested cities interpret their ordinances to apply to Netflix, Hulu, etc.; controversy resulted
- So far, no one has done it
- Issues: did ballot materials promise no phone tax on downloads? Is this discrimination under ITFA? Sufficient contacts with city to tax?

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Streaming Video Taxes

- 2017's AB 252 (Ridley-Thomas, D-LA) would have barred application of UUT to video-streaming through 2022
- 3/13/17 hearing canceled at author's request; bill ultimately pulled

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Parking Taxes

CCSF v. UC Regents, CA S Ct. Case No. S242835

- May charter city compel UCs to collect parking tax on campus lots?
- LCC filed amicus brief
- Will evaluate the proprietary / government distinction for intergovernmental immunity vs. a more modern balancing-of-interests test
- Fully briefed 6/8/18 and awaiting argument

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Tax Ballot Measures

- AB 809 (Oberholte, R-Hesperia)
 - Effective 1/1/16, Elections Code section 13119 requires ballot labels to disclose amount to be raised annually by “initiative measure” that “imposes a tax or raises the rate of a tax”
 - Intended to apply to school bonds, but those are not proposed by initiative, but by Board resolution

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Tax Ballot Measures

- AB 195 (Oberholte, R-Hesperia)
 - Effective 1/1/18, amends Elections Code section 13119 to apply to all ballot measures that propose taxes
 - Label must be: "Shall the measure (stating the nature thereof) be adopted?"
 - Must state "the amount of money to be raised annually and the rate and duration of the tax"
 - Label "shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure."
 - Purports to apply to charter cities, but many charters adopt the Election Code anyway.

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Tax Ballot Measures

SB 863 (Budget Committee)

- Would suspend AB 195 as to bond measures till 7/1/20
- Budget trailer bill
- Pending in Assembly Budget Committee as of 8/18/18

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Tax Ballot Measures

- AB 1194 (Dababneh, D-San Fernando Valley)
 - Amends Elections Code section 9401 effective 1/1/18
 - Applies to bond proposals, which are more common for schools than other local governments
 - Requires ballot book to include an estimate of average annual tax rate required to fund proposed debt & its term

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Taxpayer Actions

CCP § 526a allows taxpayers to challenge illegal government expenditures

Wheatherford v. San Rafael (2017) 2 Cal.5th 1241

- 526a challengers must have paid tax “assessed” by defendant locality, but not necessarily property tax
- Case remanded to determine whether plaintiff paid “assessed” taxes
- Concurring opinion asked Legislature to clarify requirements for 526a standing

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Taxpayer Actions

AB 2376 (Stone, D-Sta. Cruz)

- Broadens standing in response to *Wheatherford*
- Special districts would be included
- Anyone who pays broad range of taxes would have standing: income, sales, property (even if to landlord), business license taxes, provided they:
 - Live, work, own property or attend school in the jurisdiction
- As of 8/18/18 awaiting third reading in Senate

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Taxpayer Actions

• *McClain v. Sav-On Drugs* (2017) 9 CA5th 684 (CA S. Ct. Case No. S241471)

- Consumers cannot sue retailer for erroneous collection of sales tax
- Courts create remedies for tax refunds only in narrow circumstances
- Due process not offended by absence of remedy
- LCC did amicus brief
- Fully briefed as of 3/2/18 and awaiting argument

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Income Taxes

- *Hyatt v. Yee* (9th Cir. 2017) 871 F.3d 1067
 - Pay first, litigate later rule did not offend federal Constitution
 - Accordingly, federal tax injunction act forbade federal court to interfere with CDTFA suit against wealthy inventor who claimed NV residency just before cashing in on his intellectual property
 - Case generated substantial media attention

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Groundwater Extraction Charges

- *Pajaro Valley Water Mgmt. Agency v. AmRhein* (2007) 150 CA4th 1364
 - Groundwater augmentation / extraction charges are property related fees subject to Prop. 218
 - No longer good law due to *Ventura v. United Water*

