

# Update on the Law of Municipal Finance

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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 special taxes without 2/3 vote

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## Business License Taxes

- Following *Upland*, SF City Attorney opined that initiative special taxes can be approved by simple majority
- June 2018 SF ballot included Propositions C and D, nearly identical taxes on commercial landlords
- C required simple majority, D required 2/3
- C passed with 50.87%, D failed with 55.07%
- HJTA sued in August 2018
- November 2018 Ballot included another Measure C to increase business license taxes to fund homeless services; it received 61% and drew suit, too

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## More on Upland

- Much litigation has followed
  - 3 suits against SF for treating taxes as approved
    - *HJTA v. CCSF*, 1<sup>st</sup> DCA Case No. A157983
      - City won in trial court 7/5/19
      - HJTA appealed 8/7/19
    - Fresno sued for treating tax as not approved
      - *City of Fresno v. Fresno Building Healthy Communities v. City of Fresno*, Fresno Superior Court Case No. 19 CECG 00422
        - HJTA intervened
        - HJTA won judgment on the pleadings on 9/5/19, appeal likely
    - Oakland sued for treating tax as approved
      - City sought to settle, but proponents intervened
      - City then filed its own validation action

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## Sales & Use Taxes

- *Quill Corp. v. North Dakota* (1992) 504 U.S. 298 required physical contacts between retailer and state for sales taxes to apply
- This rule makes less sense in the internet economy and states sought to tax businesses which sell in their jurisdictions

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## Sales & Use Taxes

*South Dakota v. Wayfair* (2018) 138 S.Ct. 2080

- 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 authority to tax out-of-jurisdiction vendors with meaningful role in local market

Exception for small vendors advisable, both legally and politically

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## Sales & Use Taxes

- AB 147 (Burke, D-LA)
  - Implements *Wayfair* by amending Bradley-Burns
  - Sets \$500k threshold for out-of-state taxpayers
  - Approved by Governor Newsom on 4/25/19
- CDTFA regulations had obliged out-of-state to commence collecting taxes as of 4/1/19

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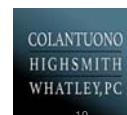


## SCAQMD Sales Tax

- SB 732 (Allen, D-Sta. Monica)
  - Proposal to allow SCAQMD to propose a Transactions and Use Taxes
  - This might compete with city and county taxes for the space under the 2% cap on all TUTs.
  - Author cancelled committee hearing on 5/13/19

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## Sales & Use Tax

- Statute imposes a 2% cap on all local sales & use taxes
- Race-to-the-cap has begun in LA and some Bay Area Counties
- Legislative proposals to lift the cap for some cities and counties
  - AB 618 (Scotts Valley, Emeryville) – vetoed
  - AB 723 (Fremont) – pending 2<sup>nd</sup> reading in Senate as of 9/9

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## Business License Taxes

*Tesoro Logistic Operations, LLC v. City of Rialto* (4<sup>th</sup> DCA Case No. E069070)

- Rialto voters approved a tax on petroleum storage operations in the City.
- Trial court concluded it was a preempted property tax because it was on storage facilities whether or not used for storage.
- DCA issued a tentative ruling (not designated for publication) on May 31, 2019 affirming; case was argued August 6 and remains under submission.
- If City loses, petition for SCOCA review may be likely.

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## Property Tax

- The California Schools and Local Communities Funding Act of 2018, Measure No. 17-0055 qualified for the 11/20 ballot to amend Prop. 13 to impose a split roll
- Would allow annual re-appraisal of non-residential property, excludes residential and agricultural land
- Would raise billions of \$ to fund schools and local governments
- Would reduce business property tax and reimburse State for reduction in income taxes due to increased deductibility of property taxes
- Hugely expensive campaign likely

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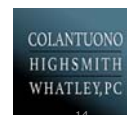
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## Property Tax

