BRISCOE IVESTER & BAZEL LLP
155 SANSOME STREET
SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 402-2700
(415) 398-5630 FAX

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Commission on
State Mandates

Peter S. Prows
(415) 402-2708
pprows@briscoelaw.net

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Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Subject: Santa Clara Valley Water District Test Claim 17-TC-04
In re Order No. R2-2017-0014
San Francisco Bay Regional Water Quality Control Board

Dear Ms. Halsey:

On behalf of the Santa Clara Valley Water District, please accept for filing the District's Rebuttal to both the San Francisco Regional Water Quality Control Board's and the Department of Finance's Written Comments regarding Test Claim 17-TC-04. Also attached is the authority required per 2 CCR § 1183.3(b)(2). Please do not hesitate to contact me with any questions.

Sincerely,

BRISCOE IVESTER & BAZEL LLP

/s/ *Peter Prows*

Peter Prows
Counsel for Santa Clara Valley Water District

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I. INTRODUCTION AND SUMMARY OF REPLY

The District must establish four elements to make out its prima facie case for reimbursement under Section 6: (i) there is a "state agency mandate[]", (ii) for "a new program or higher level of service", (iii) on a "local government", (iv) causing "costs".

The Regional Board and Department of Finance ("Respondents") do not dispute the latter two of these elements—that the District is a local government that has incurred costs from the Mandate at issue here, provision B.19 of the Regional Board's Order. Respondents do advance arguments to dispute the first two of these elements—that the Mandate is a State mandate requiring a new program or higher level of service. Their arguments about those first two elements are wrong.

Respondents also advance two affirmative defenses: (a) that the District "requested" this mandate, or (b) that the District has the authority to levy service charges, fees, or assessments to pay for the Mandate. These affirmative defenses lack merit.

This brief, as did Section 5 of the District's test claim, takes the arguments in their logical order, starting with the now-only-two disputed elements of the District's prima facie case. It then turns to the two affirmative defenses.

As for whether the Mandate here is a State mandate, Respondents make the same kind of "Federal law made us do it!' arguments that the Supreme Court rejected in the 2016 *Department of Finance* case relating to another Regional Board permit to a similarly situated local water agency. *Department of Finance* held that if the Regional Board exercised "*discretion* whether to impose a *particular* implementing requirement", then it is a State mandate. The Regional Board here had, and exercised, significant discretion in crafting, recrafting, and then recrafting again, the particulars of the Mandate. *Department of Finance* controls; this is a State mandate.

As for whether the Mandate is for a "new program or higher level of service", Respondents misread their lead case, *County of Los Angeles*, and largely ignore the District's lead case, *San Diego Unified School District*, and the cases it cites, like *Lucia Mar*.

San Diego Unified School District explains that *County of Los Angeles* set forth two "alternative" tests for whether a requirement constitutes a new program or higher level of service under Section 6: it either provides a "governmental function of providing services to the public", *or* it imposes requirements that "do not apply generally to all residents". (33 Cal.4th at 874.) Only the first of those two alternative tests is at issue here; Respondents address only the second.

The District's test claim argued that the Mandate met the first of these two alternative tests, because it required the District to perform the governmental function of providing enhanced wetlands services for the benefit of the general public, pursuant to statewide wetlands enhancement policy. Respondents vigorously assert that providing enhanced wetlands is a public service. The District agrees. That is what brings the Mandate within Section 6.

Respondents focus their arguments on this issue solely on whether the requirement is generally applicable, the second alternative test of *County of Los Angeles*. Because they do not dispute that the first alternative test applies, their argument about the second alternative test is beside the point. The Mandate requires a new program or higher level of service.

That leaves Respondents' two affirmative defenses. First, Respondents maintain that the District "requested" the Mandate from the Legislature under Government Code § 17556(a). This is just wrong. The District never requested the Mandate. The District certainly did not request it from the Legislature. The District never even applied for any permit from the Regional Board here. The District is currently challenging the legality of the Mandate in court. Ever since

the Regional Board issued the Mandate (over the District's objections), the District has simply done what it had to do to hold off the penalties the Regional Board has threatened for not going along with the Mandate. The District did not request the Mandate.

Finally, Respondents argue that the District has raised, or could raise, the funds for the Mandate from its voters. In advancing this argument, Respondents fundamentally misunderstand the constraints imposed on the District by the California Constitution. Respondents erroneously assert that Measure B is an assessment and not a tax, and then conversely argue that the funds levied through Measure B may be used to fund the off-site mitigation required by the Mandate.

Only if a mandate is "necessary to implement" or is "expressly included in" such a ballot measure is reimbursement excused. (Gov. Code § 17556(f).) Measure B raised money, among many other programs, for the general priorities of restoring wildlife habitat and providing open space, including "fish habitat" and "passage" improvements—without naming or requiring any specific projects. The Lake Almaden Project was nowhere expressly included or named in Measure B. The Regional Board, through the Mandate, wants to make the choice of proceeding with the Lake Almaden Project for the District. The District has not approved, or committed itself to, the Lake Almaden Project. No EIR has been certified for that project. The District could still decide not to undertake the Lake Almaden Project and spend the Measure B money on some other project. But for the Mandate, the District is under no legal obligation, from Measure B or anything else, to complete the Lake Almaden Project.

The Mandate is an unfunded mandate under Section 6. This test claim should be approved.

II. THIS IS A STATE, NOT FEDERAL, MANDATE

The Regional Board argues at length that the Mandate is federal, not State. (Regional Board Response [etc.] ("RBR")

pp. 53-64.) The Department echoes that argument. (Department Response [etc.] ("DR") at 1-2.) Primarily, they argue that Section 401 of the federal Clean Water Act (33 U.S.C. § 1341) required the Regional Board to adopt the Mandate. Section 401 says nothing of the sort, and imposes no requirements that look anything like the Mandate. The Mandate came from State law and the Regional Board's multiple discretionary decisions. Respondents are wrong on four levels.

A. Only New State-Law Requirements Explain The Mandate

The chronology tells the basic story. The U.S. Army Corps of Engineers ("Corps") had already determined, after decades of study, that the Project complies with federal law, including environmental review under the National Environmental Policy Act ("NEPA") and a "Section 404(b)(1) Guidelines" alternatives analysis under the Clean Water Act. (AR 5979-8125 (Corps' Record of Decision and lengthy environmental documentation).) The Corps alone applied to the Regional Board for certification under Section 401. (AR 2244 *et seq.* (Corps' 401 application).) The Corps objected to conditioning the certification on additional mitigation in the future (AR 2441.002), and Regional Board staff agreed to remove any such condition (AR 2441.001 (Regional Board staff agreement that additional mitigation "not necessarily" required in any future permits). In March 2016, the Regional Board gave a Section 401 certification solely to the Corps, without the District named as a party and without any condition requiring wetlands enhancement in the future. (AR 1848 *et seq*.) Construction then got underway.

More than a year later, in April 2017, the Regional Board issued a new order naming the District as a party, tacking on the Mandate as a new condition, and invoking "waste discharge requirements" under California law as authority. (AR 1175 *et seq.*) What made the difference between March 2016 and April 2017 to justify the Mandate for the Regional Board?: the Regional Board's invocation of

California law. State law made all the difference for the Regional Board. This is a State mandate.

B. The Regional Board Had Every Choice In Imposing The Mandate

Second, the Regional Board argues Section 401 left it "no choice" but to impose the Mandate. (RBR p. 53.) It had every choice:

- *Not An Applicant.* The Regional Board chose to impose the Mandate even though Section 401 applies only to an "applicant for a Federal license or permit". (33 U.S.C. § 1341(a)(1).) But the District never applied for any federal license or permit in this matter, and Respondents cite to no federal applications signed by the District. The Regional Board chose to impose the Mandate anyway.

- *One-Year Waiver.* The Regional Board chose to impose the Mandate even though it had already waived whatever authority it had under Section 401. State agencies always have a choice whether to issue a Section-401 certification, because no adverse consequences follow if they do not: after a year of inaction on a Section-401 application, certification is simply "waived". (33 U.S.C. § 1341(a)(1).) Respondents argue the District is a party to the Corps' September 2015 application (notwithstanding that the District did not sign that application and was not named as a party to the Regional Board's March 2016 certification that followed). (RBR p. 39; DR p. 2.) Even still, the Regional Board did not impose the Mandate until more than a year later, in April 2017. The Regional Board waived Section-401 certification under federal law. Yet the Regional Board chose to impose the Mandate anyway.

- *Discretion-In-Conditions.* The Regional Board took it upon itself to exercise a rather extraordinary amount of discretion in crafting the Mandate, recrafting it again and again, and twice making substantive changes to the Mandate from the dais at public hearings. (District Test Claim, Section 5, pp. 4-6, 11-12.) Those were all the Regional Board's choices.

