

**Update on the Law of  
Municipal Finance**  
by  
Michael G. Colantuono, Esq.  
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# Business License Taxes

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

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# Business License Taxes

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

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## *Upland* & Special Taxes With Majority Voter Approval

*City & County of San Francisco v. All Person Interested in the Matter of Proposition C* (2020) 51 CA5th 703, review denied

- Business license tax increase to fund homeless programs got 60% approval
- City filed validation action; HJTA and business groups opposed
- DCA held initiative proposing special tax may pass w/ 50%+1 approval despite
  - Prop. 13
  - Prop. 218
  - City charter

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## Still More on Upland

- *HJTA v. City & County of San Francisco* (2021) 60 Cal.App.5th 227
  - Followed the first SF case; another victory for the City
- *City of Fresno v. Fresno Building Healthy Communities* (2020) 58 Cal.App.5th 884
  - Followed the SF case, ruling for Fresno

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## Still More on *Upland*

- *City and County of San Francisco v. All Persons Interested in the Matter of Proposition G* (2021) 66 Cal.App.5th 1058
  - Followed earlier cases, this was a parcel tax
  - School district involvement in drafting measure not a problem
- *Jobs & Housing Coalition v. City of Oakland* (2021) \_\_\_\_ Cal.App.5th \_\_\_\_ (Case No. A158977)
  - Followed earlier cases
  - Fact that ballot materials said 2/3 required was not a problem

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## More on *Upland*

### Other suits

- *Alameda Co. Taxpayers Assn v. County*, ACSC Nos. RG 2007 0099, RG 2007 0495
  - Validation and reverse validation cases filed 08/20 & 09/20
  - In pleading battles as of 01/12/22
- *City of San Diego v. All Interested Persons*, SSC Case Nos. 37-2021-00024590, 37-2021-00024607
  - City tallied near-2/3 majority but did not declare measure passed or failed
  - Approved debt and directed issuance of tax after SF cases decided
  - City sued in validation; challenges sued in cross-validation
  - Set for trial in March 2022

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## Sales & Use Tax

- Statute imposes a 2% cap on all local sales & use taxes
- Race-to-the-cap has begun in LA and Bay Area
- 2019 legislative proposals to lift the cap for some cities and counties
  - AB 618 (Scotts Valley, Emeryville) – vetoed
  - AB 723 (Alameda County and its cities) – Chapter 723 of the Statutes of 2019

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## Sales & Use Tax

- SB 792 (Glazer, D-Orinda)
  - Retailers with gross receipts > \$50m would have to file a schedule by local government of the situs of its sales
  - Seems the first step in an effort to revisit allocation of sales taxes among jurisdictions
  - Senator Glazer has repeatedly (and unsuccessfully) sought to rein in sales tax kick-back agreements between host local governments and large sales tax generators
  - Vetoed (10/4/21)

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## Sales & Use Tax Enforcement

- *CDTFA v. Superior Court (Kintner)* (2020) 48 CA5th 922
  - CDTFA sought to enforce sales tax against corporate principals
  - They sued for declaratory relief to prevent enforcement
  - Trial court refused CDTFA's demurrer on the "pay first litigate later" rule
  - DCA granted an appellate writ to require the trial court to grant the demurrer
  - Very nice, strong statement of the "pay first" rule.

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## Soda Taxes

*Cultiva La Salud v. State of California*, 3<sup>rd</sup> DCA No. C095486

- Challenges 2018's AB 1838 — legislative deal to preempt charter city soda taxes until 2031 in exchange for California Business Roundtable abandoning initiative to amend the CA Constitution to make nearly all government revenues subject to voter approval
- But how to collect the tax if the CDTFA is forbidden to assist? Like other business license taxes perhaps
- Trial court ruled for plaintiff; State appealed 12/29/21

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# Cannabis Taxes

- *Silva v. Humboldt County* (2021) 62 Cal.App.5th 928
  - County ordinance changed substance of voter approved tax and was therefore beyond Board of Supervisors authority

