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Proposition 218 After Two Years

By Dean Mischynski

OCTOBER 1998

C A L I F O R N I A R E S E A R C H B U R E A U

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INTRODUCTION

Proposition 218, the “Right to Vote on Taxes Act,” was approved by California’s voters in November, 1996. This initiative measure restated that local taxes must gain voter approval, restated that the initiative can be used to undo taxes, imposed new requirements on special assessments, and imposed new requirements on fees and charges related to property ownership.

As with other controversial initiatives, Proposition 218 has inspired litigation and various interpretive opinions. This report summarizes the court cases that I have been able to learn about. There are a few appellate decisions. Since the rest of the action is mostly at the Superior Court level, and these cases are not indexed anywhere, it is possible that I have missed something. This report also summarizes the relevant Attorney General opinions. I try to offer some insight to the broader significance of these decisions and opinions.

Superior Court decisions do not provide binding precedent, and usually contain little rationale for the court’s decision. They do give us the only tangible tracing of the evolving legal debate about what Proposition 218’s reality will turn out to be. It will likely take a decade or more, perhaps much more, before stable meaning attaches to the words of Proposition 218. Proposition 13 has been with us for 20 years, and the courts are still giving us surprising new revelations about its implications.

PROPOSITION 218 COURT CASES

In an attempt to simulate order in reporting this tangle of cases, I have grouped them into four categories:

- A. Cases Concerning Special and General Taxes
- B. Cases Concerning Special Assessments
- C. Cases Concerning Water, Sewer and Flood Fees
- D. Cases Concerning Levies Missed by Proposition 218

Cases Concerning Special and General Taxes

(1) Coleman v. County of Santa Clara

(64 Cal. App. 4th 662, 1998)

Santa Clara County once had a Transportation Authority, which levied a 1/2 cent sales tax for transportation. The California Supreme Court put the kibosh on this tax in its Guardino decision,¹ ruling that the levy was really a special tax (it was, after all, pledged to pay for a specified list of projects) and illegal without 2/3 voter approval. Desperate, judging itself unable to come up with a 2/3 vote, and unspeakably creative, Santa Clara tried something new. The county (which is a general-purpose government even under Proposition 218's tight definition) proposed to levy a 1/2 cent sales tax increase, and to put the resulting revenue in its general fund, where its use would be unrestricted. That seemed to make it a general tax. The county submitted this proposal to the voters for approval in 1996, when it was approved by 51.8% of the voters. An accompanying ballot proposal offered the voters a chance to advise the county that they would like the revenue spent on a detailed list of transportation projects. This was approved by 78% of the voters. It seems plausible that the voters saw these two measures as a package deal, and that they would be unhappy if the tax revenue were spent for other purposes.

The appellate court noted that the ballot measure for the tax clearly said that the revenue would be available for general county purposes, and would not be legally restricted by the advisory proposition. Therefore, it met the definition of a general tax, and majority approval was all that was required.

Although Santa Clara's stratagem was devised as a response to Proposition 62's vote requirements, Proposition 218 puts these requirements in the Constitution and, if anything, strengthens them. So this case sheds light on how 218's vote requirements will work.

This decision blesses a considerable loophole in Proposition 62's requirement for 2/3 voter approval for special taxes, by allowing advisory-dedicated general taxes that need only majority approval. Proposition 218's special tax requirement is closely analogous, and it

¹ Santa Clara County Local Transportation Authority v. Guardino (California Supreme Court, September 28, 1995).

seems likely that the court's reasoning would apply here as well. However, Howard Jarvis Tax Association (HJTA) takes a different view, contending that 218's tighter definition of special tax would cause courts to reject similar arrangements in the future. Recall that 218 says a special tax includes "a tax imposed for specific purposes, which is placed into a general fund."² By HJTA lights, those words describe what Santa Clara did. This disagreement will be tested, maybe soon. At least two other counties and some cities are formulating similar unspecial tax measures for the November, 1998 and later ballots. If this decision turns out to be good law in the 218ed world, many more will surely follow.

