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Proposition 218 and the Application of the “Bighorn” Decision

PROPOSITION 218, A STATE BALLOT INITIATIVE known as the “Right to Vote on Taxes Act” was approved by California voters on November 5, 1996. Proposition 218 added Article XIIC, entitled “Voter Approval of Local Tax Levies” (“Article XIIC”), and Article XIID, entitled “Assessment and Property Related Fee Reform (“Article XIID”), to the California Constitution. Article XIIC and Article XIID limit the imposition by a local government of “general taxes,” “special taxes,” “assessments” and “fees” or “charges.”

Article XIIC, provides, among other things, that the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local fee or charge. This extension of the initiative power is not

The Bighorn decision has serious implications with regard to the manner in which property owner protest procedures are applied to rate increases

limited by the terms of Article XIIC to fees and charges imposed after November 6, 1996 and, absent other authority, could result in retroactive reduction in existing fees and charges.

Although the terms “fees” and “charges” are not defined in Article XIIC, in July of 2006 the California Supreme Court, in *Bighorn-Desert View Water Agency v. Kari Verjil; E. W. Kelley* (the “Bighorn Decision”), has stated that there is

no basis for excluding from Article XIIC’s authorization any of the fees subject to Article XIID.

The California Supreme Court further stated in the Bighorn Decision that it was not holding that the initiative power is free of all limitations and was not determining whether the initiative power is subject to the statutory provision requiring that water and/or wastewater service charges be set at a level that will pay debt service on bonded debt and operating expenses. Such initiative power could be subject to the limitations imposed on the impairment of contracts under the contract clause of the United States Constitution. Additionally, SB 919 provides that the initiative power provided for in Proposition 218 “shall not be construed to mean that any owner or beneficial owner of a municipal security, purchased before or after (the effective date of Proposition 218) assumes the risk of, or in any way consents to, any action by initiative measure that constitutes an impairment of contractual rights” protected by the United States Constitution.

Article XIID prohibits the assessment upon any parcel of property or upon any person “as an incident of property ownership” (defined to exclude fees for the provision of electrical or gas service) by a local government of any tax, assessment, fee or charge except voter-approved ad valorem property taxes and special taxes, fees or charges as a condition of property development, and assessments and “fees or

charges for property related services” levied or imposed in accordance with the provisions of Article XIID.

Under Article XIID, revenues derived from a “fee” or “charge” (defined as “any levy other than an ad valorem tax, a special tax or an assessment, imposed by a local government upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service”) may not exceed the funds required to provide the “property-related service” and may not be used for any purpose other than that for which the fee or charge was imposed. Further, the amount of a “fee” or “charge” may not exceed the proportional cost of the service attributable to the parcel, no “fee” or “charge” may be imposed for a service unless that service is actually used by, or is immediately available to, the owner of the property in question, and no “fee” or “charge” may be imposed for general governmental service where the service is “available to the public at large in substantially the same manner as it is to the property owners.”

The reasonable cost of providing water and wastewater service has been determined by the State Controller to include depreciation and allowance for the cost of capital improvements. State courts have held that fees such as connection fees (capacity charges) will not be special taxes if they approximate the reasonable cost of constructing improvements contemplated by the local agency imposing the fee.

In addition, in order for a “fee” or “charge” to be imposed or increased, Article XIID provides that, among other things, the parcel upon which a fee or charge is proposed for imposition must be identified, the amount of the fee or charge proposed to be imposed on each such parcel must be calculated, written notice by

mail of the proposed fee or charge must be provided to the “record owner” of each identified parcel, and a public hearing must be conducted upon the proposed fee or charge. If written protests against the proposed “fee” or “charge” are presented by a majority of owners of the identified parcels, the fee or charge may not be imposed.

The California Supreme Court in the Bighorn Decision indicated that once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. Accordingly, the imposition or increase of any fee or charge by an agency for its water and/or wastewater service will be the subject of such a majority protest procedure. If such a majority protest occurs, the ability of such agency to generate revenues sufficient to comply with its covenants under the bonds indentures, may be adversely affected.

It is impossible to predict how Article XIIC and Article XIID will be interpreted by the courts in the future and what, if any, implementing legislation will be enacted.

About the Author

Cameron A. Weist is a Public Finance lawyer whose practice is devoted primarily to public finance projects, typically as either Bond Counsel or Disclosure Counsel. Mr. Weist has established a long-standing excellent reputation in securities law, having advised clients on well over \$9 Billion in tax-exempt and taxable transactions. Mr. Weist can be contacted at www.weistlaw.com