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# Property Tax

- Prop. 19: "The Home Protection for Seniors, Severely Disabled, Families and Victims of Wildfire or Natural Disaster Act"
  - Allows xfer of Prop. 13 assessment by seniors and others with new liberality
    - Statewide, not just participating counties
    - Can trade up, not just down-size
    - Can do it 3 x in a lifetime
    - Closes some loopholes for heirs
      - they must live there
      - Limits exclusion to \$1m in fair market value
      - \$ 500k assessed valuation, \$2m fmv = \$1m assessed value
      - No exclusion for non-primary residences
  - Passed 51.1% to 48.9%
  - Effective 2/16/21 (parent-child) and 4/1/21 (portability)

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## Property Tax

- *Los Angeles Leadership Academy v. Prang* (2020) 46 CA5th 270
  - Charter school not exempt from property taxes or special assessments
  - Implied exemption for property owned and used by government can be overcome by express legislation to the contrary
  - This implied exemption does not extend to non-government operator of charter school

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## Documentary Transfer Tax

- *731 Market Street Owner, LLC v. City and County of San Francisco* (2020) 50 CA5th 937
  - Leases > 35 years treated as taxable under DTT
  - But sale of a building subject to such a lease does not trigger tax if the lease not otherwise changed
  - City ordinance, state statute, and former federal statute all construed alike

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## Documentary Transfer Tax

- *Ashford Hospitality v. City & County of San Francisco* (2021) 61 Cal.App.5th 498
  - Tiered documentary transfer tax did not violate equal protection
  - Generally, the ability to pay is a justification to ask someone to pay more (i.e., progressive income taxes)
  - But 1935 SCOTUS opinion found a progressive gross receipts tax violated equal protection; the case is still good authority but is read very narrowly

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## Parcel Taxes

- *Borikas v. Alameda USD* (2013) held statute required parcel taxes to be uniform, disallowed common structure of \$x / dwelling unit and \$y / non-residential sq. ft.
- *Dondlinger v. LA County Regional Park & Open Space Dist.* (2019) 31 Cal.App.5th 994 held tax of \$0.015 / sq. ft. of improved property was "uniform" and a permissible excise tax, not a preempted property tax

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## Parcel Taxes

- *Valley Baptist Church v. City of San Rafael* (2021) 61 Cal.App.5<sup>th</sup> 401
  - Churches and non-profits exempt from 1 % ad valorem property tax, not from special parcel taxes

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## Notice of Parcel Taxes

- Mailed notice of a new parcel tax required to property owners who do not reside in the jurisdiction
- 2016 statute, effective 2017
- AB 2476 (Daly, D-Anaheim) adopting Gov Code section 54930

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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 – settled

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# Utility Users Taxes

- *City of Torrance v. Southern California Edison Co.*  
(2021) 61 Cal.App.5<sup>th</sup> 1071
  - Cap and trade greenhouse gas program produces credits against power bills
  - Utilities and PUC decided those credits reduce local UUT tax bases, but text of ordinances is to the contrary
  - Torrance sued SCE to force it to collect tax on the credits, lost in the trial court, won on appeal
  - Affects all 104 cities and counties with electricity UUTs
  - Case is back in the trial court, but should settle and restore these revenues

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# Telephone Taxes

*MetroPCS California, LLC v. Picker* (9<sup>th</sup> Cir. 2020) 970 F.3d 1106

- Trial court enjoined enforcement of the Prepaid Mobile Telephony Services Surcharge Collection Act as preempted by federal law
- LCC expressed concern in 12/18 CDTFA would interpret it to forbid collection of local UUTs on prepaid wireless telephony
- CDTFA issued an advisory that same month informing carriers that the State's fee was suspended, but not local taxes
- 9<sup>th</sup> Circuit concluded statute not preempted and reversed.

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# Telephone Taxes

- SB 1441 (McGuire, D-Sonoma)
  - Extends sunset on Local Prepaid Mobile Telephony Services Collection Act to 2026
  - That statute provides for CDTFA collection of state and local telephone taxes on prepaid telephony with sales tax
  - Governor signed on 9/25/20

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## Utility Taxes / General Fund Transfers

- *Wyatt v. City of Sacramento* (2021) 60 Cal.App.3d 373
  - Post-218 approval of GFT from water, sewer, and trash utilities to general fund as a general tax was lawful
  - Plaintiffs had argued that Prop. 218 forbids all general UUTs
  - Victory means UUTs are safe and GFTs can be approved by voters

