

A low-angle photograph of the California State Capitol building's dome and portico. The dome is dark green with a gold finial. The portico features white columns and a pediment with a statue. Two flags are visible on a tall pole: the United States flag and the California state flag. The sky is blue with light clouds.

Cal Cities 2022: Show me some RECOVERY!
Updates on Fees, Assessments, and Financing Districts

Agenda

- Rancho Cucamonga challenges and successes
- The Revenue Toolbox
- Public Engagement
- The Legal Update
- Q&A



Speakers:

John Gillison

Tim Seufert

Danielle Wood

Michael Colantuono



Trends

- Continued Fiscalization of Land Use
- Prop 13 exacerbated sales tax/property tax divisions
- Growing agencies tasked with more housing/RHNA #'s but rarely does Res below Above Moderate bring in enough revenue to offset costs of service
- Online sales biting into brick and mortar; pandemic accelerated
- Narrow base; more exemptions
- Voters getting Fee/Tax/Assessment fatigue
- Inflation now a real thing again

What's a CM to do?



- FIA's more important than ever; peer verified
- Where does housing pay for itself
- Mixed use developments
- Ways to enhance developments in the planning stages
- DIF's & Fees & CAP updated annually or biannually
 - New DIF's like Linkage Fees
 - Include inflators where possible (even LMD/SLD)
- UUT/TOT rates updated – if community is supportive
- No subsidy of 1) utilities; 2) com dev permit fees
- Maximum feasible cost recovery for community services
- EIFD/CRIA possible tools depending on purpose

Rancho Examples

- Every December – fees all go together
- FIA's – now reviewed internally by Finance & peer reviewed
- New projects must be fiscally positive by substantial margin
- Project review – purple spikes/average revenue per acre
- Include inflators whenever possible
- If districts upside down reduce services within means
- Mixed use carefully orchestrated and conditioned for proper mix of uses
- Non-residential Linkage Fee
- EIFD for key infrastructure
- New General Plan – better understanding of land uses, revenues, impacts.
 - Negotiate DA's for community benefit fees



Why are we discussing this?



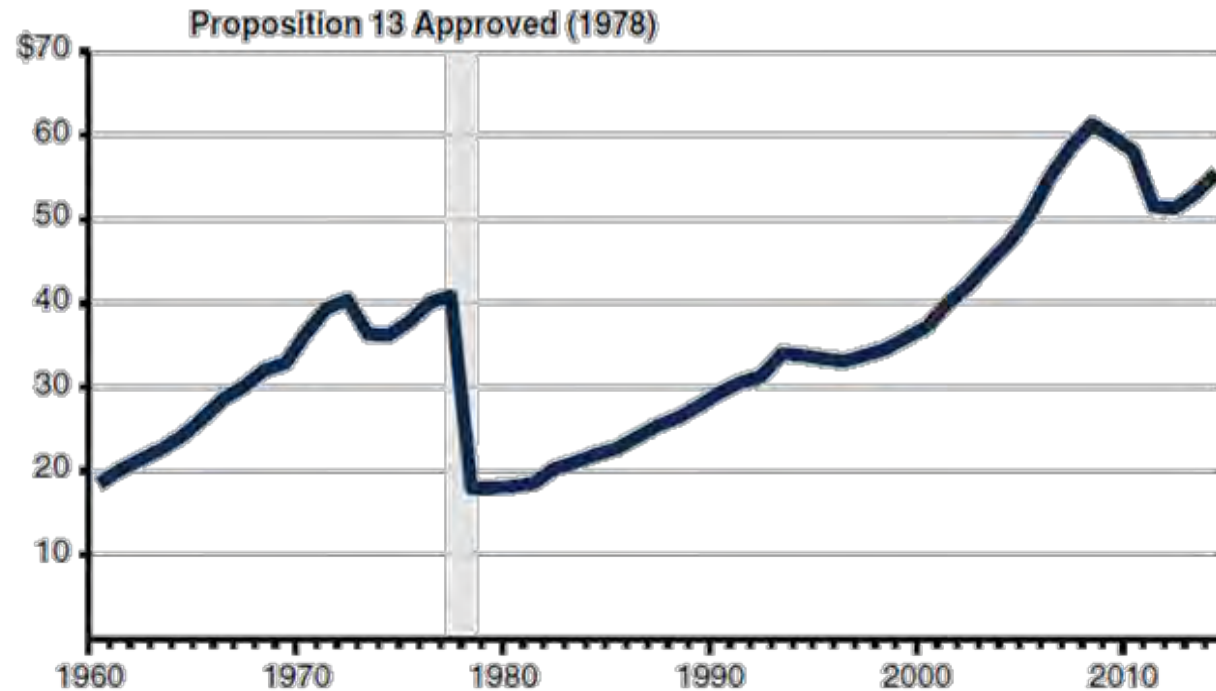
Why are we discussing this?



Why are we discussing this?

Local Government Revenue Dropped Immediately After Proposition 13

*Local Government Annual Property Tax
Revenue (In Billions, 2014-15 Dollars)*



Why are we discussing this?

Property Taxes:

- > 1977: > 90% of local gov't revenues
- > Today: < 66%



Why are we discussing this?

What primarily filled the gap?

- Sales/Hotel/Utility taxes
- Parcel taxes
- Community Facilities Districts/CFD
- Special/Benefit assessments
- Rates, fees and charges
- Development Impact Fees/DIF
- General Obligation (GO) bonds
- PPPs & other creative arrangements...



