



# **A Planner's Guide to Financing Public Improvements**

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## *Chapter 3*

# **Special Assessments**

The effects of Proposition 218 will be felt nowhere more intensely than in the area of special assessments. The initiative reverses many long-standing procedures and court interpretations relating to the use and levying of special assessments. By design, Proposition 218 restricts the uses to which assessments may be put, limits the property owners who may be charged assessments, increases local agency accountability, and prohibits assessments that lack the support of local property owners. Perhaps unwittingly, Proposition 218 may also increase the cost to local agencies of financing bonded indebtedness through assessments and impose upon local agencies substantial new administrative costs. As noted before, Proposition 218 is not written as clearly as it might have been. Given that clarification will only come through legislation and litigation, its full impact will not be known for some time.

Because it is a Constitutional amendment, Proposition 218 supersedes all conflicting statutory laws. It applies to charter cities as well as counties, general law cities, and special districts. The assessment acts discussed in this chapter will have many provisions, particularly dealing with formation procedures and the scope of assessment power, which are no longer valid. We will note in the discussions of the individual assessment acts where, as of this writing, the acts appear to conflict with the provisions of Proposition 218.

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## **Proposition 218**

Proposition 218 establishes a strict definition of "special benefit." For the purposes of all assessment acts, special benefit means "a particular and distinct benefit over and above general benefits conferred on real property located in the district or the public at large. General enhancement of property value does not constitute 'special benefit.'" In a reversal of previous law, a local agency is prohibited by Proposition 218 from including the cost of any general benefit in the assessment apportioned to individual properties. Assessments are limited to those necessary to recover the cost of the special benefit provided the property. From a practical point

of view, this will make open space and park assessments difficult to levy. It also complicates the process of setting assessments intended to finance public services, such as police, ambulance, and fire, and public buildings, such as libraries. The Chief Administrative Office of the County of Los Angeles, for example, has opined that Proposition 218 will require the county to rescind its library assessment and carefully reexamine the legality of its fire assessment.

In addition, assessments levied on individual parcels are limited to the "reasonable cost of the proportional special benefit conferred on that parcel."

Previously, assessments were seldom if ever levied on public property. Proposition 218 specifically requires assessments to be levied on public parcels within an assessment district, unless the agency which owns the parcel can "demonstrate by clear and convincing evidence" that its parcel will receive no special benefit.

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## **Assessment District Formation Procedure**

Proposition 218 establishes a common formation and ratification procedure for all special assessment districts as defined by Section 4, Article XIII D of the California Constitution. These requirements apply to all special assessments, to the exclusion of any conflicting laws. At this writing, the various assessment district acts have not been amended to remove these conflicts and to clarify ambiguities in the application of Proposition 218. The Legislature is expected to begin considering bills for this purpose in 1997.

All assessments must be supported by a detailed engineer's report prepared by a registered professional engineer. The report must contain: the total amount of money chargeable to the assessment district, the amount chargeable to each parcel in the district, the duration of the payments, the reason for the assessment, and the basis upon which the proposed assessment was calculated (Section 4(c), Article XIII D, California Constitution). Although not explicitly mandated by Proposition 218, the report should also include a description of the improvements or services to be financed through the special assessment, the proposed district boundaries, and a description of the special benefit which each parcel receives as a result of the assessment.

Prior to creating an assessment district, the city, county, or special district must hold a public hearing and receive approval from a majority of the affected property owners casting a ballot. All owners of property within the assessment district must be mailed a detailed notice of public hearing and a ballot with which to voice their approval or disapproval of the proposed district at least 45 days prior to the hearing (Section 4(e), Article XIII D, California Constitution). The notice must contain: the total amount of money chargeable to the assessment district, the amount chargeable to each parcel in the district, the duration of the payments, the reason for the assessment, the basis upon which the proposed assessment was calculated, and a summary of the ballot procedure, as well as the date, time, and location of the public hearing. The notice must also disclose that a majority protest will result in the assessment not being imposed.

At the hearing, the governing body of the agency must consider all protests to formation of the district. Assessment district proceedings must be abandoned if a majority of the ballots received by the conclusion of the hearing protest creation of the district. Ballots are to be weighted according to the proportional financial obligation of the affected property - the larger the financial obligation, the greater the weight that must be assigned to that property. Unlike previous law under many of the assessment district acts, the governing body cannot overrule the property owner vote. No other form of election is required. Once an assessment is created, it may be repealed or reduced by popular initiative.

A key practical question about the ballot process under Proposition 218 is who votes when a property is held in multiple ownership (or there are multiple renters who are directly liable for payment of the assessment) or when the property is owned by a public agency? This is not answered in the initiative and is expected to be the subject of legislation, litigation, or both in the coming year.

Agencies are going to have to work harder than ever to levy a new assessment or increase an existing one. They must clearly identify the special benefit being conferred to the parcels being assessed, excluding any identified general benefit. They must apportion the assessment on an individual basis to parcels within the district. Where an assessment is challenged in court, Proposition 218 specifies that the agency carries the burden of proof in showing that the property is receiving a special benefit and that the amount assessed is proportional to, and no greater than, the special benefits conferred. Most importantly, agencies will have to educate property owners about the advantages of the prospective assessment. The ballot process established by Proposition 218 favors those property owners who oppose the assessment (since they are generally the most motivated to return a ballot). Refer to the League of California Cities' "Proposition 218 Implementation Guide" for a discussion of the limits on public agencies' communications in elections.