C. The Mandate Derives From State Law, According To U.S. and California Supreme Court Precedent

Third, Respondents try to revive the argument that conditions in Regional Board permits simply implement federal, rather than California, law. The U.S. Supreme Court, in *PUD No. 1*, and the California Supreme Court, in *Department of Finance* (2016), have rejected this argument.

In *PUD No. 1*, the issue was whether Section 401 gives new authority to states to insist that federal Clean-Water-Act permits *must* include conditions under state law that are more stringent than what the Clean Water Act requires, or *constrains* states from asking for more stringent state-law conditions. (*PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology* (1994) 511 U.S. 700, 711.) The majority opinion read Section 401 broadly, as a grant of authority *to* states to insist on additional state-law requirements in federal permits, rather than as any requirement *on* states to regulate in some federally required way:

> [P]ursuant to § 401, States may condition certification upon *any* limitations necessary to ensure compliance with *state* water quality standards or any other

> "appropriate requirement of *State* law" […].[1]

(*Id.* at 713-714, emphasis added, quoting 33 U.S.C. § 1341(d); *see Keating v. FERC* (D.C. Cir. 1991) 927 F.2d 616, 622 ("the validity of a state's [*viz.*, California's] decision to grant or deny a request for [Section 401] certification … turns on questions of substantive *state* environmental law", emphasis added).)

The Mandate here was meant to implement California, not federal, law. After all, the federal permitting agency, the Corps, by 2015 had already determined that the Upper Berryessa Project complies with all federal laws, including the Clean Water Act and NEPA. (AR 5979-8125 (Corps' Record of Decision and lengthy environmental documentation).) The Mandate is based upon supposed impacts of the Upper Berryessa Project to the California-law-only concept of "waters of the State", which impacts the Regional Board viewed to be much more extensive here than any impacts to the federal-law concept of "waters of the U[nited] S[tates]". (AR 1183-1184; *see* Water Code § 13050(e) ("Waters of the state"); 33 U.S.C. § 1362(7) ("waters of the United States").) The Mandate is about implementing the goal of a California Executive Order (no. W-59-93) to achieve a "long term *net gain* in the quantity, quality, and permanence of wetlands acreage and values" in California (AR 1186, emphasis added), rather than any merely compensatory mitigation requirement of federal law. The Mandate comes from the Regional Board's view of what California law requires in addition to federal law.

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[1] Justice Stevens, in his concurrence, viewed the issue in the case the same way: "Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards." (511 U.S. at 723, Stevens, J., concurring.)

Because Section 401 simply gives states an opportunity to come forward with any additional state-law requirements they think ought to apply in federal permits, Respondents' reliance on Section 401 now is effectively a concession that the Mandate is a new California-law requirement.

The California Supreme Court, in *Department of Finance* (2016), resolved whatever doubt remained after *PUD No. 1.* The Regional Board concedes that the ultimate test in *Department of Finance* for whether a condition in a Regional Board permit is a State mandate is whether the Regional Board lacked "*discretion* whether to impose a *particular* implementing requirement" of federal law. (RBR p. 54 (quoting *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765, emphasis added).) The Regional Board exercised all kinds of discretion in imposing the particular Mandate here.

The Regional Board exercised discretion in ever acting against the District under Section 401 in the first place, given that by April 2017 the Regional Board had already waited too long from any supposed September 2015 federal permit application by the District. (See Section II.B above.) Respondents point to nothing in federal law that required the Regional Board to impose this particular Mandate here (to create approximately 15 acres, or 15,000 linear-feet, of enhanced waters): they do not cite, and the Commission will not find, any particular formula in the Clean Water Act, California "Antidegradation Policy", California "Basin Plan", or anything else, that yields this particular 15-acre/15,000-linear-feet Mandate for this particular flood-protection Project. The Regional Board exercised discretion again and again in imposing this particular Mandate, including twice making changes to its particulars from the dais. That is enough, under *Department of Finance*, to make this a State mandate subject to Section 6.

Department of Finance includes an illustrative discussion of the cases evaluating whether some requirement on a local agency was a State mandate under Section 6. (1

Cal.5th at 763-767.) For example, when the U.S. Supreme Court held, in *Gideon v. Wainwright* (1963) 372 U.S. 335, that indigent criminal defendants have a Sixth Amendment right under the U.S. Constitution to be provided with experts to assist the accused's counsel in preparing a competent defense, the statute California then passed to require payment for experts for indigent criminal defendants (Penal Code § 987.9) was properly a federal mandate, rather than a State one. (*Id.* at 764, approvingly discussing *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805.) But when California chose to adopt employment-law standards that went beyond what federal employment law required, that was a State mandate. (*Id.* at 765-766, approvingly discussing *Div. of Occupational Safety & Health v. State Bd. of Control* (1987) 189 Cal.App.3d 794.)

No federal statutory or constitutional requirement specifically required the Regional Board to adopt the Mandate, unlike in *County of Los Angeles*. The Mandate was intended to implement California law (such as "waters of the State") that goes beyond federal law, like in *Division of Occupational Safety*. The Regional Board exercised its particular discretion again and again in crafting the Mandate, as in *Department of Finance*. This is a State mandate under Section 6.

D. Deference?

The Regional Board's last fallback argument is for deference to its current view of what federal law requires. (RBR p. 64.) No deference to the Regional Board's view of what federal law requires is merited here because the federal permitting agency, the Corps, had already concluded that the Upper Berryessa Project complies with all federal law. (AR 5979-8125 (Corps' Record of Decision and environmental

documentation).)[2] Well before imposing the Mandate in April 2017, the Regional Board in March 2016 had concluded that the Upper Berryessa Project complied with the Clean Water Act and all other laws. (AR 1858 ("Project will comply with the applicable provisions of [the Clean Water Act] … and with other applicable requirements of State law").) The Regional Board's changed position now is owed no deference.

The Mandate is a State mandate.

III. THE MANDATE REQUIRES A NEW PROGRAM OR HIGHER LEVEL OF SERVICE

The Regional Board correctly notes that *County of Los Angeles* set forth two alternative tests for whether a State mandate constitutes a "new program or higher level of service" under Section 6. (RBR p. 44.) *County of Los Angeles* interpreted that phrase to mean either: "[i] programs that carry out the governmental function of providing services to the public, or [ii] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state". (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46,

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[2] The facts are stronger here for the District than in *Department of Finance*. That case concerned "NPDES" permits, which are Clean Water Act permits for effluent (usually liquid) discharges under Section 402 (33 U.S.C. § 1342). California has been delegated NPDES permit authority under the Clean Water Act. But here, the Regional Board's concern is for "fill and excavation impacts". (AR 1184.) California has *not* been delegated authority for dredge-or-fill discharges for solids like that, which are regulated under a different permitting regime under Section 404 (33 U.S.C. § 1344). (*See* URL cited in fn. 3 of AR 1638 (Corps letter explaining, at point 3, that California has been delegated authority under Section 402 but not under Section 404).) While it might make sense to give some deference in certain circumstances about what federal law requires in areas where the Regional Board has been delegated federal authority, the Regional Board is owed no deference about federal law in areas, as here, where it has not been delegated federal authority.

56, brackets added.) These are "alternative" tests; meeting either test suffices under Section 6. (*San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876.).)

The District's test claim rested on the first of these two alternative tests: that the Mandate's requirement to create a "net gain in wetland and waters area, function, and value", in accordance with the 'California Wetland Conservation Policy' (Executive Order W-59-93) (AR 15259-15261), required the District to create a governmental service for the public. A State agency's requirement of a local agency to provide a "service to the public" is a requirement of a new program or higher level of service. (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.)

The California Wetland Conservation Policy Executive Order requires the net creation of new wetlands, because wetlands "act as primary producers in the food chain, help retain floods, recharge and discharge groundwater, act as water quality filters, provide recreational and scenic values, and harbor a significant number of California's threatened and endangered plant and animal species". (AR 15259.) Protecting the food chain, providing flood protection, protecting groundwater, promoting water quality, creating recreational and scenic opportunities, and harboring threatened or endangered species, are all public services properly provided by government. Respondents do not argue otherwise. The Mandate requires a new program or higher level of service under the first alternative test of *County of Los Angeles.*

Respondents do not dispute that creating net gains in wetlands area, function, and values provides governmental services to the public. Their arguments are all about the second alternative test of *County of Los Angeles*—whether the Mandate is particular to government rather than generally applicable. (RBR pp. 44-50.) The Regional Board includes a very capable declaration from staff (Xavier Fernandez), asserting that the Mandate is the same type which it would

have required in other situations.[3] But whether the Regional Board would have imposed the Mandate on somebody else, under the second alternative test, misses the issue. The issue is whether the Mandate requires a governmental service to the public, under the first alternative test. It is undisputed that the Mandate meets the first alternative test of *County of Los Angeles*. The Mandate is a new program or higher level of service.

