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CALIFORNIA DEBT AND INVESTMENT ADVISORY COMMISSION

# Proposition 218 and Special Assessments

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## INTRODUCTION

Proposition 218 was approved, handily, by California voters in 1996.[1] A sequel to Proposition 13, it placed several additional constraints on revenue raising by local governments. It required that taxpayers or voters approve all new or increased local taxes, special assessments, and some fees. It clarified that citizens could use the initiative power to rescind objectionable taxes, assessments, and fees. And it added or clarified procedures that local agencies had to follow to raise additional revenues.

Special assessments have been used to finance local infrastructure and some public services in California, at least since the 1850s. Proposition 218 encouraged the courts to examine assessments more rigorously, to stop the levy of assessments that resembled flat rate parcel taxes, and to tighten up certain procedural requirements. Court decisions interpreting the proposition have created uncertainty and confusion about how assessments work. This has not mattered much for some uses of assessments, such as for funding infrastructure for new developments or for essentially private work such as energy conservation improvements or seismic safety upgrades to existing privately owned structures.[2] However, it has nearly eliminated assessments for an important and very traditional purpose: to upgrade infrastructure and certain public services in already developed areas. Examples include undergrounding utilities, installing sidewalks, sewer lines, water service, or street lights, or improving roads in an already developed area. Assessment district formation for these kinds of projects is now a tiny fraction of what it was before passage of Proposition 218.

This change probably goes beyond what was intended by the proposition's drafters and by the voters. It has happened because the proposition is, probably unintentionally, ambiguous about several matters. This paper is an attempt to identify the most important of these ambiguities. Most are matters about which lower appellate courts have disagreed and on which the California Supreme Court has not ruled. It may be that to correct these ambiguities, the constitutional provisions affected by the proposition will require revision by an additional constitutional amendment. The aim would not be to repeal Proposition 218, but to make its language and interpretation more technically correct. It is also possible that the legislature could nudge the courts in helpful directions by enacting its own clarifying language.

## WHY DOES THIS MATTER?

Special assessments may be the best, fairest, and least costly method of financing a public service in a fairly narrow but not trivial set of circumstances:

- Most property owners in a place actually want a new or higher level of public facility or service and most are willing to pay at least part of the cost of providing it.
- No one else is willing to pay for it, or at least not for its full cost. Not the city, not the county, not the state, not the federal government. The list of unfundable public service demands may be increasing.

Common uses for assessments in the past included local road paving, sidewalks, sewer and water lines, landscaping along roadways, street lighting, and utility undergrounding, among many others. Assessments have often been used in business districts to pay for a higher level of street and sidewalk cleaning, trash pickup, grafitti removal, holiday decorations, and other steps that make the area more appealling to customers. These works are maybe a little boring, but their practical value is far from trivial. They make up at least a modest part of the core of public services that nearly everyone values.

In addition to these traditional uses, assessments may prove useful as California struggles to adapt to the effects of climate change. But only if their use is restored. For example, homeowners in flammable places may be happy to pay assessments for tree thinning, brush clearing, forest raking, construction of fire breaks, improved levels of fire protection and of water for fire flow, utility undergrounding, and other fire protection projects almost certain to emerge from our highly adaptable culture. Owners of coastal property may want to help fund

[1] It was approved by 56.6% of the votes cast on the proposition, according to California Secretary of State, *Statement of Vote, November 5, 1996*, p. 45.

[2] Assessments for these purposes increased from about $30 million per year in 1993 to over $800 million in 2018.

beach replenishment and other steps to accommodate sea level rise, more frequent larger storms, and more enthusiastic wave action. Homeowners in areas at increased flood risk may happily pay assessments for works that might protect them from rising waters, especially if these works also reduce their flood insurance costs.

Some of these projects will be controversial, facing environmental complaint and perhaps social justice opposition. These struggles are going to happen. They are about matters important enough that they will probably get resolved. Assessments have nothing much to do until something like resolution is achieved. Then, they could provide a reasonable, fair, and orderly way to pay the resulting costs.

But there is a problem. The Constitutional confusion surrounding assessment use in California is serious enough to make this financing method nearly unusable for these purposes. This paper attempts to identify the most important areas of legal ambiguity and to suggest some remedies.

## WHAT ARE THE VIRTUES OF SPECIAL ASSESSMENTS?

Traditional assessment practice was close to Norman Rockwell democratic – property owners were given notice of the proposed assessment (and in many cases began the process by bringing a petition signed by a majority of property owners to the local agency), were told how much the assessment would be for each parcel, had access to an assessment engineer's report that explained how the assessment was spread among the parcels, and had the opportunity to object to and possibly stop the assessment at a public protest hearing. If owners of property responsible for a majority of the total assessment objected, the proposed assessment was usually dead. Money from the assessment could only be used for the project or services providing special benefits to the property assessed. It could not be siphoned off to benefit other areas or politically influential parties. Property owners could not be forced to subsidize their neighbors – each paid in proportion to his or her benefit. When it worked properly, it is hard to imagine a more democratic, even intimate, way to finance local improvements and services.