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## Utility Taxes / General Fund Transfers

- *Lejins v. Long Beach* (2021) 72 Cal.App.5th 303
  - Similar facts as *Wyatt v. Sacramento* – post-218 election to validate GFT from water and sewer utilities
  - Purported to distinguish *Wyatt* in ruling for challengers, but really disagrees with *Wyatt*
  - Bad fact: tax applied to non-resident customers of water utility, but election in City only
  - City seeking review in SCOCA (No. S272594)

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## State Water Project Taxes

- State Water Contractors have pre-Prop. 13 authority to impose a property tax to fund their obligations to the DWR under the SWP contracts
- *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900 held such taxes survived prop. 13 because the State Water Project and its associated contract, debts and taxes were pre-Prop. 13 debt
- *Goodman* rule reaffirmed in *Coachella Valley Water Dist. v. Superior Court* (2021) 61 Cal.App.5th 755
- May be important to pending discussions of a Delta conveyance / “the big Fix”

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## State Water Project Taxes

- *Coachella Valley Water District v. Superior Court* (2021) 61 Cal.App.5th 755
  - Challenge to tax must be brought in validation with very short statute of limitations
  - Case continues as to subsequent tax years

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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 proposed by Board resolution, not initiative

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## Tax Ballot Measures

- AB 195 (Oberholte, R-Hesperia)
  - Effective 1/1/18, amends Elections Code § 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 charter cities adopt the Election Code anyway.

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# Tax Ballot Measures

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

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# Tax Ballot Measures

## SB 268 (Wiener, D-San Francisco)

- Vetoed 10/13/19
- To approve taxes w/ more than one rate, ballot book (not label) must:
  - Describe purpose of measure and use of funds
  - List all tax rates and describe how tax imposed
  - Describe "any mechanism that would cause the tax rate or rates to vary over time"
  - State the duration of the tax
  - State "[t]he best estimate from official sources of the average annual dollar amount of tax that would be collected" in first 10 years

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# Tax Ballot Measures

## SB 268 (Wiener, D-SF)

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

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# Federal limits on local taxes

- *BNSF Railway Co. v. County of Alameda* (9<sup>th</sup> Cir. 2021)  
7 F.4<sup>th</sup> 874
  - Federal Railroad Revitalization Act limits property tax on railroads to the average tax imposed on commercial and industrial property in the taxing county

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## Tax Enforcement

- *Host International, Inc. v. City of Oakland* (2021) 70 Cal.App.4<sup>th</sup> 695
  - City gross receipts tax applied to rent Host received from subtenants of its lease of commercial spaces at OAK
  - God case on evidence, the litigation-on-the-record rule, tolling of statutes of limitations and enforcement of penalties and interest despite claimed good faith by defendant

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## Taxpayer Actions

- Steuer v. Franchise Tax Board* (2020) 51 Cal.App.5<sup>th</sup> 417
- Trust which earned taxable income in CA is subject to tax here even if the trustees resided elsewhere
  - But no taxable income to contingent beneficiary until income received (i.e., contingency ripened)
  - Involves estate plan of the owner of the Century Theater and Cinemark chains

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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* on one point – that groundwater charges subject to 218, now it is 26

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# Groundwater Extraction Charges

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

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# Groundwater Extraction Charges

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

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# Groundwater Extraction Charges

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

- Groundwater charges subject to Prop. 26, not 218
- Remanded to decide if:
  - 3:1 ratio of ag. to non-ag. rates mandated by Water Code §75594 violates Prop. 26
  - Adequate justification for rates on UWCD's record
- DCA remanded to UWCD for a new hearing
- City prevailed again; UWCD appealed again. Appeal fully briefed 10/7/21 and awaiting argument.

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# Groundwater Extraction Charges

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

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

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# Groundwater Extraction Charges

The Great Oaks saga continues:

- *Great Oaks Water Co. v. Santa Clara Valley Water District*, Sta. Clara Superior Court Case No. 2011-1-CV-205462
- Consolidates 15 cases challenging, or seeking to enforce, SCVWD's pump tax
- Trial set for 6/13/22 as of 1/12/22

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# Groundwater Extraction Charges

Sustainable Groundwater Management Act (Water Code § 10720 et seq.)