The Regional Board also invokes Government Code § 17556(b) (RBR pp. 50-52), which excludes from reimbursement any mandate that "has been declared existing law or regulation by action of the courts". The Mandate here has never been declared existing law by the Courts. The only court case the Regional Board cites that might be relevant is *PUD No. 1*, which cuts directly against Respondents' position here (see Section II.C above).

The California Wetland Conservation Policy (of 1989) also cannot be said to have been in existence at the time that Section 6 was enacted in 1979. The Mandate did not implement existing law as declared by the courts.

The Mandate is a new program or higher level of service under the first alternative test of *County of Los Angeles*.

IV. THE DISTRICT DID NOT REQUEST THE MANDATE FROM THE LEGISLATURE

Respondents assert that the District "requested the Permit", and thus that the affirmative defense of Government Code § 17556(a) applies. (RBR p. 37.) Respondents are wrong.

Government Code § 17556(a) provides a defense to reimbursement where the local agency "requests or previously requested *legislative* authority for that local agency or school district to implement the program" (emphasis added). The District has never requested legislation requiring

[3] Because this declaration was not before the Regional Board when it made its decision to impose the Mandate, it is not properly part of the administrative record and ought to be stricken.

the Mandate, and Respondents cite no such legislative request. While the District certainly encouraged the Regional Board over the years to get on with permitting the Upper Berryessa Project so that construction could proceed, it has always objected to any off-site wetlands enhancement condition attached to that permit. (See Section II.A above.) The District has always objected to conditions like the Mandate requiring off-site wetlands enhancement. (*Id.*) It is suing the Regional Board even now to invalidate the Mandate. The District never requested the Mandate from the Legislature, the Regional Board, or anybody else.

The District made no legislative request for the Mandate. This defense fails.

V. THE DISTRICT DOES NOT HAVE FEE AUTHORITY TO PAY FOR THE MANDATE, AND THE VOTERS HAVE NEVER EXPRESSLY APPROVED IT

In opposition to the District's test claim, Respondents argue that no reimbursement is required because the District can use either existing revenue or generate new revenue through fees or assessments to fund the costs of the Mandate. (RBR, pp. 40-43.) Though Respondents begin their argument correctly, explaining, "it is the expenditure of tax revenues of local governments that" triggers reimbursement (*id.*, p. 40, citing *County of Sonoma v. Com. on State Mandates* (2000) 84 Cal.App.4th 1264, 1283 (*County of Sonoma*)), their arguments following that correct premise layer misunderstanding upon misunderstanding and should be rejected.

A. Measure B Is a Tax, not an Assessment

Respondents argue, "[a]lthough labeled a 'special parcel tax,' Measure B is, in fact, a special assessment." (RBR, p. 41.) Thus, argue Respondents, the Mandate can be funded without touching the District's tax revenues. (*Id.*) Nonsense.

Under 2010's Proposition 26, "'any levy, charge, or exaction of any kind imposed by' the state or a local government, with specified exceptions" is a "tax". (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326,

citing Cal. Const., art. XIII C, § 1.)[4] Relevantly, assessments that satisfy the requirements of Article XIII D, section 4, are excepted from this broad definition of "tax."[5] In turn, an assessment is "any levy or charge upon real property by an agency for a *special benefit* conferred upon the real property" limited to "the reasonable cost of the proportional special benefit conferred on that parcel."[6] (Cal. Const., art. XIII D, § 2, subd. (b), emphasis added.)

Measure B bears all of the indicia of a tax and none of the indicia of an assessment. First and most importantly, Measure B was *structured* like a tax, not like an assessment. It was expressly imposed on all parcels within the District, not on a specifically identified set of specially benefitted parcels. (Compare AR 14139 (ballot pamphlet), with Cal. Const., art. XIII D, § 4, subd. (a).) And the District prepared no engineer's report to demonstrate the correlation between special benefits conferred, overall costs of funded public projects, and the

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[4] The levy is not a tax if the revenue is collected for: a payor-specific benefit or service (Cal. Const., art. XIII C, § 1, subds. (e)(1) & (e)(2)); certain regulatory costs (*id.* subd. (e)(3)); the use, lease, or purchase of government property (*id.* subd. (e)(4)); judicial fines or penalties (*id.* subd. (e)(5)); or property development charges (*id.* subd. (e)(6)). None of those exceptions apply here.

[5] The other exceptions are for: a payor-specific benefit or service (Cal. Const., art. XIII C, § 1, subds. (e)(1) & (e)(2)); certain regulatory costs (*id.* subd. (e)(3)); the use, lease, or purchase of government property (*id.* subd. (e)(4)); judicial fines or penalties (*id.* subd. (e)(5)); or property development charges (*id.* subd. (e)(6)). None apply here.

[6] Proposition 218 defined "special benefit" as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute 'special benefit.'" (Cal. Const., art. XIII D, § 2, subd. (i).) Proposition 218 then provided for certain procedural requirements for the imposition of an assessment. (Cal. Const., art. XIII D, § 2, subds. (a) – (f).)

amount of the levy being imposed on specific parcels. (*See* Cal. Const., art. XIII D, § 4, subd. (b).)

Consistently, the ballot materials regarding Measure B demonstrate that the voters who enacted it *understood* it was a tax, not an assessment. "Measure B would renew an existing *special parcel tax* assessed by the Santa Clara Valley Water District (District) on each parcel of land within the District." (AR 014139, emphasis added.) "The parcel tax would work exactly like the existing *tax*." (AR 14140, emphasis added.) Indeed, the very question posed to the voters was: "Shall the Santa Clara Valley Water District renew an existing, expiring parcel *tax*[?]" (AR 014139, emphasis added.)

Procedurally, Measure B was also *enacted* as a tax, not as an assessment. The District resolution calling for the ballot measure expressly cited the District's authority "to levy a special tax[.]" (AR 14142 (Resolution 12-62).) And Measure B was subjected to a vote of the entire county electorate, who were advised that the measure would pass only with 2/3 voter approval; it was not put to a majority-protest vote limited to owners of burdened parcels. (*See* AR 014139, 14146 - 49; compare Cal. Const., art. XIII C, § 2, subd. (d) (requiring 2/3 approval of "the electorate" for any special taxes imposed by local government), with Cal. Const., art. XIII D, § 4, subds. (c) - (e) (establishing procedures by which property owners are to be notified of a proposed assessment and given the opportunity to submit a simple-majority protest vote).) Measure B was only enacted once the 2/3 voter approval threshold of a tax had been met, with nearly 74% of voters approving the tax. (*See* AR 014139.)

Despite this, Respondents argue that Measure B should be considered an assessment because it was enacted to fund "five priorities." (See RBR, p. 41.) Respondents again misstate the law. The identification of priorities for anticipated revenues merely made Measure B a "special tax" requiring two-thirds voter approval, just as the ballot materials explained. (*See* Cal. Const., art. XIII C, § 1, subd. (d)

(defining "special tax" as "any tax imposed for specific purposes. . . ."); AR 14146 - 49.) The identification of priorities did not convert Measure B into an assessment.

Because it would fail both the substantive and procedural limitations the California Constitution places on assessments, Measure B would be a tax, even if the District had attempted to characterize it as an assessment. (*See* Cal. Const., art. XIII C, § 1, subd. (e).) Considering that the District and the voters always understood that Measure B was a special tax, it is abundantly clear: Measure B was a tax, not an assessment.

B. Measure B Revenue Is For General Flood-Protection, Not For The Mandate

Next, Respondents claim that no reimbursement is required because Measure B was enacted to fund a state-mandated wetlands enhancement project. (RBR, p. 41.) Government Code § 17556(f) excuses reimbursement for a State mandate for the costs of "duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters". The costs of the Mandate are neither necessary to implement nor expressly included in Measure B.

Nowhere in the actual text of Measure B is the Lake Almaden Project mentioned. Measure B also says nothing about providing wetlands enhancement to satisfy the conditions of the Upper Berryessa Project. Where Measure B allows the District to choose which projects to fund with resulting revenues, the Mandate would force the District to expend tax revenues on a specific project mandated by the State.[7] That is exactly the kind of compelled expenditure of local tax revenues that Section 6 requires the State to reimburse.

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[7] There is neither argument nor evidence that the Lake Almaden Project is the only conceivable project that the District could undertake pursuant to Measure B's priorities, nor could there be.

Though Respondents point to the Lake Almaden Project as the enhancement project required by the Mandate, it is telling that, six years after Measure B was adopted, the District has not made a final determination or commitment to proceed with the Lake Almaden Project. (Blank Decl. ¶ 5.) While Respondents are correct that the District has issued a Notice of Preparation under the California Environmental Quality Act regarding the Lake Almaden Project, it has taken no further action on that project, let alone irrevocably committed Measure B revenue to the project. But for the Mandate, the District would still retain discretion to not proceed with that project and to spend Measure B funds on some other project consistent with the priorities voters approved. The Mandate takes the discretion away from the District about how to spend Measure B funds and gives it to the Regional Board. That makes this a State mandate.