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## **Effective Date and Grandfathering**

All of the above requirements took effect on November 6, 1996, so they apply to any new or increased assessments proposed after that date. The intent of the sponsors of the initiative is that existing assessments cease by July 1, 1997 unless ratified by the assessed property owners.

As of December 1996, a number of jurisdictions had already indicated that they will hold ratification elections for and, where necessary to limit assessments to special benefits, redraw the boundaries of existing assessment districts. For example, the City of San Mateo will revisit its downtown assessment for parking and street cleaning, Sacramento County will bring its Landscaping and Lighting Districts to a vote, and the City of San Diego will place 33 Landscaping and Lighting and 14 Business Improvement Districts on the ballot for ratification. Some jurisdictions have chosen to convert existing assessments to special taxes in order to avoid any challenge that they do not meet the definition of special benefit. These require the approval of 2/3 of the jurisdiction's voters.

There are exceptions to the application of Proposition 218. These apply to many of the assessments already in place as of November 5, 1996. The following existing assessments are not required to comply with Proposition 218 (although increases after November 6, 1996 may):

"(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems, and vector control...

"(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed.

"(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

"(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment." (Section 5, Article XIII D, California Constitution)

Although they are usually sent out with the property tax bill, special assessments are not property taxes. Unlike taxes (including special taxes), the sum of a special assessment cannot exceed the cost of the improvement or service it is financing. Furthermore, special assessments cannot be levied against those properties which do not directly benefit from the improvements being financed. Property that is outside the area receiving the specific improvements being financed cannot be charged a special assessment.

Ad valorem property taxes on the other hand, are levied on eligible real property based upon that property's assessed valuation, unrelated to the proportional benefits being received by that property. So called "special taxes" are levied for a specific purpose, but are similarly unrelated to the proportional benefit being received from the improvements being financed.

California statutes give local governments the authority to levy a number of special assessments for specific public improvements such as streets, storm drains, sewers, street lights, curbs and gutters, and landscaping. The legislative body of a city, county, or in some cases a special district (flood control district, fire protection district, etc.), may, by invoking the proper statute in the proper manner, create a special assessment district that defines both the area to benefit from the improvements and the properties that will pay for those improvements. Thereafter, each property within the district will be assessed a share of the cost of improvements that is proportional to the direct benefit it receives from those improvements.

Pursuant to California case law, a special assessment district is not considered a separate legal entity like a special district (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676). Most special assessment districts have no officers or governing board and are strictly financing mechanisms.

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## History

Special assessments have a long history of use. Nationwide, special assessments can be traced back to a 1691 levy for street and drain construction in New York City. In California, several of the major assessment acts date from the early part of the 20th Century. Until the Great Depression of the 1930's, special assessments were a major municipal financing tool. Economic conditions during the depression caused numerous landowner defaults on assessments which, in turn, made it difficult to pay off the bonds backed by the assessments, and public credit suffered. From that time until the passage of Proposition 13, special assessments were used sparingly as local governments came to rely largely upon property taxes for their income.

When Proposition 13 first took effect, it reduced local property tax revenues by over 50%. Special assessments gained immediate notice as a "new" source of funding. A quick comparison of the use of special assessments before and after Proposition 13 illustrates how assessments have grown in popularity. In the 1960's and mid-70's the volume of assessments is estimated to have been from \$20-50 million per year. By 1985, the estimated annual volume of special assessments had climbed to more than \$700 million.

There were several reasons for the popularity of special assessments. First, the California courts have held they are not ad valorem property taxes. As a result, special assessments are exempt from the taxation limits imposed by Proposition 13 (*Fresno County v. Malmstrom* (1979) 94 Cal.App.3d 974; *Solvang Municipal Improvement District v. Board of Supervisors* (1980) 112 Cal.App.3d 545; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443). Second, they are not "special taxes" requiring two-thirds vote of the electorate prior to being imposed. In fact, prior to Proposition 218, special assessment districts were established by the city council or county board of supervisors and usually not subject to public vote. Third, the proceeds of a special assessment are not "proceeds of taxes" for purposes of the Gann Act (*City Council v. South* (1983) 146 Cal.App.3d 320). Accordingly, funds received from special assessments do not apply toward a jurisdiction's Gann Act spending limit.

Most of the special assessment acts also provide for the issuance of bonds. Bonds are, in effect, money that the local government is borrowing for the purpose of constructing the improvements authorized by the assessment district. These bonds are generally secured by the property within the district and the bonded indebtedness is repaid with the money generated by the assessments. Assessments are subject to reduction or repeal by popular initiative (Section 3, Article XIII C, California Constitution). Agencies securing bonded indebtedness with assessments created or increased after November 6, 1996 should disclose this fact to potential investors. Although the contract clause of the U.S. Constitution would likely preclude an initiative from eliminating an assessment securing bonded indebtedness, the loss of other potential sources of funding through initiative (which would affect the overall financial health of the agency) may be a concern.

Landowners are given the opportunity to pay off the assessment immediately, otherwise, the assessments become liens against the property and landowners pay them off in installments. Typically, assessment bonds are sold to provide the capital needed to pay for immediate construction of the project and are secured by property liens.

Several of the most common types of special assessments are summarized in the following paragraphs. These summaries are general discussions of complex financing acts. Please refer to the statutes themselves for detailed information, particularly on the subject of district formation and hearing requirements. Note that several of these acts are only available for use by cities.

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## **The Assessment Acts**

### **Improvement Act of 1911**

*(Streets and Highways Code section 5000 et seq.)*

The 1911 Act may be used by cities, counties, and "all corporations organized and existing for municipal purposes." Assessments under this Act may be used to fund a long list of improvements including:

- transportation systems (including acquisition, construction, maintenance, and operation costs related thereto);
- street paving and grading;
- sidewalks;
- parks;
- parkways;
- recreation areas (including necessary structures);
- sanitary sewers;
- drainage systems;
- street lighting;
- fire protection systems;
- flood protection;
- geologic hazard abatement or prevention;
- water supply systems;
- gas supply systems;
- retaining walls;
- ornamental vegetation;
- navigational facilities;
- land stabilization; and,
- other "necessary improvements" to the local agency's streets, property, and easements.

The 1911 Act may also be used to create a maintenance district to fund the maintenance and operation of sewer facilities and lighting systems.

Pursuant to this act, improvements must be completed before their total cost is assessed against the properties within the district. Contractors are, in effect, reimbursed for their work from the proceeds of the district. This aspect of the 1911 Act requires that sufficient funds be available for the project before it is begun and is a major drawback of the legislation. Total costs may include acquisition, construction, and incidentals (including engineering fees, attorney's fees, assessment

and collection expenses, and cost of relocating utilities). The uncertainty that results from Proposition 218's voting requirements will probably discourage the future use of the 1911 Act.

Individual assessments constitute liens against specific parcels and are due within 30 days of confirmation. If assessments are not paid in full within this period, a bond in the amount due is issued to the installer of the improvements and assessments are collected from individual properties to pay off the bond. The property owner receives a separate bill indicating the assessment due. Bonds may also be issued under the Improvement Bond Act of 1915 even though the assessment repaying the bonds has been levied under the 1911 Act. Alternatively, for assessments of less than \$150, the assessment may be collected on the tax roll upon which general taxes are collected.

Since the parcel being assessed is the only security for any bonds issued, accurately estimating the value of the property is very important. The feasibility of the project will hinge on the value of the property involved.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile these differences in the statute.

### **Municipal Improvement Act of 1913**

*(Streets and Highways Code section 10000 et seq.)*

The 1913 Act may be used by cities, counties, joint powers authorities, and certain special districts which are empowered to make any of the improvements authorized under the Act. It specifically authorizes the construction and maintenance of all the facilities authorized under the 1911 Act as well as the following:

- works and appliances for providing water service, electrical power, gas service, and lighting; and
- public transit facilities serving an area smaller than 3 square miles (including stations, structures, rolling stock, and land acquisition related thereto).

In addition, a municipality may enter into an agreement with a landowner to take over the operation and other activities of a sewer or water system owned by that landowner and create a 1913 Act assessment district for the purpose of reimbursing the landowner. Such an assessment district may also include other land that can be served by the system, upon the written consent of the other affected landowners.

Unlike the 1911 Act, the total cost of improvements is assessed against the benefited properties before the improvements are completed. An assessment constitutes a lien against a specific parcel and is due within 30 days of recording the notice of assessment. If the landowner chooses not to pay the assessment in full at that time, bonds in the amount of the unpaid assessment may be issued under the 1911 Improvement Act or the 1915 Improvement Bond Act. Landowners will then be assessed payments over time.

A number of amendments to the Act enacted in 1992 have expanded its use to include certain building repairs and upgrades that are necessary to the public safety. For example, assessments may now finance work or loans to bring public and private real property or buildings into compliance with seismic safety and fire code requirements (Chapters 1197 and 832, Statutes of 1992.) Work is limited to that certified as necessary by local building officials. Revenues must be dedicated to upgrades; they cannot be used to construct new buildings nor dismantle an existing building. In addition, no property or building may be included within the boundaries of a 1913 Act district established for these purposes without the consent of the property owner. Furthermore, when work is financed on residential rental units, the owner must offer a guarantee that the number of units in the building will not be reduced and rents will not be increased beyond an affordable level.

The 1913 Act can also be used to finance repairs to those particular private and public real properties or structures damaged by earthquake when located within a disaster area (as declared by the Governor) or an area where the Governor has proclaimed a state of emergency as a result of earthquake damage (Chapter 1197, Statutes of 1992). The kinds of work which may be financed include reconstruction, repair, shoring up, and replacement. A jurisdiction has seven years from the time a disaster area is declared or a state of emergency is proclaimed to establish a district under this statute.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative must be followed. Legislation is needed to reconcile the Act with Proposition 218.

### **Improvement Bond Act of 1915**

*(Streets and Highways Code section 8500 et seq.)*

This legislation does not authorize assessments. Instead, it provides a vehicle for issuing assessment bonds (including variable interest bonds) for assessments levied under the 1911 and 1913 Acts as well as a number of other benefit assessment statutes. Under this legislation, the local legislative body may also issue "bond anticipation notes" prior to actual bond sale - in effect borrowing money against the assessment bonds being proposed for sale. The 1915 Act is available to cities, counties, public districts, and public agencies.

After assessments have been levied and property owners given the opportunity to pay them off in cash, the local government will issue bonds for the total amount of unpaid assessments. Assessments collected to pay off 1915 Act bonds appear on the regular tax bill and are collected in the same manner as property taxes.

### **Park and Playground Act of 1909**

*(Government Code section 38000 et seq.)*

The Park and Playground Act is a method for cities to finance public park, urban open-space land, playground, and library facilities. Pursuant to a 1974 revision, the act incorporates the procedures and powers of the Improvement Act of 1911, the Municipal Improvement Act of 1913, and the Improvement Act of 1915 to finance improvements. In addition to the power to

levy assessments and issue bonds, the act provides that the city council may condemn land for improvements.

### **Tree Planting Act of 1931**

*(Streets and Highways Code section 22000 et seq.)*

Pursuant to this act, cities may levy assessments to fund the planting, maintenance or removal of trees and shrubs along city streets and to pay employees to accomplish this work. Assessments for maintenance are limited to a period of 5 years.

These assessments are apportioned on the basis of street frontage. Work is to be administered by the city parks department or other agency as appointed by the city council.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218. A city contemplating the use of the Act should document that street frontage is a valid measure of "special benefit." If frontage is not a directly indicator of benefit, use of this Act may be difficult to defend.

### **Landscaping and Lighting Act of 1972**

*(Streets and Highways Code section 22500 et seq.)*

This Act may be used by cities, counties, and special districts (including school districts). Alleged abuse of the Landscaping and Lighting Act by cities and school districts was one of the motivating forces behind Proposition 218. The initiative targeted the allegedly tenuous link between parks and recreation facilities and the benefit they provided to properties in the area. Prior to Proposition 218, the successful argument in favor of the Landscaping and Lighting Act was that parks, open space, and recreation facilities benefited properties by increasing their value. As a result of the strict definition of special benefit created by Proposition 218 ("General enhancement of property value does not constitute 'special benefit.'"), that justification no longer exists and this Act will be much harder to use.

The 1972 Act enables assessments to be imposed in order to finance:

- acquisition of land for parks, recreation, and open space;
- installation or construction of planting and landscaping, street lighting facilities, ornamental structures, and park and recreational improvements (including playground equipment, restrooms and lighting); and,
- maintenance and servicing of any of the above.

Amendments to the Act, effective January 1, 1993, exclude from the authorized improvements any community center, municipal auditorium or hall, or similar public facility, unless approved by the property owners owning 50 percent of the area of assessable lands within the proposed district. The election shall be conducted following the adoption of an ordinance or resolution at a regular meeting of the legislative body of the local agency and is in lieu of any public notice or hearing otherwise required by this part.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Benefit Assessment Act of 1982**

*(Government Code section 54703 et seq.)*

This statute provides a uniform procedure for the enactment of benefit assessments to finance the maintenance and operation costs of drainage, flood control, and street light services and the cost of installation and improvement of drainage or flood control facilities. Under legislation approved in 1989 (SB 975, Chapter 1449), this authority is expanded to include the maintenance of streets, roads, and highways. As with most other assessment acts, it may be used by cities, counties, and special districts which are otherwise authorized to provide such services. It does, however, have some differences that set it apart.

Assessments can be levied on a parcel, a class of property improvement, use of property, or any combination thereof. Assessments for flood control services can be levied on the basis of proportionate stormwater runoff from each parcel rather than a strict evaluation of the flood protection being provided. The amount of assessment must be evaluated and reimposed annually. Assessments are collected in the same manner as property taxes.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Also, the Act states that an assessment may be levied wherever service is available, regardless of whether the service is actually used - this may conflict with the initiative's definition of "special benefit." Where differences exist between statute and initiative, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Integrated Financing District Act**

*(Government Code section 53175 et seq.)*

This legislation creates an alternate method for collecting assessments levied under the 1911, 1913, and 1915 Acts, the Landscaping and Lighting Act of 1972, the Vehicle Parking District Law of 1943, the Parking District Law of 1951, the Park and Playground Act of 1909, the Mello-Roos Community Facilities Act of 1982, the Benefit Assessment Act of 1982, and charter cities' facility benefit assessments. The Integrated Financing District Act applies to all local agencies insofar as those agencies have the authority to use any of the above listed financing acts. Assessments levied under this act can be used to pay the cost of planning, designing, and constructing capital facilities authorized by the applicable financing act, pay for all or part of the principle and interest on debt incurred pursuant to the applicable financing act, and to reimburse a private investor in the project.

The Integrated Financing District Act has two unique properties:

(1) it can levy an assessment which is contingent upon *future* land development and payable upon approval of a subdivision map or zone change or the receipt of building permits;

(2) it allows the local agency to enter into an agreement with a private investor whereby the investor will be reimbursed for funds advanced to the agency for the project being financed.

Because the assessment is not triggered until development is ready to begin, these features make the act an attractive option when development is to occur in phases. Payment of assessments will be deferred until such time as public improvements are needed.

The procedure for creating an integrated financing district, including entering into a reimbursement agreement, is in addition to the procedure required by the applicable assessment act. The resolution of intention must include a description of the rates and method of apportionment, the contingencies which will trigger assessment of the levy, the fixed dollar amount per unit of development for the contingent levy, and a description of any proposed reimbursement agreement. The assessment and entry into any agreement are effective upon approval of the legislative body.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Street Lighting Act of 1919**

*(Streets and Highways Code section 18000 et seq.)*

This act allows cities to levy benefit assessments for the maintenance and operation of street lighting systems. Assessments may also finance the installation of such a system by a public utility.

Assessments are liens against land and are due within 30 days of being recorded by the tax collector. The 1919 Act also establishes two alternate methods for collecting payments on an installment basis in the manner of property taxes. An assessment levied under this act must be evaluated and reapplied annually after a public hearing, and , pursuant to Proposition 218, a vote of the property owners.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Municipal Lighting Maintenance District Act of 1927**

*(Streets and Highways Code section 18600 et seq.)*

This statute provides for the maintenance and operation (but not the installation) of street lighting systems within cities. Assessments are limited to a maximum of 5 years.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Street Lighting Act of 1931**

*(Streets and Highways Code section 18300 et seq.)*

The 1931 Act is another means for cities to finance the maintenance and service (but not installation) of street lighting systems. Assessments under this act are levied annually and collected in installments in the manner of city taxes. The term of assessment is limited to 5 years.

As of this writing, the public notice and assessment procedure under the Act (which resembles the procedure under the 1919 Street Lighting Act) conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Parking District Law of 1943**

*(Streets and Highways Code section 31500 et seq.)*

This act authorizes a city or county to levy assessments to finance:

- the acquisition of land for parking facilities;
- the construction, operation, and maintenance of parking facilities (including garages); and,
- the costs of engineers, attorneys or other people necessary to acquisition, construction, operations, and maintenance.

The Parking District Law incorporates the assessment procedures and powers of the 1911, 1913, and 1915 Acts discussed previously. It also authorizes the use of meters, user fees, and ad valorem taxes to raise funds.

Once parking facilities have been acquired, administration of the parking district is turned over to a "Board of Parking Place Commissioners" appointed by the city mayor or county board of supervisors. This board reports to the legislative body on the status of the district each year. Annual assessments are levied by the legislative body, in accordance with Proposition 218.

As mentioned earlier, the public notice and assessment procedures of the 1911, 1913, and 1915 Acts currently conflict with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Parking District Law of 1951**

*(Streets and Highways Code section 35100 et seq.)*

Cities are authorized to finance the following activities under this act:

- acquisition of land for parking facilities (including the power of eminent domain);
- improvement and construction of parking lots and facilities;
- issuance of bonds; and,
- employee salaries.

Special assessments under the 1911 Act may be levied to replace the use of fees and charges to repay outstanding bonds. Other revenue sources may include user fees, parking meter charges, and ad valorem taxes.

District formation proceedings are initiated upon petition of involved land owners and generally follow the pattern of other assessment acts. As in the 1943 Act, the district is to be administered by an appointed parking commission.

As with those other acts, the public notice and assessment procedure of the 1951 Act currently conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

### **Parking and Business Improvement Area Law of 1989**

*(Streets and Highways Code section 36500 et seq.)*

This act recodifies and supplants the 1979 law of the same name, now repealed. The Parking and Business Improvement Area Law of 1989 enables a city, county, or joint powers authority made up of any combination of cities and counties to establish areas of benefit and to levy assessments on businesses within those areas to finance the following improvements:

- parking facilities;
- parks;
- fountains, benches, and trash receptacles;
- street lighting; and,
- decorations.
- Assessment revenues may also be used for any of the following activities:
  - promotion of public events benefiting area;
  - businesses which take place in public places within the area;
  - furnishing music to any public place in the area;
  - promotion of tourism within the area; and,
  - any other activities which benefit businesses located in the area.

Assessments must be directly proportional to the estimated benefit being received by the businesses upon which they are levied. Furthermore, in an area formed to promote tourism, only businesses that benefit from tourist visits may be assessed. The agency creating the assessment district area is authorized to finance only those improvements or activities which were specified at the time the area is formed. An unusual feature of this law is that assessments may be apportioned differently among zones of benefit, in relation to the benefit being received by businesses within each zone. The agency should carefully document the special benefit which each assessed property will receive. Pursuant to Proposition 218, the assessment cannot finance improvements or services of general benefit.

Establishment proceedings may be initiated by either the legislative body of the city or county. The procedure is generally similar to other assessment acts and requires adoption of a resolution of intention and a noticed public hearing at which protests may be considered. If written protests are received from the owners of businesses which would pay 50 percent or more of the proposed

assessment, the formation proceedings must be set aside for a period of one year. If these protests are only against a particular improvement or activity, the legislative body must delete that improvement or activity from the proposal. After a district has been established under this law, the legislative body must appoint an advisory board to make recommendations on the expenditure of revenues from the assessment. The advisory board may also be appointed prior to the adoption of a resolution of intention to make recommendations regarding that notice.

There's some ambiguity over whether Proposition 218 applies to the 1989 Law. Arguably, it does not apply since assessments are levied on businesses and are therefore not "a charge upon real property." Agencies should approach this assessment act with caution and a strong opinion from counsel before choosing not to comply with Proposition 218.

### **Property and Business Improvement District Law of 1994** (*Streets and Highways Code section 36600 et seq.*)

A city, county, or joint powers authority made up of cities and counties may adopt a resolution of intention to establish this type of district upon receiving a written petition signed by the property owners of the proposed district who would pay more than 50 percent of the assessments being proposed. The city, county, or JPA must appoint an advisory board within 15 days of receiving a petition which shall make recommendations to the legislative body regarding the proposed assessments (Streets and Highways Code section 36631).

The improvements which may be financed by these assessments include those enumerated under the Parking and Business and Improvement Area Law of 1989, as well as such other items as:

- closing, opening, widening, or narrowing existing streets;
- rehabilitation or removal of existing structures; and
- facilities or equipment, or both, to enhance security within the area.
- Assessment revenues may finance the activities listed under the 1989 Law, as well as the following:
  - marketing and economic development; and
  - security, sanitation, graffiti removal, street cleaning, and other municipal services supplemental to those normally provided by the municipality.

No provision is made within this law for financing bonded indebtedness.

The property owners' petition is required to include a management district plan consisting of a parcel-specific map of the proposed district, the name of the proposed district, a description of the proposed boundaries, the improvements or activities being proposed over the life of the district and their cost, the total annual amount proposed to be expended in each year of the district's operation, the proposed method and basis of levying the assessment, the time and manner of collecting assessments, the number of years in which assessments will be levied (this is limited to five years maximum), a list of the properties being benefited, and other related matters (Streets and Highways Code 36622).

The legislative body's resolution must include the management district plan as well as the time and place for a public hearing on the establishment of the district and levy of assessments will be held (Streets and Highways Code 36621). This hearing must be held within 60 days after the adoption of the resolution. Hearing notice must be provided pursuant to Government Code section 54954.6. Both mailed and newspaper notice are required (Streets and Highways Code section 36623).

The proposal to form the district must be abandoned if written protests are received from the owners of real property within the proposed district who would pay 50 percent or more of the assessments (Streets and Highways Code section 36625). In addition, when a majority protest has been tendered, the legislative body is prohibited from reinitiating the assessment proposal for a period of one year.

The public notice and assessment procedures of the 1994 Law are similar to the provisions of Proposition 218. An agency proposing to use the Act should take care to ensure that they are proceeding in harmony with Proposition 218 and that the properties being assessed are receiving an actual special benefit. Where conflicts exist, the requirements of the initiative prevail.

No assessments under this law can be levied on residential properties or on land zoned for agricultural use (Streets and Highways Code section 36635).

This statute is an alternative to the Parking and Business and Improvement Area Law of 1989 and does not affect any districts formed under that law.

### **Pedestrian Mall Law of 1960**

*(Streets and Highways Code section 11000 et seq.)*

This authorizes cities and counties to establish pedestrian malls, acquire land for such malls (including power of eminent domain), restrict auto traffic within the malls, and to levy benefit assessments to fund mall improvements. Improvements may include:

- street paving;
- water lines;
- sewer and drainage works;
- street lighting;
- fire protection;
- flood control facilities;
- parking areas;
- statues, fountains and decorations;
- landscaping and tree planting;
- child care facilities;
- improvements necessary to a covered air-conditioned mall; and,
- relocation of city-owned facilities.

Assessments may also be used to pay damages awarded to a property owner as a result of the mall.

Establishment proceedings are similar to those found in other assessment acts. Accordingly, these provisions do not currently conform to the requirements of Proposition 218 and await reconciliation. Where conflicts exist, the requirements of the initiative prevail. Assessments and bonds are to be levied in accordance with the provisions of the Vehicle Parking District Law of 1943 (which provides for use of the 1911 and 1915 Acts, among others).

### **Permanent Road Divisions Law**

*(Streets and Highway Code sections 1160 et seq.)*

This statute enables counties to establish areas of benefit (called "divisions" under this law) within which assessments may be levied in order to finance construction, improvement, or maintenance of any county road, public road easement, or private road or easement which contains a public easement (Streets and Highways Code section 1179.5). The statute also empowers a board of supervisors to levy special taxes for these purposes upon approval by 2/3 of the electorate within the division.

Proceedings for the formation of a road division may be initiated by either: (1) a resolution of the Board of Supervisors; or, (2) submittal to the Board of Supervisors of a petition containing either the signatures of a majority of the land owners within the proposed division or the owners of more than 50 percent of the assessed valuation. The public notice and assessment procedures of the Permanent Road Divisions Law conflict with the provisions of Proposition 218 by failing to provide for a property owners' ballot. The requirements of Proposition 218 must be followed in order to establish a division. Legislation is needed to reconcile the Act with Proposition 218.

### **Community Rehabilitation District Law of 1985**

*(Government Code section 53370 et seq.)*

This act provides a means for cities and counties to finance the rehabilitation, renovation, repair or restoration of existing public infrastructure. It cannot, however, be used to pay for maintenance or services. A Community Rehabilitation District cannot be formed within a redevelopment project area.

A district established under the 1985 Act can rehabilitate public capital facilities such as:

- streets;
- sewer and water pipes;
- storm drains;
- sewer and water treatment plants;
- bridges and overpasses;
- street lights;
- public buildings;
- criminal justice facilities;
- libraries; and,
- park facilities.

It can also finance the expansion of facility capacity or the conversion to alternative technology.

The 1985 Act allows a rehabilitation district to use any of the following financing tools:

- Special assessments under the Improvement Act of 1911 and the Municipal Improvement Act of 1913 and bonds under the Improvement Bond Act of 1915.
- Special taxes and bonds pursuant to the Mello-Roos Community Facilities Act of 1982.
- Fees or charges, provided that these do not exceed the amount reasonably necessary to cover the cost of the involved project.
- Senior obligation bonds under the 1985 Act's own provisions (Gov. Code section 53387 et seq.).

Certain of the public notice and assessment procedures of this act conflict with Proposition 218. An agency proposing to use the Community Rehabilitation District Law should take care to ensure that they are proceeding in harmony with Proposition 218 and that the properties being assessed are receiving a concrete special benefit. Under Proposition 218, a general enhancement of property value is not a special benefit.

Public notice must be provided over a period of 5 weeks prior to the district formation hearing. This notice must contain the text of the resolution of intent, the time and place of the hearing, and a statement that the hearing will be open to all interested persons in favor of or opposed to any aspect of the district. If the district will utilize any of the above special assessment or community facilities acts, it may combine the notices required by those acts with this notice.

A separate procedure exists for issuing, administering, and refunding senior obligation bonds pursuant to the 1985 Act (Gov. Code sections 53387 - 53594). Issuance involves adopting a resolution of intention and submitting the bond issue to the voters of the district. Affirmation by a simple majority of voters is necessary to approve issuance of the bonds.

### **Geologic Hazard Abatement District** (*Public Resources Code section 26500 et seq.*)

This statute authorizes a city or county to create an independent Geologic Hazard Abatement District (GHAD) empowered to finance the prevention, mitigation, abatement, or control of actual or potential geologic hazards through the levy and collection of special assessments. The statute broadly defines geologic hazards to include: landslides, land subsidence, soil erosion, earthquakes, or "any other natural or unnatural movement of land or earth."

A district can:

- acquire property by purchase, lease, gift, or eminent domain;
- construct improvements;
- maintain, repair, or operate any improvements; and,
- use any of the assessment and bond procedures established in the Improvement Act of 1911, the Municipal Improvement Act of 1913, and the Improvement Bond Act of 1915.

Proceedings for forming a GHAD may be initiated by resolution of the city or county or by petition of the owners of at least 10% of affected property. A landowner petition must include

signatures, legal descriptions, and a map of the proposed district boundaries. In addition, the city, county, or petitioners must include a "plan of control" prepared by an engineering geologist which describes the geologic hazard to be addressed, its location, the affected area, and a plan for the prevention, mitigation, abatement, or control of the hazard.

When forming a GHAD, the legislative body of the city or county can be the governing body of the district. Alternatively, the legislative body can appoint five land owners to act as the district's board of directors. Thereafter, board members will be elected every four years from within the district. Unlike most special assessment districts, the GHAD is an entity independent of the city or county.

The current procedure for forming a GHAD conflicts with Proposition 218 in that it does not provide for a property owners' ballot on the question of formation. When forming a GHAD, the city or county must conform its procedure to the engineer's report, public notice, balloting, and other requirements of Proposition 218.

The statute also provides for emergency formation of a GHAD upon the request of two-thirds of the affected property owners (Public Resources Code sections 26568-26597.7). This is invalid to the extent it conflicts with Proposition 218.

The statute does not describe the method for dissolving a GHAD. However, the California Court of Appeal has opined that dissolution of a GHAD is subject to the procedures of the Cortese-Knox Local Government Reorganization Act (Gov. Code 56000, et seq.) and cannot be unilaterally undertaken by a city (*Las Tunas GHAD v. Superior Court (City of Malibu)* (1995) 38 Cal.App.4th 1002). Under this interpretation, although district formation is undertaken by a city or county without the involvement of the county Local Agency Formation Commission (LAFCO), dissolving a district requires adherence to LAFCO procedures.

A GHAD has several advantages to recommend it. One, its boundaries need not be contiguous, so it can focus on just those properties subject to hazard. Second, it is an independent district with its own board of directors drawn from the affected property owners. Third, it is not limited to a single city or county; its boundaries can cross jurisdictional lines. Fourth, its formation proceedings are not subject to review by the Local Agency Formation Commission, thereby simplifying the process. Fifth, its formation is exempt from the California Environmental Quality Act.

Contra Costa County has formed GHADs in its Blackhawk and Canyon Lakes developments. In both, the County Board of Supervisors serves as the governing body.

### **Open Space Maintenance Act** (Government Code sections 50575 et seq.)

Cities and counties are empowered to spend public funds to acquire open space land for preservation (Government Code sections 6950-6954). The Open Space Maintenance Act provides a means to levy an ad valorem special assessment to pay for the following services related to such land:

- conservation planning;
- maintenance;
- improvements related to open space conservation; and,
- reduction of fire, erosion, and flooding hazards through clearing brush, making fire protection improvements not otherwise provided the area, planting and maintaining trees and other vegetation, creating regulations limiting area use, and construction of general improvements.

The owners of lands representing 25% or more of the value of the assessable land within the proposed district may initiate district formation by filing a petition with the involved city or county. The local legislative body must then prepare a preliminary report containing a description of the proposed boundaries, the work to be done, an estimate of the cost of the assessment, and illustrating the parcels to be benefitted. The planning commission must review the report and make recommendation to the legislative body. Once the legislative body has reviewed the report, concluded that such a district is justified, and adopted an ordinance of intention to form an assessment district, it will set a time and place for hearing objections to the proposal. The ordinance of intention must specify the district boundaries, the proposed projects, the annual assessment, the maximum assessment, and the time of the protest hearing (Government Code section 50593). Notice must be placed in a newspaper of general circulation, mailed to involved property owners, and posted in a public place. The formation proceedings in current law conflict with the requirements of Proposition 218. A city or county must be careful to substitute the requirements of Proposition 218 for any conflicting provisions in the code. This statute needs to be amended to reconcile it with Proposition 218.

### **Fire Suppression Assessment**

*(Government Code section 50078 et seq.)*

Special districts, county service areas, counties, and cities which provide fire suppression services (including those provided by contracting with other agencies) are authorized to levy assessments under this act. The resulting revenues may be used to obtain, furnish, operate, and maintain fire fighting equipment and to pay salaries and benefits to firefighting personnel.

Unlike the other special assessment acts, invocation of fire suppression assessments does not require establishment of an assessment district. Instead, the jurisdiction levying the assessment specifies those parcels or zones within its boundaries that will be subject to assessment.

Assessments are based upon uniform schedules or rates determined by the risk classification of structures and property use. Agricultural, timber, and livestock land is assessed at a lower rate on the basis of relative risk to the land and its products. The local agency may establish zones of benefit, restricting the applicability of assessments. In addition, assessments may be levied on parcels, classes of improvement or property use or any combination thereof. Assessments are proportional to the fire protection benefits received by property and improvements, but may be levied whether or not the service is actually used.

The procedure for establishing a fire suppression assessment includes:

- filing of a report which details the land to be assessed, the initial amount of assessment, the maximum assessment, the duration of the assessment, and the schedule or rate of assessment;
- public notice and hearing;
- protest procedures; and,
- adoption of an ordinance or resolution imposing the levy.

Proposition 218, with its strict definition of "special benefit," may pose a problem for new or increased assessments under this code. In fact, some jurisdictions, such as the Tamalpais Valley Fire District and the County of Los Angeles, have placed fire protection levies before the voters as special taxes (subject to two-thirds approval), effectively converting them from assessments.

The agency proposing to levy fire suppression assessments must be careful to document the special benefit (excluding any benefit to the general public and any general enhancement of property value) accruing to each parcel that is included in the assessment district. In addition, the formation proceedings in current law conflict with the requirements of Proposition 218. A city or county must substitute the requirements of Proposition 218 for all conflicting provisions in the code.

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## **Facilities Benefit Assessment**

The City of San Diego is levying assessments for capital improvements in urbanizing areas designated on its general plan. The city's Facilities Benefit Assessment (FBA) ordinance is generally based upon the Municipal Improvement Act of 1913, but relies upon this charter city's home rule powers rather than state statutes for authority. It is being used to pay for capital improvements such as major arterial and local streets, sewer and water facilities, a park and ride lot, a fire station, and a library in the North City West Community Plan area.

The FBA ordinance establishes areas of benefit to be assessed for needed improvements in newly developing areas. Each parcel within an area of benefit is apportioned its share of the total assessment for all improvements (including those required for later development phases) which is then recorded on the assessment roll. Assessments are liens on private property as with the state assessment acts. Upon application for a building permit the owner of the parcel must pay the entire assessment (the payment is pro rated if only a portion of the parcel is being developed at one time). Payment releases the city's lien on the property. The funds that are collected are placed in separate accounts to be used for the needed improvements and do not exceed the actual cost of the improvements plus incidental administrative costs. San Diego's FBA financing relies upon assessments only and does not provide for issuing bonds.

The procedure for levying assessments laid out in the city's FBA ordinance parallels the state improvement acts. For the North City West Public Facilities Financing Plan FBA, the city prepared a report detailing needed improvements, construction costs and schedule, the proposed area of benefit, and the proposed formula for apportioning the assessment. After adopting the report and a notice of intention to consider enacting the assessment, the city scheduled a public

hearing for the purpose of considering protests. At the hearing, the city presented additional information regarding the proposed boundaries of the areas of benefit, the facilities to be constructed, the method of apportionment, the method of computing annual increases in the assessment, and the amount of the city's contribution toward the cost of the improvements.

Assessments are apportioned based upon the parcels' Equivalent Dwelling Units (EDU). EDUs were assigned according to the development potential of the land as projected by the community plan, final map, or other measure. EDUs were computed prior to adopting the FBA after consultation with developers and landowners.

San Diego's FBA has been upheld by the courts in the face of challenges that it was a "special tax" subject to Proposition 13 requirements and that it was beyond the city's authority to enact (*J.W. Jones v. City of San Diego* (1984) 157 Cal.App.3d 745 and *City of San Diego v. Holodnak* (1984) 157 Cal.App.3d 760).

The City of Sacramento has established an FBA that clones San Diego's model. Sacramento is using it to pay for \$16 million worth of improvements within the city's South Natomas Community Plan area. These include: traffic signals; bridges; street extensions and widening; and portions of a library, a community center and a fire station. As in San Diego, the city collects the full assessment when building permits are issued and there is no mechanism for issuing bonds.

Charter cities are subject to the requirements of Proposition 218. A city undertaking a facilities benefit assessment in the future, or proposing to increase an existing assessment, must comply with all the requirements and limitations of the initiative.

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## **Seismic Safety Assessment**

The city of Long Beach is using its powers as a charter city in forming a special assessment district to finance the private building improvements mandated by the city's seismic safety ordinance. Like many other cities, Long Beach requires that older buildings be brought up to current seismic safety standards. A strict city ordinance requires the demolition of pre-1934 buildings that have not been upgraded by 1991.

Participation in the district is voluntary. Building owners who want to be included in its boundaries must pay a non-refundable, good faith deposit and provide the city an accurate estimate of the probable cost of complying with the seismic safety ordinance. Once the city has received the owners' cost estimates and deposits, it will initiate district formation proceedings. The formation procedure is modeled after the 1911 and 1913 Acts.

After formation of the assessment district, the city issued \$17.44 million in taxable bonds to finance the district-wide cost of the improvements. Individual assessments will be equal to the cost of bringing a particular building into compliance with code, plus a share of the debt service and administrative costs.

Through the following measures, Long Beach will ensure that the funds collected by the assessment district (and the associated bond sale) go directly to addressing the community health and safety concerns embodied in its seismic safety ordinance.

The city will be responsible for hiring the necessary contractors to upgrade participating buildings. No payments or loans will be made to building owners.

The scope of the work will be limited solely to those improvements required by the city's seismic safety code. For example, fire sprinklers will not be installed because they are not mandated by the ordinance.