This decision was appealed to the California Supreme Court, which declined to review it on August 26, 1998.

(2) *HJTA v. City of Los Angeles*

The City of Los Angeles has long levied a business license tax. The tax was changed recently to apply to businesses conducted out of homes. The HJTA sued, noting that this change increased the city's revenue by \$6 million per year. Proposition 218 says a local government may "impose, extend or increase" a general tax only after majority voter approval. HJTA argues that Los Angeles' action was either an extension or an increase, and cannot be valid without voter approval.

Los Angeles sought to have the suit dismissed. The court did not agree. The case is going to trial.

(3) *McBrearty v. Brawley*

(Fourth District Court of Appeal, filed 12/15/97)

Brawley levied a utility users tax in 1991. In 1996, McBrearty sued to force the city to submit the tax to the voters as required by Proposition 62. The main issues were whether Proposition 62 was retroactive in the rather special sense of requiring cities to hold elections on certain taxes levied after enactment of Proposition 62 but before the Guardino decision, and whether the statute of limitations had run out on challenging a 1991 tax. In short, the court agreed with McBrearty and told the city to hold an election or stop levying the tax.

Two Proposition 218 issues came up:

- Proposition 218 says that general taxes imposed between January 1, 1995, and November 5, 1996, must be approved by the voters within two years or they become illegal. This can be understood to mean that taxes levied before 1995 are grandfathered, at least for Proposition 218 purposes. But the court ruled that it provides no protection from Proposition 62 suits.

² California Constitution, Article XIII(C), Section 1(d).

- Proposition 218 says that any tax “imposed, extended or increased” must be submitted to the voters. Unlike the Eskimos and their snow word fetish, our language is thin and imprecise when used to describe taxes. The word “imposed” could mean the action that a government takes when it first levies a new tax, or it could mean the action that a government takes each year in order to cause a tax to be collected for that year. McBrearty argued that the second meaning was intended in Proposition 218, and that since the tax was “imposed” every year, electoral approval should be required each year.

The court didn’t buy this argument, maligning it as “absurd.”

Cases Concerning Special Assessments

(4) Consolidated Fire Protection District of Los Angeles County v. HJTA

(98 Daily Journal D.A.R. 3887, April, 1998)

A Los Angeles County Fire Protection District had levied a fire protection assessment as authorized by state law.³ The statute requires that the district relevel the assessment each year. In December, 1996, shortly after Proposition 218 was approved by the voters, the district adopted a resolution to levy the assessment for the following year. Since they declined to go through the protest ballot and other requirements of Proposition 218, there was naturally a question about whether their assessment would be valid. The district went to court to validate its action. They were challenged there by the HJTA. The trial court agreed with the Taxpayers Association; the noncomplying assessment was not valid. Skipping tedious preliminaries, the district’s core argument was that it had a contractual obligation to continue to levy the assessment. The contract was between the district and the property owners. It committed the district to provide fire protection and required the district to collect the assessment to pay for that service. Proposition 218 was enacted after the contract and could not change its terms.

The court didn’t buy this theory, which was a pretty long reach. In developing its argument, the court shed light on two only marginally related matters which are probably more important than the main finding of the case. These are:

- The district’s contract argument implied that property owners could sue such as an assessment district or a Mello-Roos district if they felt they were not getting all the facilities or services to which they felt they were entitled. Since homeowners and developers are prone to this kind of unhappiness, considerable litigation would have been a likely consequence if the court had upheld this theory. The ruling makes this path somewhat less likely, although perhaps not unlikely enough to stop all future litigation.