C. The District Cannot Increase Fees Unilaterally To Fund The Mandate

Finally, Respondents invoke Government Code § 17556(d), which excuses reimbursement where a local agency "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." They claim "[t]he Santa Clara Valley Water District Act confers fee authority on the District for purposes of fees and charges relating to flood control or storm drainage system." (RBR, p. 41.) Whatever its organic act may state, the District is stripped by the California Constitution of the authority to unilaterally impose fees and charges on its residents for the enhancement project the Regional Board seeks to impose.

1. The District Act Does Not Authorize Fees For The Lake Almaden Project

First, Respondents miss the mark when they claim that the District Act, section 5, paragraph 9, authorizes the District to generate fee revenue for the Lake Almaden Project. That provision allows the imposition of fees exclusively for flood-

control and storm-drain facilities, either for new construction or when a drainage or flood-control problem is referred by Santa Clara County. It does not authorize fees to fund wetlands enhancement projects like what is mandated by the Mandate, Provision B.19.

Respondents argue otherwise, noting that the District identifies "the Project" as a "flood prevention project" on its website. (RBR, p. 43.) But the "Project" referred to in the referenced website is the "Upper Berryessa Creek Flood Control Project," not the Lake Almaden Project the State seeks to mandate here. (*Id*., p. 43, fn. 258.) The Lake Almaden Project cannot be considered either a flood-control or storm-drain facility, nor is there evidence or argument that the Lake Almaden project is being implemented in response to new construction or a demand from Santa Clara County. Section 5 of the District Act does not apply.

Respondents' reference to the District's general water-management purposes is similarly unavailing. (RBR, p. 43.) Though the Lake Almaden Project is unquestionably consistent with the District's public purposes, District Act section 4 does not create fee authority.

Even more off point is Respondents' reference to fee authority established by Health and Safety Code § 5471. (RBR, p. 43.) That statute applies to "entities," defined as cities, counties, or sewer districts formed for sanitation and sewer purposes. (Health & Saf. Code, § 5470, subd. (e).) The District is not a city, county, or sewer district, and Respondents have made no effort to demonstrate that it is. Health and Safety Code § 5471 does not apply.

2. Proposition 218 Impedes The District's Ability To Impose Fees For The Lake Almaden Project.

Second, even if the District had statutory authority to fund the Lake Almaden Project with fee revenue, the California Constitution still obstructs the imposition of such a

fee. In 1996, California voters enacted Proposition 218, which added, amongst other things, Article XIII D, section 6, to the California Constitution. Article XIII D, section 6 (which the District cited in Section 5 of its test claim, p. 14), placed both procedural and substantive limits on property-related fees imposed by local governments, with the likely result for the District that a fee to fund the Lake Almaden Project would face three obstacles.

First, Article XIII D, section 6, limits property-related fees to those imposed to fund services actually used by or immediately available to charged property owners. (Cal. Const., art. XIII D, § 6, subd. (b)(4).) Respondents have made no effort to explain how the Lake Almaden Project constitutes a service used by or immediately available to property owners in the County.

Second, for the same reason, it is difficult to see how a property-related fee could be calculated that would reflect either the cost of the service provided by the Lake Almaden Project to property owners or the benefits they receive from that project. (*See* Cal. Const., art. XIII D, § 6, subd. (b)(3).) Again, Respondents offer no explanation.

Third, though fees levied for providing sewer, water, and refuse-collection *services* are exempt from Article XIII D, section 6's, voter approval requirement, neither the Lake Almaden Project nor the Mandate are intended to actually provide sewer, water, or refuse collection to the public. (*See id*., at subd. (c).) The Constitution requires voter approval.

Respondents may cite the just-published decision in *Paradise Irrigation District v. Commission on State Mandates* (3d Dist. Ct. App., Oct. 1, 2018) No. C081929, __ Cal.App.5th __, for the proposition that a water district's fee authority is not impeded by Proposition 218 in a way that requires subvention. But that case does not apply to the mandate at issue in this claim. There, the water district's authority to fund the mandate with fee revenue was undisputed save the risk that a majority protest would block the imposition of a

related fee. The Court of Appeal found that *hypothetical* risk inadequate to establish that the district lacked fee authority. Here, as discussed above, a fee to fund the Lake Almaden Project could not be squared with the *substantive* limitations of Proposition 218 and would require affirmative voter approval, not merely the absence of majority protest. The Court of Appeal drew this exact distinction, stating, "[t]he majority protest procedure for levying fees lies in contrast to the voter-approval requirements imposed by Proposition 218 for new taxes." (*Id*., slip op., p. 20.) In other words, Proposition 218 stands as an actual impediment to the imposition of a fee to fund the Lake Almaden Project, not merely a hypothetical hurdle. *Paradise Irrigation District* thus has no application to the District's claim here.

VI. CONCLUSION AND CERTIFICATION

This test claim should be approved.

Per 2 CCR § 1183.3(c), this rebuttal is true and correct to the best of the authorized representative's information or belief.

1 October 2018

BRISCOE IVESTER & BAZEL LLP

/s/ Peter Prows

Peter Prows
155 Sansome Street, Suite 700
415-402-2700
pprows@briscoelaw.net
Counsel and authorized representative for
Santa Clara Valley Water District

213 Cal.App.4th 1310
Court of Appeal,
Second District, Division 3, California.

Lee SCHMEER et al., Plaintiffs and Appellants,
v.
COUNTY OF LOS ANGELES et al., Defendants and Respondents.

B240592
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Filed February 21, 2013
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As Modified March 11, 2013
|
Review Denied May 15, 2013 *

Synopsis

Background: Petitioners filed combined petition for writ of mandate and complaint challenging county ordinance prohibiting retail stores from providing plastic carryout bags and requiring stores to charge customers 10 cents for each paper carryout bag provided. The Superior Court, Los Angeles County, No. BC470705, James C. Chalfant, J., denied relief, and petitioners appealed.

[Holding:] The Court of Appeal, Croskey, Acting P.J. held that paper bag carryout charge was not a "tax" which required voter approval.

Affirmed.

West Headnotes (10)

[1] Constitutional Law
Amendments in general

The court construes provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute.

Cases that cite this headnote

[2] Constitutional Law
Intent in general

When construing provisions added to the state Constitution by a voter initiative, the court's task is to ascertain the intent of the electorate so as to effectuate the purpose of the law.

1 Cases that cite this headnote

[3] Constitutional Law
Intent in general

When construing provisions added to the state Constitution by a voter initiative, the court first examines the language of the initiative, as the best indicator of the voters' intent.

4 Cases that cite this headnote

[4] Constitutional Law
Plain, ordinary, or common meaning

When construing provisions added to the state Constitution by a voter initiative, the court gives the words of the initiative their ordinary and usual meaning and construes them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect.

Cases that cite this headnote

[5] Constitutional Law
Existence of ambiguity

Constitutional Law
Extrinsic aids to construction in general

If the language of a provisions added to the state Constitution by a voter initiative is unambiguous and a literal construction would not result in absurd consequences, the court presumes that the voters intended the meaning on the face of the initiative and the plain meaning governs; if the language is ambiguous, the court may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative.

6 Cases that cite this headnote

[6] Appeal and Error
Statutory or legislative law

The construction of statute or an initiative, including the resolution of any ambiguity, is a question of law reviewed de novo.

1 Cases that cite this headnote

[7] Taxation
Distinguishing 'tax' and 'license' or 'fee'

Charge of $0.10 imposed by county ordinance on retail establishments for each carryout paper bag provided was not a "tax" within meaning of state constitution provision prohibiting any new general or special tax imposed by local government without prior approval by the voters; charge was not remitted to the county, but rather was payable to and retained by the retail store providing the bag, and the store was required to use the funds for specified purposes. Cal. Const. art. 13 C, § 1.

6 Cases that cite this headnote

[8] Taxation
Nature of taxes

The term "tax" in ordinary usage refers to a compulsory payment made to the government or remitted to the government.

2 Cases that cite this headnote

[9] Taxation
Nature of taxes

Taxes ordinarily are imposed to raise revenue for the government, although taxes may be imposed for nonrevenue purposes as well.

4 Cases that cite this headnote

[10] Municipal Corporations
Submission to voters, and levy, assessment, and collection

Language "any levy, charge, or exaction of any kind imposed by a local government" in state constitution provision defining a "tax," for purposes of prohibition against new taxes without prior voter approval, is limited to charges payable to, or for the benefit of, a local government. Cal. Const. art. 13 C, § 1.

See 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 136.

10 Cases that cite this headnote

****353** APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC470705)

Attorneys and Law Firms

****354** Nielsen Merksamer Parrinello Gross & Leoni, James R. Parrinello, San Rafael, Eric J. Miethke, Arthur G. Scotland, Sean P. Welch and Kurt R. Oneto, Sacramento, for Plaintiffs and Appellants.

Wm. Gregory Turner for Council on State Taxation and California Taxpayers Association as Amici Curiae on behalf of Plaintiffs and Appellants.

