G045878

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

CITIZENS ASSOCIATION OF SUNSET BEACH,

Plaintiff and Appellant,

v.

ORANGE COUNTY LOCAL AGENCY FORMATION COMMISSION, ET AL.

Defendants and Respondents.

Appeal from a Judgment of the Superior Court, Orange County
Case No. 30-2010-00431832, Hon. Frederick P. Horn

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH **APPELLATE DISTRICT, DIVISION** THREE	Court of Appeal Case Number: G045878
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Timothy A. Bittle, Esq (Bar No. 112300) HOWARD JARVIS TAXPAYERS FOUNDATION 921 11th Street, Suite 1201 Sacramento, CA 95814 TELEPHONE NO.: (916) 444-9950 FAX NO. *(Optional):* (916) 444-9823 E-MAIL ADDRESS *(Optional):* Tim@hjta.org ATTORNEY FOR *(Name):* Plaintiff /Appellant	Superior Court Case Number: 30-2010-00431832 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Citizens Association of Sunset Beach RESPONDENT/REAL PARTY IN INTEREST: O.C. Local Agency Formation Comm.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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Date: February 9, 2012

Timothy A. Bittle
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▶ Tim Bittle
(SIGNATURE OF PARTY OR ATTORNEY)

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RULE 8.204(a)(2) STATEMENT

A. *Nature of the Action*

This case of first impression avers that, before a tax can be imposed for the first time on residents of a defined geographical area who heretofore were not politically subject to the tax, the Right to Vote on Taxes Act (Cal. Const., art. XIII C, added by Proposition 218) guarantees them the right to an election on the tax, and the Legislature cannot take that right away by statute.

B. *Relief Sought and Trial Court's Order*

Appellant, the plaintiff below, sought an injunction, a writ of mandate or a declaratory judgment that, before the Orange County Local Agency Formation Commission ("OC LAFCO") may finalize the annexation of Sunset Beach to the City of Huntington Beach, the City must first hold an election and obtain, from the voters of Sunset Beach, approval of City taxes that they would be required to pay if annexed. Clerk's Transcript ("CT") Vol. 2 at 457.

The trial court denied relief on the grounds that "Proposition 218 does not apply to the facts of this case because the annexation of Sunset Beach will not involve the imposition, extension or increase of any new general or special taxes." Minute Order at 2 (see Motion to Augment Record, filed 01/25/12). The trial court entered judgment in favor of defendants on September 20, 2011. CT Vol. 3 at 672.

C. *Appealability*

A final judgment is appealable under Code of Civil Procedure section 904.1(a)(1).

ISSUES ON APPEAL

1. Does article XIII C, section 2(b) of the California Constitution, which provides that "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," apply when a city seeks, by annexation, to extend its taxes to land that is currently unincorporated, and thereby increase the tax burden of a community of people by imposing on them certain taxes they were never before required to pay?

2. If so, then should the trial court have required that, before the OC LAFCO may finalize the annexation of Sunset Beach to the City of Huntington Beach, the City must first hold an election and obtain, from the voters of Sunset Beach, approval of City taxes that they would be required to pay if annexed?

THE ANNEXATION PROCESS

The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Gov. Code §§ 56000, *et seq.*) ("the Act") establishes in each of California's counties an agency know as a Local Agency Formation Commission, or "LAFCO." The purpose of each LAFCO is to process reorganization proposals. Proposals can come through a citizen petition or an application by a local agency (Gov. Code § 56650) or be initiated by the LAFCO on its own (Gov. Code § 56375). A proposal may be to create a new entity (such as the incorporation of a new city), or to dissolve an entity, merge entities, annex new territory to an entity, or detach territory from an entity. Gov. Code §§ 56021, 56375. In evaluating such proposals, a LAFCO is guided by a number of factors (*see generally* Gov. Code §§ 56377, 56668, 56668.3, 56668.5), with the overarching goals of encouraging orderly growth, discouraging urban sprawl (Gov. Code § 56001) and best serving the interests of the landowners and inhabitants in the affected areas. Gov. Code §§ 56325.1, 56668.3(a).