³ Government Code Sections 50078 *et seq.*

- The court determined that the only contract ordinarily created by establishment of an assessment district was between the district and the bondholders. That contract provides that the district will levy and collect assessments and use the proceeds to pay the bondholders, who have lent the district money. That this commitment is a contractual relationship is important under Proposition 218's Article XIII(C), which allows citizens to use the initiative to remove taxes and assessments without limit. This provision raised the frightening possibility that an initiative could remove the source of money to repay outstanding bonds, leading to default. This decision perhaps implies that this is not a threat, because the initiative would have to break the district's contractual obligation to collect the assessments, in violation of the U.S. Constitution's prohibition against state and local laws which abrogate contracts.

This protective argument is not wholly bombproof. It could be argued that XIII(C) reserves the people's power to undo any tax or assessment, and that this reservation is implicitly part of the contract for all future bonds. Perhaps some future court will definitively settle this question.

(5) HJTA v. City of San Diego

(Summary Judgment April 30, 1998, Superior Court for the County of San Diego)

San Diego had been levying assessments under the "Parking and Business Improvement Area Law of 1989."⁴ This law allows cities to create districts to pay for improvements such as parking lots, street lights, parks, and decorations, and also for activities intended to promote businesses in the area, such as advertising and street music. It paid for this work by levying an annual special assessment against the business owners (as opposed to the property owners) in the district.

The law requires that the assessment be levied each year. San Diego's renewal after Proposition 218 was challenged by the HJTA, which argued that these assessments did not comply with 218's requirements, or that maybe they were really a special tax and were therefore illegal because they had not been approved by a 2/3 popular vote.

The trial court was unimpressed with this argument.⁵ It ruled that San Diego's levy was not subject to Proposition 218, emphasizing that the assessment was against the business owners, not against the property owners. The levy was not a special assessment, because

⁴ Streets and Highways Code Section 36500 *et seq.*

⁵ The text of the substantive part of the judgment is as follows:

"The Court finds as a matter of law that the Parking and Business Improvement Area Law of 1989 and Proposition 218 [California Constitution Articles XIII(C) and XIII(D)] are not in conflict. The former is based on status and the latter is based on real property. There is no incident of real property ownership in a license to do business, which is an interest in real property. There is no incident of real property ownership in a license to do business, which is an interest in personal property. There is no direct relationship to property ownership between the services sought to be provided and the business levy by the City. The assessments provided for in the Parking and Business Area Law of 1989 are not assessments, special taxes or fees as defined by Articles XIII(C) and XIII(D)."

special assessments under 218 were levies against property owners. The levy was not a fee or charge of the type restricted by 218, because 218's limits applied only to fees and charges "as an incident of property ownership." The court was not explicit about why the levy was not a special tax under 218, but perhaps felt that 218 applied only to special taxes levied against property.

If the trial court is upheld, its judgment offers at least two ways that local agencies could raise money that would probably be surprising to 218's sponsors:

- The judgment proposes that there is a category of special assessment levied not against property, but against users of property, which is exempt from Proposition 218. In this case, an assessment levied against businesses (who might merely rent real property) was exempt. But the same principle would allow assessments to pay for residential facilities and services if levied against the occupants of houses and apartments, rather than against their owners.
- The judgment may imply that there is a category of special tax levied not against property, but against users of property, which is exempt from Proposition 218, including 218's 2/3 vote requirement. Of course, there are also 2/3 vote requirements for special taxes in Proposition 13 itself and in Proposition 62, but those seem not to have come up in this case. This is all admittedly airy speculation, because the court totally ignored the relation between this levy and 218's special tax provisions.

The HJTA is appealing the decision in this case.

(6) *HJTA v. City of Riverside*

(Judgment entered April 24, 1998, Superior Court for the County of Riverside)

Riverside levied citywide assessments under the Landscape and Lighting Act of 1972⁶ to pay for street lighting and some road maintenance work. Since these assessments are also levied annually, the city sought to grandfather the assessments it had been levying. It put the matter to the voters in the June, 1997 election, and received strong majority approval.