John F. Krattli, County Counsel, Albert Ramseyer, Principal Deputy County Counsel, and Truc L. Moore, Deputy County Counsel, for Defendants and Respondents.

Colantuono & Levin, Michael G. Colantuono, Los Angeles, and Jon R. di Cristina for League of California Cities and California State Association of Counties as Amici Curiae on behalf of Defendants and Respondents.

Frank G. Wells Environmental Law Clinic, Sean B. Hecht and Xiao Y. Zhang for Surfrider Foundation, Heal the Bay, The 5 Gyres Institute, Environment California Research and Policy Center, and Seventh Generation Advisors as Amici Curiae on behalf of Defendants and Respondents.

Opinion

CROSKEY, Acting P.J.

***1313** A Los Angeles County ordinance prohibits retail stores from providing plastic carryout bags and requires stores to charge customers 10 cents for each paper carryout bag provided. Lee Schmeer and others (Petitioners) filed a combined petition for writ of mandate and complaint challenging the ordinance. Petitioners contend the ordinance violates article XIII C of the California Constitution, as amended by Proposition 26, because the 10–cent charge is a tax and was not approved by county voters. We conclude that the paper carryout bag charge is not a tax for purposes of article XIII C because the charge is payable to and retained by ***1314** the retail store and is not remitted to the county. We therefore will affirm the judgment in favor of the county and other respondents.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

The Los Angeles County Board of Supervisors enacted ordinance No. 2010–0059 on November 23, 2010. The ordinance prohibits retail stores within unincorporated areas of Los Angeles County from providing plastic carryout bags to customers. The ordinance states that retail stores may provide, for the purpose of carrying goods away from the store, only recyclable paper carryout bags or reusable carryout bags meeting certain requirements (including plastic bags satisfying those requirements). The ordinance also states that retail stores must provide reusable bags to customers, either for sale or free of charge, and encourages retail stores to educate their employees to promote reusable bags and post signs encouraging customers to use reusable bags.

The ordinance further states that retail stores must charge the customer 10 cents for each recyclable paper carryout bag provided and must indicate on the receipt the number of recyclable paper carryout bags provided and the total amount charged for the bags. It states that customers participating in the California Supplemental Food Program for Women, Infants, and Children (Health & Saf.Code, § 123275) or the Supplemental Food Program (Welf. & Inst.Code, § 15500 et seq.) are exempt from the charge and must be provided free of charge either reusable bags or recyclable paper carryout bags. The ordinance states that the money received for recyclable paper bags must be retained by the store and used only for (1) the costs of compliance with the ordinance; ****355** (2) the actual costs of providing recyclable paper bags; or (3) the costs of educational materials or other costs of promoting the use of reusable bags, if any.

The ordinance includes a severability provision stating: "If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid."

The ordinance became effective on July 1, 2011. The ordinance was not submitted to the county electorate for its approval.

***1315** 2. *Trial Court Proceedings*

Lee Schmeer, Salim Bana, Jeff Wheeler, Chris Wheeler and Hilex Poly Co. LLC (Hilex) filed a combined petition for writ of mandate and complaint in October 2011 against the County of Los Angeles and three county officials. Petitioners allege that the individual petitioners are California taxpayers who have been required to pay the paper carryout bag charge and that Hilex is a manufacturer of plastic bags prohibited by the ordinance.

Petitioners allege that the paper carryout bag charge required under the ordinance is a "tax" as defined in article XIII C of the California Constitution, as amended by Proposition 26. They allege that the charge was imposed by the county in violation of section 2 of article XIII C, which prohibits any new general or special tax imposed by local government without prior approval by the voters. Petitioners allege counts for (1) a writ of mandate to prevent the county from implementing and enforcing the ordinance and (2) a judicial declaration that the paper carryout bag charge violates article XIII C.

The trial court conducted a hearing on the merits of the petition for writ of mandate in March 2012. The court adopted its written tentative decision denying the petition as its final ruling. The court concluded that the paper carryout bag charge is not a general or special tax because the money is retained by the retail stores and is not remitted to the county. The court also concluded

that even if the charge fell within the general definition of a tax under Proposition 26, the charge would satisfy an exception to that definition for "[a] charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege" (Cal. Const., art. XIII C, § 1(e)(1)). The court stated that the county, through retail stores, conferred the benefit of a paper carryout bag only on customers paying the charge, satisfying the first prong of the exception. The court stated that Petitioners waived the argument that the charge did not satisfy the second prong of the exception by failing to assert that argument in their opening brief on the petition. The court stated further that, in any event, substantial evidence shows that the money received by the stores for recyclable paper bags will be used for the purposes required under the ordinance. The court therefore concluded that Petitioners were not entitled to a writ of mandate.

Petitioners' counsel acknowledged that the trial court's ruling on the petition for writ of mandate effectively adjudicated the count for declaratory relief as well. The court entered a judgment in April 2012 denying Petitioners any relief on their ****356** combined petition for writ of mandate and complaint. Petitioners timely appealed the judgment.

*1316 *CONTENTIONS*

Petitioners contend (1) the paper carryout bag charge is a special tax imposed by the county without the voters' prior approval and therefore violates article XIII C of the California Constitution; (2) the charge does not satisfy the exception for a charge imposed for a specific benefit conferred or privilege granted, or any other exception under article XIII C; and (3) the challenged provisions of the ordinance are not severable, so the entire ordinance must be invalidated, including the ban on single–use plastic bags.

DISCUSSION

1. *Standard of Review*

The trial court's ruling turned on its construction of article XIII C of the California Constitution, as amended by Proposition 26, and its determination that the amount charged did not exceed the reasonable costs. We review the ruling de novo to the extent that the court decided questions of law concerning the construction of constitutional provisions and not turning on any disputed facts. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032, 56 Cal.Rptr.3d 814, 155 P.3d 226 (*Professional Engineers*).) We review the court's factual findings under the substantial evidence standard. (*Ibid.*)

2. *Construction of a Voter Initiative*

[1] **[2]** **[3]** **[4]** We construe provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute. (*Professional Engineers, supra,* 40 Cal.4th at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226.) Our task is to ascertain the intent of the electorate so as to effectuate the purpose of the law. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, 135 Cal.Rptr.2d 30, 69 P.3d 951.) We first examine the language of the initiative as the best indicator of the voters' intent. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321, 120 Cal.Rptr.3d 741, 246 P.3d 877.) We give the words of the initiative their ordinary and usual meaning and construe them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect. (*Professional Engineers, supra,* at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226; *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043, 12 Cal.Rptr.3d 343, 88 P.3d 71.)

[5] If the language is unambiguous and a literal construction would not result in absurd consequences, we presume that the voters intended the meaning on the face of the initiative and the plain meaning governs. (*Professional Engineers, supra,* 40 Cal.4th at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226; ***1317** *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737, 21 Cal.Rptr.3d 676, 101 P.3d 563.) If the language is ambiguous, we may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative. (*Professional Engineers, supra,* at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226.)

[6] The construction of statute or an initiative, including the resolution of any ambiguity, is a question of law that we review de novo. (*Bruns v. E–Commerce Exchange, Inc.*

(2011) 51 Cal.4th 717, 724, 122 Cal.Rptr.3d 331, 248 P.3d 1185.)

3. *Historical Foundations of Proposition 26*

a. *Proposition 13*

California voters adopted Proposition 13 in June 1978, adding ****357** article XIII A to the California Constitution. Proposition 13 "impos[ed] important limitations upon the assessment and taxing powers of state and local governments." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 218, 149 Cal.Rptr. 239, 583 P.2d 1281 (*Amador Valley*).) Proposition 13 generally (1) limited the rate of any ad valorem tax on real property to 1 percent; (2) limited increases in the assessed value of real property to 2 percent annually absent a change in ownership; (3) required that " 'any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation' " must be approved by two-thirds of the Legislature; and (4) required that special taxes imposed by cities, counties and special districts must be approved by a two-thirds vote of the electors. (*Amador Valley, supra,* at p. 220, 149 Cal.Rptr. 239, 583 P.2d 1281, quoting former art. XIII A, § 3 as added by Prop. 13.)

The California Supreme Court in *Amador Valley, supra,* 22 Cal.3d at page 231, 149 Cal.Rptr. 239, 583 P.2d 1281 , stated that the various elements of Proposition 13 formed "an interlocking 'package' " with the purpose of providing effective real property tax relief. *Amador Valley* rejected several constitutional challenges to the initiative. Local governments, however, soon found ways to generate additional revenue without a two-thirds vote of the electors despite Proposition 13. Some of those efforts were approved by the courts.