An "annexation" is the addition of new territory to a city or district. Gov. Code § 56017. When an application for annexation is properly filed with

a LAFCO, the LAFCO executive officer schedules the matter for a hearing and prepares a report with his recommendation regarding the application. Gov. Code § 56665. The LAFCO then has 35 days to adopt a resolution "approving or disapproving the proposal, with or without conditions." Gov. Code § 56880.

In adopting its resolution, a LAFCO has broad power under Government Code section 56375 to approve the annexation request "with or without amendment ... or conditionally." However, the Legislature has mandated by statute that, if new territory is to be annexed to a city or district, the annexed territory must thereafter be subject to the existing taxes of that city or district. Gov. Code § 57330. Therefore, among the conditions that a LAFCO may impose upon an annexation applicant is "approval by the voters of general or special taxes." Gov. Code § 56886(s).

In most cases, the Act allows the residents and landowners in the territory proposed for annexation to challenge the annexation through protest proceedings. Gov. Code § 57000 *et seq.* The executive officer schedules a protest hearing, and at the conclusion of the hearing counts the number of written protests delivered before or at the hearing. Gov. Code § 57052. If there are written protests from a majority of the registered voters in the territory to be annexed, the annexation is terminated. Gov. Code § 57075(a)(1). If less than a majority protest exists, but at least 25% of the registered voters or at least 25% of the record landowners filed protests, the annexation must be confirmed by an election. Gov. Code § 57075(a)(2).

Although most annexation applications can be protested, the Act provides a special option for the annexation of so-called unincorporated "islands" to the cities that surround them. Gov. Code § 56375.3. If a city-initiated annexation proposal meets the criteria required for an island

annexation–generally, that the territory is 150 acres or less, is developed (or is developing non-agricultural land), and is substantially surrounded by the annexing city–then the Act provides that, "in addition to those powers enumerated in Section 56375," a LAFCO shall approve the island annexation, and shall "waive protest proceedings." Gov. Code § 56375.3(a)(1).

Thus, in an island annexation, the residents/landowners in the territory to be annexed are not afforded an opportunity to file written protests or otherwise given a vote on whether the territory will be annexed. Nothing in the Act, however, prohibits giving voters in the territory a vote on taxes. In prohibiting LAFCOs from denying island annexations in section 56375.3, the Legislature expressly preserved LAFCOs' other "powers enumerated in Section 56375," which includes the power to approve an annexation request "with or without amendment ... or conditionally." It appears therefore that nothing bars a LAFCO from requiring an annexing city to hold an election on the imposition/extension/increase of taxes on the proposed new residents, especially when the constitution so requires.

STATEMENT OF FACTS

Sunset Beach is a beachfront community in Orange County. Sunset Beach was established as a town in 1904. It is comprised of approximately 134 acres and has about 1200 permanent residents. The City of Huntington Beach abuts Sunset Beach on its southern and eastern borders, and part of its northern border. However, because Sunset Beach is naturally divided from the City of Huntington Beach by the Pacific Coast Highway and a channel of the Huntington Harbor, the town has retained its own unique identity for over the past one hundred years. At all times relevant to this action and before, Sunset Beach was unincorporated; that is, it belonged to the County of Orange.

In 2010, the City of Huntington Beach applied to annex Sunset Beach.

Rather than utilize the general annexation statutes that would afford the residents of Sunset Beach an opportunity to challenge the annexation through protest proceedings, the City chose to apply under the involuntary island annexation statute, Government Code section 56375.3.

The City of Huntington Beach collects certain taxes from its residents that the County of Orange does not collect, most notably a utility tax on one's use of water, electricity, gas, telephone and television services (CT Vol. 1at 71) and a "grandfathered" property tax (above Proposition 13's one percent ceiling) to pay for pre-1978 public employee pension benefits (CT Vol. 1 at 92). At the time this litigation was commenced, Sunset Beach residents did not pay these taxes.