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Groundwater Extraction Charges

- *Griffith v. Pajaro Water Mgmt. Agency* (2013) 220 CA4th 586
 - Charge is a fee for “water service” exempt from 13D, 6(c) election requirement
 - Omnibus Act’s definitions are good authority notwithstanding *HJTA v. Salinas*
 - Notice of protest hearing can be given to property owners alone
 - Holding groundwater charges subject to 218 no longer good law under *Ventura*; but other holdings still useful

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Groundwater Extraction Charges

- *Griffith* (continued)
 - Debt service, GA&O, service planning all permissible uses of fee
 - AWWA M-1 Manual’s cost-accounting process complies w/ Prop. 218
 - Parcel-by-parcel cost analysis is not required; class-by-class is okay if classes rationally drawn

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Groundwater Extraction Charges

Ventura v. UWCD (2017) 3 Cal.5th 1191

- Groundwater charges subject to Prop. 26 not 218
- Remanded to decide if:
 - 3:1 ratio of ag. to non-ag. rates mandated by Water Code §75594 violates Prop. 26
 - Adequate justification for rates on UWCD's record
- Back in DCA, which received substantial additional briefing and indicates intent to allow argument
- May return to Cal. S. Ct. next year

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Groundwater Extraction Charges

Great Oaks Water Co. v. Sta. Clara Valley WD (grant & hold behind *Ventura*)

- Groundwater charges subject to Prop. 218?
- "Water" charges exempt from election requirements?
- DCA remanded substantive challenges to 10:1 ratio of ag. to non-ag. Fees
- Remanded to DCA 6/20/18. resubmitted after further briefing on 8/14/18 and awaiting argument
- Took a while to remand it
- Two justices abstained, likely because they are subject to SCVWD fees and taxes

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Groundwater Extraction Charges

- Sustainable Groundwater Management Act (Water Code § 10720 et seq.)
 - 400+ new Groundwater Sustainability Agencies
 - To fund and implement plans to bring groundwater basins into balance
 - New fees on groundwater use expected to be adopted consistently with Prop. 218 (for supply) and Prop. 26 (for regulation)
 - *Ventura* says 218 not constitutionally required; will require legislation to relax this requirement; may not be politically feasible

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Groundwater Extraction Charges

First lawsuit filed under SGMA to contest reliance on earlier groundwater plan:

- *Sloughouse RCD v. Sacramento Central Groundwater Authority*, Sacto. Superior No. 34-2017-80002529
 - Alleges CEQA, CCP 526a, writ and declaratory relief claims under SGMA
 - 5/25/17: Stayed pending DWR's action on proposal to use existing plan as SGMA plan

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Drinking Water Tax

- SB 623 (Monning D-Carmel)
 - "Safe and Affordable Drinking Water Fee" to fund drinking water service in disadvantaged communities
 - Three separate fees: (1) Fertilizer Safe Drinking Water Fee; (2) Dairy Safe Drinking Water Fee; (3) Safe and Affordable Drinking Water Fee
 - Proposed taxes per customer range from \$0.95/month (1-inch meter) to \$10/month (4-inch meter)
 - Became two-year bill 09/01/2017 and returned to Assembly Rules Committee; more hearings in next session
 - Intense opposition by ACWA; included in Governor's budget
 - August 2018 proposal to make payment of (3) voluntary but to require water providers to collect it on an "opt out" basis

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Water Meter Shut-Offs

- SB 998 (Dodd, D-Napa)
 - Would require water utilities with more than 200 customers to adopt a policy on residential service shut-offs to protect low-income customers
 - May increase bad debt
 - Pending third reading on Assembly floor as of 8/18/19