- Proponents of split roll filed a new measure with the AG in late July
- No. 19-0008: "The California Schools and Local Communities Funding Act of 2020"
- May be a response to poor polling on Measure 17-0055.
- Awaiting AG's title & summary as of 9/9/19

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## Property Tax

### Major changes in new split-roll measure

- applies Local Control Funding Formulas for school funding
- applies AB 8 share to allocate city and non-school special district funding
- exempts residential & ag property,
- exempts small commercial and industrial property owners
- defers tax increase on properties occupied by small businesses
- reassessments to be phased in by statute

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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

### ACA 1 (Aguiar-Curry, D-Woodland)

- Would lower voter-approval threshold from 2/3 to 55% for bonds or special parcel taxes to fund affordable housing, permanent supportive housing, or public infrastructure
- 2/3 legislative approval required
- Failed third reading in the Assembly 44-20 w/ 15 abstentions, including many Dems in competitive seats
- Reconsideration granted, so the measure may come back as a two-year bill

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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 challenge to property tax assessment of 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

## Parcel Taxes

- *Borikas v. Alameda USD* (2013) held that statute 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.* (2019) 31 Cal.App.5th 994, review denied, tax of \$0.015 per sq. ft. of improved property was "uniform" within the meaning of statute and a permissible excise tax rather than a forbidden property tax

## Parcel Taxes

- SF adopted Measure G, a parcel tax to fund teacher salaries, by 61% at June 2018 election
- City Attorney filed validation action in September 2018 to test lawfulness of special tax approved w/o 2/3.
- Will likely be decided with the two Measure C business license taxes noted above.

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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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## Sales & Use Taxes

### Prop. 64 and Sales Taxes on Marijuana

- Medical marijuana sales are exempt from state and local sales and use taxes
  - 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](http://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

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## Measure A / Measure B Taxes

*Johnson v. County of Mendocino* (2018) 25 Cal. App.5th 1017

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



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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.* (Colo. 2017) 405 P.3d 1128

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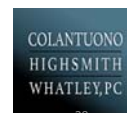
## Under-Collection of Bed Tax by Online Resellers

- *City of San Antonio v. Hotels.com* (5<sup>th</sup> 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: San Francisco 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
- *In re Transient Occupancy Tax Cases: Los Angeles v. Hotels. Com, L.P.* (2d DCA Case No. B255223)
  - DCA ruled for OTCs against Los Angeles; Los Angeles appealed, arguing ordinance reference to "secondary operators" ought to change result
  - DCA ruled for OTCs in an unpublished decision, LA did not seek review

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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 – settled
- *Engquist v. LA*: class action challenge to including monthly customer charge in tax base – class certified in May 2019 discovery underway as of 9/2/19; summary judgment motion expected if case does not settle

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## Telephone Taxes

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

- Bush II administration's 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

*MetroPCS California, LLC v. Michael Picker*, 348 F.Supp.3d 948 (ND Cal. 2018) 9<sup>th</sup> Circuit Case No. 18-17382

- Enjoined enforcement of the Prepaid Mobile Telephony Services Surcharge Collection Act as preempted by federal law; PUC appealed to the 9<sup>th</sup> Circuit; fully briefed as of 9/4/19
- LCC expressed concern in 12/18 CDTFA would interpret it to forbid collection of local UUTs on prepaid wireless telephony
- CDTFA issued an advisory that same month informing carriers that the State's fee was suspended, but not local taxes

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## Parking Taxes

*CCSF v. UC Regents* (2019) 7 Cal.5th 536

- Charter city may compel UCs and CSU to collect parking tax on use of campus lots by third parties
- Did not undermine the older test distinguishing governmental from “proprietary” activity, but applied balancing test drawn from charter city preemption cases and cases involving collection of UUTs by utility districts which are, technically, state agencies.
- Nice victory for local government
- Will apply broadly to third-party taxes like UUTs, hotel taxes, parking taxes, etc.