What is in our Revenue Toolbox discussion today?

- FIA – Fiscal Impact Analysis
- DIF – Development Impact Fees/Capacity Fees
- CFDs – Community Facilities Districts
- Benefit Assessment Districts
- Parcel Taxes
- The Others: EIFDs, Property-related Fees, etc.



What is the 5-Step Fiscal Sustainability Plan?

1. Update your Cost Allocation Plan (CAP)
2. Update all rate/fees, and adopt relevant new ones
3. Consider general and special taxes
4. Research SFD (Special Financing Districts) options
5. Understand your fiscal and development impacts

Cost Allocation Plan (CAP)

1. Are you leaving money on the table?
2. What is a CAP?
3. Which types of CAPs exist?
4. What are the regs?
 - *Title 2 CFR Part 200 (was affectionately known as OMB A-87)*



Updating Utility Rates and User Fees

1

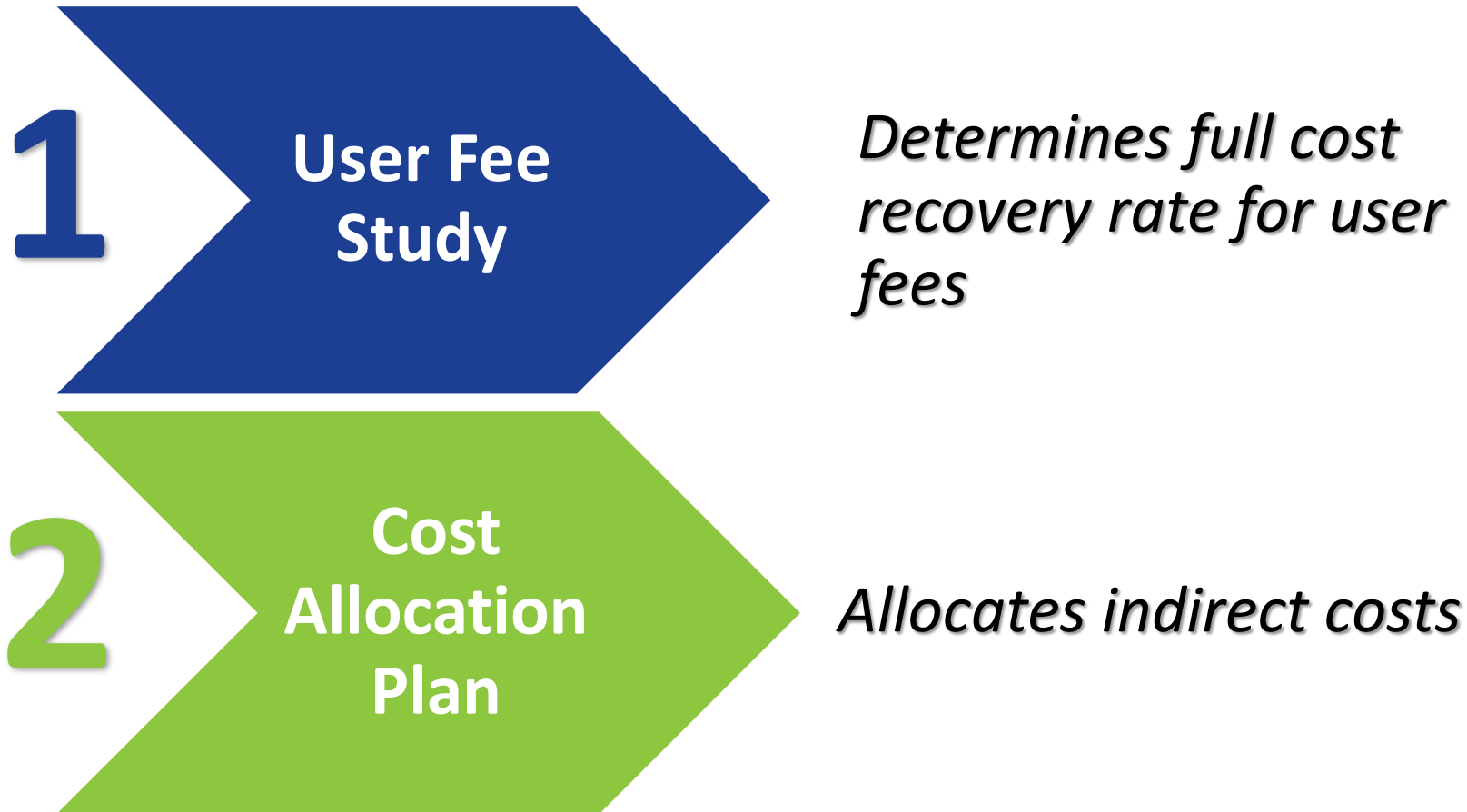
Know your costs



2

Know what you want to do!
What are your policy objectives?