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Prop. 218 & Water Rates

City of Palmdale v. Palmdale Water District (2011) 198 CA 4th 926

- City challenged conservation water rates, claiming Prop. 218 disallows them
- DCA found 218 and Constitutional provision against wasting water (art. X, § 2) could be harmonized, but struck down PWD rates as insufficiently justified
- Conservation rates must be set carefully

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Prop. 218 & Water Rates

Capistrano Taxpayers Assn v. City of San Juan Capistrano (2015) 235 CA4th 1493

- Must satisfy water conservation mandate of article X, § 2 and Prop. 218
- Domestic rates can fund recycled water as supply program
- Tiered rates require precise cost-justification
- Disagrees with other cases and therefore trial courts need not follow it

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Prop. 218 & Water Rates

Morgan v. Imperial Irr. Dist. (2014) 223 CA4th 892

- No separate protest vote on water rates on domestic, municipal, industrial and agricultural water customers
- Full cost recovery
- Data need not be perfect

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Prop. 218 & Water Rates

Green Valley Landowners Assn v. City of Vallejo (2016)
241 CA4th 425

- Restates pay first, litigate later rule
- Urban water rates need not subsidize higher cost of service to exurban system

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Prop. 218 & Water Rates

- Challenges to tiered water rates following *San Juan Capistrano* pending in:
 - Marin Municipal Water District
 - City of Glendale
 - Goleta Water District
 - San Jose (City prevailed b/c it ended tiered rates in 2017 and plaintiff did not show class could litigate refund issue efficiently)
- General fund transfer disputes pending in
 - San Jose (City prevailed due to claiming requirement, overhead adequately justified, late fees not subject to Prop. 218)

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Prop. 218 & Water Rates

- 2016's SB 814 (Hill, D-San Mateo) adopted Water Code §§ 365 ff. to authorize tiered rates as a regulatory tool during drought
- Imposes state-wide penalty for violation of water conservation regulations to be administered locally
- Impact on *San Juan Capistrano* challenges uncertain

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Prop. 218 & Water Rates

- 2017's SB 564 (McGuire, D-Healdsburg) adopted Gov. Code § 6586.7 to authorize JPA to issue debt to fund water conservation improvements to be funded by surcharge on water bills of those who choose to participate
- "PACE for water efficiency"
- Effective 1/1/18

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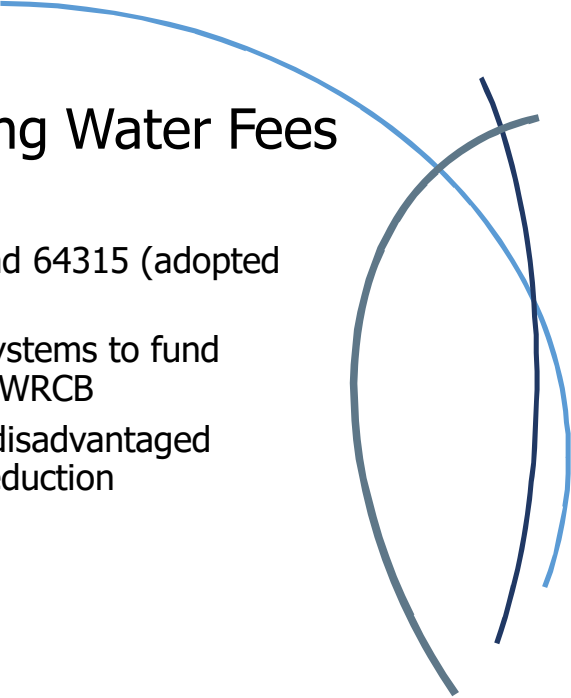
SWRCB Annual Drinking Water Fees

- 22 CCR 64300, 64305, 64310 and 64315 (adopted 4/10/17)
- Annual fees on all public water systems to fund drinking water programs of the SWRCB
- Fee allows systems which serve disadvantaged communities to apply for a fee reduction