HJTA was not happy, and sued the city. They made two main arguments:

- Because these assessments were city-wide, they did not meet 218's requirement that assessments can only be proportional to "special" benefits to particular parcels of property. A benefit which is citywide is probably not so special. If not special assessments, these levies were presumably special taxes and required 2/3 popular approval before they could be levied.
- Proposition 218 offers several ways that special assessments can be grandfathered. One is if they were approved by at least a majority vote before a date specified

⁶ Streets and Highways Code Section 22500 *et seq.*

somewhat ambiguously in Proposition 218. HJTA argued that if these levies were assessments after all, then the election approving them was too late. HJTA maintained that an election had to be before November 5, 1996 (when Proposition 218 was adopted). Riverside argued that before July 1, 1997 was good enough.

The trial court was not interested in either argument. Instead, it looked at another of Proposition 218's grandfathering possibilities for assessments, which said assessments for certain very ordinary public facilities including sidewalks, streets, sewers, and water systems which existed in November, 1996, could continue to be levied. Street lighting is not on the list. Nonetheless, the court held that the assessments for street lights could continue to be levied, apparently on the theory that street lighting is part of "streets" as used in Proposition 218 (the judgment itself offers no clue as to the court's reasoning, so this interpretation is based on impressions of spectators).

If upheld, this decision sheds light on a couple of 218 issues:

- Many cities pay for street lighting with this assessment act. They will be pleased to know that they can continue to do so without further taxpayer involvement.
- Proposition 218 was intended to substantially change the way assessments worked. Assessments were to be levied for a narrower set of public works than before (only those that produced "special benefits") and, most revolutionary, the burden of proof was on the public agency to prove that the assessments were actually proportional to benefits. In this case, anyway, the judge appeared unwilling to entangle himself in this tedious and elusive conceptual framework. If that proves predictive, 218 will change assessment practice less than its framers probably intended.

HJTA has appealed this decision.

(7) *HJTA v. Cathedral City*

The county levied a county service area charge for "miscellaneous extended services" for several services, including police and fire protection, in an area that was eventually incorporated as Cathedral City. The HJTA sued, arguing that this levy was either a tax or an assessment, and either way had not been properly levied under Proposition 218 and must be void. The city argued that the levy was an assessment, and had been grandfathered. Proposition 218 says that assessments that were approved by the voters before November, 1996 (or maybe even later, a point in dispute) may continue to be levied. In this case, the voters did not exactly approve the assessment, but they did vote on the incorporation which sort of included the assessment.

This case delves into a mysterious area of local financing law. County service areas (CSAs) are sections of a county where a higher level of service is provided by the county, and where money is raised to pay for that additional service. Before Proposition 13, an additional property tax rate was levied in the area. After Proposition 13, and after a time

when there was really no way to raise additional money within the CSA, some counties experimented with “benefit charges,” which are not exactly charges and not exactly benefit assessments.⁷ The legal status of these charges even before Proposition 218 was somewhat cloudy. Perhaps decisions arising from this case will lend clarity.

The Superior Court case is still pending.

(8) Irvin Grant and George Popovich vs. City of Torrance and Torance Street lighting and Landscaping District

(Case No. BC180441, settled on February 4, 1998.)

Torrance levied street lighting assessments throughout the city in August, 1997. Grant and Popovich made several objections under Proposition 218, including that the assessments were not proportional to the benefit to each parcel, that the city had no engineers report to substantiate the assessments, and that the protest procedure used by the city did not conform to Proposition 218.

Torrance settled, backed off the assessments, and paid attorneys’ fees.

The reporting of this settled case is sketchy. The apparent lesson is that red-handedly ignoring Proposition 218 leaves a city in an awkward position.

Cases Concerning Water, Sewer, and Flood Control Fees

(9) HJTA v. Modesto

Modesto levies charges for water and sewer service. The city used to charge a “franchise fee.” That means the city diverted some of the water and sewer revenue into the city’s general fund. This is a common practice throughout California, with several kinds of service charges, and supported by several rationales. In this case, the city renamed its franchise fee as “return on capital.” The apparent theory is that the city advanced city funds when water and sewer facilities were constructed, and the money diverted is in repayment for those advances. The HJTA argues that any water or sewer fee in excess of the actual cost of providing the service is a tax, and can only be collected after approval by the voters.

