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Tax Issues



Proposition 218: The Drafters' Statement of Intent

By Jonathan Coupal

Editor's Note: Following is the statement of intent from the drafters of Proposition 218, the "Right to Vote on Taxes Act," which was approved by voters last November. Three main elements of the initiative - general and special taxes; assessment reform, and property-related fees and charges - are addressed in this statement. It was issued in January by the Howard Jarvis Taxpayers Association, primary proponent of the initiative.



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VOTER APPROVAL FOR LOCAL TAX LEVIES.

Comment: This section sets forth provisions similar to those found in Proposition 62, Government Code Section 53720, et seq. Although Proposition 62 was upheld by the California Supreme Court in Santa Clara County Local Transportation Authority v. Guardino (Howard Jarvis Taxpayers Association, et al., Real Parties in Interest) (1995) 11 Cal.4th 220, that initiative was a statutory initiative and charter cities, for the most part, have refused to follow its mandates. On the other hand, there is no dispute that Proposition 218 applies to charter cities.

Article XIII C is added to the California Constitution to read:

SEC. 1. Definitions.

As used in this Article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special District" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

Comment: The terms "local government" and "special district" are defined broadly so as to encompass all government entities other than the state itself. These definitions are more expansive than those set forth in Proposition 62.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

Comment: The purpose of this definition is to require an analysis which looks to the purpose of the funding, not to the name on the account. See, e.g., Rider v. San Diego (1991) 1 Cal.4th 1. This provision is intended to prevent local governments from levying special taxes without a two-thirds vote simply by laundering the proceeds through a general fund. To this extent, the revised definition reverses Neecke v. City of Mill Valley (1995) 39 Cal.App.4th 946. It also would prohibit schemes which purport to authorize a "general" tax with a simple majority vote while, at the same time, propose a companion "advisory" vote on how the money should be spent. Such taxes retain their "special" characteristics under Proposition 218.

SEC. 2. Local Government Tax Limitation.

Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

Comment: This provision is similar to the language of the Supreme Court in the Rider v. San Diego decision recognizing that special districts, by their special nature, have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

Comment: Under Proposition 218, a tax measure put to the voters could incorporate future increases and, if the ballot measure is approved, then the agency would not have to seek additional authorization from the voters for those increases. Also, except in cases of emergency, tax-measure elections are to be consolidated with regular elections at which members of governing bodies are chosen. A unanimous vote is needed to declare an emergency but, consistent with existing case law, this should be interpreted as a unanimous vote of those present at the meeting. The concern is that the nature of the emergency might keep some members of the local legislative body from attending a meeting.

(c) Any general tax imposed, extended or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

Comment: This provision of Proposition 218 applies to any general fund tax levied after 1994. Those taxes imposed, extended or increased without voter approval on or after January 1, 1995 which have not received majority voter approval must be approved by a simple majority vote of the electorate by November 6, 1998. The reason the drafters designated an effective date of

January 1, 1995 was to prevent a "rush" of new taxes imposed prior to November 1996 designed to avoid voter approval.

The designation of the January 1, 1995 date does not, in any way, affect any potential claim against a local government entity for violations of Proposition 62. Taxes imposed prior to that date without voter approval may still be subject to challenge under that initiative as well as the recent Guardino decision.

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

Comment: This section states that any tax that is levied for a specific purpose must obtain a two-thirds vote of the electorate. These taxes include any tax imposed for a specific purpose or purposes including, but not limited to, local sales taxes or parcel taxes designated for specific purposes.

SEC. 3. Initiative Power For Local Taxes, Assessments, Fees and Charges.

Notwithstanding any other provision of this Constitution, including, but not limited to Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

Comment: This section merely "constitutionalizes" the principles of Rossi v. Brown, (1995) 9 Cal.4th 688, a recent decision of the California Supreme Court upholding the right of the electorate to use the local initiative power to reduce or eliminate government-imposed levies via the initiative power.