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Prop. 218 Legislation

- 2016's AB 2801 (Gallagher, R-Sutter Co.)
 - Amends Prop. 218 Omnibus Implementation Act GC § 53755 to require protests to be treated as public records and retained for two years
 - Earlier proposal to limit validation died in Assembly Committee
 - Effective 1/1/17

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Solid Waste Fees

Leeds v. City of Los Angeles, LA Superior Case No. BC709568 (filed 6/14/18)

- Class action challenge to solid waste franchise fees as taxes under Prop. 218
- High-profile plaintiffs' counsel
- Demonstrates trend of increasing interest by such counsel in municipal revenue cases
- Initial case management conference set for 8/29/18

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Sewer Fees

Moore v. City of Lemon Grove (2015) 237 CA4th 363

- Prop. 218 allows full cost recovery
- Approved informal cost justification of allocation of public works department costs to sewer utility

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Sewer Fees

Cape Concord HOA v. City of Escondido (2017) 7 CA5th 180

- GC § 53082(c) requires sewer fee refunds when agency discovers it has been billing those it does not serve if claim filed within 180 days of payment
- This bill did not allow HOA to claim refund for domestic rates applied to irrigation use before separate irrigation meter installed

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Sewer Fees

Plantier v. Ramona MWD (2017) 12 Cal.App.5th 856, review granted CA S Ct. Case No. S243360

- Prop. 218 challenge to sewer fees defeated in trial court for failure to exhaust administrative remedies by participating in the Prop. 218 majority protest hearing
- DCA reversed, S Ct. granted review
- LCC and other local government associations filed amicus brief
- Fully briefed as of 1/31/18 and awaiting argument

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Sewer Fees

AB 231 (Hertzberg, D-San Fernando Valley)

- Effective 1/1/18, defines "sewer" under Prop. 218 to include storm sewers (GC 53750(k))
- Seeks to overrule *HJTA v. Salinas* by statute, citing *Crawley* and *Griffith*
- This authority is most safely used for a stormwater recapture and reuse project that benefits water supplies
- Test litigation may be coming

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Sewer Fees

Marks v. City of San Diego, San Diego Superior Court Case No. 37-2018-00014112

- Class action challenge to transfer from sewer to water fund to contribute to cost of advanced metering infrastructure
- Claims 50/50 split of AMI cost between two utilities violates Prop. 218 because sewer does not benefit equally with water
- Case in very early stages as of 8/18/18
- Plaintiffs counsel from San Diego & Seattle

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Referenda on Fees

- Prop. 218 allows initiatives to repeal or reduce fees
- Can a fee also be referended?
 - *Monterey Peninsula Water Mgmt. Dist. v. Monterey Peninsula Taxpayers Assn* (6th DCA H042484)
 - Court affirmed ruling for agency b/c plaintiffs did not attach full text of ordinance to referendum petition
 - Unpublished ruling
 - *HJTA v. Amador Water Agency* (3rd DCA C082079)
 - fully briefed as of 11/3/16 and awaiting argument

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Regulatory Fees

- *CBIA v. SWRCB* (2018) 4 Cal.5th 1032
 - Applies *Sinclair Paint* under Prop. 13 to SWRCB fees for water quality programs
 - Very deferential review of SWRCB decision to account for 8 programs collectively
 - Prop. 26 review of cost justification is fairly deferential
 - Ok that fees exceeded costs because surpluses were declining and stayed in the program to underwrite future costs
 - Ok to fund reserves
 - Reasonable estimates are acceptable in cost justification
 - Plaintiff must make a prima facie case of invalidity before burden of proof shifts under 13 and perhaps 26
 - Helpful discussion of Prop. 26
 - Fee/tax question is legal question reviewed de novo on independent judgment review of the facts