This case may explore at least two interesting questions:

- It is unclear whether water and sewer fees, especially if they are based on metered or estimated usage, are fees levied “as an incident of property ownership” and therefore subject to Proposition 218’s protest hearing and other requirements, or if they are user fees having nothing to do with property ownership, and therefore

⁷ Government Code Section 25210.77a.

exempt from Proposition 218 completely. This is a pretty important and quite ambiguous issue throughout California. Perhaps this case will clarify.

- It is unclear whether local governments can levy “franchise fees” such as this, or under what circumstances they can. Perhaps this case will clarify.

The case may be going to trial, although the city may instead just agree to put the levy to a popular vote.

(10) HJTA v. City of Los Angeles

This is another franchise fee case, this time for city sewer fees. It is going to trial.

(11) Sacramento’s Franchise Fee.

Sacramento also levied a franchise fee on its water and sewer systems. In this instance, HJTA threatened to sue, and the city agreed to put the levy on the June ballot. The voters approved.

(12) Keller v. Chowchilla

Chowchilla levied a water standby charge. That is, property owners who had not yet developed and connected to the water system’s pipe were charged an annual amount, on the theory that they were paying their share of the capital cost of making that service available whenever they were ready to use it.

Keller argued that Proposition 218 explicitly said that standby charges could only be levied as special assessments, after the hearing, protest, and other procedures in Proposition 218 were followed. Since Chowchilla had not followed those procedures, the charges were invalid.

The Superior Court agreed with Keller. The charges were invalid.

The case is on appeal.

(13) HJTA v. Big Horn - Desert View Water District

(Judgment dated 3/30/98, Superior Court for the County of San Bernardino, East Desert District)

This water district also levied a standby charge, in this case for \$22 per acre for properties within 660 feet of a main water line. An unhappy taxpayer rounded up what he thought were sufficient signatures on initiative petitions to force a popular vote on the charge. There was an initial dispute about the number of signatures required. The water district’s

statute required a petition signed by 10 percent of the registered voters. Proposition 218 says initiatives to reduce taxes and fees need be signed by only 5 percent of those who voted in the last gubernatorial election, or roughly 3 percent of the registered voters. The district eventually reluctantly agreed to accept the initiative petition signed by the lower number of voters.

A second dispute concerned the form of the initiative, which somewhat airily called for repeal of the two district resolutions which levied the standby charges. The district argued that this initiative was not in proper ordinance form, and would not be intelligible to the voters. It declined to put the matter on the ballot. HJTA sued. The municipal court judge who heard the case ruled that the district must put the measure on the upcoming general election ballot. The judge observed that although the initiative petition was not drafted as an ordinance, its intent was sufficiently clear that the board of the district could draft an ordinance to carry out its purposes. He embellished that the board has “the experience, knowledge, and legal resources to comply with the intent of the initiative. Once the will of the people is known, it is up to the governing authority to comply with that intent.”⁸

The dispute has escalated since the court decision. Disgruntled taxpayers have qualified initiatives to repeal most other fees of the district, to reduce the district’s operating budget substantially, and to prohibit the district from undertaking any capital improvement without a popular vote.⁹

*(14) HJTA v. City of Upland*¹⁰

Upland levied a storm water drainage fee some months before Proposition 218 was approved. The fee has been challenged by HJTA on several grounds that raise interesting questions. These are:

- Public property is exempt from Upland’s fee. HJTA argues that since the full cost of the service is collected from the private property owners, they are subsidizing the public parcels. This arguably violates 218’s requirement that fees be allocated based on the actual cost of providing the service to each parcel.
- Upland allegedly uses the proceeds of the fee for storm drain maintenance, and also for tree trimming, street sweeping, and weed cutting. HJTA argues that the city claims to have levied the fee under authority of Section 5471 of the Health and Safety Code, which allows fees only for “water systems and sanitation, storm drainage, or sewerage

⁸ *Thomas Bullion and HJTA v. Bighorn-Desert View Agency*, Superior Court, County of San Bernardino, April 14, 1998.