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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

- 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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## Tax Ballot Measures

SB 268 (Wiener, D-San Francisco)

- Pending 3<sup>rd</sup> reading in Assembly as of 9/9/19
- For ballot measures to approve taxes w/ more than one rate, ballot book (not label) must
  - Describe purpose of measure and use of funds
  - List all tax rates and describe how tax imposed
  - Describe “any mechanism that would cause the tax rate or rates to vary over time”
  - State the duration of the tax
  - State “[t]he best estimate from official sources of the average annual dollar amount of tax that would be collected” in first 10 years
- Would apply to 3/20 and subsequent elections

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## Tax Ballot Measures

SB 268 (Wiener, D-SF)

- For bond measures, ballot book (not label) must estimate
  - Average annual tax rate
  - Expected pay off of bonds and sunset of tax
  - Highest tax rate
  - Total debt service
  - “the statement may contain a declaration of policy of the legislative or governing body of the applicable jurisdiction, proposing to use revenues other than ad valorem taxes to fund the bond issue, and the best estimate from official sources of these revenues and the reduction in the tax rate levied to fund the bond issue resulting from the substitution of revenue.”

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## Taxpayer Actions

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

- CCP § 526a allows taxpayers to challenge illegal government expenditures
- 526a challengers must pay 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)

- Amended CCP 526a to broaden standing in response to *Wheatherford*
- Special districts now included
- Anyone who pays broad range of taxes has standing: income, sales, property (even if to landlord), business license taxes, provided they:
  - Live, work, own property or attend school in the jurisdiction
- Effective 1/1/19



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## Taxpayer Actions

### *McClain v. Sav-On Drugs* (2019) 6 Cal.5th 951

- 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
- Any remedy must come by legislation

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## Taxpayer Actions

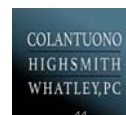
### *North Carolina Department of Revenue v. The Kimberly Rice Kaestner 1992 Family Trust* (2019) \_\_ US \_\_\_\_, 2019 WL 2552488

- Due Process clause of federal constitution limits State and local governments power to tax economic activity w/ minimum connection to the taxing agency.
- Presence of a trust beneficiary in No. Carolina did not create sufficient connection to allow the state to tax the trust.

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## Revenue Enforcement

*City & County of San Francisco v. Uber Technologies, Inc.* (2019) 36 Cal.App.5th 66

- City sought data from Uber to enforce parking, traffic and safety ordinances. Uber refused, claiming the PUC had exclusive enforcement authority.
- City issued legislative subpoenas and sued for an order compelling. The trial court issued the order; the Court of Appeal affirmed.
- Statute authorizes city councils and boards of supervisors to issue legislative subpoenas to investigate anything subject to local regulation. They often require suit to enforce, but are a powerful tool.

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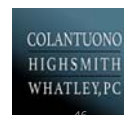


## Income Taxes

- *Hyatt v. Yee* (9<sup>th</sup> 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
- SCOTUS decided Constitution prohibits a state to be sued in the courts of another state without its consent: *Franchise Tax Board of California v. Hyatt* (2019) 139 S.Ct. 1485

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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
  - DCA remanded to UWCD for a new hearing
  - Review denied, litigation resumes in trial court, along with previously stayed cases involving subsequent years

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## Groundwater Extraction Charges

*Great Oaks Water Co. v. Sta. Clara Valley WD*, 6<sup>th</sup> DCA  
Case No. H035260, S Ct. Case No. S252978

- Grant & hold behind *Ventura*
- On remand to DCA, unpublished victory for SCVWD
- Groundwater charges not subject to Prop. 218, no Prop. 26 argument preserved for appeal
- Claim rates violated District's Act reviewed very deferentially; plaintiffs' trial victory reversed
- District did not obtain publication; SCOCA denied review 2/22/19
- Other trial court cases raise Prop. 26 claim

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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 Prop. 218 compliance 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
  - Writ hearing on 11/16/18 vacated and case reassigned to new judge; no subsequent activity as of 9/2/19