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Regulatory Fees

- *CBIA v. SWRCB* (2018) 4 Cal.5th 1032
 - Subsidies of fees are permissible if from other sources
 - Cost-to-fee ratio need not be “precise” – “inherent component of reasonableness in this context is flexibility”
 - 3% overcharge of a class as between historic costs and projected fee collections was reasonable, especially as gap was closing over the years in the record
 - Distinguished *San Juan Capistrano* b/c agency there “failed to show its property-related fees did not exceed the cost of services attributable to each parcel.”
 - Prop. 218 demands more than Prop. 26 as to proportionality of fee to cost of service

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Regulatory Fees

Northern California Water Assn. v. SWRCB (2018) 20 Cal.App.5th 1204

- Cal. S. Ct. upheld statutory fee on water rights holder to fund Water Rights Division of SWRCB
- Remanded to determine if rates were properly apportioned to benefits & burdens under Prop. 13 and *Sinclair Paint*
- Trial court ruled they were not; this decision reverses
- Favorable to rate-makers: all USBOR water of benefit to fee payors including that required for environmental purposes, general fund subsidy can be applied to cover uncharged beneficiaries

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Franchise Fees

Jacks v. City of Santa Barbara (2017) 3 Cal.5th 248

- SCE agreed to increased franchise fee upon PUC authorization for line item on power bills
- DCA found tax requiring voter approval
- Supreme Court remanded: Franchise fees must reflect reasonable value of franchise
 - Reasonable value may be shown by bona fide negotiations, "other indicia of worth"
 - Also reaffirms that valid fees do not become taxes simply because passed on to rate payers
 - Challenger must bear legal, not economic, burden of fee or tax

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Franchise Fees

- Similar disputes in Ventura, Bakersfield and San Diego
 - *McNulty v City of Ventura* – proceeding slowly
 - *King v. City of Bakersfield* – plaintiffs dismissed
 - *Majon v. San Diego* – City won summary judgment
- *Jacks* to be tried in January 2019

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Franchise Fees

- Attorney General's Opinion No. 13-403 (2016)
 - County can impose PEG fee on DIVCA franchise holder without voter approval under Prop. 26
 - Not imposed by local government
 - Federal preemption
 - Did not cite exemption for fees for use of government property (13C, § 1(e)(4))

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Development Impact Fees

616 Croft Ave., LLC v. City of W. Hollywood (2016) 3 CA5th 621

- Inclusionary housing fees not subject to Prop. 218 nor exactions subject to AB 1600
- 90-day statute under Planning & Zoning Law applies
- *Nollan / Dolan* analysis applies, though
- US Supreme Court denied certiorari

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Development Impact Fees

1901 First Street Owner, LLC v. Tustin USD (2018) 21 Cal.App.5th 1186

- “Assessable space” for school impact fees included common area interior spaces
- Statute requires measurement to match “the standard practice of th[e] city or county in calculating structural perimeters”
- Thus, the standard varies by building department

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Prop. 26 Litigation

Griffith v. City of Santa Cruz (2012) 207 CA4th 982

- Challenge to fee on landlords for housing code enforcement
 - No violation of equal protection, 218 or 13
 - Helpful discussion of burden of proof under 26, practical application of licensing exception, applies pre-26 regulatory fee case law

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Prop. 26 Litigation

Newhall County Water Dist. v. Castaic Lake Water Agency (2016) 243 CA4th 1430

- Wholesaler w/ 4 customers could not make rates by class
- Wholesaler w/o groundwater services or regulatory authority could not tie rates to groundwater use (free-rider violation)
- Conservation rates must conserve rate-maker's own water supplies

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Prop. 26 Litigation

Schmeer v. County of Los Angeles (2013) 213 CA4th 1310

- Challenge to provision of plastic bag ban requiring retailers to charge \$0.10 for paper bags
- Because fee doesn't fund government, 26 doesn't apply

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Prop. 26 Litigation

Citizens for Fair REU Rates v. City of Redding (Aug. 27, 2018, No. S224779) ___ Cal.5th ___ [2018 WL 4057226]