⁹ Reported by Ron Bangert, General Manager of the Bighorn-Desert View Water Agency, July 13, 1998.

¹⁰ My reporting of this case relies on information from Tim Biddle at HJTA. Upland’s city manager declined to return a telephone call.

facilities.” Tree trimming, street sweeping, and weed cutting seem to fit awkwardly under that authorization.

- Homeowners in two gated communities are required to pay the fee, even though they allegedly pay for these services through their homeowners’ association dues. This practice may violate 218’s admonition that “No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question.”¹¹ Although this language has mostly been thought of as prohibiting standby charges, it takes on a potential new meaning in this context.
- Apartment owners are charged based on the number of apartment units, which HJTA says is not related to storm water run-off or drainage costs. In particular, since the apartments are mostly two story buildings, the run-off from each unit might be roughly half of what it would be for a house (although parking pavement might complicate that). An interesting question raised by this argument has to do with the degree of precision required by 218. The proposition requires that charges “not exceed the proportional cost of the service attributable to each parcel.” Does that mean that only “rough” proportionality is needed, or is high refinement required?

The case is just beginning its discovery process.

(15) Raleigh Enterprises v. Las Virgenes Municipal Water District

(Los Angeles County Superior Court Case No. VC153057)

This water district has an “inclining block rate structure,” which means that the heavy water users pay a higher rate for additional water than light users. This arrangement is intended to encourage conservation, and seems to have been designed with residential users in mind. The district was sued by an avocado, grape, and citrus farmer, who paid for most of his water at the highest rate and was consequently unhappy. Among other arguments, he contended that this rate structure violated Proposition 218’s requirement that fees be apportioned based on actual costs of service to each parcel. He felt his high fees were subsidizing small urban users.

The court’s decision included two conclusions relating to Proposition 218:

- The court agreed with an Attorney General’s opinion (summarized on p. 14, no. 2) that water charges which are based on metered use are not based on property ownership, and therefore are not subject to Proposition 218. Since this is a metered use case, Proposition 218 simply does not apply.
- The court then seems to have yielded to creative impulse, and offered the notion that Proposition 218’s fee restrictions apply only to fees for services, not to fees for

¹¹ Article XIII(D), Section 6(b)(4).

“natural resources,” such as water. It is difficult to locate the source for this concept in 218’s text, and presumably it is another surprise for HJTA.

Cases Concerning Levies Missed by Proposition 218

(16) Action Apartment Association v. Santa Monica Rent Control Board

(Judgement entered August 5, 1998, Court of Appeal, Second District)

Santa Monica is noted for its rent control program. It imposed a fee on landlords to pay for the cost of administering the program. Landlords sued, complaining that this was a fee “imposed as an incident of property ownership” and had not met Proposition 218’s requirement that such fees be subject to a protest hearing and an election.

The Superior Court held that Santa Monica’s fee was not covered by Proposition 218, because it was a “regulatory fee,” a conceptual category not mentioned in Proposition 218, so the city was free to continue to collect this charge. The recent appellate court decision upholds the trial court and the city. The unpublished opinion cites two earlier California cases which said that certain fees used to pay the administrative expenses of programs are not taxes and not subject to Constitutional limits on the taxing power. It is less clear about why this is not a fee “incident to the ownership of property.” It says, inscrutably, that this fee is “imposed only because property is used for rental, and is not ‘incident to property ownership.’” It also notes, as though somehow decisive, that “The fees are not imposed on all property owners—only that small subset of owners who operate rental businesses.”