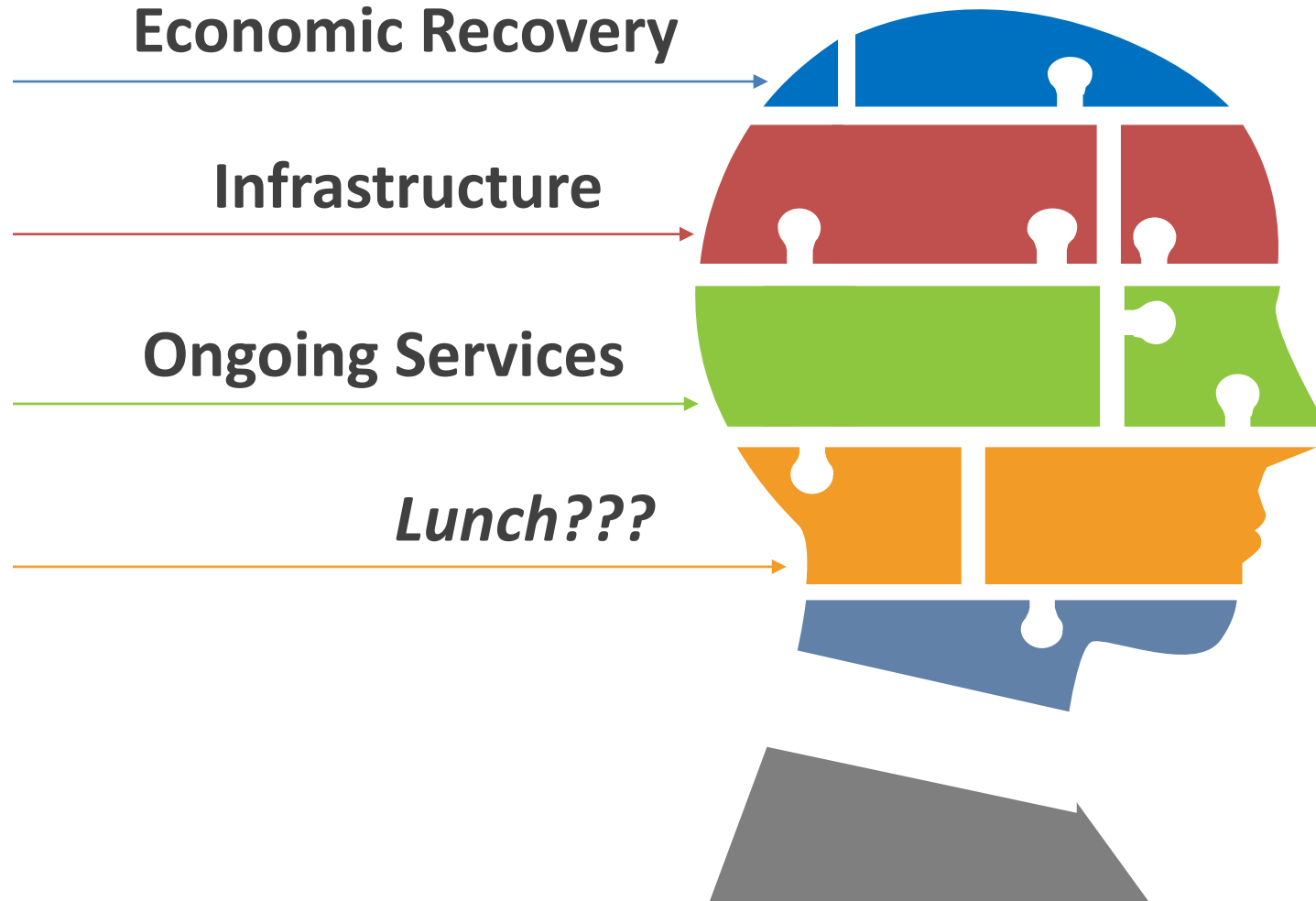
Updating User Fees



Fee Study Methodology – Defining “Total Cost”

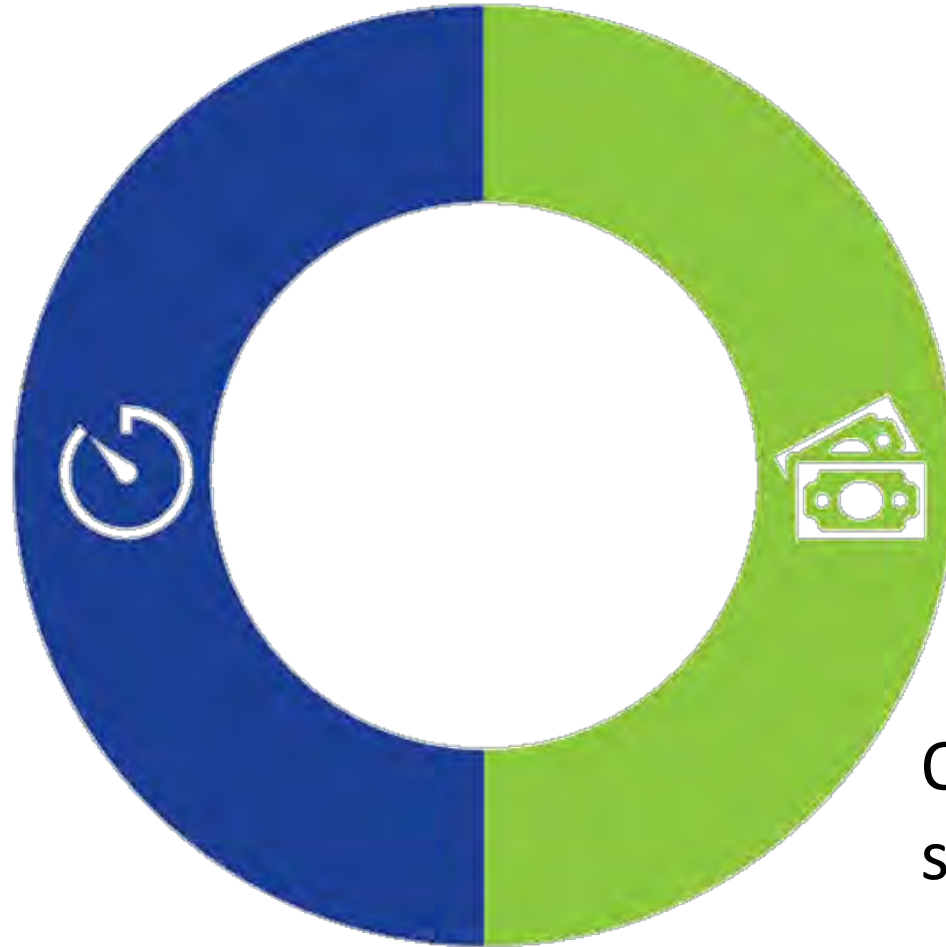
Costs	Contents
Direct	Departmental Budget: salaries and benefits, services and supplies
Indirect	Dept/Division: management, clerical, training Agency: HR, Finance, Management, etc.
Fee Specific	Pass-through costs, specific materials, etc.

What are your Fiscal Priorities?



Capital vs. Services

One-time
capital
investment

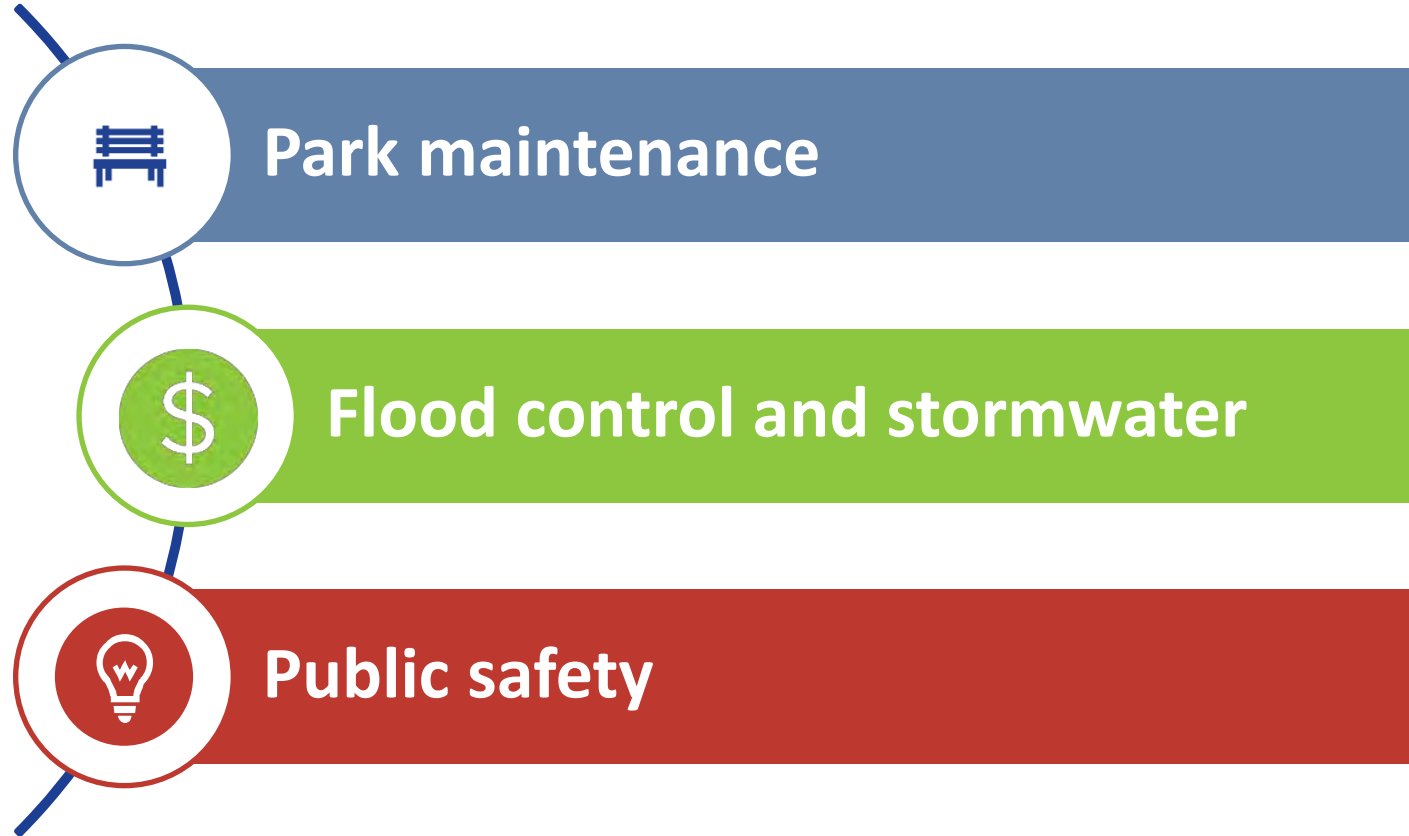


Ongoing
services

Let's talk Infrastructure...



Let's talk Services...



SFD Revenue Tools: The Short List

- 1 Community Facilities District, or CFD
- 2 “Special” Parcel Tax
- 3 Special/Benefit Assessment Districts
- 4 Property-related fee

Financing Tools: A Short List

- 1 **Municipal bonds, taxable or exempt**
- 2 **State Revolving Fund (SRF)**
- 3 **Internal Loan/Bonds**
- 4 **Bank Loans**

CFDs and Parcel Taxes

NOT BENEFIT-BASED

- Reasonable metrics
- Achieves local goals and policies
- “Additional” services if landowner vote
- Any services if voter vote

APPROVAL MECHANISM

- Registered voter approved
- OR
- CFD landowner vote(s)
- 2/3 votes in favor (or 50%?)

SAMPLE PROJECTS

- Parks and open space
- Flood/storm protection system maintenance
- Other public facilities with useful life of 5+ years

DIF and/or Quimby Fees

COST-BASED

- Fee may not exceed cost of built infrastructure

APPROVAL MECHANISM

- Approval by Council or Board
- Optional: Approval by land use agency legislative body

SAMPLE PROJECTS

- DIF – fire stations, community center, etc. (Gov Code 66000)
- Quimby - park land acquisition or fee in lieu for residential subdivisions (Gov Code 66477)

Where does Public Engagement fit in?

1

Outreach

2

Public Engagement

3

Collaborative Governance



Outreach

- Official Notices
- Education/Awareness
- Transparency
- Recordings on YouTube Channel



Public Engagement

- Advisory committees
- Polling
- Surveys
- Contests
- Workshops with constituents
- Virtual meetings (webinars with participation)



Collaboration

working together to achieve a goal. It is

a recursive process where two or more people or organizations work together to realize shared goals. Collaboration

also present in opposing goals exhibit the notion of adversarial collaboration

is not a common case

Barriers to Success

- Internal readiness
- External readiness
- Level of concern is low
- The situation is an emergency
- Can not commit to implementing an agreement or outcome
- Not enough resources
- The issues are framed as a matter of rights

Focused Engagement Topics

1

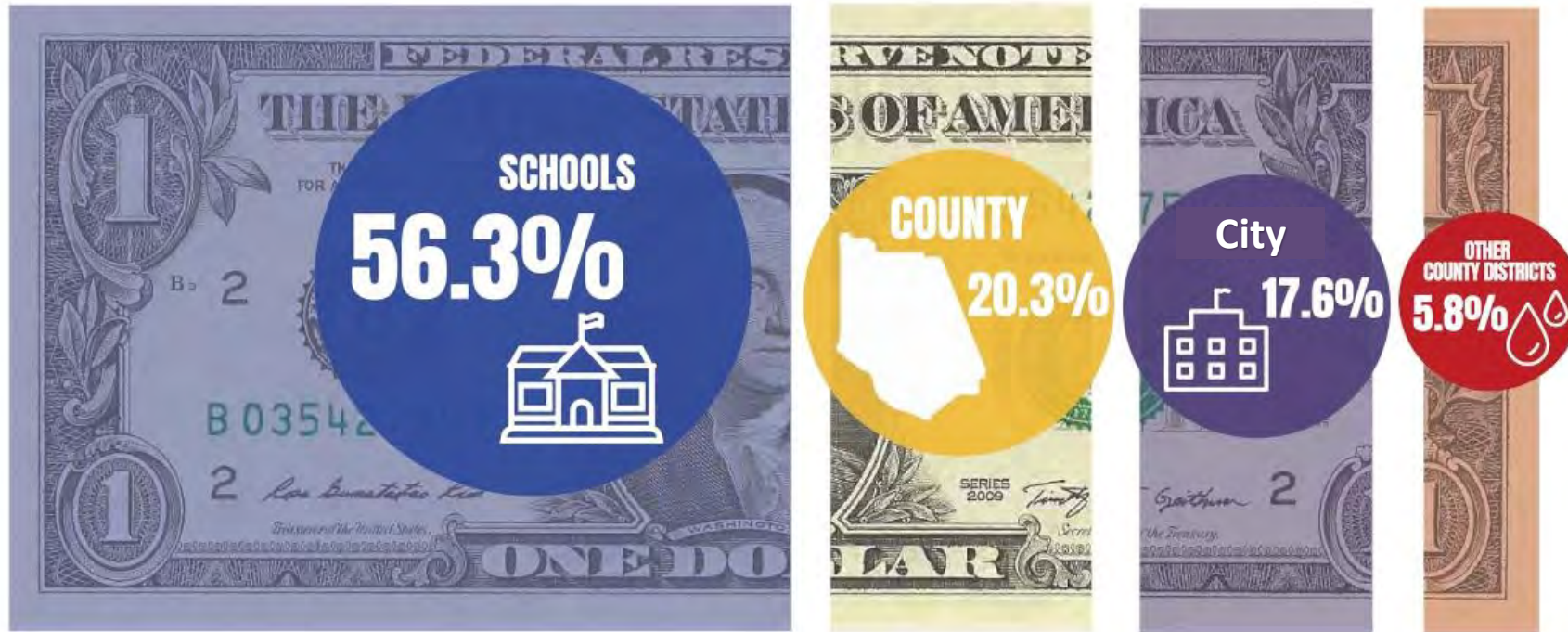
Revenue – where does it come from

2

Services – who provides them

Where do your property taxes go?


PROPERTY TAXES



Questions to Ask?

- How are the engagement efforts being measured?
- Are the engagement efforts inclusive?
- Are the expectations for engagement clear?





Update on the Laws related to
Municipal Finance
by
Michael G. Colantuono, Esq.
September 9, 2022

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**

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

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

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) 73 Cal.App.5th 505
 - Followed earlier cases
 - Fact that ballot materials said 2/3 required was not a problem

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
 - Trial court victories, appeals expected
- *City of San Diego v. All Interested Persons*, 4th DCA Case No. D080199
 - 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; challengers sued in reverse validation
 - Trial court ruled for challengers; now on appeal

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

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)

Sales Tax

Southwest Jet Fuel Co. v. CDTFA, Fresno Superior Court
Case No. 22 CECG 01224

- Plaintiff sued in April 2022 alleging collection of sales tax on jet fuel on 100% of sales violates Proposition 62, demanding \$10.7 million refund. The Plaintiff did not include the affected cities or counties as defendants. State demurred for failure to join indispensable parties Demurrer to be heard in late 2022
- Affects 7 counties and several large cities (with airports)

Sales Tax

AB 1951 (Grayson, D-Contra Costa)

- Would exempt manufacturing and R&D purchases from state and local sales taxes
- Cal. Cities, CSAC and Cal. Tax oppose
- Passed Assembly 74-0
- Pending 3rd Reading in the Senate as of 8/17/22

AB 2887 (Garcia, D-Coachella)

- **Similar exemption for “alternative feedstock” manufacturing**
- Also pending 3rd reading in Senate as of 8/17/22

Sales Tax

AB 2622 (Mullin, D-San Mateo)

- Sales tax exemption for zero emissions transit buses
- Supported by local government associations
- Pending 3rd reading in Senate as of 8/17/22

Soda Taxes

Cultiva La Salud v. State of California, 3rd 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

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**

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)

Property Tax and ERAF

- *North Sonoma Coast Fire Protection Dist. v. Roeser* (2022) 74 Cal.App5th 267
 - **Rejected fire district's challenge to ERAF calculation following a LAFCO-approved reorganization**
 - Application of technical aspects of ERAF specific to fire districts

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 (e.g., 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

Documentary Transfer Tax

- *CIM Urban REIT 211 Main Street (SF) LP v. City & County of San Francisco* (2022) 75 Cal.App.5th 939
 - **Merger of limited partnerships was a “transfer” of property** subject to documentary transfer tax
 - \$12m tax was disputed
 - City won a number of procedural issues, too

Documentary Transfer Tax

- *CSHV 1999 Harrison, LLC v. County of Alameda* (1st DCA Case No. A163369)
 - Is Cal STRS exempt from documentary transfer tax as to investments operated by third parties?
 - Fully briefed as of June 13, 2022

Parcel Taxes

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

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

Utility Users Taxes

- *City of Torrance v. Southern California Edison Co.*
(2021) 61 Cal.App.5th 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 partly settled; attorney's motion pending**

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 voters can approve GFTs

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

Hotel Bed Taxes

Gajanan, Inc. v. City & County of San Francisco (2022)
77 Cal.App.5th 780

- Court relieved taxpayers of penalties and interest because their reliance on employee to file timely returns was reasonable
- Returns were filed, but were inaccurate
- Good faith defense to penalties allowed by ordinance is not optional for the City
- \$1.7m in issue

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”**

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

Climate Resiliency Districts

SB 852 (Dodd, D-Napa)

- Authorizes creation of a RDA-like entity to fund projects to mitigate climate change
- Very broad financing powers, including power to tax, with voter approval
- No property tax share without consent of affected agencies
- **Approved and headed for the Governor's desk as of 8/17/22**

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

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.

Federal limits on local taxes

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

Tax Enforcement

- *Host International, Inc. v. City of Oakland* (2021) 70 Cal.App.4th 695
 - City gross receipts tax applied to rent Host received from subtenants of its lease of commercial spaces at OAK
 - Good 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

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.

Groundwater Extraction Charges

City of San Buenaventura v. United Water Conservation Dist. (2022) 79 Cal.App.5th 110, review denied

- **Affirmed City's victory on remand**
- Statute requiring 3:1 ratio of M&I to ag fees unconstitutional
- District could not justify 3:1 ratio on any of its many records
- Standard of review under Prop. 26 is independent judgment
 - No deference to ratemaker
 - Follows 218 standard of *Silicon Valley*
- **Prop. 26 requirement of "fair or reasonable relationship" between fee and a payor's burdens on and benefits from service allows ratemaker "flexibility"**

Groundwater Extraction Charges

Great Oaks Water Co. v. Sta. Clara Valley WD, 6th 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

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**
- Tried in July 2022, post-trial briefs due September 2022

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 amend writ petition set for August 2022
- *Searles Valley Minerals v. Indian Wells Valley Groundwater Authority*,
- Focuses on the replenishment fee

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, exchanging refunds for releases
 - Class action lawyers sued for more, arguing breach of contract, and 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

Prop. 218 & Water Rates

- Challenges to tiered water rates following *Capistrano* in:
 - *Patz v. Otay Water District, Coziahr v. Otay Water District*, 4th DCA Case No. D080308 – trial court invalidated tiered rates, **City's appeal now being briefed**
 - *Dreher v. LA DWP*, City won all but low-income discount; mediating before briefing remedies phase

Prop. 218 & Water Rates

- Still more suits:
 - *Campana v. EBMUD*, 1st DCA case No. A163054 (EBMUD won on statute of limitations; plaintiffs appealed) – Reply Brief due 8/31/22
 - *Chinitz v. City of Sta. Cruz*, SCSC no. 19 CV 03364 (tiered rates) City prevailed, class action counsel did not appeal

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; case continues as to SF: *Toy v. CCSF*, SF Case No. CPF-22-517764

Water Rates

- SB 323 (Caballero, D-Salinas)
 - Establish a 120-day statute of limitations to challenge water and sewer rates, comparable to that for power rates
 - Must give notice of the SOL in notice of Prop. 218 protest hearing
 - Sponsored by ACWA
 - Adopts GC 53759 for rates adopted after 1/1/21

Water Rates

- *KCSFV I v. Florin County Water Dist.* (2021) 64 Cal.App.5th 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.

Water Rates

Miner's Camp LLC v. Foresthill PUD, 3rd DCA Case No. C088828

- Rates include a charge to master-metered properties based on the number of units
- 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
- DCA ruled for challengers in unpublished decision
- Request to publish pending in SCOCA as of 8/16/22

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
- Tentatively settled

Water Rates

Plata v. City of San Jose (2022) 74 Cal.App.5th 736,
review denied

- *Post-Capistrano* challenge to tiered water rates
- Late payments not subject to Prop. 218 analysis (and get lenient review under Prop., 26)
- Trial court abused its discretion to allow plaintiffs to raise at trial an issue not in their Government Claims Act claim or in their complaint

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 protest hearing
- S Ct. reversed, concluding the Prop. 218 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

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*

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 court refused extra record evidence, but changed its mind post-*Malott*; City unsuccessfully sought writ review and SCOCA review
- City then settled for a 70/30 split of AMI costs; to litigate \$2m fee claim in late 2022

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

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 to first amendment complaint is set for Oct. 20, 2022**

Stormwater Fees

- *Dessins, LLC v. City of Sacramento, Sac. Superior Court*
Case No. 34-2022-80003901
 - Challenge to increase in storm water fee because margin of **victory in property owner vote provided by city's own** properties and those of other government agencies

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
- *Zolly* limits utility of this defense

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*

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

Trash Franchise Fees

Zolly v. City of Oakland (2022) ____ Cal.5th ____ 2022 WL 3270058 (SCOCA Aug. 11, 2022)

- Challenge to franchise fee imposed on City solid waste franchisees under Props. 218 and *Jacks v. City of Santa Barbara*
- SCOCA ruled apartment owners had standing because they bore economic incidence of **fee; city's claim otherwise could not be tested on demurrer**
- Prop. 26 exception for use of property limited to tangible property, not franchise itself
- Fee was "imposed" so as to trigger Prop. 26 b/c established by legal authority**
- Oakland can try to prove at trial that haulers get unusual rights in rights-of-way that are proportionate in value to franchise fee

Trash Franchise Fees

- Tips for protecting this revenue source
 - Avoid controversy if possible
 - Make a record that haulers get rights in rights-of-way that others do not (like the right to place bins in the street once a week)
 - Make a record that the value of those rights is at least roughly proportionate to the franchise fee
 - Have a cost-of-service study in your record; consider hiring a consultant, and subject it to legal review
 - Separately cost regulatory fees (like AB 939 compliance fees)

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
- DCA vacated argument and invited supplemental briefs on *Zolly* on July 7, 2022

Solid Waste Fees

Padilla v. City of San Jose (2022) 78 Cal.App.th 1073,
review denied

- Class action challenge to collection of delinquent trash fees on tax roll
- Court affirmed trial court conclusion that plaintiffs could not pursue case because they had not paid the fees under protest under HSC 5470 et seq. or to pay first and litigate later
- Powerful defense for water, sewer and trash rates

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 to jury 12/5/22; appeal may be likely

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 DCA in *Zolly v. Oakland*
- SCOCA granted review, but held briefing pending decision in *Zolly*

Other Fees for Use of Public Property

Turo, Inc. v. Superior Court (City and County of San Francisco) (2022) 80 Cal.App.5th 517

- Granted writ to reverse summary judgment for City to enforce airport access fee on car rental app
- DCA concluded app was a software provider, not a car rental company
- Another example of the difficulty of applying existing laws to commerce enabled by new technology

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

Development Impact Fees

- AB 602 (Grayson, D-Contra Costa)
 - Establishes standards for nexus studies supporting DIFs
 - Requires HCD to develop a model nexus study by January 2024
 - Gov. Code § 66016.5

Utility Connection & Capacity Charges

- AB 2536 (Grayson, D-Contra Costa)
 - Requires special districts to provide nexus studies for capacity and connection charges
 - Requires all local agencies to make the study available 14 days before rates are adopted
 - Adopts Gov. Code 66016.5

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

Development Impact Fees

- *McClure v. City of Lincoln*, 3rd DCA Case No. C096238
 - Testing *El Dorado County* SOL holding by appealing dismissal of plaintiff who had not paid fee in 5+ years
 - Case as to timely plaintiff remains pending in trial court
 - Awaiting record on appeal as of 8/16/22

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

Development Impact Fees

- *Schmier v. City of Berkeley* (2022) 76 Cal.App.5th 549
 - Statute of limitations for challenge to affordable housing fee on condo conversion runs from imposition of fee, not later recordation of lien to enforce its later application
 - Cites favorably problematic decision in *Honchariw v. County of Stanislaus* (5th DCA 2020) involving time to challenge conditions of map

Vehicle License Fees

AB 1449 (Caballero, D-Salinas)

- After many years of failed efforts to restore VLF support for annexations, a new approach
- This bill would empower OPR to offer incentives for cities to annex disadvantaged unincorporated communities and other unincorporated islands
- Pending 3rd reading in Assembly as of 8/17/22

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

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

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-payors cover them.
- No duty to subsidize rates with discretionary revenue

Prop. 26 Litigation

Similar GFT challenges against gas and electric utilities

- Alameda – voters approved GFT in 12/16
- Anaheim (water settled, City won power: *Palmer v. City*, 4th DCA No. G060880 – reply brief due 9/12/22)
- Burbank (settled)
- *Beck v. City of Canyon Lake*, Riverside case no. RIC2003025 – city lost
- **Glendale (unpub. Dec. 12/27/18, pub'n & review denied; plaintiffs' remedy appeal B310212 – fully briefed)**

Prop. 26 Litigation

- Lejins v. Long Beach – voter approval of GFT as tax lost in trial and DCA, SCOCA denied review
- Los Angeles (settled)
- *Hobbs v. Modesto Irrigation District* (lost liability phase; remedy phase being briefed as of 8/16/22)
- *Green v. Palo Alto* (Won power, lost gas; appeal pending, may settle)
- *Komesar v. Pasadena*, City won under *Wyatt*, appeal settled
- *Simpson v. Riverside*, RIC 1906168 (voter approved water GFT, demurrer to 4AC resolved 08/22)

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

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 claims to be tried 12/20/22

Assessments

Silicon Valley Taxpayer's Ass'n v. Sta. Clara Co. Open Space Auth. (2008) 44 Cal.4th 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

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
- *Broad Beach GHAD* case ambivalent about it
- *Hill RHF* remand appeal may disagree with it

BID Assessments

AB 2890 (Bloom, D-Sta. Monica)

- Attempts to codify *Dahms'* standards for PBIDs
- *Hill RHF* remand court asked for briefing on its impact
- Courts not bound by legislative interpretations of **Constitution, but they don't ignore them either.**
- Effective January 1, 2023
- Amends the PBID law

BID Assessments

Hill RHF Housing Partners, LP v. City of Los Angeles
(2021) 12 Cal.5th 458

- 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, that appeal to be argued Oct. 19. 2022 with decision w/in 90 days

BID Assessments

- *Craig v. City of Stockton*, 3rd DCA Case No. C096280
 - Stockton prevailed in Prop. 218 challenge to Tourism BID
 - Plaintiffs appealed
 - As of 8/16/2022, the record is being prepared

GHAD Assessments

Broad Beach GHAD v. All Persons (2022) ___ Cal.App.5th ___
[2022 WL 32053306, filed Aug. 2, 2022]

- 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
- DCA affirmed

GHAD Assessments

- Broad Beach GHAD
 - DCA treated beach enhancement like a public park, demanding substantial public benefit
 - May make assessment financing of oceanfront GHAD projects difficult
 - **Accepted trial court's fact-finding** and rejected defenses that
 - **Treated existing revetment as "facts on the ground," not part of the project**
 - Beach enhancement as regulatory cost of project, not part of its special benefit
 - General benefits provided at no additional cost by provisions of special benefits need not be counted

Advice re Assessments

- Tend of cases is conservative (anti-assessment)
- Assessments other than for tried-and-true improvements and services are risky
- **Use a strong, current engineer's report**
- Get legal review of reports
- Consider special taxes instead; initiative special taxes need only 50% approval

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

Mandates

Coast Community College Dist. v. Commission on State Mandates (2022) __ Cal.5th ____ [2022 WL 3349232]
(Aug. 12, 2022)

- Statute allows Chancellor of Community College System to reduce state funding to districts which do not satisfy state curriculum requirements
- SCOCA reversed DCA ruling for district, concluding the expenditures were not legally compelled, but might be practically compelled, and remanded that issue

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

Taxpayer Actions

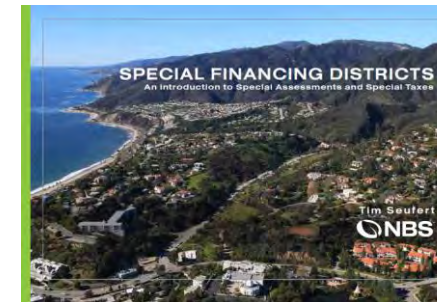
- *San Diegans for Open Government v. Fonseca* (2021)
64 Cal.App.5th 426
 - Unincorporated association of taxpayers lacked standing to **challenge school district's settlement with whistleblower** for failure to demonstrate it had a member who paid a tax to the district in the year before suit
 - CCP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

Recommended Resources

Publications available:

- League of CA Cities Proposition 218 Implementation Guide
- League Municipal Revenue Handbook
- NBS' SFD Primer
- NBS' Rates and Fee Compendium

Propositions 26 and 218 IMPLEMENTATION GUIDE | AUGUST 2021



Questions and Comments



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