- Challenge to electric utility PILOT
- Trial court found grandfathered
- DCA found subject to Prop. 26 b/c adopted w/ biennial budget & remanded for cost justification
- Court concluded fees not made taxes by PILOT because non-retail-rate revenues were sufficient to cover it
- Did not reach grandfathering issue or question whether cost could be deemed reasonable b/c comparable to taxes PUC-regulated utilities
- Other cases pending against other municipal utilities may reach those issues

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Prop. 26 Litigation

Citizens for Fair REU Rates v. City of Redding (Aug. 27, 2018, No. S224779) ___ Cal.5th ___ [2018 WL 4057226]

- Gross proceeds of wholesale transactions treated as discretionary revenue
- May make sense to segregate reserves between those funded by rates and those funded by discretionary revenues
- 26 is plainly less demanding than 218
- Free-riders are a problem only if other fee-payers cover their share.
- No duty to subsidize rates with available discretionary revenue

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Prop. 26 Litigation

- Similar GFT challenges against gas and electric utilities pending in
 - Alameda (stayed)
 - Anaheim
 - Burbank (to settle following election?)
 - Glendale (on appeal)
 - Long Beach
 - Los Angeles (settled)
 - Modesto Irrigation District (stayed)
 - Palo Alto (stayed)

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Prop. 26 Litigation

Webb v. City of Riverside (2018) 23 Cal.App.5th 244

- Challenge to general fund transfer from power utility rejected under 120-day statute of limitations of PUC §10004.5
- Changing the transfer formula (an expenditure) was not an “increase” that triggers new Prop. 26 claim
- Cited favorably in *Redding*

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Prop. 26 Litigation

Cal. Chamber of Commerce v. CARB (2017) 10 CA5th 604

- Greenhouse gas auctions did not exceed statutory authority under AB 32
 - Were not taxes under Prop. 13 because voluntarily paid for a valuable right (to emit carbon)
 - CA Supreme Court denied review 06/28/2017
- Paves way for a new revenue strategy: use power to regulate to impose standard on industry and then allow businesses to buy around it

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Prop. 26 & State Fire Fee

HJTA v. CDF, Sacto Superior Case No. 34-2012-00133197

- State imposed \$150 / structure fee on State Responsibility Areas
- HJTA challenged under Prop. 26 b/c not approved by 2/3 of each house
- Transportation funding deal rescinded fee in summer 2018
- Dismissed as moot

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Prop. 26 Litigation

Otay Mesa Water Dist. v. City of San Diego, Otay Water District v. City of San Diego Riverside Superior Court Case No. RIC1804278

- Challenges San Diego's allocation of costs for recycled water to other utilities. Argues two systems should be costed separately.
- City answered in August 2017, case moved to Riverside 1/30/18
- Status Conference Dec. 6, 2018

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Prop. 26 Litigation

San Diego County Water Authority v. Metropolitan Water District (2017) 12 Cal.App.5th 1124

- SDCWA challenged wheeling rate for including costs of SWP rather than only costs to operate Colorado River Aqueduct and prevailed at trial
- DCA overturned that victory, concluding postage stamp rates allowed under statute were also sufficient under Prop. 26
- Core holding likely of little impact on other agencies, but many good holdings

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Prop. 26 Litigation

San Diego County Water Authority v. Metropolitan Water District (2017) 12 Cal.App.5th 1124

- Independent judgment review doesn't allow court to choose between competing methodologies
- Conservation costs could not be recovered from a transportation rate
- Common law standard of rate-making is very deferential
- Did not decide if Met "imposes" rate on SDCWA
- Confirms local governments have standing to assert constitutional claims, upholding SDCWA's preferential rights argument, striking Met penalty on San Diego for litigating the issue

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Prop. 26 Litigation

Templo v. State of California (2018) 24 Cal.App.5th 730

- Challenge to jury fees for civil trials under Prop. 26
- DCA affirmed trial court dismissal for suing the State rather than the Judicial Council
- Brief discussion of Prop. 26, including the shifting of the burden of proof from plaintiffs to government