- 400+ new Groundwater Sustainability Agencies
- To fund and implement plans to bring groundwater basins into balance
- New fees on groundwater use expected to be adopted consistently with Prop. 218 (for supply) and Prop. 26 (for regulation)
- *Ventura* says Prop. 218 compliance not constitutionally required; will require legislation to relax this requirement; likely not 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
  - Alleged CEQA, CCP 526a, writ and declaratory relief claims under SGMA
  - Stayed pending DWR decision whether to accept earlier plan as SGMA plan
  - DWR disapproved that plan on 11/12/19 and litigation settled

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## More SGMA Suits

### *Mojave Pistachios, LLC v. Indian Wells Valley Groundwater Authority*, Orange Co. Sup. Ct. No. 30-2021-01187589

- Challenges GSP, sustainable yield report, and extraction fee
- Alleges writs, validation, takings, constitutional claims, and CEQA violations
- Fee of \$2,120 / AF and allocation of water to China Lake NAWS
- Consolidated with other cases in Orange County
- Motion to Strike set for 3/4/22
- *Searles Valley Minerals v. Indian Wells Valley Groundwater Authority*,
  - Focuses on the replenishment fee

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## Prop. 218 & Water Rates

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

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

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# Prop. 218 & Water Rates

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

- Must satisfy water conservation mandate of article X, § 2 and Prop. 218
- Domestic rates can fund recycled water as supply program
- Tiered rates require precise cost-justification
- Disagrees with other cases and therefore trial courts need not follow it
- SCOCA read narrowly to invalidate rates b/c city offered no cost justification

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# Prop. 218 and Tiered Rates

- Capistrano's last chapter
- *Daneshmand v. City of San Juan Capistrano* (2021) 60 Cal.App.5th 923
  - City settled the original case, making refunds in exchange for releases
  - Class action lawyers sued for more, arguing breach of contract, and other common law claims
  - Trial court gave the City summary judgment, enforcing releases and the 1-year claiming requirement of the Government Claims Act
  - Court of Appeal affirmed

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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* in:
  - *Marin Municipal Water District* – DCA found no duty to exhaust, SCOCA denied review, MWD lost liability phase; settled after briefing remedy
  - *City of Glendale* – unpublished victory, publication & review denied, settled
  - *Goleta Water District* – unpublished victory, request to publish denied
  - *San Jose* (City prevailed b/c it ended tiered rates in 2017 and Pl. didn't show class could litigate refund efficiently; appeal G060382 & G060385 argued 11/22/21)
  - *Heath v. Western MWD*, Riverside No. RIC1806590
    - Upheld WMD's tiered rates 10/17/19, no appeal
  - *Patz v. Otay Water District*, *Coziahr v. Otay Water District*, SDSC No. 37-2015-00023413 00400000 – trial court invalidated tiered rates in 3/4/21 order, in remedies phase
  - *Dreher v. LA DWP*, LASC No. 19 STC CV 07272 tried 12/7/21, awaiting decision

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## Prop. 218 & Water Rates

- Still more suits:
  - *Campana v. EBMUD*, 1<sup>st</sup> DCA case No. A163054 (EBMUD won on statute of limitations; plaintiffs appealed) – AOB due 2/2/22
  - *Chinitz v. City of Sta. Cruz*, SCSC no. 19 CV 03364 (tiered rates) writ to be argued 1/14/22

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## Prop. 218 & Water Rates

- Unpublished case on tiered rates in
  - *Boyd v. Soquel Creek Water Dist.*, 2016 WL 1752932
    - District's trial court win against pro per reversed on appeal and remanded for trial on 6(b)(3)[rates proportional to cost] but affirmed on 6(b)(4) [immediately available water service]
  - *Delano Guardians Comm. v. City of Delano*, 2018 WL 5730155
    - City victory in trial court affirmed on various grounds; tiered rates challenge rejected on appeal because not raised at trial

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## Prop. 218 & Water Rates

- Albany, CA law firm of Driscoll & Omens filed dozens of identically worded claims w/ water agencies around CA in 11/19
- Each asserted the agency's rates violated Prop. 218, w/o elaboration
- One combined suit against 83 agencies filed in March 2018 in San Jose: *Kessner v. City of Santa Clara*, SCSC Case No. 20 CV 364054
  - Defeated on second-round demurrer for misjoinder; negotiating mutual walkway as of 1/12/22

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# Water Rates

- SB 323 (Caballero, D-Salinas)
  - Establish a 120-day statute of limitations to challenge water rates, comparable to that for power rates
  - Sponsored by ACWA
  - Adopts GC 53759 for water rates adopted after 1/1/21

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# Water Rates

- SB 222 (Dodd, D-Napa)
  - Establishes a state-funded Water Rate Assistance Fund to help low-income ratepayers pay for water
  - To the inactive file on 9/3/21
- SB 223 (Dodd, D-Napa)
  - Extend SB 998 (2018) limits on water meter shutoffs for nonpayment to very small community water systems with funding support from the State
  - Held in Committee 5/20/21

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# Water Rates

- *KCSFV I v. Florin County Water Dist.* (2021) 64 Cal.App.5<sup>th</sup> 1015
  - Invalidated water rates for inadequate notice of rates and insufficient cost justification
  - Very good discussion of procedural defenses for Prop. 218 cases
  - Bad decision for Florin CWD, but good news for the rest of us
  - Lesson learned – hire a ratemaking consultant to cost-justify your rates unless you have the resources to do it in-house. You cannot just convert your budget into an across-the-board rate increase.

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# Water Rates

*Miner's Camp LLC v. Foresthill PUD*, 3<sup>rd</sup> DCA Case No. C088828

- Rates include a charge to master-metered properties based on the number of units served by the master meter
- Customer sued without exhausting remedies by participating in the Prop. 218 hearing
- Trial court ruled for property owner on exhaustion and the merits and PUD appealed
- ACWA provided amicus brief
- Fully briefed as of 2/5/21, no action on 8/27/21 motion to expedite as of 1/12/22

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# Water Rates

*Sunset Farms, Inc. v. City of Santa Cruz*, Sta Cruz Sup. Ct. Case No. 19 CV 01725

- Farmers' challenge to rate for extra-territorial wholesale service, arguing they should pay same rate the City gives another water district in a water-exchange agreement
- Demurrer to 4th amended complaint set for 1/13/22

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# Water Rate Delinquencies

- SB 155, budget trailer bill
  - Extended COVID moratorium on water meter shutoffs to 12/31/21
  - Extended it to community water systems

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## Solid Waste Fees

- *Chiquita Canyon, LLC v. County of Los Angeles*, LA Superior Case No. BS171262
  - Challenge to landfill tipping fees imposed via CUP on landfill operator under Mitigation Fee Act
  - Trial court found some fees lacked nexus
    - Park development
    - Natural habitat
    - Disaster debris cleanup
  - Others lacked proportionality
    - AB 939 fee of 25¢ per ton
    - Road impacts of 50¢ per ton
    - \$200k to \$3m for alternative technology research
  - Granted writ 7/2/20, remaining claims to be tried 8/1/22; appeal may be likely

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## Sewer Fees

- Moore v. City of Lemon Grove* (2015) 237 CA4th 363
- Prop. 218 allows full cost recovery
  - Approved informal allocation of public works department costs to sewer utility

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# Sewer Fees

*Plantier v. Ramona MWD* (2019) 7 Cal.5th 372

- Prop. 218 challenge to sewer fees defeated in trial court for failure to exhaust administrative remedies by participating in the Prop. 218 majority protest hearing
- S Ct. reversed, concluding the Prop. 218 majority protest proceeding was not fit to resolve complaint about EDU assignment
- Left open whether plaintiffs must participate in protest hearing to challenge fee increases
- Advisable to establish a local remedy that **does** apply to as-applied and facial challenges and to state in notice of 218 hearing that all challenges will be heard

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# Sewer Fees

SB 231 (Hertzberg, D-San Fernando Valley)

- Effective 1/1/18, defines "sewer" under Prop. 218 to include storm sewers (GC 53750(k))
- Seeks to overrule *HJTA v. Salinas* by statute, citing *Crawley v. Alameda* and *Griffith v. Pajaro*
- This authority is most safely used for stormwater reuse project benefitting water supplies
- Test litigation coming?
- Cited favorably in *Paradise Irr. Dist. v. Comm'n on State Mandates*

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# Sewer Fees

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

- Class action challenge to transfer from sewer to water fund to contribute to cost of advanced metering infrastructure
- Claims 50/50 split of AMI cost between utilities violates Prop. 218 because sewer does not benefit equally w/ water
- Trial set for 5/6/22
- Trial court refused extra record evidence, but changed its mind post-*Malott*; City unsuccessfully sought writ review and SCOCA review

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# Sewer Fees

*Malott v. Summerland Sanitary District* (2020) 55 Cal.App.5th 1102

- Apartment owner sued small agency under Prop. 218 for rates that assign equal EDUs to SFRs and to apartments and condos
- Trial court ruled for agency, refusing to allow after-the-fact, extra-record expert evidence
- Court of Appeal found no duty to exhaust administrative remedies, right to challenge rates in declaratory relief, and right to admit after-the-fact expert evidence
- 5 local government associations sought depublication or sua sponte review but SCOCA denied both

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## Sewer Fees

- *Allred v. City of San Diego*, SD Superior Court Case No. 37-2021-00030939
  - Alleges City overcharges sewer customers to cover bad debt from industrial dischargers
  - City's demurrer set for May 20, 2022

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## Other Service Fees

*County Inmate Telephone Services Cases (2020) 48 Cal.App.5th 354* Counties provide telephone services to inmates via concession agreements w/ carriers that provide substantial fees to counties

- Statute directs those fees to inmate welfare fund
- Class of inmates sued under Prop. 26
- Court of Appeal ruled they could not challenge the fee because they bear its economic, not legal, incidence
- This standing defense is important in many finance suits

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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* (2020) 9 Cal.5th 1105
    - Disallowed referendum, overruling Court of Appeal's earlier, contrary decision
  - *HJTA v. Amador Water Agency* (2019) 36 Cal.App.5th 279
    - 3d DCA disagreed with its own decision in *Wilde*

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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 > costs because surpluses were declining and stayed in program to underwrite future costs
  - Ok to fund reserves
  - Reasonable estimates are acceptable
- Plaintiff must make a prima facie case of invalidity before burden of proof shifts under 13 and, perhaps, 26
- Helpful discussion of Prop. 26
- Fee vs. tax is legal question reviewed de novo on independent judgment review of the facts

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# Regulatory Fees

- *CBIA v. SWRCB* (2018) 4 Cal.5<sup>th</sup> 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 that city “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

- *American Coatings Assn., Inc. v. State Air Resources Board* (2021) 62 Cal.App.5<sup>th</sup> 1111
  - Upheld fee imposed on makers of paints and other products which emit VOCs
    - Under Prop. 13
    - No illicit delegation of legislative authority to CARB
    - No separation of powers violation
    - No equal protection or due process violation
  - Another example of deferential review of regulatory fees

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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
- City won remand trial
- City won further appeal in an unpublished ruling; plaintiffs did not appeal

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# Franchise Fees

## *Mahon v. City of San Diego* (2020) 57 Cal.App.5th 681

- San Diego obliges SDG&E to spend 4.5% of gross receipts on utility undergrounding and the PUC allows SDG&E to recover 3.53% from customers as a line item on bills
- Plaintiffs alleged this is a non-voter approved tax under Prop. 218
- Trial court ruled for city, citing *Jacks* and concluding this was a proper regulatory fee.
- Court of Appeal affirmed only under *Jacks*, concluding: (i) there were good faith negotiations and (ii) there was substantial evidence the fee was reasonably related to value of the franchise

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# Franchise Fees

## *Zolly v. City of Oakland* SCOCA Case No. No. S262634, imminent argument notice sent 11/23/21

- Challenge to franchise fee imposed on City solid waste franchisees under Props. 218 and *Jacks v. City of Santa Barbara*
- City prevailed because hauler, not customers, paid fees
- Court of Appeal reversed, concluding allegation of collusion between City and haulers to soak customers was sufficient under *Jacks*
- *County Inmate Telephone Services* said was not a standing case
- *HJTA v. Bay Area Toll Authority* disagreed with it
- *Mahon v. San Diego* distinguishes it as a demurrer case