Assessments date at least to the middle ages and have been part of California public finance since before statehood. Assessments paid for the grading of the oldest streets in Sacramento and San Francisco in the 1850s, were critical to the development of the state's early irrigation districts (allowing small landowners to raise the capital to compete with California's early giant landowners), and were a primary means of paying for the booming state's urban infrastructure in the early 20th century. They were the ultimate backstop for the bonds that funded construction of the state water project in the 1960s and after. The state's main assessment acts, known as the 1911 Act, the 1913 Act, and the 1915 Act, proclaim their vintages eponymously.

Assessments have also been used in other ways. Before Proposition 218, a fairly common way to fund infrastructure for a new development project was to create an assessment district congruent with the area of the project. The local agency with jurisdiction levied assessments against the newly created lots, sold bonds backed by the resulting cash flow, and used the proceeds to pay for local streets, sewer and water lines, street lights, and neighborhood parks. In time, people bought the new houses, moved in, paid their share of the assessment along with their property taxes each year, and enjoyed the benefits of their new local infrastructure. Assessment financing is still often used for these purposes, although special tax financing using the Mello-Roos Community Facilities Act is often used instead.

Another, somewhat more controversial use of assessments was to fund services formerly paid for with a local agency's general revenues. For example, a city that paid for electricity and maintenance for street lights with general fund revenue might later create assessment districts, neighborhood by neighborhood, to fund these electricity and maintenance costs. If successful, this allowed the city to use their general fund savings to pay for other needed services, such as police and fire protection. This kind of transaction was fairly common after Proposition 13, as cities and counties struggled with their newly straitened circumstances.

## HOW HAS PROPOSITION 218 AFFECTED THE USE OF ASSESSMENT FINANCING IN CALIFORNIA?

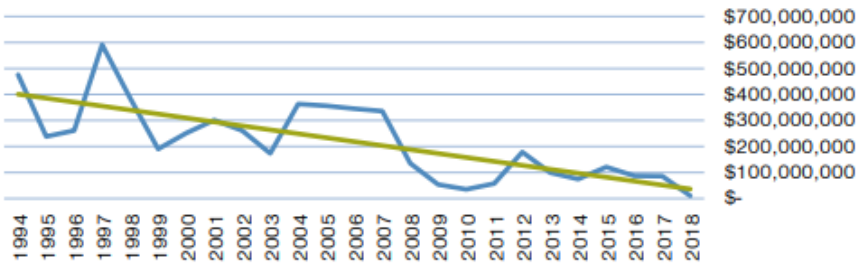
It is more difficult than one might think to answer this question because no one collects data on the number of existing or new assessment districts or the amount of revenues they raise. The State Controller reports on something called "revenue from benefit assessments" for local agencies. But the category specifically excludes revenues from many traditional assessment districts (such as the 1911 and 1913 Acts), and includes substantial revenues from "special assessments" for police and fire protection. It is hard to know how this relates to special assessments as defined in Proposition 218.

The most useful indicator of assessment activity is the California Debt and Investment Advisory Commission's (CDIAC) data on bond issuance by local governments for assessment districts. The data, however, does not include assessments levied for services or infrastructure that do not involve bonds, such as for street lighting and park maintenance.

Using the CDIAC data, Figure 1 displays the dollar amounts of assessment bonds sold each year for new traditional public works projects, mostly in already developed areas. The graph shows considerable volatility, which reflects the ups and downs of California's overall economy. The late 1990s and mid 2000s were boom times, with a lot of construction activity—the early 2000s and after 2008 were recession years. The trend line shows assessment use declining from a little less than $400 million per year to under $50 million per year, a roughly 88 percent reduction. If the numbers were adjusted for inflation, the reduction would be much larger.

**FIGURE 1**

SPECIAL ASSESSMENT BONDS ISSUED BY YEAR




Source: California Debt Advisory Commission or California Debt and Investment Advisory Commission, California State Treasurer, Data available at www.debtwatch.treasurer.ca.gov.

Tables 1 and 2 show a different, more nuanced story. Table 1 lists all the jurisdictions that issued traditional assessment bonds for already developed areas in 1993, three years before enactment of Proposition 218. Table 2 shows analogous numbers for 2018. Neither is a boom or bottom of bust year. For both years, the tables list jurisdictions which issued bonds for new projects, and do not include those that only refinanced (or refunded, in bond-speak) already outstanding assessment debt. This gives a fair indication of the number of jurisdictions actively involved and the volume of new traditional assessment financing in these two years.

The difference is striking. In 1993, before Proposition 218's enactment, 56 jurisdictions issued assessment bonds totaling $118 million. They included urban, suburban, and small rural communities distributed throughout the state. The bond issues were mostly modest in size, averaging slightly over $2 million. The chart fits with the characterization of assessment use given earlier – a mostly small scale way to take care of neighborhood level infrastructure needs.

In 2018, the CDIAC report identified only five issues. The average issue size for those eight bonds was still about $2 million, as before. This is a very different fiscal ecology compared to 1993.

Why the difference between 1993 and 2018? It is usually difficult to establish with certainty why government agencies stop doing something. But a reasonable, informed explanation is that most local governments were frightened away from using assessments in already developed areas by the series of decisions delivered by California courts over the years before 2018.[3] These decisions left so many ambiguities and loose ends that it was nearly impossible for even a well-intentioned local agency to create an assessment district, for even a completely traditional application and doing their level best to comply with Proposition 218. Those that did attempt to do so risked losing the work done to create the district, the legal costs to defend it, and any costs from paying their challengers' legal fees. So they just stopped.

## WHAT WAS PROPOSITION 218 SUPPOSED TO ACCOMPLISH?

It seems unlikely that this degree of disruption of a very old and generally well accepted financing device was intended. If it were, it would have been simpler to do away with benefit assessments in California completely. On the contrary, Proposition 218 enshrines in the Constitution both the procedural and conceptual detail of traditional assessment law. The proposition largely mimics the standard requirement that landowners be given detailed notice of the launch of assessment proceedings. It mimics the requirement that an engineer's report be prepared, explaining in some detail how the assessment will be apportioned among the parcels in the district, and the requirement that the allocation be in proportion to the special benefit to each parcel. It mimics the requirement that the local agency hold a well-noticed public hearing on the proposed assessment, and the requirement that proceedings be abandoned if sufficient protests are filed by property owners. None of this is new. It makes little sense to put all this detail in the Constitution if the underlying intent is to make this financing method unusable for its traditional purposes.

Clearly, Proposition 218 was intended to change assessment law. But the ballot arguments and campaign rhetoric are not really helpful in identifying just what effect these changes were intended to produce.

Proposition 218 was sponsored by the Howard Jarvis Taxpayers Association (HJTA). The most thoughtful, detailed, and seemingly candid expression of its intent was posted on the organization's web site in 2006.[4] Admittedly, this was 10 years after passage of the proposition and cannot be understood to have been before the voters at the time of the election. And it is widely accepted that the drafters of initiatives or legislation are not allowed to "interpret" matters after enactment, so their later proclamations are hardly decisive. Still, the drafters' intent helps keep things in perspective.

This analysis of Proposition 218's assessment provisions identifies a few aims that the proposition was intended to fix. These include:[5]

[3] These cases are discussed more fully in "Opportunities to Use Assessment Districts to Finance Facilities and Services in California Today", California Debt and Investment Advisory Commission, CDIAC 15.07, 2015 at www.treasurer.ca.gov/cdiac/publications/opportunities.pdf.

[4] Howard Jarvis Taxpayers Association, *Text of Proposition 218 with Analysis*, May 10, 2006, at www.hjta.org/propositions/proposition-218/text-proposition-218-analysis. It is reproduced as Appendix 1 below.

[5] The HJTA discussion covers several other subjects that are not particularly important for this inquiry, and are not pursued here.

**TABLE 1**

SPECIAL ASSESSMENT BONDS ISSUED IN 1993

| JURISDICTION | PRINCIPAL AMOUNT OF ASSESSMENT BONDS ISSUED |
|---|---|
| AMADOR COUNTY | |
| Jackson | $266,363 |
| CONTRA COSTA COUNTY | |
| Antioch | $15,000,000 |
| Concord | $48,008 |
| County | $2,312,598 |
| EL DORADO COUNTY | |
| Georgetown Divide PUD | $257,000 |
| FRESNO COUNTY | |
| Coalinga | $2,269,000 |
| Fowler | $787,500 |
| Fresno | $1,898,711 |
| San Joaquin | $35,165 |
| Selma | $5,835,000 |
| IMPERIAL COUNTY | |
| Calexico | $750,000 |
| LAKE COUNTY | |
| Konocti Co. Water District | $1,857,167 |
| LOS ANGELES COUNTY | |
| Long Beach | $383,455 |
| Long Beach | $2,470,000 |
| Redondo Beach | $1,147,000 |
| South Gate | $328,000 |
| MARIN COUNTY | |
| Corte Madera | $313,571 |
| Novato | $2,495,000 |
| MARIPOSA COUNTY | |
| Mariposa PUD | $238,511 |
| MERCED COUNTY | |
| County | $3,126,084 |
| Dos Palos | $600,000 |
| Merced | $971,433 |
| MONTEREY COUNTY | |
| Salinas | $226,508 |
| ORANGE COUNTY | |
| Irvine | $1,248,487 |
| Irvine | $13,265,000 |
| Newport Beach | $171,911 |
| Rossmoor CSD | $5,000,000 |
| PLACER COUNTY | |
| Placer County Water Agency | $181,080 |
| PLUMAS COUNTY | |
| Plumas County | $637,737 |
| RIVERSIDE COUNTY | |
| Eastern Municipal Water District | $953,633 |
| Indio | $3,688,892 |
| La Quinta | $1,880,892 |
| Riverside Flood and Irrigation District | $5,715,000 |
| SACRAMENTO COUNTY | |
| Galt | $3,430,000 |
| Sacramento County Sanitation Dist. #1 | $191,153 |
| SAN BENITO COUNTY | |
| Hollister | $2,415,000 |
| SAN BERNARDINO COUNTY | |
| San Bernardino County | $4,229,842 |
| SAN DIEGO COUNTY | |
| Chula Vista | $3,607,498 |
| Encinitas | $192,316 |
| San Diego | $73,109 |
| SAN JOAQUIN COUNTY | |
| Lathrop | $563,229 |
| Stockton | $2,554,608 |
| SAN LUIS OBISPO COUNTY | |
| Atascadero | $2,100,000 |
| Atascadero | $903,356 |
| SAN MATEO COUNTY | |
| South San Francisco | $840,942 |
| SANTA CLARA COUNTY | |
| Morgan Hill | $283,695 |
| Palo Alto | $2,055,000 |
| SANTA CRUZ COUNTY | |
| Capitola | $2,940,000 |
| Santa Cruz County | $186,510 |
| Scotts Valley | $400,000 |
| SHASTA COUNTY | |
| Redding | $165,000 |
| Shasta Dam Area PUCD | $1,202,700 |
| SOLANO COUNTY | |
| Fairfield | $4,482,227 |
| SONOMA COUNTY | |
| Santa Rosa | $3,000,000 |
| STANISLAUS COUNTY | |
| Turlock Irrigation Dist | $14,268 |
| Turlock Irrigation Dist | $76,151 |
| Waterford | $259,858 |
| YOLO COUNTY | |
| Woodland | $5,525,051 |

Source: California Debt Advisory Commission, Office of California Treasurer, 1993 Summary of California Public Debt, CDAC 94-4, 1994, Tables A-5 and A-10 and 1993 Calendar of Public Debt Issuance.

TABLE 2

SPECIAL ASSESSMENT BONDS ISSUED IN 2018 FOR PUBLIC WORKS

| JURISDICTION | PRINCIPAL AMOUNT OF ASSESSMENT BONDS ISSUED |
|---|---|
| MARIN COUNTY | |
| Belvedere | $2,810,000 |
| Tiburon | $265,000 |
| ORANGE COUNTY | |
| Newport Beach | $2,955,000 |
| SAN DIEGO COUNTY | |
| Valley Center Muni Water District | $4,035,000 |
| STANISLAUS COUNTY | |
| Turlock Irrigation District | $126,400 |

Source: Califonia Debt and Investment Advisory Com- mission, Califonia State Treasurer, "2018 Debt Issu- ance Data" and "2019 Debt Issuance Data" at www.treasurer.ca.gov/cdiac/datafile/2018 and www.treasurer.ca.gov/cdiac/datafile/2019

- The proposition shifts the burden of proof in assessment proceedings, so the public agency has to demonstrate that the assessed parcels receive a special benefit beyond benefits to the public at large, and that each parcel's assessment is proportional to that benefit.
- The proposition sets out rules concerning special benefits and their relation to the amounts assessed, which the HJTA analysis characterizes as "similar to those imposed by traditional assessment law." The proposition restates and delicately adjusts these requirements. Assessments must be proportional to the special benefit received by each parcel and public properties that receive special benefits must pay their fair share. It does not suggest that the public must pay for all general benefits. It does not suggest that assessments cannot take account of differences in the cost of providing special benefits to each parcel. Overall, it pro- vides a modest and nuanced clarification of the traditional concepts of special benefits and proportional assessment.

The analysis clarifies that "mere increase in the value of property" does not constitute special benefit. The special benefit must exceed the benefit to the public at large, or, confusingly, "even to other similar properties."

- The proposition standardizes the pro- test procedure in assessment proceedings, saying that assessments cannot be imposed if "ballots submitted in op- position to the assessment exceed the ballots submitted in favor of the assessment,"[6] where ballots are weighted by the amount of assessment each property owner would have to pay. Before the proposition, assessment laws used various weighting formulations, often weighting by the area of each parcel. Before the proposition, a local agency had to stop proceedings only if protest was filed by a majority of property owners (however weighted), a consider- ably more difficult standard for assessment opponents to achieve. Before the proposition, a local agency could over- ride a majority protest with a 4/5 vote of the legislative body if it found that public health and safety were at risk. Note that this is a group of changes that the HJTA intended to make, and that the words of the initiative are quite clear about this intent.
- The HJTA comments include an observation that lends perspective: "The over- all purpose of this section is to permit assessments to be used, once again, as a legitimate financing mechanism for capital improvements and public ser- vices that provides (sic) particular benefits to property and not just a means to impose parcel taxes." The comments note that the proposition clarifies several procedural requirements that have long been traditional with assessments. For example, assessments must be supported by an "engineer's report," and property owners must get mailed notice of pro- posed assessment proceedings.

CENTRAL AMBIGUITIES

The decisions of several courts suggest, how- ever, that the consequences of Proposition 218 are not always what was intended by the HJTA. This paper is an attempt to identify a small number of issues that have had the practical, and probably unintended, effect of making special assessments in already developed areas unusable for most purposes and for most jurisdictions in California.

## 1. THE STANDARD OF JUDICIAL REVIEW OF BENEFIT ASSESSMENTS

The notions that special assessments must be justified by the existence of special benefits, and must be more or less proportional to them, have been central to the assessment tradition at least since statehood. Before enactment of Proposition 218, the courts largely ducked second-guessing the judgments of a city council or other local legislative body that created an assessment district. Although this practice can be traced to the state's early formative years, it is usually identified with the California Supreme Court's decision in *Dawson v. Town of Los Altos Hills* (1976). Dawson, a property own- er, challenged a special assessment levied under California's 1913 Act to pay for capacity in a sewage treatment plant. As under Proposition 218, the law in 1976 required the town to identify parcels specially benefited by this capacity, exclude parcels not specially benefited, and spread assessments "in proportion to the estimated benefits" to be received by each parcel.

The court noted that the formation of the assessment district was "a peculiarly legislative process grounded in the taxing power of the sovereign." It went on to write:

> The Board of Supervisors is the ulti- mate authority which is empowered

[6] California Constitution, Article XIIID, SEC. 4(e).

> to finally determine which lands are benefited and what amounts of benefit should be assessed against the several parcels benefited…[7]

And concluded:

> In such a case the court will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed.[8]

Proposition 218 changed this state of judicial affairs. It did so by placing the burden of proof on the local agency to show that the assessed parcels will receive special benefits and that the assessments are proportional to those benefits. Before, the local agency did not have to "demonstrate" special benefits. It only had to state its judgment about benefits and could reasonably expect the courts to uphold that judgment against any challenge. Following Proposition 218 the local agency has to make the demonstration and can expect a critical review by the courts.

What does this mean in practice? The Supreme Court, in its Silicon Valley decision, about which more later, observed that this "burden" was "somewhat imprecise."[9] To resolve this imprecision, the Court quotes at length from the proponents' ballot arguments, the Legislative Analyst Office's summary, and its own reasoning upholding a park assessment in *Knox v Orland*,[10] These quotations substantially reflect the "taxpayer's revolt" of the time, and show that the "burden" subsection was intended to make it more difficult for local agencies to defend their assessment decisions. But none of these sources sheds any light on the remaining, centrally important question: How much more difficult?

## 2. WHAT ARE SPECIAL BENEFITS ANYWAY? BENEFITS AND LEGAL TRADITION

Special assessments have been used in California for more than 160 years. The rationale that assessments must be proportional to special benefits received by parcels of property has been central for all of that time. The California Supreme Court in 1859 observed that many public projects, such as the original paving of J Street in Sacramento at issue in the case, particularly benefit nearby property owners. The court upheld a special assessment on those owners to pay for the work, enthusing:

> General taxation for such local objects is manifestly unjust. It burthens those who are not benefited, and benefits those who are not burthened. This injustice has led to the substitution of street assessments, in place of general taxation; and it seems impossible to deny that in the theory of their apportionment, they are far more equitable than general taxation, for the purpose they are designed for.[11]

Still, courts have never ventured into rigorous definition of special benefit. Benefits have always been identified impressionistically, often using a common sense standard. The assessment engineer typically converted common sense into a simple formula (relating special benefits to front footage for a sidewalk, or number of bathrooms and distance for a sewer connection, for example). The most important constraint on excessive manipulation of this approach was exposure at the public hearing required for the proposed assessment and the likelihood of a majority protest. The Dawson standard was not a case of the courts caving in to local government excess. Rather, it reflected the intuitive, judgmental quality of special benefit determinations. The Dawson Court faced the question: Should these kinds of decisions be made by local elected decision-makers in front of their constituents or by the courts? It sided with the local decision-makers.

How does Proposition 218 change this tradition? It primarily tells us that the local agency has the burden of "demonstrating" that assessments are proportional to special benefits. But how do they demonstrate proportionality of a traditionally intuitive, common sense measure, not really subject to quantification in most cases? Perhaps the answer is that the agency must show that it had a reasonable, intuitive, common sense basis for apportioning the assessments based on special benefits. A court review would then consist of an examination of whether the apportionment defies common sense and reasonable intuition. That is not far from the apparent, although not explicitly described, standard emerging from recent court decisions. In the Santa Clara Open Space authority case, the Supreme Court concluded that the authority's judgment that over one million parcels enjoyed equal special benefits from open space, not yet purchased or even identified, defied common sense. In *Dahms v Pomona*, the court wrote that the city's judgment that downtown businesses benefited from a business improvement district in proportion to street footage (40 percent), building size (40 percent), and lot size (20 percent) "made sense."[12] In the *Tiburon* utility undergrounding case, the court accepted the engineer's assignment of proportional benefit based on weights for each parcel's improvement in aesthetics, increased safety, and reliability.[13] It did not require detailed proof, for example, that undergrounding decreased the likelihood of power outages, or statistics about the amount of reliability im-

[7] *Dawson v. Town of Los Altos Hills*, (1976) 16 Cal. 3d 676 at 684.

[8] Ibid, but quotations from *Larsen v. San Francisco*, (1920), 182 Cal. 1.

[9] *Silicon Valley Taxpayers Taxpayers Association v. Santa Clara County Open Space Authority*, (2008), 44 Cal. 4th 431, at 445.

[10] *Knox v. Orland* (1992) 4 Cal. 4th 132.

[11] *Burnett v. City of Sacramento*, 12 Cal. 76 (1859).

[12] *Dahms v. Downtown Pomona Property and Business Improvement District*, (2009), 174 Cal. App. 4th, 708.

[13] *Town of Tiburon v. Bonander*, (2009) 180 Cal. App. 4th, 1057.

provement expected, or about the economic value of increased reliability. The court said the improvement was "self-evident," which is harmonically resonant, if not perfectly identical, to "common sense."

## 3. SPECIAL BENEFITS AND GENERAL BENEFITS

Special assessment law before Proposition 218 concerned itself only with special benefits. Assessments were supposed to be proportional to special benefits derived from the public work or service to each parcel. Projects might well have produced benefits enjoyed by a broader public than those subject to assessment, but trying to identify or describe them did not really come up. Doing so would have had no effect on the distribution of assessments.

Proposition 218 introduces the concept of general benefits. It mentions this notion twice. After explaining that assessments must be proportional to special benefits, it says, "(o)nly special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel."[14] In defining "special benefit," it says "(g)eneral enhancement of property value does not constitute 'special benefit."[15] This may mean general enhancement of property value is a general benefit.

These phrases are apparently intended to help define "special benefits." They explain that not all benefits produced by a public project or service are special. On the contrary, some were so widely distributed that they were general. The Supreme Court identified a particular example that was important to the sponsors of Proposition 218, and may well be the intended target of the "general benefit" admonitions. Specifically, the ballot argument in favor of the proposition identified an assessment district where "in Northern California, taxpayers 27 miles away from the park are assessed because their property supposedly benefits from the park."[16] The court correctly noted that the reference was to the case of *Knox v Orland*,[17] concerning an assessment district formed in the town of Orland to raise funds to maintain five existing parks. Before enactment of Proposition 218, the court upheld the assessments, agreeing that property owners were "uniquely benefited" by proximity to the park, even though the assessment district "contained 42,300 acres of land and geographically consisted of the entire city and portions of outlying areas of Glenn County."[18] The court admonished local agencies never to do anything like that again. The Supreme Court, if not the Santa Clara Open Space Authority, got the point in concluding that the Authority's proposed assessment district, covering an area with a population of 1.2 million people, probably included some general benefit and could not be a proper basis for a special assessment.

Lower appellate courts, however, have expanded this fairly modest definition to have a more transformative impact on assessment practice, one never hinted at in the campaign leading to passage of the proposition and only applied after enactment by some, but not all, appellate courts. The matter remains unresolved, as standing appellate decisions disagree about it.

## 4. THE COST OF PROVIDING THE SPECIAL BENEFIT

It has been longstanding tradition that the amount of special assessment levied on a property can reflect the cost of providing a facility or service to that parcel. A lot farther away can be assessed more for connection to a sewer system because more pipe and more digging are needed. Similarly, properties whose sewage needs to be pumped uphill to connect to the municipal sewer system can be assessed for the cost of the pump station, while properties whose sewage flows into the municipal system courtesy of gravity need not be compelled to pay for the pump station.

Proposition 218 seems to be intended to reflect this tradition. It says an assessment cannot exceed "the reasonable cost of the proportional special benefit conferred on the parcel."[19] Nothing in the ballot materials or the election campaign suggests that the traditional practice was a source of complaint, or that there was an interest in changing it. The HJTA's explanatory annotations to Proposition 218 make this observation about the relevant section of the initiative:

> 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 (sic} particular benefit to property.

It expresses no interest in changing traditional practice.

The LAO's ballot summary says this: "Second, local governments must ensure that no property owner's assessment is greater than the cost to provide the improvement or service to the owner's property."[20] This also reflects the traditional practice and understanding that the assessment should be based on the cost of providing the special benefit.

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[14] California Constitution, Article XIIID, SEC. 4(a).

[15] California Constitution, Article XIIID, SEC. 2(i)

[16] The ballot argument can be found at **https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2138&context=ca_ballot_props**. It is quoted by the Supreme Court at *Silicon Valley*, op.cit. at 445.

[17] *Knox v. Orland*, op. cit.

[18] *Silicon Valley*, op. cit. at 446.

[19] California Constitution, Article XIIID, SEC. 4(a).

[20] California Secretary of State, Voter Information Guide: November 5, 1996 – General Election, Proposition 218: Voter Approval for Local Government Taxes. Limitation on Fees, Assessments, and Charges, Analysis by the Legislative Analyst, available at **https://lao.ca.gov/ballot/1996/prop218_11_1996.html**.

Yet an appellate court[21] has held, differently than HJTA and the LAO, that assessments could not reflect the cost of providing a public facility or service to each individual parcel. Instead, it held that the local agency must calculate the total cost of the public facility, and divide that cost up among the parcels based on each parcel's special benefit. The case in question involved the cost of undergrounding utilities. The city levied larger assessments in an area where lot sizes were larger, since the project's engineer determined that it cost more to underground utilities in that area. The city followed traditional practice. The court ruled the assessment invalid.

The court was helped in reaching this conclusion by the confusing wording of the proposition. The subsection which directs that the assessment not exceed the reasonable cost of providing the special benefit also says that "(t)he proportionate special benefit derived by each individual parcel shall be determined in relationship to the entirety of the capital cost of a public improvement."[22] So special benefit must be "determined in relationship to" the project cost. This is ambiguous. It could, conceivably, suggest that the amount specially assessed against each parcel must be the product of its share of special benefits times the total cost of the project, as the appellate court ruled. It could mean that the amount assessed against each parcel should be proportional to its special benefit adjusted by the cost incurred to provide that special benefit, as suggested by the reference to "reasonable cost" in the following sentence in the proposition. It could just state the traditional principle that the total amount assessed should cover the cost of the project, and not more.

## 5. ASSESSMENTS AGAINST PUBLIC PROPERTY

Construction of a new public facility such as a sewage collector system or local streets and sidewalks is likely to provide benefits to public facilities as well as private houses and businesses. These might include benefits to a library or fire station run by the same local agency that created the assessment district, a school run by a separate school district, a Department of Motor Vehicles office run by the state, or a federal court house. Prior to passage of Proposition 218, state law generally allowed localities to not assess public property, and to require the private property owners in the district to make up the difference.[23] If the locality did assess the federal or state government and that government did not pay, the locality creating the district would have to pay the amount due instead.[24] Sometimes contributions from public agencies were negotiated. A basic principle of sovereignty is that a local government cannot compel a "higher" level of government to pay.[25]

Proposition 218 clearly changes the rules about this. It declares, "Parcels within a district that are owned or used by any (local) 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 the publicly owned parcels in fact receive no special benefit."[26] The primary intention here was presumably to stop the old practice of requiring the private parcels in the district to pay the public agency share of the project's cost. The money to pay that share would have to come from local general revenues, the state or federal government, or some other source.

However, the proposition contains an important ambiguity. Does "shall not be exempt from assessment" mean only that owners of the private parcels in the district cannot be required to pay the share of project cost corresponding to the special benefit going to each public agency? Or does it mean that each agency, including other local agencies, the state, and federal agencies, must actually be compelled to pay their share of the project cost? The first interpretation is consistent with the proposition's announced aim of protecting private taxpayers and is fairly simple. The second would not be simple. Proposition 218 cannot change the sovereign power of federal agencies to decline to pay.

The LAO's ballot analysis does not shed light on how this would work. It says "(l)ocal governments must charge schools and other public agencies their share of assessments. Currently, public agencies generally do not pay assessments."[27] This could be consistent with either interpretation, but arguably leans in the direction of change to the principles of sovereignty.

The HJTA Annotations on Proposition 218 from 2006 reinforces this interpretation:

> (a)ssessments 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

[21] *Town of Tiburon v. Bonander* (2009), 180 Cal. App. 4th 1057/

[22] Cal. Const., Article XIII D, SEC. 4.

[23] California Streets and Highways Code Section 5301 allows local agencies creating assessment districts to omit public agency property within the area of the district from assessment, and Section 5302 specifically allows the local agency to levy the total cost of the project against the parcels remaining in the district. These sections appear to be in contradiction to Proposition 218, and perhaps would benefit from revision.

[24] California Streets and Highways Code Sections 5303.

[25] *McCulloch v. Maryland*, 17 U.S. 316 (1819)

[26] California Constitution, Article XIIID, SEC. 4(a).

[27] Proposition 218 Ballot materials, "Analysis by Legislative Analyst," under "Proposed Requirements for Assessments."

same manner as private property, then it must be assessed.[28]

## 6. ASSESSMENT OF CHURCHES AND OTHER FAVORED PROPERTIES

Churches, educational institutions, and certain other nonprofits are exempt from the ad valorem property tax.[29] California's assessment laws generally do not create similar exemptions from special assessments. But in practice churches and some other nonprofits have often been exempted from special assessments. Although drafters of Proposition 218 were adamant that public agencies pay their special benefit share, they were more circumspect about requiring that churches and fraternal organizations do so. However, the proposition's requirement that all parcels with special benefits be identified and that assessments be proportional to special benefits would seem to preclude exemption for any category of parcel. Just as with public properties, a question remains: Do churches and other properties really have to pay? Or could the local agency identify the church's share of project cost and pay that amount from some other source? Or could the local agency exempt the church property and require the other private owners to pay more to compensate (an outcome possibly implied by an appellate court decision, at least according to a concurring opinion).[30]

## 7. ARE ASSESSMENTS LIMITED TO PERMANENT PUBLIC IMPROVEMENTS?

In *Knox v City of Orland*, a leading California Supreme Court case from 1992 before Proposition 218, the court defined a special assessment as, among other things, a method used to pay "the expense of a permanent public improvement."[31] The court quoted those words approvingly in its Silicon Valley decision, and other appellate courts have found repeating this mantra irresistible. So far, it has not actually mattered. No assessment has been rejected because it funded an ongoing service, instead of a capital improvement. At least one court has upheld a service assessment.[32] But, repeated often enough, it is possible that courts will actually believe this assertion, so it is worth discussing.

The notion that assessments can only be used for permanent public improvements would be a very odd determination. Special assessments have been used in California to pay for a range of services for a very long time. For example, the Street Lighting Act of 1919 authorizes assessments to pay for, among other things, the maintenance of street light systems and the purchase of "electric current or energy, gas, or other illuminating agent."[33] Energy is not a permanent public improvement. The Tree Planting Act of 1931 authorized assessments to fund "clipping, spraying, fertilizing, irrigation, propping, treating for disease or injury, or other similar acts to promote the life, growth, health and beauty of trees."[34] These are also not permanent public improvements. The Landscape and Lighting Act of 1972 authorizes assessments to provide both landscape and lighting services. It specifies a procedure to set assessment rates annually as needed to pay the ongoing service costs. Assessments have been a central and historically important source of funding for the ongoing operations expenses of irrigation and flood control districts throughout the state for over a century.

In declaring that assessments are only to be used to pay for "permanent public improvements," the court ignored this extensive statutory record and associated history.

Proposition 218 says the amount assessed on each parcel shall be based on the capital cost of a public improvement, "the maintenance and operation expenses of a public capital improvement, or the cost of the property related service being provided."[35] It further defines "maintenance and operation expenses" to include "fuel, power, electric current, care, and supervision necessary to properly operate and maintain a permanent public improvement."[36] So clearly the proposition does not envision limiting assessments to funding only permanent capital facilities.

The Omnibus Implementation Act for Proposition 218, enacted by the legislature and governor define "assessment" as being imposed to pay the capital cost of a public improvement, "the maintenance and operation expenses of the public improvement, or the cost of the service being provided."[37]

## CONCLUSION

Special assessments have been part of financing public facilities and services in California since statehood. They were a primary means of financing urban infrastructure during the early decades of the 20th century, but faded to a much reduced role during and after the Great Depression. They saw increased use, and in some cases abusive use, after passage of Proposition 13 in 1978.

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[28] HJTA, Text of Proposition 218 with Analysis, comment after Article XIIID, SEC. 4(a).

[29] California Constitution, Article XIII, SEC. 3.

[30] *Dahms v. Downtown Pomona Property et al.*, 174 Cal. App. 4th 708, including its concurring opinion by J. Bauer.

[31] *Knox v. City of Orland*, (1992) 4 Cal. 4th 132

[32] *Dahms v. Downtown Pomona Property et al.* (2009) 173 Cal. App. 4th 1201

[33] California Streets and Highways Code, Section 18030.

[34] California Streets and Highways Code, Section 22012.

[35] California Constitution, Article XIIID, SEC. 4(a).

[36] California Constitution, Article XIIID, SEC. 2(f).

[37] California Government Code, Section 53750.

Proposition 218 was intended to correct the abuses that befell assessment finance. In the words of its drafters, its "overall purpose" "is to permit assessments to be used, once again, as a legitimate financing mechanism for capital improvements and services that provides (sic) particular benefits to property and not just a means to impose flat rate parcel taxes."[38]

Unfortunately, the measure's impact has gone far beyond this statement of intent. It has driven all but a few jurisdictions to abandon the use of assessments entirely. This is partly because the measure contains ambiguities and apparent contradictions. The courts have not helped. Recent court decisions have departed from traditional assessment practice and some of these decisions may result from the initiative's ambiguous or imprecise wording.

If California's local governments are sufficiently dissuaded from using the special assessment acts by recent court decisions, then the legal tests needed to clarify how Proposition 218 is supposed to work may never arise. If so, California has lost a public financing mechanism that is uniquely democratic, transparent, and fair. It might also be of growing value as towns and neighborhoods try to adopt to the threats arising from climate change.

If, on the other hand, California wants to again have the use of assessments subject to the legitimate restrictions of Proposition 218, it will need to clarify several issues. Clarification might be achieved by the California Supreme Court, if the proper cases came before it. Failing that, the cleanest path would be to amend parts of Proposition 218, not to undo the measure's primary intentions, but to state those intentions with better clarity and precision. If that should prove politically implausible, the Legislature could consider amending the provisions of statutes interpreting Proposition 218. Although the courts would not be bound to follow legislative advice of this sort, they might actually be grateful for it. Here is a preliminary, summary list of needed clarifications:

1. Clarify that special benefit can be demonstrated by evidence of particular, exceptional increases in property values[39] or by other reasonably expected beneficial impacts, such as aesthetic improvement or increased service reliability.
2. Clarify that assessments must be proportional to the cost of providing the special benefit to each parcel, but that there is no requirement to add up special and general benefit and limit assessments to funding the special benefit portion of project costs.
3. Clarify that private property owners cannot be required to pay for the portion of special benefits going to public agencies or favored properties such as churches, but that Proposition 218 does not require that these entities actually pay their proportional assessment (or, clarify that they do have to pay, at least for state and local agencies, although that would lead to complication).
4. Clarify that assessments may be used to pay for services as clearly stated in assessment acts.

By addressing item 1 through 4, courts will be aided in their "independent review" of assessments and produce more conforming results. And special assessments might again be used for traditional purposes in already developed areas, or for new purposes consistent with traditional principles to help localities adapt to climate changes.

[38] Howard Jarvis Taxpayers Association, Text of Proposition 218 with Analysis, comment on Article XIIID, SEC. 4(a).

[39] Nevada defines special benefit as "the increase in the market value of a tract that is directly attributable to a project for which an assessment is made as determined by the local government that made the assessment." Nevada Revised Statutes 271.208.