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Prop. 26 Litigation

Reid v. City of San Diego (2018) 24 Cal.App.5th 343

- Class action challenge to tourism marketing district assessment under Prop. 26
- DCA affirmed dismissal for failure to comply with 30-day statute of limitations for validation specified by charter City assessment ordinance, rejecting tolling and continuous accrual claims
- No equal protection violation in limiting vote to hoteliers
- Rejected sanctions b/c fair question whether charter city could invoke validation by ordinance
- Petition for review pending as of 8/18/18, decision due 9/4/18

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Assessments

Silicon Valley Taxpayer's Ass'n v. Sta. Clara Co. Open Space Auth. (2008) 44 Cal.4th 431

- Independent judicial review of assessments
- Tighter definition of "special benefit"
- Open space and other services that benefit public broadly harder to justify
- Proportionality requirement unclear

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BID Assessments

Dahms v. Downtown Pomona PBID

(2009) 174 CA4th 708 allows:

- exemption of residential pty from assessment for security, streetscape maintenance & marketing
- discounted assessments for non-profits
- use of front-street frontage for apportionment, along with lot & building size
- Very generous to agency; later cases less so

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Utility Undergrounding Assessments

Tiburon v. Bonander (2009) 180 CA4th 1057

- No general benefit for utility undergrounding
- Court can look outside agency's record to reach earlier record on same assessment
- Invalidated allocation of assessment and establishment of zones of benefit

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Park Assessments

Beutz v. Riverside Co. (2010) 184 CA4th 1516

- Park M&O can be 100% assessment financed b/c capital provided w/ other \$
- Agency must always prove special benefit and proportional allocation even if challenger doesn't raise these points
- Questions use of cost to allocate benefit

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Fire Suppression Assessments

Concerned Citizens v. West Point FPD, Cal. S. Ct. Case No. S195152

- Sufficiency of engineer's report to show special benefit or proportionality
- Use of cost to allocate benefit
- Dismissed as moot and DCA opinion not republished
- Similar case pending in Fresno DCA

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Maintenance Assessments

Golden Hill Neighborhood Ass'n v. City of San Diego (2011) 199 CA4th 416

- Invalidated maintenance district under 1972 Lighting & Landscaping Act for inadequate engineer's report (no basis for allocation of votes to City property)
- Helpfully limited DCA's *West Point* decision and provides guidance for engineers' reports

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PBIDs, BIDs and TMDs

- Property-based business improvement districts have engendered litigation
- AB 2618 (Pérez, D-LA) codified *Dahms* as to PBIDs and clarifies the statute effective 1/1/15
- TMD assessments have generated litigation under Prop. 26.
 - Ontario prevailed on standing grounds;
 - San Diego mooted by amendment to limit assessment to large hotels; fee award appealed; duplicative suits dismissed by trial court and now also on appeal (*Reid & another*)

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Assessing Other Governments

- 218 says you cannot exempt other governments and it was unclear whether that means you can assess them
- *Manteca USD v. Reclamation District 17* (2017) 10 CA5th 730
 - Art. 13D, § 4(a) ban on exempting government property trumps Water Code provision forbidding RD to assess schools and roads

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Advice re Assessments

- Use a strong, current engineer's report
- Get legal review of reports at least until assessment law stabilizes
- Watch for current developments

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Mandates

Dept. of Finance v. Comm'n on State Mandates (2016) 1 C5th 749

- NPDES mandates are imposed under federal rather than state law, and thus were not reimbursable mandates
- 4–3 decision with all 3 Brown appointees in dissent

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Debt

- 2016's SB 1029 (Hertzberg, D-LA) adopts GC § 8855 to require California Debt and Investment Advisory Commission to track outstanding state and local debt
- Requires local policies re use of debt and local agencies to certify to CDIAC consistency of debt w/ policy for issuances after 1/21/17

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