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# Franchise Fees

## *Apartment Owners Association of California v. City of Los Angeles* (2d DCA Case No. B313439)

- Class action challenge by well-known plaintiffs' lawyers to franchise fees on commercial and multi-family haulers under Prop. 218
- City won summary judgment; plaintiffs appealed
- Respondent's Brief due 2/7/22

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## Other Fees for Use of Public Property

*Howard Jarvis Taxpayers Assn v. Bay Area Toll Authority* (2020) 51 CA5th 435 (review granted as No. S263835)

- Regional Measure 3 raised Bay Area bridge tolls \$3 to fund a range of transportation projects.
- Didn't get 2/3 at the polls or in the Legislature
- DCA upheld it as a fee for the use of property, concluding such fees need not be limited to cost
- Expressly disagrees with *Zolly v. Oakland*
- SCOCA granted review, but held briefing pending decision in *Zolly*

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## Development Impact Fees

*Amcal Chico LLC v. Chico Unified School District* (2020) 57 Cal.App.5th 122

- Developer of private apartment for unmarried university students challenged school impact fee
- Claimed failure to make AB 1600 findings, that the fee was an invalid special tax, and a taking
- Trial court granted summary judgment to USD and Court of Appeal affirmed
- Again, construction workers have kids, too. Moreover, once the building exists, there is no guarantee it will always be a private dorm.

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## Development Impact Fees

SB 13 (Wieckowski, D-Fremont) GC 65852.2, 65830.2

- Promotes accessory dwelling units (“granny units”)
- Prohibits dev. impact fees on ADUs < 750 sq. feet
- New utility connection cannot be required unless ADU is freestanding and fee is proportional to sq. footage or fixture count
- As other units cannot be charged more to make up the difference, this will impose infrastructure costs on existing customers to be recovered by rates
- Effective 1/1/20

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## Development Impact Fees

AB 602 (Grayson, D- Contra Costa) GC 65940.1, 66016.5, 66019

- Limits development impact fees on housing, including AB 1600 fees, Quimby fees, construction excise taxes, and Mello-Roos taxes
- Requires nexus study and rough proportionality, including fees allocated per square foot and not per dwelling unit
- Requires HCD to develop model nexus study
- Effective 1/1/22

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# Development Impact Fees

*County of El Dorado v. Superior Court of El Dorado County* (2019) 42 Cal.App.5th 620

- Statute of limitations to challenge DIFs is one-year
- But suit can be filed after each year's findings, so it serves to limit remedy, but not litigation exposure
- AB 1600 findings are burdensome, but it is very risky not to do a good job on them every year
- Limits *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350 which had ordered refund of all fees collected since inception of fee

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# Development Impact Fees

- AB 571 Mayes, I-Rancho Mirage
  - Forbids "inclusionary zoning fees and in-lieu fees" on affordable units in density bonus projects
  - GC 65915.1
  - Essentially no opposition in the Legislature
  - Effective 1/1/22

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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 supplies

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## Prop. 26 Litigation

- *City of Signal Hill v. Central Basin Municipal Water District*, LASC Case No. 19 STCP 03882
  - Challenge to meter charges, fixed charges on retailers based on meter count, to cover wholesaler's fixed costs
  - Trial court issued writ in January 2021 invalidating the charges
  - Case then settled

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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 whether cost reasonable b/c comparable to taxes IOUs pay
- 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 fee-payers cover them.
- No duty to subsidize rates with discretionary revenue

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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

Similar GFT challenges against gas and electric utilities

- Alameda – voters approved GFT in 12/16
- Anaheim (water settled, power: *Palmer v. City*, 30-2017-00938646, 30-2018-01013732 – summary judgement set for 9/24/21)
- Burbank (settled)
- *Beck v. City of Canyon Lake*, Riverside case no. RIC2003025 – city lost
- Glendale (unpublished decision 12/27/18, publication & review denied; remedy now on appeal by plaintiffs)