The California Supreme Court in *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 208, 182 Cal.Rptr. 324, 643 P.2d 941 (*Richmond*), held that a sales tax imposed by the Los Angeles County Transportation Commission and approved by a majority, but less than two-thirds, of county voters was validly adopted. The state Legislature, before the ***1318** passage of Proposition 13, had authorized the local commission to adopt a sales tax to fund public transit projects. Writing for a plurality of three justices, Justice Mosk stated that the term "special districts" in section 4 of article XIII A of the California Constitution was ambiguous. (*Richmond, supra,* at p. 201, 182 Cal.Rptr. 324, 643 P.2d 941 (plur. opn. of Mosk, J.).) Justice Mosk stated that the requirement of a two-thirds vote imposed by the state's voters on local voters was "fundamentally undemocratic" and that the language of section 4 therefore must be strictly construed in favor of allowing local voters to approve special taxes by a majority vote rather than a two-thirds vote. (*Richmond, supra,* at p. 205, 182 Cal.Rptr. 324, 643 P.2d 941 (plur. opn. of Mosk, J.).) Noting that section 4 expressly prohibited cities, counties and special districts from imposing ad valorem taxes on real property or transaction or sales taxes on the sale of real property even with a two-thirds vote, and citing language in the ballot pamphlet, the plurality held that "special districts" under section 4 must be limited to special districts authorized to levy taxes on real property. (*Richmond, supra,* at p. 205, 182 Cal.Rptr. 324, 643 P.2d 941 (plur. opn. of Mosk, J.).) Two justices concurred in the judgment and also concluded that the term "special districts" was limited to special districts authorized to levy taxes on real property. (*Richmond, supra,* at p. 209, 182 Cal.Rptr. 324, 643 P.2d 941 (conc. opn. of Kaus, J.).)

Justice Richardson stated in a dissent that the sales tax imposed by the local commission served as a convenient substitute for an increase in real property taxes. (*Richmond, supra,* 31 Cal.3d at pp. 212–213, 182 Cal.Rptr. 324, 643 P.2d 941 (dis. opn. of Richardson, J.).) The dissent stated that under the holding by the majority, the creation of districts without real property ****358** taxing authority provided a means by which local government could readily avoid the restrictions of Proposition 13. (*Id.* at p. 213, 182 Cal.Rptr. 324, 643 P.2d 941.) The dissent concluded that just as the county would be prohibited from imposing the new tax without a two-thirds vote of its voters, the local commission as the county's surrogate should be prohibited from imposing the new tax without the required voter approval. (*Id.* at p. 215, 182 Cal.Rptr. 324, 643 P.2d 941.)

City and County of San Francisco v. Farrell (1982) 32 Cal.3d 47, 184 Cal.Rptr. 713, 648 P.2d 935 held that a payroll and gross receipts tax imposed on businesses operating within the City and County of San Francisco, but not approved by a two-thirds vote of the voters, was valid. *Farrell* concluded that the requirement in section

4 of article XIII A of the California Constitution that "special taxes" imposed by cities, counties and special districts must be approved by a two-thirds vote of the electors applied only to taxes levied for a specific purpose and did not apply to taxes paid into the general fund to be used for general governmental purposes. (*Farrell, supra,* at p. 57, 184 Cal.Rptr. 713, 648 P.2d 935.)

Rider v. County of San Diego (1991) 1 Cal.4th 1, 2 Cal.Rptr.2d 490, 820 P.2d 1000 found invalid a sales tax imposed by the County of San Diego ***1319** for the purpose of financing the construction and operation of criminal detention and courthouse facilities. The tax was enacted without the approval of two-thirds of the voters. [1] Distinguishing *Richmond, supra,* 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941, the *Rider* court held that a local agency that the trial court found was created solely for the purpose of circumventing Proposition 13's two-thirds voter approval requirement was a "special district" (Cal. Const., art. XIII A, § 4) despite its lack of authority to levy taxes on real property. (*Rider, supra,* at pp. 8, 10, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* stated, "To hold otherwise clearly would create a wide loophole in Proposition 13 as feared by the dissent in *Richmond*." (*Id.* at p. 10, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* noted a proliferation of governmental entities lacking the power to levy real property taxes raising revenues through sales taxes without the approval of two-thirds of the voters following *Richmond, supra,* 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941. (*Rider, supra,* at p. 10, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* stated that the framers of Proposition 13 and the voters who adopted it could not have "intended to adopt a definition [of 'special districts'] that could so readily permit circumvention of section 4." (*Rider, supra,* at p. 11, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* held that the term "special district" includes "any local taxing agency created to raise funds for city or county purposes to replace revenues lost by reason of the restrictions of Proposition 13." (*Ibid.*)

Knox v. City of Orland (1992) 4 Cal.4th 132, 14 Cal.Rptr.2d 159, 841 P.2d 144 held that a charge levied against real property in the City of Orland for the maintenance of public parks was a "special assessment," and was not a "special tax" within the meaning of section 4 of article XIII A of the California Constitution. *Knox* stated that a special assessment is a charge levied against real property within a particular district for the purpose of conferring a special benefit on the assessed properties beyond any benefit received by the general public. (*Knox, supra,* at pp. 141–142, 14 Cal.Rptr.2d 159, 841 P.2d 144.) A "special tax," in contrast, is imposed to provide ****359** benefits to the general public. (*Id.* at pp. 142–143, 14 Cal.Rptr.2d 159, 841 P.2d 144.) *Knox* concluded that the park maintenance charge was a special assessment and therefore was not subject to the two-thirds voter approval requirement. (*Id.* at pp. 140–141, 145, 14 Cal.Rptr.2d 159, 841 P.2d 144.)

b. *Proposition 218*

California voters adopted Proposition 218 in November 1992, adding articles XIII C and XIII D to the California Constitution. Proposition 218 imposed additional voting approval requirements on the imposition of taxes by a local government. Proposition 218 also added to Proposition 13's limitations on ad valorem property taxes and special taxes similar limitations on assessments, fees, and charges relating to real property. (***1320** *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 837, 102 Cal.Rptr.2d 719, 14 P.3d 930 (*Apartment Assn.*).) The initiative measure's findings and declaration of purpose stated:

"The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 2, p. 108, reprinted in Historical Notes, 2A West's Ann. Cal. Const. (2013 supp.) foll. art. XIII C, § 1, p. 171.)

Section 2, subdivision (a) of article XIII C of the California Constitution, added by Proposition 218, states: "All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes." Section 1 of article XIII C defines "[g]eneral tax" as "any tax imposed for general governmental purposes" and defines "[s]pecial

tax" as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (*Id.,* subds.(a), (d).) Proposition 218 required that all general taxes imposed by a local government must be approved by a majority vote of the electorate and all special taxes imposed by a local government must be approved by a two-thirds vote of the electorate. [2] (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Proposition 218, however, did not define the term "tax."

Section 3, subdivision (a) of article XIII D of the California Constitution, added by Proposition 218, states that the only "taxes, assessments, fees, or charges" that a local government may impose "as an incident of property ownership" are ad valorem property taxes, special taxes approved by two-thirds of the voters, "[a]ssessments as provided by this article," and "[f]ees or charges for property related services as provided by this article." Proposition 218 restricted local government's ability to impose real property assessments by (1) tightening the definition of "special benefit" ****360** and "proportionality" (Cal. Const., art. XIII D, §§ 2, subd. (i), 4, subd. (a)); (2) establishing strict procedural requirements for the imposition of an assessment (*id.,* § 4, subds.(b)-(e)); and (3) shifting to the public agency the burden of demonstrating the legality of an assessment (*id.,* § 4, subd. (f)). (***1321** *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443–444, 79 Cal.Rptr.3d 312, 187 P.3d 37.) Proposition 218 also established procedural requirements for the imposition of new or increased fees and charges relating to real property and requirements for existing fees and charges. (Cal. Const., art. XIII D, § 6.)

Apartment Assn., supra, 24 Cal.4th at page 838, 102 Cal.Rptr.2d 719, 14 P.3d 930, held that article XIII D of the California Constitution restricted only fees imposed on real property owners in their capacity as owners and therefore did not apply to an inspection fee imposed by the City of Los Angeles on property owners in their capacity as landlords.

c. *Sinclair Paint Co. v. State Board of Equalization*

In *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 64 Cal.Rptr.2d 447, 937 P.2d 1350, the California Supreme Court decided the question whether fees imposed by the Legislature on manufacturers and others contributing to environmental lead contamination were "taxes enacted for the purpose of increasing revenues" under former section 3 of article XIII A of the California Constitution, and therefore subject to the requirement of a two-thirds vote of the Legislature. (*Sinclair Paint, supra,* at p. 873, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* construed the language " 'taxes enacted for the purpose of increasing revenues' " in former section 3 of article XIII A, which had not been construed in any California appellate opinion, by reference to prior opinions construing the term "special taxes" in section 4 of article XIII A. (*Sinclair Paint, supra,* at pp. 873–881, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated:

"The cases recognize that 'tax' has no fixed meaning, and that the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts. [Citations.] In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.]....

