



The CBRT and Other Hot Topics in Municipal Revenues

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SELECTED TOPICS IN THE LAW OF MUNICIPAL FINANCE

May 9, 2024

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INTRODUCTION. Local government finance law has become a complex specialty since the adoption of Proposition 13 in 1978. It is rapidly developing still. Cal Cities has asked me to provide an update on these developments:

- Assembly Constitutional Amendments 1 and 13, which will appear on the November 2024 statewide ballot;
- Recent litigation involving utility users taxes on water, sewer, and trash service fees;
- Recent and proposed legislation affecting water rates;
- Options to fund Clean Water Act mandates as to stormwater;
- Franchise fees after *Zolly v. City of Oakland*; and,
- Recent litigation involving development impact (“AB 1600”) fees.

ASSEMBLY CONSTITUTIONAL AMENDMENT 1. Proposition 13 generally caps property taxes at 1 percent of assessed valuation, but allows supplemental property taxes to fund acquisition and improvement of real property. (Cal. Const., art. XIII A, § 1, subds. (a), b(2).) In 2000, California voters amended Proposition 13 to allow a supplemental property tax to fund school bonds with 55 percent voter approval. Many efforts to broaden that authority have failed in the two decades since. The latest effort succeeded in reaching the November 2024 ballot. It is Assembly Constitutional Amendment 1. Carried by then-Assembly Local Government Committee Chair Cecelia Aguiar-Curry (D-Woodland), it extends the 55 percent approval standard to local governments’ bonds issued for infrastructure and affordable housing. Specifically, it allows the lower threshold for:

Bonded indebtedness incurred by a city, county, city and county, or special district for the construction, reconstruction, rehabilitation, or replacement of public infrastructure, affordable housing, or permanent supportive housing for persons at risk of chronic homelessness, including persons with mental illness, or the acquisition or lease of real property for public infrastructure, affordable housing, or permanent supportive housing for persons at risk of chronic homelessness, including persons with mental illness, approved by 55 percent of the voters of the city, county, city and

county, or special district, as appropriate, voting on the proposition on or after the effective date of the measure adding this paragraph.

(ACA 1, article First [proposed Cal. Const., art. XIII A, § 1, subd. (b)(4)].) A number of strings are attached: funds cannot be used for “salaries and other operating expenses,” projects funded must benefit the jurisdiction issuing the debt, the agency must certify that it has evaluated other funding sources, annual performance and financial audits must be made public and submitted to the State Auditor, a “citizens oversight committee” is required and bidding on construction work is prohibited “by an entity owned or controlled by a local official that votes on whether to put a proposition on the ballot.” (*Id.*, subd. (b)(4)(A)(i)–(ix).) Once a bond is approved, a city may not propose another until all funding from the first issuance has been “committed to programs and projects listed in the proposition’s specific local program or ordinance.” (*Id.*, subd. (b)(4)(B).) The Legislature may impose further “accountability measures” by two-thirds vote. (*Id.*, subd. (b)(4)(C).)

“Affordable housing” shall include housing developments, or portions of housing developments, that provide workforce housing affordable to households earning up to 150 percent of countywide median income, and housing developments, or portions of housing developments, that provide housing affordable to extremely low, very low, low-, or moderate-income households, as those terms are defined in state law. Affordable housing may include capitalized operating reserves, as the term is defined in state law.

(II) “Affordable housing” shall also include downpayment assistance programs.

(ACA 1, article First [proposed Cal. Const., art. XIII A, § 1, subd. (b)(4)(E)].)

The infrastructure which can be funded by such bonds is also defined:

“Public infrastructure” shall include, but is not limited to, projects that provide any of the following:

(I) Water or protection of water quality.

(II) Sanitary sewer.

(III) Treatment of wastewater or reduction of pollution from stormwater runoff.

(IV) Protection of property from impacts of sea level rise.

(V) Parks and recreation facilities.

(VI) Open space.

(VII) Improvements to transit and streets and highways.

(VIII) Flood control.

(IX) Broadband internet access service expansion in underserved areas.

(X) Local hospital construction.

(XI) Public safety buildings or facilities, equipment related to fire suppression, emergency response equipment, or interoperable communications equipment for direct and exclusive use by fire, emergency response, police, or sheriff personnel.

(XII) Public library facilities.

(ACA 1, article First [proposed Cal. Const., art. XIII A, § 1, subd. (b)(4)(E)(iv)].)

ACA 1 would also authorize special sales and use taxes to fund affordable housing and infrastructure, also on a 55 percent vote, with conditions akin to those summarized above. (ACA 1, article Fourth.)

ASSEMBLY CONSTITUTIONAL AMENDMENT 13. Sponsored by Assemblyman Chris Ward (D-San Diego), this measure is a reaction to the proposed “Taxpayer Protection and Government Accountability Act,” an initiative constitutional amendment designed to reverse essentially every appellate victory of state and local governments under Propositions 13, 218 and 26. (Initiative No. 21-0042A1.)¹ That measure is also known as the California Business Roundtable measure and, in Cal Cities’ parlance, the Corporate Tax Trick. Perhaps intended as leverage for a bargain in which its proponents, the

¹ The text of that initiative appears here:

< <https://oag.ca.gov/system/files/initiatives/pdfs/21-0042A1%20%28Taxes%29.pdf> > (as of Apr. 15, 2024).

California Business Roundtable, might trade it for legislation (as occurred with essentially this same measure in 2018), it was originally intended for the 2022 ballot. However, its proponents gathered insufficient valid signatures to qualify it for the ballot on the basis of a random sample (perhaps due to the difficulty of collecting signatures during the pandemic) and the Secretary of State did not certify it as bearing sufficient signatures in time. It is now eligible for the November 2024 ballot. But the Legislature refused to bargain, mounting three defenses to the measure — a “no” campaign, a suit to remove it from the ballot, and ACA 13.

Legislature of the State of California, et al. v. Weber (Hiltachk), Case No. S281977 seeks a writ in the Supreme Court’s original jurisdiction ordering Secretary of State Shirley Weber to withhold the measure from the ballot as an improper attempt to revise (rather than amend) the Constitution by initiative and as impairing essential governmental financial powers. The Supreme Court agreed to entertain the writ and, as of mid-April, the writ is to be set for argument soon. Decision is expected by the June 2024 deadline to print ballots for the Fall election.

ACA 13 will appear on the Fall ballot, too, perhaps along with the Taxpayer Protection Act. Both are retroactive, the latter to January 1, 2022, the former to January 1, 2024. Its concept is simple — an initiative constitutional amendment that imposes a super-majority voting requirement cannot become law without achieving that same super-majority. As it is retroactive, if it is adopted by a simple majority of voters this Fall, the Taxpayer Protection Act will require two-thirds voter approval. Given the scope of opposition from employee unions, contractors, and others with a stake in state and local government services, that may not be achievable. ACA 13’s core provision states:

Notwithstanding Section 4 of Article XVIII [“Amending and Revising the Constitution”] or any other provision of the Constitution, an initiative measure that includes one or more provisions that amend the Constitution to increase the voter approval requirement to adopt any state or local measure is approved by the voters only if the proportion of votes cast in favor of the initiative measure is equal to or greater than the highest voter approval requirement that the initiative measure would impose for the adoption of any state or local measure.

(ACA 13, article Second [proposed Cal. Const., art. II, § 10.5, subd. (b)].)

UTILITY USERS TAXES. A number of recent cases have disputed whether cities and counties may transfer funds from utility enterprise funds to their general funds under a

range of theories — payments in lieu of taxes (PILOTs), franchise fees, or taxes approved by voters but paid by the utility rather than shown on bills. Published opinions have taken different approaches to this issue, creating uncertainty and inviting more litigation.

First is *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373. When Proposition 218 was approved in 1996, Sacramento placed a matter before voters to readopt — as a tax — an ordinance authorizing the City Council to allocate up to 11 percent of gross utility revenues to general fund purposes. Voters approved it, and the City maintained its annual transfers. Years later, a challenger attacked the transfer, arguing it amounted to using the proceeds of utility rates for non-utility purposes in violation of Proposition 218 — California Constitution, article XIII D, section 6, subdivision (b)(2). The trial court granted the writ, invalidating the City’s fee. The Court of Appeal reversed, concluding that voter approval was sufficient to justify the transfer, which it found was “at least akin to a tax.”

By contrast is *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303. The case has facts similar to *Wyatt*’s except that the voter approval of the transfer did not come immediately after Proposition 218’s 1996 adoption, but following settlement of litigation over another version of the transfer years later. The trial court invalidated the transfer as violating article XIII D, section 6, subdivision (b)(2)² and the Court of Appeal affirmed. It purported to distinguish *Wyatt*, rather than disagree with it, but the distinction is hard to grasp:

In this regard, the matter before us is distinguishable from *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, 274 Cal.Rptr.3d 710, a recent Third District Court of Appeal case on which the City relies in support of its contention a city’s voter-approved general tax on utility services, to fund transfers to the city’s general fund, does not violate article XIII D. In *Wyatt*, Sacramento argued—and the Court of Appeal concluded Sacramento proved—a voter-approved mandatory 11 percent tax Sacramento imposed on utilities’ revenues was a cost of providing services that the utilities could pass on to ratepayers without violating article XIII D, section 6, subdivision (b). (*Wyatt*, at pp. 378, 380, 383, 274 Cal.Rptr.3d 710.) We express no opinion on whether *Wyatt* was correctly decided. We note only that *Wyatt*’s analysis is inapplicable to the case before us because the City here never argued, and there is nothing in the record indicating, the Measure M transfers and/or

² Unspecified references to “articles” are to the California Constitution.

surcharge were in any way related to the costs of providing water and sewer services.

(*Lejins, supra*, 72 Cal.App.5th at pp. 323–324.) But *Wyatt* reasoned the transfer was a cost of utility services because voters had approved it and was “at least akin to a tax,” like the sales and use taxes public utilities pay.

Also relevant is *Palmer v. City of Anaheim* (2023) 90 Cal.App.5th 718, which upheld a voter-approved fund transfer from the City’s electric utility to its general fund. Electric rates are not subject to Proposition 218 (Cal. Const., art. XIII D, § 3, subd. (b)), but are subject to Proposition 26. (Cal. Const., art. XIII C, § 1, subd. (e)(2); *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1.) *Palmer* concluded that Anaheim voters’ approval of a charter amendment reauthorizing the general fund transfer was sufficient to satisfy Proposition 26 and the fact of the transfer did not make rates taxes because they exceeded the cost of service. (90 Cal.App.5th at pp. 726–727.) Thus, *Palmer* seems to share *Wyatt*’s view that voters may approve taxes on utilities collected wholesale (i.e., paid by the utility from rate proceeds rather than collected on utility bills) without violating Propositions 218 and 26’s rule that rates may not exceed cost of service.

The Supreme Court denied review in *Wyatt* and *Lejins* and the tension between them remains. Pending cases may give the Fourth District an opportunity to weigh in. *Simpson v. City of Riverside*, Riverside Superior Court case number RIC 1906168 followed *Lejins*, not *Wyatt*, and is pending in a remedies phase of trial as this paper is written. Appeal is likely.

Beck v. City of Canyon Lake, Fourth District Court of Appeal case number D083322 is the City’s appeal from a judgment invalidating its voter-approved utility users tax on water and sewer services. The trial court concluded that taxing these services — provided by a special district — violated Proposition 218’s requirement that utility rate proceeds not be used for non-utility purposes. But, of course a tax collected by a special district from utility customers is a revenue stream legally distinct from the special district’s rate proceeds, just as sales taxes are. If the trial court’s conclusion were the law, no utility users tax could apply to fees for a property-related service, like water, sewer and trash removal. There are more than 100 such taxes in California. As the proponents of Proposition 218 assured voters in ballot arguments that voters could continue to approve utility taxes if Proposition 218 passed, this ought not to be the meaning of that measure. The Fourth District will have opportunity to decide later this year or in 2025.

WATER RATE LEGISLATION. Water rate litigation has generated water rate legislation. First is **2023's AB 755** (Papan, D-San Mateo), which adopts Water Code sections 390 and 390.1 to require a cost-of-service analysis (COSA) for water rates prepared after January 1, 2024 to identify the top 10 percent of customers by demand and identify any costs associated with serving them. Sponsored by environmental interests, it is intended to nudge water retailers to adopt tiered water rates, which get more expensive per unit of water as consumption increases, after *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 led some to believe such rates are too risky. Identifying a cost caused by a customer class and not isolating that cost to that class in rate design implies an improper cross-subsidy of rates — i.e., cost-shifting from those customers to others. However, the statute refers to the top 10 percent of all **customers**, not the top 10 percent of any customer **class**. In many agencies, the largest users will be non-residential and a COSA can easily explain that costs associated with serving those users are not best allocated to them, but to customer classes such as commercial, industrial, single-family, etc. as is industry-standard practice. Thus, the bill will require a little thought about these issues when preparing a COSA and adopting new rates, but may not unduly control rate design.

Assemblywoman Papan has also proposed **2024's AB 1827** to facilitate tiered water rates by stating that a COSA can consider any or all of: higher water demand, maximum potential water use, and projected peak water use in allocating costs to customers who use more water than others. Pending in the Assembly Local Government Committee as this paper is written, it is a response to trial court rulings involving the City of San Diego and the Otay Water District which adopted the plaintiffs' draft statement of decision declaring that tiered rates and use of peaking factors more generally (i.e., measures of the extent to which a water user class's peak use exceeds its average use) are necessarily unreasonable and violate Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (b)(3) unless the agency has time-of-use data. (*Coziahr v. Otay Water Dist.* (4th DCA No. D081099) [fully briefed Apr. 12, 2024]; *Patz v. City of San Diego* (4th DCA No. E083543) [fully briefed Aug. 28, 2023]). That reasoning is absurd. Water ratemakers have been using peaking factors for decades and time-of-use data is a novelty available only to the largest and best-funded utilities. Nothing in Proposition 218 suggests that maintaining long-standing, industry-standard ratemaking practices is unreasonable.

STORMWATER FEES. City Attorneys know that the cost of complying with Regional Water Quality Control Board mandates under the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) has become unsustainably expensive. Proposition 218, as interpreted in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98

Cal.App.4th 1351 requires majority property-owner approval, or two-thirds registered-voter approval, of fees for water quality and flood control programs. (Cal. Const., art. XIII D, § 6, subd. (c).) *Salinas* read Proposition 218's exception from that rule for fees for "sewer, water, and refuse collection services" (*ibid.*) to limit "sewer" to sanitary sewer fees.

Environmental advocates who persuaded the regional boards to impose the expensive water quality mandates have recognized the need to help local governments finance compliance. This led to 2017's SB 231 (Hertzberg, D-San Fernando Valley) which amended Government Code section 53750, subdivision (k) to define the "sewer" services fees which are partially exempt from Proposition 218 to include storm, as well as sanitary, sewers. It also adopts Government Code section 53751 to explain the Legislature's disagreement with *Salinas*. One trial court has accepted that reasoning and refused to follow *Salinas*. (*Gluck v. City and County of San Francisco*, 1st DCA Case No. A170087 [Mar. 29, 2024 appeal from Feb. 26, 2024 order sustaining demurrer without leave to amend].)

However, the Third District Court of Appeal, while noting that SB 231 postdated the dispute before it, nevertheless disagreed with it and provided a more intellectually rigorous justification for *Salinas*' interpretation of Proposition 218. (*Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535.) The decision concluded that, because of the voter-approval requirement, local governments do not have the power to adopt stormwater fees. Accordingly, many of the provisions of the 2007 NPDES permit for the County of San Diego and the cities within it are unfunded state mandates requiring the Legislature to fund their costs or to suspend the mandate. Interestingly, the Court of Appeal noted that many stormwater permit programs amount to removing waste from waterways and might therefore be funded by a fee for "refuse collection services" exempt from Proposition 218's election requirement, and subject only to its 45-day noticed majority-protest proceeding, with which we have become familiar.

In light of these developments, cities may rely on one or more of these options to fund stormwater mandates:

1. use general funds;
2. charge appropriate portions of the stormwater budget to other city programs which burden the system — like water, sewer and trash services;

3. recover a portion of the stormwater budget from a fee for “refuse collection services” in the form of efforts to prevent trash from entering receiving waters or removing it from them;
4. seek property-owner or voter approval of a stormwater fee under article XIII D, section 6, subdivision (c); or
5. seek voter approval of a general or special tax under article XIII C, section 2.

FRANCHISE FEES. Proposition 26 makes all government revenues taxes subject to voter approval unless one of seven express and one or two implied exceptions apply. The express exceptions appear in California Constitution, article XIII C, section 1, subdivision (e). The implied exceptions are for fees that do not fund government (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310 [fee for bags at grocery stores under plastic bag ban ordinance not subject to Prop. 26 because grocers retained it] and, perhaps, those which government does not “impose” by force or authority so as to come within the language of article XIII C, section 1. (But, see *Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 791 [rejecting this argument as to trash franchise fees].) Relevant here is the fourth exception for a “charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.” (Cal. Const., art. XIII C, § 1, subd. (e)(4). Many franchise fees imposed by government are for the use of property, such as the use of rights-of-way in providing electric service.

Zolly and other cases have made the legal basis for such fees more complex. *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 determined that city’s fee on Southern California Edison for use of city rights-of-way to provide electric service was not a tax, even though the PUC required it to appear on residents’ utility bills as a separate line item, if the fee was at least roughly proportionate to the value of the rights in real estate the franchise confers. That relationship could be proven by bona fide negotiations or “other indicia of value,” a phrase to be defined by subsequent case law. The City proved that relationship on remand, and prevailed on a further appeal in an unpublished decision.

Zolly is more problematic. There, Oakland renewed its solid waste and refuse franchises in a messy process that led to controversy and a scathing grand jury report. Landlords sued to challenge substantial franchise fees paid by the haulers to the City’s general fund, alleging they bore the economic burden of the fees via rates they paid on behalf of their tenants for refuse collection services. The trial court sustained the City’s

demurrer on the basis that the fee was not imposed on the landlords and that the haulers paid it voluntarily. The Court of Appeal affirmed in part, rejecting the City's argument that the landlords lacked standing to challenge a fee they did not pay directly, and the Supreme Court granted review.

Justice Liu's opinion is broad, drawing a concurrence from Justices Corrigan and Jenkins arguing for a narrower rationale. First, he found standing — at the demurrer stage — from the landlords' allegations they bore the burden of the fee. This creates unresolved tension with such cases as *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472 and *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, which held plaintiffs must be directly obligated to pay a fee to have standing to challenge it. *Zolly* distinguishes, rather than disagrees with, those cases, noting statutory bases for their standing requirement not applicable to *Zolly's* writ claim.

Second, *Zolly* concludes that Proposition 26's fourth exception for fees for the use of government property is limited to tangible property (real and personal property) and excludes intangible property like the right to provide waste-hauling services in Oakland.

Third, the franchise fee was "imposed" so as to trigger Proposition 26 even if voluntarily paid because it was established by a legislative act of government — approval of the franchise.

The Court remanded for trial of *Zolly's* petition, leaving Oakland to raise below its argument that haulers received valuable rights in City rights-of-way — i.e., the right to place trash cans there on a weekly basis. As Oakland had not briefed the point, but raised it only at oral argument, the Supreme Court did not reach the claim.

Another recent case of note is *City of Lancaster v. Netflix, Inc.* (2014) 99 Cal.App.5th 1093. Given changes in the television industry, Lancaster sought to enforce a franchise fee under the Digital Infrastructure and Video Competition Act (DIVCA), not just against the legacy cable franchisee, but also against Netflix and other streaming services, which typically use cable and telephone lines in rights-of-way to deliver their services. The Second District affirmed the trial court's order sustaining the streaming services' demurrer, concluding DIVCA did not grant cities a private right of action against non-franchise holders.

In light of these cases, cities should consider these steps to maintain franchise fees on trash haulers and others who make economic use of rights-of-way:

- Make a record that the franchise grants franchisees rights in rights-of-way that others do not enjoy (like the right to place bins in street weekly);
- Make a record that the value of those rights is at least roughly proportionate to the franchise fee, perhaps using a ratemaking consultant or real estate appraiser;
- Include a cost-of-service study in the record on which the fee is approved; consider hiring a consultant to prepare it, and have a lawyer review it; and
- Separately cost regulatory fees (like AB 939 fees compliance to fund compliance with the Integrated Waste Management Act) and fees for encroachment permits, as well as impact fees for road degradation. Such fees more easily defended than franchise fees for use of rights-of-way.

DEVELOPMENT IMPACT FEES. Fees on development to fund facilities and services necessary for that development, often called AB 1600 fees for the 1987 statute which regulates them, have been controversial of late. That statute, Government Code section 66000 et seq., requires detailed findings to impose such a fee, typically supported by what is known as a “nexus study,” and annual and five-year reports intended to show that the money is being promptly spent to deliver the facilities or that there is good reason for local government to continue holding the funds. Those reports are demanding, best prepared by consultants, worthy of legal review before they are submitted to a city council, and often overlooked. A series of recent cases have made them riskier.

First is *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350, which found that City had failed to timely spend, or to properly justify not spending, fees imposed for beach parking and ordered the City to refund \$10.5 million in fees collected over many years. This got the attention of cities — and the plaintiffs’ bar.

Next came *County of El Dorado v. Superior Court* (2019) 42 Cal.App.5th 620 which lowered the temperature a bit by holding that the statute of limitations for refund claim under AB 1600 was one year, as the duty to refund fees is a penalty, triggering the statute of Code of Civil Procedure section 340, subdivision (a).

Then came *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528 which held that a fee a developer voluntarily paid in lieu of providing all the parking its project required was also subject to AB 1600. It ordered the city to refund the fees because it had not spent them in the allowed time without adequate justification. This was an

unwelcome surprise because the public law community had understood that in-lieu fees are not subject to AB 1600 (because they are voluntary), but analyzed under the regulatory takings standard of *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, which had upheld as not a taking a fee in lieu of public art included in a project. *Ehrlich* analysis requires much the same justification as AB 1600 to **establish** a fee, but does not require the money to be spent by a deadline nor require annual and five-year reports. This is vital because in-lieu fees generally do not fund projects identified in advance and are frequently held awaiting an opportunity to spend them efficiently. Unless the Legislature provides a remedy by statute, cities may wish to reconsider whether to accept fees in lieu of complying with development standards — providing the parking or the public art. Developers would be worse off in that case (they would lose options) but cities would reduce their risk. *Hamilton & High* also appears to criticize the holding of *El Dorado*, although it does not formally disagree with it.

The property rights bar continues to seek ways to reduce or eliminate development impact fees — while retaining the benefits of Proposition 13's cap on property taxes, which makes local governments unable to subsidize development by providing infrastructure to facilitate it. A recent example is *Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394 which upheld a \$23,420 traffic impact fee on a modest pre-fabricated house in a rural area to fund countywide transportation improvements, like improving Interstate 50. The county won in the trial court and the Court of Appeal affirmed, concluding that the regulatory takings analysis of *Nollan v. California Coastal Com'n* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374 did not apply to a fee imposed legislatively, but only to ad hoc conditions of approval which exact property or money from developers. It also concluded that AB 1600 does not require tract-specific analysis of development, allowing County-wide fees, and that the fees were reasonably related to traffic impacts of development.

The U.S. Supreme Court reversed in *Sheetz v. County of El Dorado* (Apr. 12, 2024) ___ U.S. ___, 2024 WL 1588707. While the petitioners had hoped to invalidate fees of this sort entirely as regulatory takings, the Justices unanimously agreed that *Nollan / Dolan* analysis **does** apply to legislatively adopted fees, and decided nothing further. The California Court of Appeal will decide on remand whether the traffic impact fees bear nexus to the traffic impacts of Sheetz's development (they almost certainly do) and whether they are shown to be at least roughly proportionate to the extent of impacts from his development. It seems that the legislative / adjudicative distinction will survive on that second point, however. Proportionality is necessarily shown differently for a class of future projects than for a single project subject to quasi-judicial review. Indeed, three

Justices wrote separately to generally approve of legislative fees intended to mitigate the impacts of classes of development.

Also worth following is *Barajas v. City of Petaluma*, First District Court of Appeal Case No. A165258 (fully brief as of Jan. 3, 2024) which may further develop state law on this issue. It is awaiting argument as this paper is written. Cal Cities provided an amicus brief in support of the City.

One statute is worth noting here, too. 2023's AB 516 (Ramos, D-San Bernardino) effective January 1, 2024, raises the bar for annual and five-year reports on AB 1600 fees, requiring updates on project construction and on refunds of fees. It imposes additional requirements for audits, including review of construction schedules; requires cities to inform fee payors of their right to request audits, and to post audits and reports to the City's website.

CONCLUSION. Further developments are, of course, inevitable and city attorneys will do well to continue to monitor these trends for new developments in the courts, the Legislature, and in the communities we serve.

**2024 Spring
HOT TOPICS
IN MUNICIPAL REVENUES: THE CBRT MEASURE**

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INTRODUCTION

On February 1, 2023, the Taxpayer Protection and Government Accountability Act, which is sometimes referred to as the CBRT Measure (“the Measure”), qualified to appear on the November 5, 2024 ballot.¹ According to the Measure’s proponent, it would combat “overtax[ation]” in California by giving the people a vote on all taxes and requiring all charges and fees to be passed by elected governing bodies rather than unelected “bureaucrats.” According to the Measure’s opponents, it is an unprecedented reordering of California’s fundamental government structures which would gravely undermine the ability of state and local governments to generate revenue of any kind.

On September 26, 2023, the Legislature of the State of California, Governor Gavin Newsom, and John Burton (the “Weber Petitioners”) filed an Emergency Petition for Writ of Mandate in the California Supreme Court, asking the Court to accept the case as an original matter and remove the Measure from the ballot on the ground that it is beyond the power of the voters to enact. (*Legislature v. Weber*, Cal. Supr. Court Case No. S281977.) Specifically, the *Weber* Petitioners assert that the Measure is an unlawful attempt to revise, rather than amend, the California Constitution and that its passage would endanger the ability of state and local governments to provide essential government services. Thomas W. Hiltachk, the proponent of the Measure and Real Party in Interest in the case (the “Proponent”), opposes the petition on the grounds that the Measure merely amends rather than revises the Constitution and that any alleged effect on state or local government’s ability to provide essential services is speculative.

On November 29, 2023, the Supreme Court issued an order to show cause, mandating additional briefing. Briefing closed on February 14, 2024, and oral argument will be held on XX X, 2024.

The League of California Cities joined both an amicus curiae letter brief to the California Supreme Court in support of review of the merits, and an amicus brief on the merits on behalf of various local government amici urging the Court to withhold the Measure from the ballot. Separately, the Mayors of the cities of San Diego, Los Angeles, San Jose, San Francisco, Sacramento, Long Beach, Oakland, and Irvine sent an amicus letter brief urging the Court to accept review of the Measure. No local governments have filed any amicus briefs opposing the *Weber* petition, although taxpayer advocates did so.

I. THE MEASURE’S PROVISIONS

The Measure seeks to restrict the ability of the government and the people to raise revenue of all kinds in a variety of ways. The Petitioners in *Legislature v. Weber*, however, address only the following four key aspects of the Measure from their perspective as present and former State

¹ The Measure’s text is here: <https://oag.ca.gov/system/files/initiatives/pdfs/21-0042A1%20%28Taxes%29.pdf> (as of Mar. 20, 2024).

officials.² Local government amici elaborated on these arguments from local governments' perspective.

First, the Measure targets the Legislature's taxing and spending powers. Most significantly, it revokes the Legislature's power to impose state taxes. Today, the Legislature can enact taxes with a two-thirds vote. (Cal. Const., art. XIII A, § 3, subd. (a).) Under the Measure, the Legislature could only propose state taxes to the voters, who would then have authority to approve those taxes. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1).)

The Measure would also require the Legislature, when proposing special taxes to the voters, to relinquish its spending power over the revenues generated by those taxes. Today, the Legislature has broad authority to appropriate funds, including the authority to generally change how funds from a particular revenue source are appropriated from one year to the next. The Measure, however, would require that each new state tax measure either impose binding limitations on how the revenue could be spent – which could only be changed by the voters – or contain a statement that the tax revenue could be spent for “unrestricted general revenue purposes.” (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1)(B).) Because voters are more likely to reject taxes that can be used for unrestricted purposes than special taxes that are earmarked for specific purposes, like schools or public safety,³ the Legislature may feel compelled to propose special taxes at the cost of relinquishing a portion of its spending authority with each new tax.

Second, the Measure revokes from the executive branch of government the power to impose charges of any kind. Under the Measure, the State executive branch would lose the ability to impose any charges, regardless of whether defined as a tax or a non-tax “exempt charge.” The Measure accomplishes this goal through two steps. First, the Measure changes article XIII A's⁴ scope to include not only changes to state statutes, but also executive actions. Today, article XIII A (adopted by Proposition 13 in 1978) applies to changes in “state statute” (Cal. Const., art. XIII A, § 3), but the Measure would apply more broadly to any change in “state law” – a term that would be defined to include all executive branch actions, from regulations to opinion letters to legal interpretations and enforcement actions. (Measure, Sec. 4, proposed

² To cite one of the many other changes the Measure would make, the Measure would establish new limits on the ability of the State to assess property taxes by expanding the scope of restrictions on the collection of property taxes by local government agencies to any entity of government. (Measure, Sec. 7, proposed art. XIII D, § 3, subd. (a).)

³ See *Coleman v. Cty. of Santa Clara* (1998) 64 Cal.App.4th 662, 673 (allowing general tax to be accompanied by an advisory measure stating voters' views on how general tax proceeds should be spent).

⁴ References to “articles” are to the California Constitution.

art. XIII A, § 3, subds. (a), (h)(4).) Similar changes are made at the local level. (*Id.*, Sec. 6, proposed art. XIII C, § 2, subd. (a) & Sec. 5, proposed art. XIII C, § 1, subd. (f).)⁵

Then, the Measure requires that any change in “state law” that results in a higher tax or non-tax “exempt charge” must be enacted by the Legislature: by a two-thirds vote, and subject to voter approval, for an increased charge that is deemed a “tax” (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (b)(1)), and by majority vote for any “exempt charge.” (*Id.*, Sec. 4, proposed art. XIII A, § 3, subd. (c) [“Any change in a state law which results in any taxpayer paying a new or higher exempt charge must be imposed by an act passed by each of the two houses of the Legislature.”].) Put otherwise, the Measure revokes the power of the Governor and state administrative agencies to impose or increase any charge, even those that are not “taxes.”

Similarly, with respect to virtually all local charges,⁶ “[o]nly the governing body of a local government” or the voters exercising their power of initiative “shall have the authority to impose any exempt charge.” (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (e).) This means, for example, that if a state or local administrative agency promulgates a regulation or interprets an ordinance in a manner that would result in even a single individual paying a new or higher fee that is labeled a “tax” under the Measure, that regulation or interpretation would be deemed a tax that only the legislative branches could propose and the voters could enact. Likewise, even for non-tax administrative fees, the administrative agency could no longer act alone under delegated authority, but rather would have to submit any fee change to the Legislature or local legislative body. How this would affect charter city agencies, like elected and appointed rent boards, remains to be seen.

As a consequence of these two changes, administrative agencies would lose the power to do much of the work they do today under legislatively-delegated authority, such as assessing fees for the disposal of hazardous waste (at the state level) and adjusting service fees for inflation or charges for health care at public hospitals (at the local level).

Viewed from a different perspective, these changes also mean that the Legislature and local legislative bodies would lose the power to delegate these administrative tasks to the agencies with the expertise to best perform them.

Third, the Measure expands the definition of taxes to place many additional charges beyond the power of the Legislature and local legislative bodies to enact. Under today’s Constitution,

⁵ Actions by the judicial branch, the University of California, the California State University, and California Community Colleges are excluded from this definition of “state law,” but not from the Measure entirely. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (h)(4).)

⁶ There is an exception for certain charges related to health care services. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (e)(3); Sec. 6, proposed art. XIII C, § 2, subd. (e); Sec. 5, proposed art. XIII C, § 1, subd. (j)(7).)

charges imposed by state or local government are defined as “taxes” unless they fall into enumerated categories of non-tax “charges” — a narrowing of the seven exemptions in Proposition 26’s definition of “tax.” (Cal. Const., art. XIII A, § 3, subd. (b) [state charges]; art. XIII C, § 1, subd. (e) [local charges].) The Measure would transform many of these charges — which would be renamed “exempt charges” — into taxes that require voter approval.

To cite just three examples:

- The Measure would eliminate the category of charges imposed for “a specific benefit conferred or privilege granted directly to the payor” (Measure, Sec. 4, proposed art. XIII A [deleting Cal. Const., art. XIII A, § 3, subd. (b)(1)]; Sec. 5, proposed art. XIII C [deleting Cal. Const., art. XIII C, § 1, subd. (e)(1)].) Consequently, some franchise fees,⁷ professional licensing fees, and regulatory fees, like fees on manufacturers of consumer products with adverse environmental impacts⁸ — all of which are deemed non-tax fees under current law — might become taxes under the Measure unless the parallel exemption for services or products (or another exemption) is deemed to include them.
- Charges for “a specific government service or product” would have to reflect the government’s “actual cost” for providing the service or product. (Measure, Sec. 4, proposed art. XIII A, § 3, subds. (e)(1), (h)(1); Sec. 5, proposed art. XIII C, § 1, subds. (a), (j)(1).) Moreover, the enacting body would have to prove these elements by clear and convincing evidence. (*Id.*, Sec. 4, proposed art. XIII A, § 3, subd. (g)(1); Sec. 6, proposed art. XIII C, § 2, subd. (h)(1).) This could transform many charges like court filing fees⁹ and utility service charges¹⁰ into taxes.
- The Measure would limit charges that could be imposed by the judicial branch or the State for violations of the law to include only fines imposed “to punish” a violation of law after undefined “adjudicatory due process.” (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (e)(5); Sec. 5, proposed art. XIII C, § 1, subd. (j)(4).) This would affect punitive portions of drought rates for water and might affect such things as parking tickets and library fines.

By transforming these charges into taxes, the Measure would make it more difficult to modify or enact them. For example, the State and local governments can currently enact certain charges directly, after a majority-protest hearing for water, sewer, and trash service rates. (Cal. Const., art. XIII A, § 3, subd. (a); art. XIII C, § 1, subd. (e); art. XIII D, § 6, subds. (a) & (c).) Under

⁷ *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 270-271.

⁸ *Am. Coatings Assn., Inc. v. State Air Res. Bd.* (2021) 62 Cal.App.5th 1111, 1125-1129.

⁹ *Townzen v. Cty. of El Dorado* (1998) 64 Cal.App.4th 1350, 1359.

¹⁰ *Humphreville v. City of L.A.* (2020) 58 Cal.App.5th 115, 124.

the Measure, many such charges would become taxes requiring approval by both a legislative body and the voters.

Fourth, the Measure restructures the voters' fiscal powers. As an initial matter, it extends the power of referendum to taxes and charges that have long been beyond its reach. Since 1911, the voters' power of referendum has not extended to "statutes providing for tax levies." (Cal. Const., art. II, § 9, subd. (a).) The California Supreme Court has held that "tax" has a broader meaning under article II, section 9 than it does under articles XIII C and D, placing many charges that are "taxes" under the latter provisions beyond the voters' power of referendum. (*Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1116-1118.) The Measure would reverse that decision by declaring that the word "tax" has the same meaning under article II, section 9 as it does under articles XIII A and XIII C. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (d); Sec. 5, proposed art. XIII C, § 1, subd. (i).) This means that some exactions that are now considered exempt from the referendum would become subject to the referendum. This may complicate issuance of revenue bonds backed by utility rate proceeds, for example.

In conjunction with the revocation of the Legislature's taxation power, these changes ensure that *every single revenue-raising measure enacted at the state or local level would be subject to voter approval, either because it is a tax that the voters must enact in the first instance, or because it is an exempt charge that can only be enacted by the legislative branch, subject to the voters' power of referendum.*¹¹

The Measure also reduces the power of local voters to increase their own taxes. Under today's Constitution, local voters can propose initiatives to amend their city or county charters in many ways, including by increasing their taxes. (See Cal. Const., art. XI, § 3, subd. (a).) The Measure would revoke the voters' power to amend their charters to increase their own taxes. (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (f).)

Also, under today's Constitution, voters can enact and increase their own special taxes by a simple majority vote. (See, e.g., *City of Fresno v. Fresno Bldg. Healthy Communities* (2020) 59 Cal.App.5th 220, 235, 238.) The Measure would increase that requirement to a two-thirds supermajority vote. (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (c).)

Still further, the Measure would prohibit advisory measures to accompany special taxes, allowing voters to express their views as to how tax proceeds should be spent. (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (d)(3).)

Finally, the Measure includes a retroactivity provision requiring that any state or local "tax" or "exempt charge" that is adopted between January 1, 2022 and the effective date of the

¹¹ Courts would have to determine whether the Measure changes the law providing that the voters' referendum power does not extend to administrative acts. (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399-400.) If that rule survives, some charges might remain exempt from the referendum.

Measure thirty-four months later, and which does not comply with the Measure – including every tax enacted in that time and every state and local administrative change – would become void within twelve months unless reenacted to comply with the Measure. (Measure, Sec. 4, proposed art. XIII A, § 3, subd. (f); Sec. 6, proposed art. XIII C, § 2, subd. (g).) Thus a flurry of elections in 2025 could be expected. This is especially problematic for general taxes, which must appear on general election ballots, as few cities contest council seats in odd-numbered years. (Cal. Const., art. XIII C, § 2, subd. (b).)

II. THE LEGAL CHALLENGE

The Petitioners in *Legislature v. Weber* advance three legal theories.

A. The Court Must Decide Whether To Resolve The Challenge Before The Election

The first issue in the case involves the threshold effort to secure pre-election review of the Measure. Courts will generally delay the consideration of challenges to a ballot measure's validity until after the election. (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.) Nevertheless, preelection review is appropriate when a measure is challenged on the ground that it "cannot lawfully be enacted through the initiative process," including when the measure is challenged as a constitutional revision. (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029-1030.)

Because the *Weber* Petitioners have challenged the Measure as a revision that is beyond the power of the voters to enact, they have argued that pre-election is appropriate. They have additionally argued that preelection review is particularly appropriate in this case because the retroactivity provision is already affecting how state and local officials craft their budgets and plan for the fiscal future.

As described above, under that retroactivity provision, governments would have only twelve months from the effective date of the Measure in December 2024 in which to conform any taxes or fees adopted over the previous thirty-four months to the Measure's requirements.¹² For every tax and many fees, the Measure would require voter approval, forcing a plethora of state and local special elections. The cost of those elections alone would be substantial, but policymakers must also consider the possibility that the measures would fail because voters could be overwhelmed by so many tax and fee measures on the ballot at once. Faced with this, affected cities, counties and special districts are being forced to plan for potential revenue loss by reducing expenditures.

¹² By contrast, Proposition 218, which added article XIII C in November 1996, gave local governments two years to reenact nonconforming taxes, which meant they did not have to call special elections. (Cal. Const., art. XIII C, § 2, subd. (c).)

The parties in *Weber* dispute exactly how many taxes would be implicated by this retroactivity clause, but they agree that at least 26 local measures throughout the state would have to be reenacted, putting at least \$830 million in annual local tax revenues at risk.

The scope and reach of the retroactivity provision is unclear, however, because several of the substantive provisions of the Measure are unclear, requiring policymakers to guess at its meaning. For example, the Measure proposes to amend articles XIII A and XIII C to require that the ballot materials for any state or local tax include “the duration of the tax,” whereas only the amendment to article XIII A requires that a statewide tax “Act” – but not the ballot materials – include “[a] specific duration of time that the tax will be imposed” (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (d)(2); Sec. 4, proposed art. XIII A, § 3, subd. (b)(1)(A), (b)(2)(B).) Notwithstanding the difference in language, some local officials have interpreted the Measure to require that local taxes passed without a sunset date be resubmitted to the voters.¹³ If the Measure passes, voters and local officials would have to wait until the courts resolve the duration issue. Because that could occur after the one year the Measure permits for taxes to be resubmitted for voter approval, some local officials will feel compelled to submit all affected taxes that were passed without sunset clauses with new sunset dates for voter approval. This could result in numerous unnecessary ballot measures and elections if the courts rule that sunset dates are not required.

Depending on how these ambiguities are resolved, Petitioners estimate that there could be as many as 102 local taxes in 90 jurisdictions at risk, implicating \$1.3 - \$1.9 billion in annual local revenue. Petitioners have also identified 87 bond measures in 81 jurisdictions that might have to be reenacted, and 15 state taxes.¹⁴

In addition to these many measures, state and local officials will have to examine every administratively enacted fee increase made in the nearly three years implicated by the retroactivity clause – from local library overdue fines to state-imposed penalties for oil spills – to determine whether it is an “exempt charge” that must be reenacted legislatively. If there is doubt about whether a charge is an “exempt charge” or a “tax,” the jurisdiction may have to hold an election on that charge too.

The fact that the Supreme Court issued an order to show cause in the *Weber* matter suggests that the Court has determined that preelection review is appropriate in this case. Neither party has taken that possibility for granted, however, and merits briefs by all parties address the propriety of reviewing the Measure now as opposed to after the election.

¹³ See, e.g., City of Sebastopol City Council Meeting, March 7, 2023, Agenda Item #5 at pp. 1-7, <https://ci.sebastopol.ca.us/wp-content/uploads/2023/04/Agenda-Item-Number-5-Opposition-of-CA-Business-Roundtable-Ballot-Measure-Relating-to-City-UUT.pdf>.

¹⁴ The Declaration of Inez Kaminski in Support of Emergency Petition for Writ of Mandate, which is included in the materials accompanying this paper, identifies these measures.

B. Petitioners Have Challenged The Measure As An Unlawful Revision

The voters' initiative power is substantial but not unlimited. The Constitution only allows voters to amend the Constitution; they cannot revise it. (Cal. Const., art. II, § 8(a).) A ballot initiative constitutes an unlawful qualitative revision of the Constitution if it would “*make a far-reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the Constitution.*” (*Strauss v. Horton* (2009) 46 Cal.4th 364, 444 (*Strauss*), emphasis added; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 341 (*Raven*).) Petitioners argue that the Measure would do both.¹⁵

Significantly, the difference between an amendment and a revision “does not turn on the relative importance of the measure but rather upon the measure’s scope” (*Strauss, supra*, 46 Cal.4th 364, 447.) Consequently, deeply significant changes have been deemed to be amendments rather than revisions because, however significant the changes might be to substantive rights or governmental processes, the changes would not broadly impact the fundamental structure of government or the foundational powers of its branches. (See, e.g., *id.* at pp. 442-443, 457 [Proposition 8, which provided that only marriages between a man and a woman are valid, was not a revision]; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 (*Amador Valley*) [Proposition 13, which imposed significant changes to the state and local tax systems, was not a revision].)

Yet in *Raven v. Deukmejian, supra*, 52 Cal.3d 336, 352, described further below, the Supreme Court invalidated an initiative that sought to vest certain state judicial powers in the United States Supreme Court. This is the only time in the 112-year history of the initiative in California that a measure has been struck down as an unlawful qualitative revision. The *Weber* Petitioners argue that the Measure is so sweeping and unprecedented that it must be the second. The Measure’s Proponent argues that the Measure is nothing more than an amendment that merely builds upon past initiative measures like Propositions 13 and 218.

1. The Measure Changes Core Legislative Powers

“[T]he core functions of the legislative branch include passing laws, levying taxes, and making appropriations.” (*Carmel Valley Fire Prot. Dist. v. California* (2001) 25 Cal.4th 287, 299 (*Carmel Valley*).) The Measure targets two of these core powers by revoking the Legislature’s power to levy new or increased taxes, and revoking the Legislature’s power to appropriate the revenue from special taxes for purposes that differ from those originally articulated by the Legislature.

¹⁵ A ballot measure might also be an unlawful *quantitative* revision. A quantitative revision is an “enactment which is so extensive in its provisions as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions.” (*Strauss, supra*, 46 Cal.4th 364, 427.) The Measure has not been challenged as a quantitative revision.

The *Weber* Petitioners argue that these changes – standing alone – constitute a revision under *Raven v. Deukmejian, supra*, 52 Cal.3d 336.¹⁶ At issue in *Raven* was a challenge to a provision of Proposition 115 providing that California courts would have to construe the state constitutional rights of criminal defendants consistently with the federal courts’ construction of parallel rights under the United States Constitution. In other words, it “would vest all judicial interpretive power, as to fundamental criminal rights, in the United States Supreme Court.” (*Id.* at p. 352, emphasis omitted.)

The *Raven* Court described this change as “devastating” because it ensured that criminal defendants in California could have no greater constitutional rights under the California Constitution than afforded by the federal Constitution. (*Raven, supra*, 52 Cal.3d 336, 352.) In doing so, the initiative implicated both fundamental constitutional rights and the independence of the California Constitution and its judiciary. The Court acknowledged that California courts already defer to United States Supreme Court interpretations when construing language in the state Constitution that is similar to language in the federal Constitution unless there are “cogent reasons” to depart from federal precedent. (*Id.* at p. 353.) Nevertheless, the California judiciary retains the ability to construe the California Constitution differently and had done so at least eight times in the previous sixteen years. (*Id.* at pp. 353-354.)

The *Raven* Court declared that Proposition 115 would require deference to the federal courts “for the first time in California’s history.” (*Raven, supra*, 52 Cal.3d 336, 354.) It would “substantially alter[] the preexisting constitutional scheme” the courts used to enforce state constitutional protections and contradict the principle that the judiciary “must possess the right to construe the Constitution in the last resort.” (*Id.*, quoting *Nogues v. Douglass* (1857) 7 Cal. 65, 70.) The Supreme Court therefore concluded that Proposition 115 was an invalid constitutional revision. (*Raven*, at pp. 354-355.)

The *Weber* Petitioners argue that the same analysis applies to the CBRT Measure. The changes it would make to the Legislature’s core powers would also be imposed “for the first time in California’s history,” would “substantially alter[] the preexisting constitutional scheme” the Legislature uses to fund the entire state government, and would contradict the principle that the Legislature’s power over taxes is “supreme.” (See *Raven, supra*, 52 Cal.3d 336, 354.) However, while Proposition 115 would have revoked one aspect of one core judicial power – the interpretive power relating to the constitutional rights of criminal defendants – the Measure would revoke one of the Legislature’s core powers in its entirety, by transforming the power to impose taxes into the ability merely to propose taxes, and revoke aspects of two other core legislative powers – the powers to appropriate and make laws. (See *Carmel Valley, supra*, 25 Cal.4th 287, 299.) Thus, the changes the Measure would make to the Legislature’s powers are at least as sweeping as the changes Proposition 115 would have made to the judiciary’s power. The fact that there is no emergency exception in the Measure to allow the

¹⁶ These changes are made more sweeping by the fact that the Measure expands the definition of taxes, placing many additional charges beyond the power of the Legislature.

Legislature to respond to something like the Northridge Earthquake or the Great Recession makes this especially troubling.

The Measure's Proponent argues that the Measure merely amends the Constitution, and that any alleged revisionary affects are based on the *Weber* Petitioners' speculation about circumstances that may never come to pass. In particular, the Proponent relies on *Amador Valley, supra*, 22 Cal.3d 208, in which the Supreme Court rejected a challenge to Proposition 13 on the grounds that the measure revised the Constitution by, among other things, requiring local voters to approve special taxes. The Proponent argues that since the Court determined that Proposition 13 did not constitute a revision despite imposing a voter approval requirement for local special taxes and property taxes exceeding the one percent tax Proposition 13 allows, then the less-far reaching Measure cannot be a revision. The Measure's Proponent bolsters this argument by citing Proposition 13's other provisions, including its requirement that the Legislature approve taxes with a two-thirds majority and its changes to property tax assessments and tax rates.