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## Water Meter Shut-Offs

- SB 998 (Dodd, D-Napa)
  - HSC Section 116900 et seq. requires water utilities with more than 200 customers to adopt a policy on residential service shut-offs to protect low-income customers
  - Arguably requires policy to be translated into several languages whether or not spoken in the community
  - Requires annual forgiveness of interest, caps repayment obligations, forbids turn-offs if customer has doctor's note
  - Will increase bad debt, may prompt policies to require credit-worthiness or security deposits
  - Mandates claim, challenge as violating Prop. 218 by compelling improper cross-subsidy possible; litigation, too
  - Effective 1/1/19
  - Clean-up bill in discussion for 2020

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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
- SCOCA read narrowly to invalidate rates b/c city offered no cost justification

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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* – DCA found no duty to exhaust, SCOCA denied review, to be tried in 12/19
  - *City of Glendale* – unpublished victory, publication and review denied, settled
  - *Goleta Water District* – unpublished victory, request to publish denied
  - *San Jose* (City prevailed b/c it ended tiered rates in 2017 and plaintiff did not show class could litigate refund issue efficiently; appeal pending as H046064 as of 9/2/19)
- General fund transfer disputes pending in
  - San Jose (City prevailed due to claiming requirement, overhead adequately justified, late fees not subject to 218)

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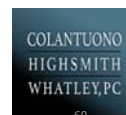
## Prop. 218 & Water Rates

- Unpublished victories for water agencies on tiered rates in
  - *Boyd v. Soquel Creek Water Dist.*, 2016 WL 1752932
  - *Delano Guardians Comm. v. City of Delano*, 2018 WL 573015

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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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## Drinking Water Tax

SB 200 (Monning, D-Monterey)

- Would have required all water providers to collect a tax on potable water to fund the Safe and Affordable Drinking Water Fund to assist low-income communities in accessing safe potable water supplies
- Included in Governor Newsom's budget
- Legislature subsequently provided state funding for the SADWF
- This bill chaptered on another topic

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## Water & Sewer Providers

AB 1751 (Chiu, D-SF)

- Facilitates acquisition of investor-owned water and sewer corporations by public agencies by requiring expedited PUC approval of transactions
- Intended to address failing systems in disadvantaged communities
- Held in Senate Appropriations as of 8/30/19

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## Mandates & Prop. 218

*Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174

- Districts argued state water quality regulations were reimbursable mandates. State argued they had fee-making power to recover those costs, an exception to the duty to fund mandates
- Districts argued majority protest procedure under Prop. 218 meant they did not have rate-making power
- DCA was not persuaded
- Did cite SB 231 (storm sewer fees exempt from 218 election requirement) favorably
- Review denied

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## Solid Waste Fees

*Kahan v. City of Richmond* (2019) 35 Cal.App.5th 721

- City liened tax roll for delinquent trash fees
- Investor who purchased property sued, arguing the lien was preempted by statutes governing the priority of liens against property.
- DCA concluded statute authorized the special assessment lien and that the assessment provisions of Prop. 218 did not apply.

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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* (2019) 7 Cal.5th 372

- 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
- S Ct. reversed, concluding the Prop. 218 majority protest proceeding was not a fit forum to resolve restaurant's complaint about its EDU assignment
- Left open the possibility that plaintiffs might need to participate in protest hearing to challenge fee increase itself
- Advisable to establish a local remedy that **does** apply to as applied and facial challenges to fees and state in notice of 218 hearing that all challenges will be heard

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## Sewer Fees

SB 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 v. Alameda* and *Griffith v. Pajaro*
- This authority is most safely used for stormwater reuse project benefitting water supplies
- Test litigation coming
- Cited favorably in *Paradise Irr. Dist. v. Comm'n on State Mandates*