A concern has been expressed with respect to this provision's impact on existing and future bonds. The drafters believe these concerns are not well-founded. First, with respect to existing bonds, the impairment clause of the federal Constitution (U.S. Const., Art. I, Sec. 10(1)) would prevent a revenue stream protected thereunder from being jeopardized by an inappropriate

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use of the initiative power. Notwithstanding the clear application of federal law, however, Proposition 218's detractors contended, during the campaign, that there is no expressed exclusion for existing bonds under this provision. Because that part of the Right to Vote on Taxes Act dealing with assessment reform set forth in proposed Article XIID does have such an exemption, the implication is that the lack of one in Section 3 was intentional. There are two responses to this argument. First, if anything, the protection for existing assessments that are used to repay bonded debt reflects a policy of protecting those instruments. Second, the reason that there was an expressed exception in the assessment provisions is that those provisions were dealing with retroactive application of the initiative. Because of that, a special effort was made to carefully detail those exemptions.

In any event, it is clear that the impairment clause would prevent extension of the initiative power to jeopardize a dedicated revenue stream used to pay existing bonded indebtedness. Indeed, the California State Treasurer called opponents of Proposition 218 "irresponsible" for their failed effort to make the credit worthiness of existing bonds an issue during the campaign.

Proposition 218 does not greatly expand the initiative power. This power historically was intended to apply to the repeal of taxes. See, Rossi v. Brown, supra at 699-705. It was not until the Meyers line of cases that this even became an issue. But the Supreme Court in Rossi expressly repudiated Meyers and its progeny (Rossi at 705-711) and the goal of the proponents has simply been to place this repudiation in the California Constitution.¹

The next issue is whether Section 3 has an impact on future bonds. For a number of reasons, any detrimental impact is wholly speculative. First, as noted above, the initiative power could not be used to impair bonds that are already sold (even if they are sold after Proposition 218 becomes effective). The concern that the new provision will put potential bond holders "on notice" that the revenue stream could be eliminated is not well-founded. The concerns expressed, in short, do not take into account the fact that the people's power of initiative is a co-extensive power with that of the legislative body. See e.g., Carlson v. Cory (1983) 139 Cal.App.3d 724 and DeVita v. County of Napa (1995) 9 Cal.4th 763. If the legislative body could be enjoined from impairing contractual rights, then so could the people.

The above does not leave the taxpayers without a remedy, however. If the taxpayers wish to preclude or limit future rate or

tax increases via an initiative, they could do so prior to any valid, legally binding commitment being made by the legislative body with respect to a particular revenue stream. For example, the one scenario where our initiative could in fact have an impact is when the bonds are authorized, but not sold. Presumably, at that point, the legislative body could decide not to sell the bonds and no "impairment" would be at issue. If this is true, then there is no policy reason why the people, using the initiative power, could not be able to impact the sale of the bonds in a similar fashion. It should be noted, however, that since Rossi was decided more than a year ago, the drafters are aware of no instance where the initiative power was even threatened to be used to stop the sale of unsold bonds.

SECTION 4. ASSESSMENT AND PROPERTY RELATED FEE REFORM.

Comment: This is the third major element of Proposition 218 which provides significant reforms in the area of assessments, fees and charges.

Article XIID is added to the California Constitution to read:

ARTICLE XIID

SEC. 1. Application.

Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees, and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this Article or Article XIIC shall be construed to:

- (a) Provide any new authority to any agency to impose a tax, assessment, fee or charge.
- (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.

Comment: The purpose of this provision is to leave unaffected existing laws relating to the imposition of developer fees. Although there have been abuses in this area by local governments (resulting in substantially increased housing costs), the focus of Proposition 218 is on those levies imposed simply by virtue of property ownership. Developer fees, in contrast, are imposed as an incident of the voluntary act of development.

Proposition 218 should not significantly impede the ability of developers to employ "land secured financing" as a means to finance infrastructure. While assessments on developers are to be treated as any other assessment, it should be noted that Mello-Roos taxes (as special taxes consistent with the provisions of Proposition 13) will still be available to developers.

One significant impact of Proposition 218 on developers is that a tax imposed on development would be subject to voter approval just like any other tax. For example, in Centex Real Estate Corp. v. City of Vallejo (1993) 19 Cal.App.3d 1358, the court upheld the legality of a so-called "excise tax" on development levied by a charter city outside the restrictions that state law places on the imposition of developer fees. Because such levies are conceded to be taxes (levied solely for the purpose of raising revenue), they would fall under the purview of Proposition 218's voter approval requirement. (Such taxes also violate Proposition 62. However, Proposition 218 does not present the yet unresolved issue regarding whether the voter approval requirements of Proposition 62 are enforceable as against charter cities).

(c) Affect existing laws relating to the imposition of timber yield taxes.

Comment: These taxes are already addressed in the California Constitution and by legislation. The intent of Proposition 218 was to leave this entire area of law unaffected.

SEC. 2. Definitions.

As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction or replacement of a permanent public improvement by an agency.

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"...services should be broadly construed to include levies imposed for services or regulatory activities which have a nexus to the beneficial use of property including rent control fees."

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service.

Comment: Included in covered fees and charges are levies for property related services. Such services should be broadly construed to include levies imposed for services or regulatory activities which have a nexus to the beneficial use of property including rent control fees. "Fees," for purposes of this article, are limited to levies imposed as an incident of property ownership or fees for property related services. DMV fees, statewide fees, fines, and recreation fees such as park gate fees, are not affected. However, fees for sewer, water and refuse collection, because of their connection to property, are included.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

Comment: Under this definition, if a tenant of real property is directly liable to pay an assessment, that tenant would have the right to protest and vote. This will depend on the terms of the lease. "Direct pass-throughs" are more common in commercial leases than in residential leases. Moreover, it would not be inappropriate for the Legislature to provide the specific guidelines with respect to the duties of the agency and property owners for the implementation of this provision.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(I) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

Comment: What constitutes a special benefit will depend on the nature of the capital improvement or service being provided. It must be more than a mere increase in the value of the property because, arguably, the availability of any public service could provide additional value. It must be a direct and special benefit conferred on the property that exceeds the benefit conferred on the public or large or even to other similar properties.

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited.

Comment: This section provides an exclusive list of those levies that can be imposed on real property.

(a) No tax, assessment, fee or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A of this Constitution.

(2) Any special tax receiving a two-thirds vote pursuant to Article XIII A, Section 4.

Comment: Proposition 218 permits special taxes with a two-thirds vote consistent with Proposition 13. Although there remain significant policy issues with respect to any non-ad valorem property tax, the authors of Proposition 218 realized it would be difficult to repeal existing statutory authorization for special taxes on property as long as those taxes secured the requisite two-thirds vote. General taxes on property are not permitted on property under existing California Constitutional principles. (Article XIII, Section 1).

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

SEC. 4. Procedures and Requirements for All Assessments.

(a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that such publicly owned parcels in fact receive no special benefit.

Comment: These requirements for assessments are similar to those imposed by traditional assessment law. The overall purpose of this section is to permit assessments to be used, once again, as a legitimate financing mechanism for capital improvements and services that provides particular benefits to property and not just a means to impose flat rate parcel taxes. These requirements are: assessments must be proportional to the benefit; only special benefits are assessable; and public properties must pay their fair share. Historically, benefit assessments have also been levied on public properties. (See, e.g., Municipal Improvement Act of 1911). Only in recent years when assessments have been used to impose what are, in effect, parcel taxes, have public properties received blanket exemptions from assessments. Under Proposition 218, if public property is benefited in the same manner as private property, then it must be assessed.

(b) All assessments must be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

Comment: This requirement is consistent with traditional assessment law. Only since Proposition 13 have non-engineers been able to prepare engineers' reports."

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of

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such payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

recent years to the detriment of taxpayers."

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of any such ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

Comment: Notice requirements for assessments have been substantially liberalized in recent years to the detriment of taxpayers. Proposition 218 requires mailed notice, not just publication in a newspaper. Mailed notice would also include a ballot to be returned by the property owners as more fully described below.

Notice of Proposed Assessment: *The procedures for processing and tabulating protests against a proposed assessment under Proposition 218 are largely set forth in the initiative. Under Proposition 218, each property owner subject to a proposed assessment must receive a written notice of the proposed assessment and a ballot to be returned to the agency indicating support or opposition to the proposed assessment.*

The notice, ballot, and return envelope must be mailed to property owners at least 45 days before the required public hearing on the assessment. During the 45 days between the time the notice is mailed and the hearing is held, the engineer's report and all other pertinent materials or public records must be made available to property owners for their review, along with the address where they may review the documents. The notice must also set forth:

1) The amount proposed to be charged as an assessment against the specific parcel.

- 2) *The amount proposed to be charged as an assessment to the entire district.*
- 3) *The length of time the proposed assessment will be in place.*
- 4) *The reasons for the assessment and the grounds upon which the proposed assessment for the parcel was calculated.*
- 5) *The date, location and time of the required public hearing.*
- 6) *A summary of the protest procedure, including instructions for the completion and return of the ballot.*

Drafters' Suggested Procedures:

Ballot: The ballot should remain sealed with all pertinent property owner information on the outside of the envelope so that both the signature and the information can be verified by the tabulator before the envelope is opened. The envelope should include parcel number, signature, address, sworn declaration, etc. The ballot should include the agency's address (or a self-addressed envelope, stamp at agencies discretion) for return of the ballot.

Tabulation Procedures: Ballots should be opened and tabulated at the end of the public hearing. Ballots can be mailed to the agency or delivered personally to the agency prior to actual ballot tabulations. Ballots are tabulated by adding the amount of the assessment on each ballot indicating either approval of, or opposition to, the assessment. If the dollar amount representing the consenting ballots exceeds the dollar amount reflective of the opposing ballots, the assessment may be imposed. In the event of a tie, the assessment cannot be imposed.

Ballots should be retained by the agency for a sufficient period of time to permit resolution of disputes involving the ballot process. Also, nothing in Proposition 218 prohibits the use of independent private firms or public agencies to contract with the levying agency to administer the ballot process. Thus, a local agency could contract either with an accounting firm or a county registrar of voters for this purpose.

Preprinted ballots in the following format are recommended:

Parcel No. [preprinted from assessors tax roll]

**"...limiting the
ability to protest
assessments to
those who own**

Record Owner: [preprinted from assessors tax roll]

Address: [preprinted from assessors tax roll]

____ Yes, I approve of the proposed annual assessment of \$
[preprinted] on the parcel identified on this ballot.

____ No, I do not approve the proposed assessment on this parcel.

*Signature of Record Owner or Authorized Representative in the
case of property owned by non- individuals.*

As previously noted, the Legislature may wish to provide additional details with respect to those tenants of real property who, by virtue of their lease, are directly obligated to pay an assessment. The Drafters do not recommend legislation which places the burden of determining who has the right to protest an assessment on the public agency. One possible solution is a statute providing that the property owners have an affirmative duty to inform tenants, and transmit the ballots, in those situations where the tenants are financially responsible for the payment.

Legal Issue Regarding Right to Vote

During the campaign, opponents of Proposition 218 claimed that the initiative would deprive electors of the right to vote by giving corporations (including foreign corporations) more voting power than individual voters or property owners. However, limiting the ability to protest assessments to those who own property is consistent with over one hundred years of assessment law. Similarly, Proposition 218's specific provision of "weighting" the protest votes according to the amount of the assessment is also consistent with the "weighting" formula of some existing statutes. See, e.g. Fire Suppression Assessments, Gov't Code 50078, et seq. This formula was selected because it the most reflective of the policy that those who have to pay should have the right to affect the decision of whether the levy should be imposed. Moreover, some of the other existing "weighting" formulas, such as those based on acreage, led to some strange and inequitable results. The County of Los Angeles' park assessments are prime examples.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The

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agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

Comment: Although this provision shifts the burden of proof in taxpayers' favor on the issue of benefits to property, it is consistent with some current case law. See, e.g., Beaumont Investors v. Beaumont-Cherry Water Dist. (1985) 165 Cal.App.3d 567.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by Section 4(e).

Comment: Under existing law, it is not a violation of the right to vote to limit elections to property owners if the district provides only a narrow, property related service. So. Cal. Rapid Transit District v. Bolen (1992) 1 Cal.4th 654.

SEC. 5. Effective Date

Comment: Although titled "effective date," this section has some important exceptions regarding the requirements for assessments. If one of the following exceptions does not apply, then an existing assessment must cease by July 1, 1997 unless ratified by the property owners.

Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all

existing, new or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

Comment: An assessment is deemed "existing on the effective date of this Article," even if it is the type of assessment which comes up for annual renewal. As long as the assessment rates and methodology remained the same from year to year, the fact that the assessment is "imposed" annually would not necessarily trigger applicability of the requirements of this Article. This would be true even if the total revenue to the district increased due to changes in land use for specific parcels (e.g., newly-created or improved parcels). Again, as long as the assessment rates and methodology remain the same, an increase in revenue as the result of land use changes would not trigger applicability of Section 4. However, the procedures and approval process of Section 4 would apply to the entire assessment in the event the assessments were increased either by the rate of assessment or by a change in methodology.

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

Comment: This is the "traditional purposes" exception. These existing assessments do not need property owner approval to continue. However, future assessments for these traditional purposes are covered. The reference to "streets" does not include street lighting.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

Comment: This provision exempts most land secured financing arrangements used by developers.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would

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violate the Contract Impairment Clause of the Constitution of the United States.

Comment: Even an amendment to the California Constitution cannot impair a contract protected by the federal constitution. However, this exception can only be used for bonds that are actually protected by the impairment clause. Certificates of Participation and other creative debt instruments would not be protected. Moreover, in order to qualify for this exception, the assessment levied would have to be specifically tied to the repayment of bonds.

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assessments."**

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

Comment: Although the exception for assessments previously approved by the voters will permit the continued collection of some particularly illegitimate assessments, requiring an additional approval process would be redundant. It should also be noted, however, that the vote necessary to qualify for this exception must be binding. Advisory votes are insufficient.

SEC. 6. Property Related Fees and Charges.

Comment: The purpose of this section is to prevent the exploitation of "fees" as a means to avoid the new restrictions on assessments. Because flat rate parcel taxes have avoided the strictures of Proposition 13 simply by being called "assessments," the drafters are concerned that the same will happen with "fees" - that is, circumventing taxpayer protections by manipulating the label of the levy.

(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this Article including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee

or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

Comment: This section is applicable to any fee imposed on a parcel basis or for fees which provide a property related service. It does not affect fees that are not property related such as DMV fees, park fees, or administrative charges imposed by a local government.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

Comment: Votes on property fees and charges are not weighted in the same manner as assessments. Because fees can vary according to usage of the service, there is no workable methodology to apportion the votes of the service users. Thus, the issue of a fee increase will be determined by a simple majority vote of property owners or fee payers.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

Comment: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the "cost of service."

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

Comment: Requirements 1 & 2 will prohibit the current practice of siphoning off fee revenue to supplement a city's general fund. This practice, sometimes known as charging an "in lieu franchise

"Standby charges are usually nothing more than flat rate parcel taxes ... This provision is a flat prohibition of such levies."

fee," currently occurs both in Los Angeles and Sacramento, as well as in many other municipalities. However, "cost of service" may also include reasonable overhead expenses as well as other items on a service bill which are necessary to provide service to the particular service user. What is included in "cost of service" will have to be determined on a case by case basis.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

Comment: As with assessments, fees and charges must be proportional to the actual use of the service.

(4) 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. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

Comment: Standby charges are usually nothing more than flat rate parcel taxes imposed on the theory that water or sewer service may, at some point in the indefinite future, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent "special benefit" requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 5 or cease to be collected.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

Comment: This provision prohibits the imposition of parcel "charges" for general governmental services. The purpose of this provision is to stop those levies, such as the County of Los Angeles' parcel "charge" for library services irrespective of use of library services.

Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a

significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.

(c) Voter Approval for New or Increased Fees and Charges.

Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until such fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

Comment: This exemption for sewer, water and refuse collection is for voter approval only. Such fees must still meet all of the five substantive requirements of paragraph (b). The policy reason for this exemption is consistent with preventing end-runs around Proposition 13. Since water, sewer and refuse collection fees pre-date Proposition 13, they were exempted from voter approval.

(d) Beginning July 1, 1997, all fees or charges shall comply with this Section.

SECTION 5. LIBERAL CONSTRUCTION. The provisions of this Act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Comment: The purpose of this section is to ensure that, in the event of any ambiguity, the rights of taxpayers will be the paramount consideration.
