

# Update on the Law of Municipal Finance

League of California Cities  
Finance Officers Institute

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San Francisco

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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 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 thus will likely draw suit, too.

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## Business Licenses Tax

- *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 larger tax jurisdiction to reach out-of-jurisdiction vendors with meaningful role in local market

Exception for small vendors advisable, both legally and politically

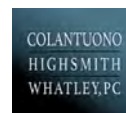


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## Property Tax

*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 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

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## 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.* (2d DCA No. B284932) challenges November 2016's Measure A on this theory, trial court judgment for County, plaintiffs appealed. Argued 11/13/18; decision due in 90 days

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## 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 with less than 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 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](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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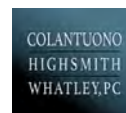


## Measure A / Measure B Taxes

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

- *Coleman* rule 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
- Very 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 certification to be heard in Feb. 2019

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## Telephone Taxes

- Gonzalez v. City of Norwalk* (2017) 17 Cal.App.5th 1295
- Bush II 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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## 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?

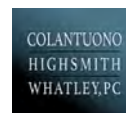
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## Streaming Video Taxes

- 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.

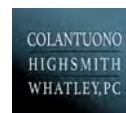
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## Tax Ballot Measures

- 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

*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)

- Amends CCP 526a to broaden standing in response to *Wheatherford*
- Special districts are 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

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## Taxpayer Actions

- *McClain v. Sav-On Drugs* (2017) 9 CA5th 684 review granted (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
- To be argued 12/5/18, decision due 90 days thereafter

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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

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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*

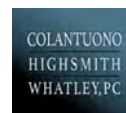
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## Groundwater Extraction Charges

- *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

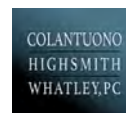
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## Groundwater Extraction Charges

- 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 indicated 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*, 6<sup>th</sup> DCA  
Case No. H035260

- grant & hold behind *Ventura*
- On remand to DCA, 11/8/18 unpublished victory for SCVWD
- Groundwater charges not subject to Prop. 218, no Prop. 26 argument preserved
- Claim rates violated District's Act reviewed very deferentially; verdict for plaintiffs reversed
- District sought publication; plaintiffs may appeal
- New suit to raise Prop. 26 claim likely

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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
  - Writ hearing on 11/16/18 vacated and case reassigned to new judge

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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
  - May increase bad debt
  - Effective 1/1/19

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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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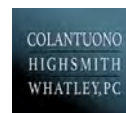


## Prop. 218 & Water Rates

*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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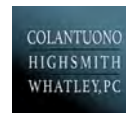


## Prop. 218 & Water Rates

*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; appeal pending as H046064 as of 11/18/18)
- General fund transfer disputes pending in
  - San Jose (City prevailed due to claiming requirement, overhead adequately justified, late fees not subject to Prop. 218)

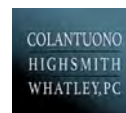
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## Prop. 218 & Water Rates

- 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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## Solid Waste Fees

*Leeds v. City of Los Angeles*, LA Superior Case No. BC709658 (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
- Case still in early stages

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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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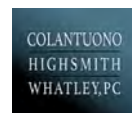


## Sewer Fees

*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
- Letter notice of imminent argument sent 10/15/18 – argument likely by January or February 2019

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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 v. Alameda* and *Griffith v. Pajaro*
- This authority is most safely used for stormwater recapture and reuse project that benefits water supplies
- Test litigation 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
- Class certification to be heard in July 2019
- 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* (Nov. 15, 2018) \_\_\_ CalApp.5th \_\_\_ [2018 WL 5994224]
    - Allows referendum in poorly reasoned decision
    - Rehearing, review, depublication may be likely
  - *HJTA v. Amador Water Agency* (3<sup>rd</sup> 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* – stayed pending *Jacks*
  - *King v. City of Bakersfield* – plaintiffs dismissed
  - *Mahon v. San Diego* – City won summary judgment, appeal pending as D074877
- *Jacks* to be tried in February 2019

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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* (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
- 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
  - Burbank (appeal pending as B288874, AOB due 1/4/19)
  - Glendale (appeal argued 10/2/18)
  - Long Beach (settled)
  - 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 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 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 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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## 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 (*Reid* & another appeal argued 11/16/18)

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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

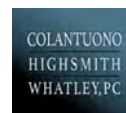
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## Advice re Assessments

- 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. Brown*, 3d DCA  
Case No. C079835

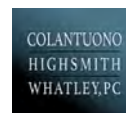
- Mortgage fraud settlement provided \$300+ million to fund consumer credit education, mortgage assistance and similar housing programs.
- Legislature appropriated it for general fund purposes.
- Activist groups sued; Court of Appeal ordered reversal of transfer
- Supreme Court granted review and remanded to DCA for reconsideration in light of 2018 budget trailer bill reconfirming the transfer
- Supplemental opening briefs due in DCA on 12/7/18

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## Questions?

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