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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
- Class certification to be heard in September 2019, trial set for June 2020
- 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?
  - *Wilde v. City of Dunsmuir* (2018) 29 Cal.App.5th 158 (review grant, S. Ct. case no. S252915)
    - Allowed referendum in poorly reasoned decision
    - HJTA substituted in for pro per after DCA decision
    - Amicus briefs filed May 2019; awaiting argument
  - *HJTA v. Amador Water Agency* (2019) 36 Cal.App.5th 279
    - 3d DCA disagreed with its own earlier decision
    - Grant-and-hold review in SCOCA behind *Dunsmuir*

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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 vs. tax 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* – stayed pending *Jacks*
  - *King v. City of Bakersfield* – plaintiffs dismissed
  - *Mahon v. San Diego* – City won summary judgment, appeal pending as D074877, fully briefed as of 8/29/19
- *Jacks* tried May 2019 and trial court found franchise fee not a tax due to good-faith bargaining between City and SCE
- *Jacks* appealed as Case No. B299297

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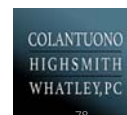
## Franchise Fees

- *Zolly v. City of Oakland*, 1<sup>st</sup> DCA Case No. A154986
  - Challenge to franchise fee imposed on City solid waste franchisees under Props. 218 and *Jacks v. City of Santa Barbara*
  - City prevailed on demurrer because fees paid by hauler, not customers
  - Respondent's brief due 9/5/19 as of 9/9/19

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## Franchise Fees

*Apartment Owners Assn of CA, Inc. v. City of Los Angeles, LASC Case Nos. BC677423, BC709658*

- Class action challenges to LA's recycling program, including franchise fees paid by private haulers, as tax under Prop. 26
- Filed September 27, 2017, in discovery as of 9/2/19
- Status Conference set for 10/8/191

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## Vehicle License Fees

AB 818 (Cooley, D-Rancho Cordova; Quirk, D-Buena Park)

- Latest effort to restore favorable allocation of VLF to newly incorporated cities to reflect the lessened burden on the CHP which polices county, but not city, roads.
- VLF was reassigned during the State's budget crisis.
- Legislature solved the near-bankruptcy of four newly incorporated Riverside County cities, but has not restored the incentive for new incorporations
- Committee hearing postponed 5/16/19; two-year bill

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## Development Impact Fees

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

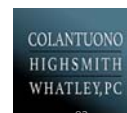
- “Assessable space” for school impact fees included common area interior spaces
- Statute requires measurement to match “the standard practice of th[e] city or county in calculating structural perimeters”
- Thus, the standard varies by building department



## Development Impact Fees

*Summerhill Winchester LLC v. Campbell USD* (2018) 30 Cal.App.5th 535

- Affirmed refund in developer’s challenge to school impact fee
- DCA concluded the fee study did not contain required data
- Use of hypothetical new schools the district did not intend to build was not reasonable means to measure capital need



## Development Impact Fees

*Tanimura & Antle Fresh Foods, Inc. v. Salinas Union HSD*  
(2019) 34 Cal.App.5th 775

- Ag. Business obliged to pay school impact fees for adults-only farm worker housing
- Construes statute, can be explained as reflecting school impacts of economic development (construction workers have kids, too).

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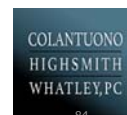
## Development Impact Fees

SB 646 (Morell, R-Rancho Cucamonga)

- Requires water and sewer connection fees to satisfy the "fair or reasonable relationship" standard of Prop. 26, which otherwise does not apply to such fees
- May not change the law much; bill drew no opposition
- Chaptered 7/10/19
- Effective 1/1/20

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## Development Impact Fees

SB 13 (Wieckowski, D-Fremont)

- Promotes accessory dwelling units (“granny units”)
- Prohibits development impact fees on ADUs of less than 750 square feet
- Prohibits requirement of new utility connection unless ADU is free-standing and fee proportional to sq. footage or fixture count
- As other units cannot be charged more to make up the difference, this will impose infrastructure costs on existing customers to be recovered by rates
- Pending 3<sup>rd</sup> reading in Assembly as of 9/9/19