"The 'special tax' cases have involved three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power." (*Sinclair Paint,supra,* 15 Cal.4th at p. 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)

Sinclair Paint stated that the courts had held that special assessments and development fees satisfying certain requirements were not "special taxes" under article XIII A, section 4. (*Sinclair Paint,supra,* 15 Cal.4th at pp. 874–875, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated that regulatory fees that do not exceed the reasonable cost of providing the services for which the ***1322** fees are charged and are not levied for any unrelated revenue purposes also are not "special taxes" subject to the two-thirds voting requirement of section 4. (*Sinclair Paint, supra,* at p. 876, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* rejected the holding by the Court of Appeal in that case that the fees were not regulatory in nature because the legislation imposing the fees imposed no other conditions ****361** on persons subject to the fees. Instead, *Sinclair Paint* concluded that the fees were regulatory because the legislation "requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their

products created in the community." (*Id.* at p. 877, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated that such " 'mitigating effects' fees" were just as regulatory in nature as fees imposed on polluters or producers of contaminating products for the initial permit or licensing programs, and that such fees in substantial amounts also regulate future conduct by deterring the conduct subject to the fee and by encouraging research and development of alternative products. (*Ibid.*)

Sinclair Paint rejected the argument that the state had no authority to impose the fees, stating that the case law "clearly indicates that the police power is broad enough to include mandatory remedial measures to mitigate the *past, present, or future* adverse impact of the fee payer's operations, at least where, as here, the measure requires a casual connection or nexus between the product and its adverse effects. [Citations.]" (*Sinclair Paint,supra,* 15 Cal.4th at pp. 877–878, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated that if the primary purpose of a fee is to regulate rather than to raise revenue, the fee is not a tax. (*Id.* at p. 880, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)

4. *Proposition 26*

California voters approved Proposition 26 on November 2, 2010. Proposition 26 expanded the definition of taxes so as to include fees and charges, with specified exceptions; required a two-thirds vote of the Legislature to approve laws increasing taxes on any taxpayers; and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax. Proposition 26 amended section 3 of article XIII A and section 1 of article XIII C of the California Constitution. The initiative was an effort to close perceived loopholes in Propositions 13 and 218 and was largely a response to *Sinclair Paint, supra,* 15 Cal.4th 866, 64 Cal.Rptr.2d 447, 937 P.2d 1350. Proposition 26's findings and declaration of purpose stated:

"The people of the State of California find and declare that:

"(a) Since the people overwhelmingly approved Proposition 13 in 1978, the Constitution of the State of California has required that increases in state taxes be adopted by not less than two-thirds of the members elected to each house of the Legislature.

***1323** "(b) Since the enactment of Proposition 218 in 1996, the Constitution of the State of California has required that increases in local taxes be approved by the voters.

"(c) Despite these limitations, California taxes have continued to escalate. Rates for state personal income taxes, state and local sales and use taxes, and a myriad of state and local business taxes are at all–time highs. Californians are taxed at one of the highest levels of any state in the nation.

"(d) Recently, the Legislature added another $12 billion in new taxes to be paid by drivers, shoppers, and anyone who earns an income.

"(e) This escalation in taxation does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. Fees couched as 'regulatory' but which ****362** exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.

"(f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees.' " (Ballot Pamp., Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, p. 114, reprinted in Historical Notes, 2A West's Ann. Cal. Const. (2013 supp.) foll. art. XIII C, § 3, pp. 141–142.)

****363** Proposition 26 amended section 3 of article XIII A of the California Constitution to read:

"(a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

"(b) As used in this section, 'tax' means any levy, charge, or exaction of any kind imposed by the State, except the following:

"(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does ***1324** not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.

"(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.

"(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

"(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

"(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

"(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

"(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." [3]

Proposition 26 amended section 1 of article XIII C of the California Constitution to read:

***1325** "(a) 'General tax' means any tax imposed for general governmental purposes.

"(b) 'Local government' means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

"(c) 'Special district' means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

"(d) 'Special tax' means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

"(e) As used in this article, 'tax' means any levy, charge, or exaction of any kind imposed by a local government, except the following:

"(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

"(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

"(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

"(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

"(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

"(6) A charge imposed as a condition of property development.

"(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

***1326** "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." [4]

Proposition 26, in an effort to curb the perceived problem of a proliferation of regulatory fees imposed by the state without a two-thirds vote of the Legislature or imposed ****364** by local governments without the voters' approval, defined a "tax" to include "any levy, charge, or exaction of any kind imposed by" the state or a local government, with specified exceptions. The question here is whether the paper carryout bag charge constitutes a tax and therefore is subject to one of the two voter approval requirements (Cal. Const., art. XIII C, § 2, subds. (b), (d)).

5. *The Paper Carryout Bag Charge Is Not a Tax*

[7] The county contends the paper carryout bag charge is not a tax because it is payable to and retained by the retail store and is not remitted to the county. We agree.

[8] **[9]** The term "tax" in ordinary usage refers to a compulsory payment made to the government or remitted to the government. Taxes ordinarily are imposed to raise revenue for the government (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 437, 121 Cal.Rptr.3d 37, 247 P.3d 112 (*California Farm*) ["Ordinarily taxes are imposed for revenue purposes and not 'in return for a specific benefit conferred or privilege granted' "]; *Sinclair Paint, supra,* 15 Cal.4th at p. 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350 ["In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted"]; *Morning Star Co. v. Board of Equalization* (2011) 201 Cal.App.4th 737, 750, 135 Cal.Rptr.3d 457), although taxes may be imposed for nonrevenue purposes as well (see *Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134, 158, 100 S.Ct. 2069, 65 L.Ed.2d 10 ["taxes can be used for distributive or regulatory purposes, as well as for raising revenue"]).

The definition of a "tax" in California Constitution, article XIII C, section 1, subdivision (e) does not explicitly state that the levy, charge or exaction must be payable to a local government, but does state that it must be "imposed by a local government." In light of the ordinary meaning of a "tax" as a ***1327** compulsory payment made to the government or remitted to the government, we conclude that subdivision (e) is ambiguous as to whether a levy, charge or exaction must be payable to a local government in order to constitute a tax. Our consideration of other language added to article XIII C by Proposition 26 helps to resolve this ambiguity.

Subdivision (e) of article XIII C, section 1 lists seven exceptions to the rule that " 'tax' means any levy, charge, or exaction of any kind imposed by a local government" (*ibid.*). The exceptions (quoted *ante*) all relate to charges ordinarily payable to the government, including charges imposed in connection with governmental activities or use of government property, fines imposed by the government for a violation of law, development fees and real property assessments. (*Ibid.*)

The first three exceptions, in particular, state that a charge imposed by a local government is not a tax if the charge does not exceed "the reasonable costs to the local government" of conferring a specific benefit or privilege directly to the payor or providing a specific service or product directly to the payor, and also except from the definition of a tax a charge "for the reasonable regulatory costs to a local government for issuing licenses and permits" and related activities. (Cal. Const., art. XIII C, § 1, subd. (e), items (1), (2) & (3).) These exceptions, generally speaking, except from the definition of a "tax" charges not exceeding the reasonable costs to the local government of providing specific benefits or regulatory services. These exceptions do not contemplate the situation where a charge is paid to an entity or ****365** person other than a local government or where such an entity or person incurs reasonable costs. In our view, this suggests an understanding that the language "any

levy, charge, or exaction of any kind imposed by a local government" in the first paragraph of article XIII C, section 1, subdivision (e) is limited to charges payable to a local government. This is consistent with the ordinary meaning of the term "tax." [5]

No reason appears on the face of Proposition 26, or from our consideration of the ballot pamphlet and the historical foundations of the initiative, ***1328** to conclude that the voters approving the initiative intended the definition of a "tax" to include both charges payable to a local government and charges payable to a nongovernmental entity or person, while limiting the "reasonable costs" exceptions to charges payable to a local government. In other words, there is no reason to believe that the voters approving Proposition 26 intended to except from the definition of a "tax" and, consequently, from the voter approval requirements, charges payable to a local government not exceeding the reasonable costs of providing specific benefits or regulatory activities, but intended the same charges if made payable to another person or entity in an amount not exceeding the reasonable costs to be considered taxes subject to the voter approval requirements.