The *Weber* Petitioners respond that the *Amador Valley* Court's revision analysis is narrower than suggested by the Proponent's argument because the Court only considered the arguments presented by the *Amador Valley* petitioners, which centered on home rule and republican form of government issues not raised in *Weber*. Furthermore, the *Weber* Petitioners argue that the Measure, considered in its entirety, goes far beyond Proposition 13, as further described below. It affects **all** state taxes, not just some of them, and defines tax so broadly as to include nearly all government revenues.

2. The Measure Shifts Substantial Powers Between The Legislative And Executive Branches

The courts have declared in past cases the central importance of the executive branch's role in modern governance. The Supreme Court declared nearly a century ago that "the ever-increasing multiplicity and complexity of administrative affairs" had made it "imperative" to allow the legislative branch to entrust "many quasi-legislative and quasi-judicial functions . . . to departments, boards, commissions, and agents." (*Gaylord v. Pasadena* (1917) 175 Cal. 433, 436 (*Gaylord*)).) The Court therefore refused to deprive a local legislative branch of the ability to delegate power to its executive branch, declaring that doing so would "stop the wheels of government and bring about confusion, if not paralysis, in the conduct of the public business." (*Id.* at p. 437, quoting *Union Bridge Co. v. United States* (1906) 204 U.S. 364, 383; *E. Bay Mun. Util. Dist. v. Dept. of Pub. Works* (1934) 1 Cal.2d 476, 479 [same].) A court of appeal has more recently affirmed the "imperative" role administrative agencies play. (*Schabarum v. Cal. Legislature* (1998) 60 Cal.App.4th 1205, 1223.) Indeed, the *Schabarum* court proclaimed that any effort to return to a form of government in which the Legislature and courts are forced to perform legislative and judicial functions without the aid of administrative agencies "may well be impossible, without risking paralysis in the conduct of the public business *But it is certainly too late in the day to return to such a form of government without effecting a constitutional revision.*" (*Id.* at p. 1224, emphasis added.)

The *Weber* Petitioners argue that the Measure risks the kind of “paralysis in the public business” that the *Gaylord* and *Schabarum* courts disallowed. It would reorder the balance of powers by effectively (1) prohibiting the Legislature from delegating certain powers to the executive branch; (2) prohibiting the executive branch from exercising certain delegated powers; and (3) compelling the Legislature to perform administrative acts. Specifically, the Legislature would lose the power to delegate, and the executive branch would lose the authority to perform, virtually any task resulting in “any taxpayer” paying any new or increased amount of money – whether those funds are deemed a “tax” or an “exempt charge.” Again, this means that the executive branch would lose the power to do much that it does today.

For example, state and local legislative branches would lose the power to delegate to the executive branches the duty to establish regulatory and other fees that are not deemed “taxes” under current law or the Measure, like the rent-registration fees set by many rent boards. Because the Measure sweeps broadly, the Measure would also revoke the power for executive agencies to increase any payment, including agency rules, regulations, rulings, executive orders, opinion letters, and even acts of enforcement and interpreting laws. The *Weber* Petitioners therefore argue that these provisions of the Measure – standing alone – constitute a revision.

This would drastically reduce the power of the executive branch – and correspondingly impose substantial new duties on the legislative branch and the electorate. The Department of Tax and Fee Administration could lose the authority to adjust taxes to account for changes in the cost of living. (See Rev. & Tax Code, § 60050.) The California Public Utilities Commission could lose its authority to approve the rates that each electric utility charges its customers. (See Pub. Util. Code, § 451.) Municipal utilities could lose the authority to impose late charges when customers fail to pay their trash collection or water service bills. (See *id.*, § 12811.) Local agency staff would no longer be able to adjust or impose fees, presumably including fees for trash collection and water service, sewer connections, permits and licenses, cemeteries, and parks and recreation. The Measure would transform day-to-day governmental activities in California, requiring that the legislative body and (for charges deemed “taxes”) the voters to perform work that administrative agencies have done for decades.

The Measure’s Proponent emphasizes that the Measure does nothing more than “extend” legislative decisions that have already been made. That is, the Proponent points out that state and local legislative bodies regularly set certain fees themselves (as by annual master-fee resolutions) rather than delegating that authority to executive agencies. Furthermore, the Proponent argues that the Court’s pronouncement in *Schabarum* that it would require a constitutional revision to prevent the delegation of legislative authority does not apply to the Measure since *Schabarum* was referring to the revocation of all legislative delegations of power, while the Measure only addresses delegations relating to taxes and fees. In short, the Proponent argues that these provisions are not sufficiently far-reaching to constitute a revision rather than an amendment.

The *Weber* Petitioners have responded by pointing out that *Raven* rejected similar arguments when it found that Proposition 115 was a revision. That is, the *Raven* Court acknowledged that

California courts sometimes voluntarily defer to federal courts when interpreting the scope of the state constitutional rights of criminal defendants, but nevertheless concluded that mandating such deference constituted a far-reaching change in the judicial power. Similarly, the *Raven* Court found that Proposition 115 revised the Constitution even though that measure only targeted one aspect of the judicial power rather than all judicial power. The *Weber* Petitioners argue that, under *Raven*, a revision occurs when a measure revokes part of a core government power, even if it leaves other similar powers intact.

3. The Measure Restructures The Voters' Fiscal Powers

The *Weber* Petitioners further argue that the Measure also makes far-reaching changes to the voters' foundational powers and, in doing so, to the fundamental governmental structure in this State.

On the one hand, the Measure reduces the power of local voters to increase their own taxes by (1) revoking their power to amend local charters to increase taxes, (2) requiring supermajority rather than simple majority votes to approve voter-initiated increases in special taxes, and (3) forbidding advisory measures to accompany general tax proposals. On the other hand, the Measure increases the voters' power to reject new or increased taxes and charges as described above. It would also newly subject large categories of state and local charges to referendum. In these ways, the initiative power would favor some voters over others.

Considered with other changes described above, these changes mean that *nearly every state and local revenue-raising measure would be subject to voter approval*, either as a tax that requires voter approval, or an exempt charge subject to the voters' power of referendum.

Finally, by compelling voters to assume a more active role in state government, the Measure would have implications for the future of governance. Taxation is both highly complex and essential to the adequate functioning of the State. Developing sound tax policy therefore requires time and expertise. California's full-time Legislature and other elected bodies have the capacity to implement tax policy because legislators can spend time reviewing a law and debating its impact, all while being advised by professional legislative staff and robust public input. Not so with voters. As it is, voters have neither the time nor resources at their disposal to comprehensively study their crowded ballots, as the courts have acknowledged. Indeed, the courts have observed that "even the most conscientious voters may lack the time to study ballot measures with [a high] degree of thoroughness." (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n* (1990) 51 Cal.3d 744, 770; accord, *Schmitz v. Younger* (1978) 21 Cal.3d 90, 99 (dis. opn. of Manuel, J.); *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, 768, fn. 4 (dis. opn. of McKinster, J.) [expressing doubt "that initiative voters read the actual text of the proposed laws" based on cited authorities].) The Measure would amplify these concerns.

Moreover, under the Measure, the work of democracy would demand more from voters than it does today, both in terms of the number of decisions to be made and their complexity. Future

ballots would include more ballot measures presenting technical questions like what formulas to use to ensure local property taxes are sufficient to pay local bond obligations and whether to increase sewage fees to prevent the deterioration of a local wastewater treatment plant. Such added burdens create the risk of rising voter fatigue and frustration, with corresponding declines in voter engagement and turnout.

The Measure's Proponent argues that many of the Measure's changes have precedents in past measures, including the voter approval requirements in Propositions 13 and 218. The Proponent also asserts the Court should reject any effort to withhold this Measure from the voters based on the courts' well-established duty to safeguard the voters' "precious" right of initiative. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) The *Weber* Petitioners argue that no past measure has proposed anything this sweeping, and honoring the power of the initiative means respecting its constitutional limits. In *Weber*, that requires the Court to safeguard the limits on the voters' power by preventing them from having to vote on a Measure that would only have to be struck down later.