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## Development Impact Fees

*Boatworks, LLC v. City of Alameda* (2019) 35 Cal.App.5th 290

- Court invalidated City’s park impact fees because fee calculated on cost to acquire and improve land, but City owned the necessary land already
- City could treat areas zoned for open space as parks for purposes of the fee
- Remedy was to declare the ordinance void; not to order the City to repeal it
- Developer got fees as a private attorney general despite its economic interest in the case because it benefited other developers and buyers of 4,600 homes

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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* (2018) 6 Cal.5th 1

- 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 pay
- 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* (2018) 6 Cal.5th 1

- 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-payors cover them.
- No duty to subsidize rates with discretionary revenue

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## Prop. 26 Litigation

Similar GFT challenges against gas and electric utilities

- Alameda (stayed)
- Anaheim (*Palmer v. City*, 30-2017-00938646, 30-2018-01013732)
- Burbank (settled)
- Glendale (unpublished decision 12/27/18, publication & review denied; remedy to be retried)
- Long Beach (settled)
- Los Angeles (settled)
- Modesto Irrigation District (9/27/19 trial)
- Palo Alto (9/18/19 trial)

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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)
- 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 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 recycled water systems should be costed separately
- City answered, case moved to Riverside
- Trial set for 11/21/19



## 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





## 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 on this record
- 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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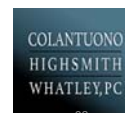
## Prop. 26 Litigation

*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

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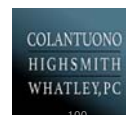
## Prop. 26 Litigation

*Howard Jarvis Taxpayers Assn v. The Bay Area Toll Authority*, 1<sup>st</sup> DCA Case Nos. A157972, A157598

- Legislature authorized a voter-approved \$3 increase in Bay Area bridge tolls to fund BART, SF Muni, ferries, port improvements, and bike and pedestrian trails
- Voters approved it as Regional Measure 3 in June 2018
- HJTA sued, arguing Prop. 26 required 2/3 legislative approval
- Trial court concluded this was a fee for use of public property not subject to a cost-of-service limit
- HJTA appealed in June 2019

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## State Fire Fees

*HJTA v. California Department of Forestry and Fire Protection* (3<sup>rd</sup> DCA Case No. C086660)

- HJTA challenged state fire fees on parcels in state responsibility areas as a tax under Prop. 26
- Case was dismissed for failure to try it w/in 5 years
- HJTA appealed, case fully briefed and awaiting argument since 2/06/19

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## Assessments

*Silicon Valley Taxpayer's Ass'n v. Sta. Clara Co. Open Space Auth.* (2008) 44 Cal.4<sup>th</sup> 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 property 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



## 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



## 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 (2012)

- 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

*Davis v. Mariposa County Board of Supervisors* (2019) \_\_\_ Cal.App.5th \_\_\_ [2019 WL 3939067]

- County's trial court victory affirmed b/c plaintiff failed to appeal in the 30 days allowed for validation actions
- Still no published case upholding assessment funding of services post-*West Point*

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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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## Tourism Marketing Districts

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 (*Reid* & unpublished victory for City)
- Fee appeal resulted in victory for City on 4/4/19



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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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## General Fund Transfers

*National Asian American Coalition v. Newsom* (2019) 33 CA5th 993

- Mortgage fraud settlement provided \$300+ million to fund consumer credit education, mortgage assistance and similar housing programs.
- Legislature appropriated it for general fund purposes.
- Activist groups sued; Court of Appeal ordered reversal of transfer
- Supreme Court granted review and remanded to DCA for reconsideration in light of 2018 budget trailer bill reconfirming the transfer
- DCA again ordered reversal of transfer; review denied

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## Economic Development

SB 531 (Glazer, D-Antioch)

- Bans sales tax situs agreements as of 1/1/20
- They kickback part of tax to retailer for locating sales office in a jurisdiction.
- Failed on third reading in Assembly on vote of 36-21 w/ 22 abstentions
- Reconsideration granted
- To enrollment as of 9/5/19

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Questions?

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