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## Prop. 26 Litigation

- *Lejins v. Long Beach* – voter approval of GFT as tax lost in trial and DCA, SCOCA review pending
- Los Angeles (settled)
- *Hobbs v. Modesto Irrigation District* (lost liability phase; remedy phase in discovery)
- *Green v. Palo Alto* (Won power, lost gas; appeal pending)
- *Komesar v. Pasadena*, City won under *Wyatt*, appeal settled
- *Simpson v. Riverside*, RIC 1906168 (voter approved water GFT, demurrer to 4AC to be heard 1/26/22)

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## Prop. 26 Litigation

- *Humphreville v. City of Los Angeles* (2020) 58 Cal.App.5<sup>th</sup> 115
  - GFT not a tax because rates did not exceed cost of service
  - Plaintiff admitted this to avoid the short 120-day statute of limitations for challenges to power rates
  - Amounts to a restatement of *Webb* and *Redding*

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## Prop. 26 Litigation

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

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

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## Prop. 26 Litigation

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

- Challenged San Diego's allocation of costs for recycled water to other utilities. Argues two recycled water systems should be costed separately
- Trial court ruled for San Diego concluding
  - No duty to set separate rates for 2 plants
  - Rates for recycled water were less than cost and therefore satisfied Prop. 26
- Remaining issues still to be tried

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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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## State Fire Fees

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

- HJTA challenged state fire fees on parcels in state responsibility areas as a tax under Prop. 26
- Case was dismissed for failure to try it w/in 5 years
- Court of Appeal affirmed in an unpublished decision on 9/15/20.

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## Assessments

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

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

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# BID Assessments

*Dahms v. Downtown Pomona PBID* (2009) 174 CA4th 708 allows:

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

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# BID Assessments

*Hill RHF Housing Partners, LP v. City of Los Angeles* (2021) \_\_ Cal.5th \_\_ (No. S263734 decided 12/20/21)

- Affordable housing owner challenged renewal of two LA BIDS, claiming assessment not proportionate to its benefit
- City & BIDs prevailed on the merits at trial
- DCA affirmed for failure to exhaust administrative remedies
- SCOCA reversed, eliminating this defense in most Prop. 218 & 26 cases absent legislation
- Remanded for DCA to review merits

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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 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 them
- Questions use of cost to allocate benefit

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## Fire Suppression Assessments

*Concerned Citizens v. West Point FPD*, Cal. S. Ct. Case No. S195152 (2012)

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

*Davis v. Mariposa County Board of Supervisors* (2019) 38 Cal.App.5th 1048

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

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## Maintenance Assessments

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

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

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## Tourism Marketing Districts

TMD assessments have generated litigation under Prop. 26.

- Ontario prevailed on standing grounds;
- San Diego mooted by amendment to limit assessment to large hotels; fee award reversed on appeal; duplicative suits dismissed by trial court (*Reid* & unpublished victory for City)
- Palm Springs CVB won and then settled

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## GHAD Assessments

*Broad Beach GHAD v. All Persons*, 2d DCA Case No. B304699

- Homeowners formed GHAD to fund beach restoration, approving two assessments without incident
- 2017 assessment to fund expensive Coastal Commission mandates drew controversy
- Trial court found insufficient justification for allocation of special benefit, insufficient general benefit, and concluded assessment should reflect cost of eminent domain to acquire construction access rights
- GHAD appealed; reply to amicus brief due 1/24/22

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## Advice re Assessments

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

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## Mandates

- *Dept. of Finance v. Commission on State Mandates*  
(2021) 59 Cal.App.5th 546
  - NPDES business inspection mandates not reimbursable b/c local governments can impose fees on regulated businesses
  - Mandate for trash services at transit stops was a reimbursable mandate b/c local governments cannot impose fees on transit agencies

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## Revenue Bonds

- *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2021) 63 Cal.App.5th 168
  - San Diego charter provision governing revenue bonds did not apply to JPA bonds
  - Nor did it apply to lease revenue bonds
  - The risk of litigation is always present in public finance
  - JPAs and lease/leaseback financing are immune from many challenges to other debt

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## Taxpayer Actions

- *San Diegans for Open Government v. Fonseca* (2021) 64 Cal.App.5th 426
  - Unincorporated association of taxpayers lacked standing to challenge school district's settlement with whistleblower for failure to demonstrate it had a member who paid a tax to the district in the year before suit
  - CCP 526a standing has been liberalized, but it still has limits

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# Questions?

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