C. The *Weber* Petitioners Contend The Measure Would Gravely Interfere With Essential Government Services

California courts have held that the initiative or referendum process cannot be used if it would seriously impair essential government functions. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 703, citing *Geiger v. Bd. of Supervisors* (1957) 48 Cal.2d 832, 839-840.) Only recently, in *Wilde v. City of Dunsmuir, supra*, 9 Cal.5th 1105, the Supreme Court held that a city's increase in water rates was not subject to referendum because it was exempt as a tax within the meaning of the referendum provision of the state Constitution, at article II, section 9. In doing so, the Court declared: "[I]f essential governmental functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended." (*Id.* at p. 1123, quoting *Geiger*, at p. 839.)

Wilde acknowledges that a government's ability to manage its fiscal affairs is arguably the most essential government function, because without it, government services could not be provided at all. The *Weber* Petitioners argue that the Measure endangers those essential functions because it makes their funding hinge on voter approval, either expressly for new or increased taxes or indirectly by making new fees subject to referendum because they must be passed by a legislative body. In either case, even if the voters ultimately approve a tax or fee increase, the delay inherent in obtaining voter approval itself endangers essential government functions.

According to the *Weber* Petitioners, this risk can be understood in the historical context of the initiative process, including earlier amendments that narrowed the ability of state and local government to raise and spend funds. The initiative was not meant to interfere with a legislative body's overall ability to manage the government's fiscal affairs. When California voters adopted the initiative process in 1911, they expressly stated that "[t]he legislative power of this state shall be vested in a senate and assembly which shall be designated 'The legislature

of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the constitution"¹⁷ As this language indicates, "[t]he original concept of the initiative was to provide a check on elected officials, not to replace representative government."¹⁸

This was especially true with respect to matters involving taxation and fiscal affairs. The 1911 amendments left intact former article XIII of the Constitution, which was titled "Taxation" and which ended with the requirement that "[t]he Legislature shall pass all laws necessary to carry out the provisions of this article."¹⁹ The Legislature also retained authority to authorize taxation by local governments. (Cal. Const., former art. XI, § 12, now art. XIII, § 24, subd. (a).) Moreover, the 1911 amendments not only declared taxation beyond the reach of the referendum power, but they provided that tax levies and appropriations for the usual current expenses of the State go into effect immediately. This safeguard ensures that legislative bodies can respond to a crisis by raising the money necessary to deal with it. Yet the Measure would eliminate these protections for many revenue-raising mechanisms — without an emergency exception.

Moreover, the *Weber* Petitioners argue that the Measure's effects must be understood in the context of existing restrictions on the revenue-raising ability of state and local government. The Supreme Court has described the power to collect and appropriate state revenue as "one peculiarly within the discretion of the Legislature,"²⁰ and for nearly 100 years, that authority was largely unrestricted. The passage of Proposition 13 in 1978 marked a shift, followed by Proposition 62 in 1986, Proposition 218 in 1996, and Proposition 26 in 2010.

In roughly the same time period, these revenue-raising restrictions were accompanied by limits on legislative spending. In 1990, the voters added "the Gann limit" to the Constitution to limit state and local appropriations from the proceeds of taxes and require the Legislature to provide funding whenever the State "mandates a new program or higher level of service on any local government" (Cal. Const., art. XIII B, § 6, subd. (a).) The pressure on state revenues therefore increased as the Legislature attempted to fill in gaps in local services caused by the loss of revenues under Proposition 13.

Further amendments limited how the Legislature could spend state revenues. The most significant was Proposition 98, which sets a minimum annual funding level for public education.

¹⁷ Cal. Const., former art. IV, § 1, added by Sen. Const. Amend. No. 22, approved by voters, Special Elec. (Oct. 10, 1911), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1006&context=ca_ballot_props#page=3 [measure placed on the ballot by the Legislature].

¹⁸ Cain & Noll, *Constitutional Reform in California* (1995) at pp. 288-289.

¹⁹ Cal. Const., former art. XIII, § 13, now art. XIII, § 33, available at <https://archives.cdn.sos.ca.gov/collections/1879/archive/1879-constitution.pdf#page=18>.

²⁰ *Carmel Valley*, *supra*, 25 Cal.4th 287, 299, internal quotation marks omitted.

(Cal. Const., art. XVI, §§ 8, 8.5.) Because of restrictions on local taxes imposed by Propositions 13, 62, 218, and 26, much of the minimum guarantee must be supplied by the State. Additional initiatives placed more restrictions in the Constitution.

Although these constitutional amendments passed in the last forty-five years have altered the Legislature's authority over taxing and spending, the Legislature has retained its plenary power to tax and to authorize state and local agencies to raise fees. The Measure would change that, making it different in kind from those prior measures in its impacts on the State's ability to provide essential governmental functions at all levels of government.

The Proponent of the Measure disagrees that the Measure would imperil government services, pointing out that voters routinely approve new state and local taxes, and that state and local governments have weathered many crises in the past without imposing new taxes.

The *Weber* Petitioners respond by noting that voters also routinely disapprove new state and local taxes, and the State has never had to weather a crisis with these particular far-reaching restrictions in place. Specifically, the State has become a backstop for local governments since past measures have curbed their taxing abilities, but that safety net would disappear with the Measure's passage. It would then be only a matter of time until state and local governments confront circumstances in which new revenues would not be available to address an immediate crisis or long-term changes.

III. PREPARING FOR THE POSSIBILITY THAT VOTERS WILL APPROVE THE MEASURE

If they have not done so already, cities may wish to begin preparing for the Measure's possible passage given the broad sweep of the Measure's retroactivity provision – all taxes or fees enacted since January 1, 2022 – and the short amount of time that state and local governments would have to re-enact such measures to ensure compliance with the Measure – only 12 months after the effective date of the Measure.

The *Weber* case will likely be resolved by June 27, 2024. That is the date identified by the Petitioners as the final day for the Secretary of State to formally place the Measure on the ballot in time to print ballots for the Fall election. Neither the respondent Secretary of State nor the Proponent have objected to or disagreed with that date. Nevertheless, it remains possible that the Supreme Court could choose to decide the case later in the summer or choose to delay its decision until after the November election.

Cities should consider taking the following steps:

- Identify all tax ordinances enacted from January 1, 2022 through the present in the city, and any tax ordinances that might be enacted before the Measure's anticipated effective date.

- Identify all actions taken by agencies in the jurisdiction from January 1, 2022 through the present that could be considered a change in “local law” under the Measure and any such actions that might be taken before the Measure’s anticipated effective date. Note that the Measure defines “local law” broadly to include without limitation “any ordinance, resolution, ruling, opinion letter, or other legal authority or interpretation adopted, enacted, enforced, issued, or implemented by a local government.” This might be understood as akin to a “change of methodology” for the implementation of a tax under Proposition 218. (Gov. Code, § 53750, subd. (h)(2)(B)).
- Analyze whether the identified taxes and changes in local law would be considered a tax or an exempt charge under the Measure to determine which procedures the Measure requires to enact that tax or exempt charge.
- Consider whether and to what extent the city wishes to conform future tax ordinances or changes in local law to the Measure’s requirements. In particular, exempt charges should be adopted by ordinance (Measure, Sec. 6, proposed art. XIII C, § 2, subd. (e)) and ballot labels for general taxes must include the words “for general government use.” (*Id.*, subd. (d)(3).)
- Analyze whether the identified taxes and changes in local law that have already been adopted or taken were done so in compliance with the Measure.
- Consider what steps the city will take, if necessary, to ensure any non-compliant taxes or changes in local law are made to comply with the Measure. Such steps could include determining whether to seek any clarification from the courts if it is unclear how the Measure would apply; deciding whether to call a special election; and making budget cuts or adjustments to prepare for the potential loss of revenue.

CONCLUSION

In the event that *Legislature v. Weber* does not succeed in removing the Measure from the November 2024 ballot, the voters will decide whether the Measure becomes law. Whether that happens will depend in part on whether the voters approve Assembly Constitutional Amendment 13. As described further in “Selected Topics In The Law Of Municipal Finance” by Michael G. Colantuono (Spring 2024), the Legislature has placed ACA 13 on the November ballot to mandate that any measure imposing a super-majority voting requirement must win the approval of that same super-majority of voters in order to become law. Accordingly, if the voters approve ACA 13, the Measure would require the approval of at least two-thirds of the voters. City Attorneys are advised to continue monitoring these developments to ensure that they are prepared to conform past and future enactments with the Measure’s requirements.