The analysis and arguments for and against the initiative in the official ballot pamphlet discussed the impact of the initiative on the ability of local government to raise revenues. The analysis by the Legislative Analyst stated, "Generally, the types of fees and charges that would become taxes under the measure are ones that government imposes to address health, environmental, or other societal or economic concerns." A chart listed several examples of regulatory fees that could be considered taxes under the measure, stating as to each one that the state or local government "uses the funds" for specified purposes, necessarily implying that the fees were payable to the government. There was no discussion in the ballot pamphlet of any charges or fees payable to a nongovernmental entity or person and nothing to suggest to the voters that Proposition 26 would have any impact on such charges or fees. [6]

[10] ****366** Accordingly, we conclude that the language "any levy, charge, or exaction of any kind imposed by a local government" in the first paragraph of ***1329** article XIII C, section 1, subdivision (e) is limited to charges payable to, or for the benefit of, a local government. [7]

Petitioners note that Proposition 26 deleted the language "any change in state taxes enacted for the purpose of increasing revenues collected pursuant thereto" in article XIII A, section 3 of the California Constitution and replaced it with "[a]ny change in state statute which results in any taxpayer paying a higher tax." Petitioners argue that this amendment indicates an intent to eliminate the prior requirement that a charge must produce revenue for the government to be considered a tax. We disagree. This amendment was to the provision requiring approval by two-thirds of the Legislature for any increase in state taxes. The provisions requiring voter approval for increases in local taxes (Cal. Const., art. XIII A, § 4, art. XIII C, § 2), in contrast, never included the language "for the purpose of increasing revenues" or any similar limiting language. The purpose of this amendment to article XIII A, section 3 was to end the Legislature's practice of approving by a simple majority vote so-called "revenue-neutral" laws that increased taxes for some taxpayers but decreased taxes for others. The Legislative Analyst's analysis in the official ballot pamphlet stated:

"*Current Requirement.* The State Constitution currently specifies that laws enacted 'for the purpose of increasing revenues' must be approved by two-thirds of each house of the Legislature. Under current practice, a law that increases the amount of taxes charged to some taxpayers but offers an equal (or larger) reduction in taxes for other taxpayers has been viewed as not increasing revenues. As such, it can be approved by a majority vote of the Legislature.

"*New Approval Requirement.* The measure specifies that state laws that result in *any* taxpayer paying a higher tax must be approved by two-thirds of each house of the Legislature." (Boldface omitted.)

Accordingly, we conclude that the amendment to article XIII A, section 3 does not support Petitioners' position. The paper carryout bag charge is payable to and retained by the retail store providing the bag, which is required to use the funds for specified purposes. The charge is not remitted to the county. Because the charge is not remitted to the county and raises no revenue for the county, we conclude that the charge is not a "tax" for purposes of article XIII C of the California Constitution. The voter approval requirements of article XIII C, section 2 ***1330** therefore are inapplicable. In light of our conclusion, we

need not decide whether, if the charge were otherwise considered a tax, any of the specified exceptions would apply.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

****367** WE CONCUR:

KITCHING, J.

ALDRICH, J.

All Citations

213 Cal.App.4th 1310, 153 Cal.Rptr.3d 352, 13 Cal. Daily Op. Serv. 2037, 2013 Daily Journal D.A.R. 2393

Footnotes

* Kennard and Corrigan, JJ., are of the opinion the petition should be granted.

1 The tax was approved by 50.8%, a bare majority of the county voters. (*Rider, supra,* 1 Cal.4th at p. 6, 2 Cal.Rptr.2d 490, 820 P.2d 1000.)

2 Article XIII C, section 2, subdivision (b) states, in relevant part, "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote." Subdivision (d) states, in relevant part, "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote."

3 Section 3 of article XIII A stated, in its entirety, before the enactment of Proposition 26: "From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed." Proposition 26 amended the first sentence of section 3, designated the first paragraph as subdivision (a), and added subdivisions (b), (c) and (d).

4 Proposition 26 added subdivision (e) of article XIII C, section 1 and left subdivisions (a) through (d) of section 1 unchanged.

5 None of the seven exceptions expressly refers to the reasonable costs to a nongovernmental entity or person or to activities undertaken by or payments typically made to a nongovernmental entity or person. Consideration of the final paragraph of article XIII C, section 1, subdivision (e) supports the view that the exceptions all refer to activities directly undertaken by the local government. The final paragraph states, "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of *the governmental activity,* and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, *the governmental activity*." (Italics added.) Use of the term "the governmental activity" as a shorthand reference for the activities described in the exceptions suggests that the exceptions all refer to activities undertaken directly by the local government.

6 Another part of the Legislative Analyst's analysis provided other examples of regulatory fees, including "fees on the purchase of beverage containers to support recycling programs." The California Beverage Container Recycling and Litter Reduction Law (Pub. Resources Code, § 14500 et seq.) requires a payment by the distributor to the Department of Resources Recycling and Recovery for each beverage container sold or transferred to a retailer. (*Id.,* § 14574.) The burden of the distributor's payment is passed on to the consumer through a fee charged by the retailer. The payments are deposited into a fund in the state treasury and used for the administration of the recycling program. (*Id.,* §§ 14574, 14580, subd. (a).) Here, in contrast, the paper carryout bag charge is retained by the retailer, and no payment is made into any government fund. Contrary to Petitioners' argument, the charge here is not akin to a beverage container fee, and the reference in the ballot materials to beverage container fees did not suggest to the voters that a charge such as the paper carryout bag charge would be considered a tax.

7 A charge payable to a third party creditor to extinguish a debt owed by a local government, for example, would effectively be equivalent to a payment made to the local government.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 2, 2018, I served the:

- **Claimant's Rebuttal Comments filed October 1, 2018**

  Waste Discharge Requirements and Water Quality Certification for: Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project, 17-TC-04
  San Francisco Bay Regional Water Quality Control Board (SFRWQCB) Order No. R2-2017-0014, Provision B. 19, effective April 12, 2017
  Santa Clara Valley Water District, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 2, 2018 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

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Claim Number: 17-TC-04

Matter: Waste Discharge Requirements and Water Quality Certification for: Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project

Claimant: Santa Clara Valley Water District

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Marni Ajello, Attorney, Office of Chief Counsel, *State Water Resources Control Board*
San Francisco Bay Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 327-4439
marnie.ajello@waterboards.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Tamarin Austin, Attorney, Office of Chief Counsel, *State Water Resources Control Board*
San Francisco Bay Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5171
Tamarin.Austin@waterboards.ca.gov

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Dale Bowyer, Section Leader, *San Francisco Bay Regional Water Quality Control Board*
1515 Clay Street, Suite 1400, Oakland, CA 94612

Phone: (510) 622-2323
Dale.Bowyer@waterboards.ca.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Norma Camacho, Chief Executive Officer, *Santa Clara Valley Water District*
5700 Almaden Expressway, San Jose, CA 95118
Phone: (408) 265-2600
ncamacho@valleywater.org

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Annette Chinn, *Cost Recovery Systems,Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legal Analyst's Office*
925 L Street, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Anita Dagan, Manager, Local Reimbursement Section, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-4112
Adagan@sco.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Dillon Gibbons, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dillong@csda.net

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Eric Koch, Deputy Director, *Department of Water Resources*
Flood Management and Dam Safety, P.O Box 942836, Room 1115-9, Sacramento, CA 94236-0001
Phone: (916) 654-7180
Eric.Koch@water.ca.gov

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
michael.lauffer@waterboards.ca.gov

Erika Li, Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Keith Lichten, Division Chief, *San Francisco Bay Regional Water Quality Control Board*
Watershed Management, 1515 Clay Street, Suite 1400, Oakland, CA 94612
Phone: (510) 622-2380
klichten@waterboards.ca.gov

Selina Louie, Water Resource Control Engineer, *San Francisco Bay Regional Water Quality Control Board*
1515 Clay Street, Suite 1400, Oakland, CA 94612
Phone: (510) 622-2383
SLouie@waterboards.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legal Analyst's Office*
925 L Street, Sacramento, CA 95814
Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Thomas Mumley, Assistant Executive Officer, *San Francisco Bay Regional Water Quality Control Board*
1515 Clay Street, Suite 1400, Oakland, CA 94612
Phone: (510) 622-2395
thomas.mumley@waterboards.ca.gov

Karla Nemeth, Director, *Department of Water Resources*
P.O Box 942836, Room 1115-1, Sacramento, CA 94236-0001
Phone: (916) 653-7007
Karla.Nemeth@water.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Steven Pavlov, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Steven.Pavlov@dof.ca.gov

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Peter Prows, Partner, *Briscoe Ivester & Bazel LLP*
Claimant Representative
155 Sansome Street, 7th Floor, San Francisco, CA 94104
Phone: (415) 402-2700
pprows@briscoelaw.net

Mark Rewolinski, *MAXIMUS*
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236

Phone: (949) 440-0845
markrewolinski@maximus.com

Theresa Schweitzer, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3140
tschweitzer@newportbeachca.gov

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Eileen Sobeck, Executive Director, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
Eileen.Sobeck@waterboards.ca.gov

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Joe Stephenshaw, Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Joe.Stephenshaw@sen.ca.gov

Derk Symons, Staff Finance Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Derk.Symons@dof.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Emel Wadhwani, Senior Staff Counsel, *State Water Resources Control Board*

Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814
Phone: (916) 322-3622
emel.wadhwani@waterboards.ca.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Bruce Wolfe, Executive Officer, *San Francisco Bay Regional Water Quality Control Board*
1515 Clay Street, Suite 1400, Oakland, CA 94612
Phone: (510) 622-2314
bwolfe@waterboards.ca.gov

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov