

Special Taxes and Franchise Fees

A. Proposition 13 (1978)

a. Article XIII A, Section 4:

- (1) “Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.”
- (2) *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47 (construes special tax as tax levied for a specific purpose; two-thirds vote requirement does not apply to board-proposed gross receipts tax levied to raise general revenue).

b. Article XIII A, Section 3:

- (1) This provides that “any changes in State taxes enacted for the purpose of increasing revenues ... must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature”
- (2) *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.3d 245, held that this provision neither removed the electorate’s power to adopt tax measures by initiative nor imposed a two-thirds requirement on such measures.

B. Proposition 218 (1996)

1. Article XIII C, Section 2(b): “No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote.... The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government....”
2. Prop. 218 also defines “local government” as “any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.”

C. *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924

1. Issue: is a local initiative proposing to raise taxes subject to the general election requirement in Article XIII C. Section 2(b)?
2. The court said no, for several reasons:
 - a. Article XIII C, Section 2(b) applies to “local governments” rather than local electorates.
 - b. Courts should liberally construe the initiative power, resolving doubts in its favor whenever possible.
 - c. No clear statement to limit the initiative power either in Prop. 218’s text or in its stated purposes.
 - (1) Findings stated: “This measure protects taxpayers by limiting the methods by which local governments can exact revenue from taxpayers,” thus distinguishing between the government and its citizens.
 - (2) Indeed, no mention of limiting the initiative power anywhere in Prop. 218’s legislative history.
 - (3) To the contrary, the ballot materials focused on the evils of “politicians” raising taxes.
 - d. Arguments that could have been made by the majority
 - (1) The text of 2(b) expressly distinguishes between local governments and local electorates in the approval process.
 - (2) Moreover, the power of the electorate to legislate by initiative is not coextensive with the power of the governing body to legislate: a legislative body cannot bind its successors but an initiative generally prevents the legislative body from enacting contradictory legislation.
 - e. The dissent’s best arguments
 - (1) Prop. 218 should be construed in accordance with its purpose, which was to constrain the taxing power.
 - (2) When a local electorate adopts a tax it does so exercising the legislative power of the relevant local entity.
3. Cases following *California Cannabis*:
 - a. *City and County of San Francisco v. All Persons Interested in the Matter of Proposition C* (2020) 51 Cal.App.5th 703 (two-

thirds vote requirement for government-imposed special taxes does not apply to initiative).

- b. *City of Fresno v. Fresno Building Healthy Communities* (2020) 59 Cal.App.5th 200 (follows and liberally quotes from *All Persons*)
- c. *Howard Jarvis Taxpayers' Assn. v. City and County of San Francisco* (2021) ___ Cal.App.5th ____. 2021 WL 265412 (follows *All Persons* and holds irrelevant Board member's participation in the initiative process).

D. Franchise Fees

- 1. Prop. 26, adopted in 2010, defines a "tax" for purposes of Article XIII C as "any levy, charge, or exaction of any kind imposed by a local government," subject to numerous stated exceptions.
- 2. One exception is found in Article XIII C, Section 1(e)(2), which provides that "tax" does not include a "charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product."
- 3. Likewise, under Article XIII D, Sections 6(b)(1) and (2), a city may not extend, impose, or increase a property-related fee or charge unless, inter alia,
 - a. (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
 - b. (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
- 4. Fees paid by municipally owned utilities.
 - a. *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637 (invalidated transfer of 4% of utility's total budget to general fund)
 - b. *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914 (2005) (invalidated fee of 1% of utility's fixed assets).
 - c. *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 (PILOT did not violate Prop. 26 where it did not

increase rates because rates were insufficient to cover cost of service without PILOT).

- d. *Humphreville v. City of Los Angeles* (2020) 58 Cal.App.5th 115 (transfer of surplus from municipal utility to general fund not invalid where plaintiff conceded (to avoid the statute of limitations) that rates did not exceed cost of providing service).
 - e. *Wyatt v. City of Sacramento*, ___ Cal.App.5th ___, 2021 WL 302867 (upholds tax adopted by voters after Prop. 218 but before Prop. 26 requiring municipal utilities to pay 11% of gross revenues to general fund).
5. Fees paid by private (i.e., “public”) utilities
- a. *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 (invalidating 1% surcharge imposed by city on bills paid by customer of private utility, but holds that a charge imposed in exchange for franchise rights is a fee, not a tax, if reasonably related to the value of the franchise, and that fee may be used for any municipal purpose).
 - b. *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, review granted Aug. 12, 2020). Issue presented: “Must city franchise fees that are subject to California Constitution, article XIII C, be reasonably related to the value of the franchise?”
 - c. *Mahon v City of San Diego* (2020) 57 Cal.App.5th 681 (undergrounding surcharge on bills constituted valid consideration for use of city streets and thus was not a tax for purposes of Proposition 218; fee was reasonably related to value of franchise because it was the product of bona fide negotiations).