This interpretation is also probably surprising to Proposition 218’s drafters. It blesses a potentially substantial category of additional fees. Reaching a little, a fee to pay the cost of running the police force, the courts, the district attorney, the public defender, and the jail could perhaps be understood as a kind of grand regulatory fee.

(17) The Sacramento Kings Case

Sacramento negotiated a complicated package to finance an arena to help keep its basketball team in town. It included a provision that required the team owner to impose a ticket surcharge under certain circumstances if needed to pay debt service on the bonds that were sold. An unhappy citizen sued, arguing that this surcharge was an illegal tax, fee, or assessment because levied without observing the rites set out in Proposition 218.

The court said the surcharge was none of these, presumably on the theory that it was not a governmental levy but only a matter of private contract.

Although this instance involves an odd niche, the concept has potential broad meaning. If water fees levied by private utility companies are similarly immune from Proposition 218, perhaps even if pledged to a public or semi-public purpose, then local agencies may find an

important reason to “privatize” their water and sewer systems, and perhaps other local functions as well.

(18) F&L Farm Co. v. City Council of the City of Lindsay

(98 Daily Journal D.A.R. 8501)

Lindsay, famous for olives, has long had a problem with olive brine leaking from city treatment facilities into the groundwater. Nearby farm owners claimed the city had “taken” or damaged their property by salting their wells, and won. The city was ordered to pay some \$5 million in compensation. The city has not paid up, arguing that the city lacks the authority to raise the needed money because of Proposition 218.

The appellate court recalled much earlier case law holding that localities may ignore California’s constitutional debt limitation and sell bonds in order to satisfy court judgements of this kind. The contemporary form of this question is: can a locality ignore Proposition 13, the Gann expenditure limitation in Article XIII B of the constitution, and Proposition 218 in order to satisfy a court judgement? The answer, pregnant with loophole, is “yes.” The city is free to levy taxes and fees, despite these initiatives, to raise the money needed to satisfy the court order.

In this case, the court really only held that this sweeping waiver applied to satisfying “takings” or “inverse condemnation” judgements. But the court’s words are much broader. For example, it says Proposition 218’s requirement for 2/3 popular approval for local special taxes applies only to taxes used for “specific purposes of local governments.” The 2/3 vote requirement does not apply to spending for “discharge of a duty imposed by law.” This may mean, for example, that counties that are under court order to improve their jails, or maybe hospitals, or to protect endangered species, could levy taxes or fees willy-nilly to satisfy those orders. The possibilities are quite amazing.

Needless to say, this case has caused indignation at HJTA.

ATTORNEY GENERAL OPINIONS RELATING TO PROPOSITION 218¹²

The Attorney General has offered three official opinions that seem to relate to Proposition 218, although one does not mention that relation. While AG opinions do not carry the weight of appellate court opinions, they are respected and thoughtful and a significant part of the debate. These opinions are summarized below:

1. Opinion 97-406 (July 14, 1997)

This opinion examines whether a county water district can adopt a lower price structure for public agency customers, such as a fire district. The opinion concludes that a water district can charge public agencies lower water fees than it charges its private customers.

The analysis is largely an examination of several pre-Proposition 218 cases concerning utility rate structures. Proposition 218 is not mentioned. Perhaps it should be. If water charges are property related service charges subject to Proposition 218 (a matter still in controversy), then complications arise. In particular:

- Proposition 218 decrees that fees must “not exceed the proportional cost of the service attributable to the parcel.”¹³ If the total of the fees levied pays the full cost of the water service, and if service is provided to a fire district, for example, for free, then it seems likely that the paying properties are paying their own proportional cost and a share of the fire district’s proportional cost. That might be understood to violate 218.
- Proposition 218 says that no fee may be imposed for “general governmental services including, but not limited to, police, fire, ambulance. . . .”¹⁴ An “excess” water fee on a private property owner to subsidize water service to a fire district could be understood to violate this directive.

2. Opinion 97-302 (July 14, 1997)

This opinion examines whether a water district can use a “tiered water rate structure,” which involves charging a larger amount per unit of water as the level of consumption increases. It concludes that such a rate arrangement is just fine.

The thread of argument is that Proposition 218 only regulates water charges that are an incident of property ownership. Water charges which are based on metered use are not based on property ownership, but rather on water use. Therefore they are not subject to Proposition 218.

¹² These opinions can be obtained from the AG’s web site at <http://caag.state.ca.us/opinions>.

¹³ California Constitution, Article XIII(D), Section 6(b)(3).

¹⁴ California Constitution, Article XIII(D), Section 6(b)(5).

HJTA's attorney published a testy rebuttal to this opinion, arguing that Proposition 218's drafters intended to cover water and sewer fees.¹⁵

It is hard to know which view is correct (the HJTA view as to the intent of the drafters is presumably correct, but not definitive as to the ultimate meaning of Proposition 218). The proposition uses several very slippery phrases in describing the set of fees and charges covered, including a fee "imposed by an agency . . . as an incident of property ownership, including user fees or charges for a property-related service."¹⁶ It adds: "Reliance by an agency on any parcel map . . . may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership. . . ."¹⁷ For clarity, it adds: "'Property-related service' means a public service having a direct relationship to property ownership."¹⁸ Depending on the inclination of the interpreter, these multiple, somewhat inconsistent definitional clues could support at least several very different meanings:

(a) They could include all fees for all public services commonly used together with real property to produce a useful service, such as from a residence, a factory, or a farm. This would include water, sewer, fire, police, the courts, property recording, schools, roads, snowplowing, and the national guard. The HJTA view seems to go in this direction, but warily.

(b) They could include all fees for public services that protect the ownership of property. In the narrowest case, this includes mostly fees for recording title and some court fees. Perhaps it could also include fire and police (although 218 says we can't have property-related fees for fire and police).

(c) They could include fees for public services where the fee is apportioned on a per parcel basis (and therefore based purely on the ownership of property, not on the amount of service used.) If a water fee is set at a flat rate per city lot, it is levied as an incident of property ownership. If the water fee is based on metered usage, it is not. This seems to be the Attorney General's view.

The courts will need to clarify this. The outcome will matter.

3. Opinion 97-1104 (March 5, 1998)

Vallejo's Sanitation and Flood district levies separate fees for its sewer and storm drain systems. The storm drain fee is levied only on parcels which are connected to the sanitary sewer and pay a sewer fee. So an empty lot, or a parking lot, pay nothing for storm drainage.

¹⁵ "Water Rates under Proposition 218" by Jonathan M. Coupal and Jack Cohen, at <http://www.caltax.org/218water.htm>.

¹⁶ California Constitution, Article XIII(D), SEC. 2(e).

¹⁷ California Constitution, Article XIII(D), SEC. 6(b).

¹⁸ California Constitution, Article XIII(D), SEC. 2(h).

The opinion reaches three interesting conclusions:

- (a) This fee arrangement does not satisfy Proposition 218's requirement that fees not exceed "the proportional cost of the service attributable to the parcel." The opinion somewhat snidely notes that the sewer fee is based on the amount of sewer use attributed to the parcel, and that the Attorney General had "not been informed of any relationship between sewer usage and the District's proportional cost of providing storm drainage service to a particular parcel."
- (b) The district proposes to replace this fee with a new one based on the impervious area of each parcel. The opinion easily concludes that this new fee is "property related," and therefore subject to proposition 218, because it is based on the impervious area of the parcel and is "intended to serve directly the property." Curiously, the impervious area method is probably an attempt to scale the fee to storm water run-off from each parcel, which could be seen as the storm water equivalent to metered water use. In this respect, this opinion seems not quite consistent with the previous one.
- (c) Proposition 218 requires that increased fees be voter approved, except for fees for "sewer, water, and refuse collection." The opinion concludes that storm drainage is none of these, and so the proposed new fee structure must be voter approved.