In a study commissioned by the City of Huntington Beach for the annexation, the City's consultant opined: "Taxes that are collected in the City, but not in the County, such as the Utility Users Tax, cannot be collected in Sunset Beach without a vote of that community's electorate." CT Vol. 1 at 108. The consultant also reported that:

> "[I]n the view of LAFCO legal staff, the Utility Users Tax could be imposed only if the annexation were processed as a normal [annexation] requiring a vote of the Sunset Beach electorate. Since it is being pursued as an 'island' annexation, not involving a vote of those being annexed, Proposition 218 would bar the imposition of this tax to this area according to LAFCO." CT Vol. 1 at 110.

In July of 2010, residents of Sunset Beach formed a nonprofit mutual benefit corporation called the Citizens Association of Sunset Beach ("CASB") to represent the interests of its members, including their interest in resisting the annexation of Sunset Beach by the City of Huntington Beach, and instead

incorporating Sunset Beach as its own city. CASB is the plaintiff/appellant in this action.

By letter dated July 15, 2010, CASB requested that OC LAFCO require the City to obtain approval from the voters of Sunset Beach regarding the imposition of new taxes as a condition of the annexation. CT Vol. 1 at 137. CASB sent another such request to OC LAFCO in September of that year. CT Vol. 1 at 141. OC LAFCO did not respond to either of these requests.

By letter dated November 9, 2010, Huntington Beach City Attorney Jennifer McGrath advised the residents of Sunset Beach that, following annexation, the City would begin collecting its taxes from them:

> "This letter is to advise you that all taxes currently charged to residents of Huntington Beach will be charged to the residents of Sunset Beach post-annexation. These taxes include utility users tax, business license tax, property tax override, and the library tax, among other various taxes and property-related fees." CT Vol. 1 at 144.

On December 8, 2010, OC LAFCO held a hearing on the City's annexation proposal and, despite objections from numerous residents of Sunset Beach and from CASB's attorney, OC LAFCO approved Resolution No. IA 10-05, the annexation of Sunset Beach to the City of Huntington Beach, with various conditions, but no condition requiring the City to first obtain Sunset Beach voter approval of new taxes. CT Vol. 1 at 152.

On December 9, 2010, CASB filed this action seeking an injunction, a writ of mandate or a declaratory judgment that, before OC LAFCO may finalize the annexation of Sunset Beach to the City of Huntington Beach, the City must first hold an election and obtain, from the voters of Sunset Beach, approval of City taxes that they would be required to pay if annexed.

On January 18, 2011, the trial court issued a preliminary injunction, enjoining OC LAFCO and the City from taking any further action on the City's annexation application, including the recording of a Notice of Completion, until the legal issues raised in the complaint were resolved. CT Vol. 2 at 442.

CASB filed an amended complaint on February 16, 2011. CT Vol. 2 at 446. After briefing and hearing, the trial court on August 18, 2011, issued its order on the merits. Motion to Augment Record, filed 01/25/12, Ex. A.

On August 23, 2011, appellant applied ex parte to stay enforcement of the order pending appeal (Code of Civ. Proc. § 918). CT Vol. 3 at 634. The trial court denied the application for a stay on September 14, 2011. CT Vol. 3 at 668. Judgment was entered in favor of defendants on September 20, 2011. CT Vol. 3 at 672. Appellant timely filed notice of appeal on October 5, 2011. CT Vol. 3 at 683.

ARGUMENT

I

PROPOSITION 218 GIVES SUNSET BEACH RESIDENTS THE RIGHT TO VOTE ON NEW TAXES

Proposition 218, officially titled the "Right to Vote on Taxes Act," was approved by California voters in November 1996. It added articles XIII C and XIII D to the California Constitution. Article XIII C requires voter approval for general and special taxes. Article XIII D deals with benefit assessments and property-related fees, requiring approval by either the voters or affected property owners, depending on the circumstances.

Article XIII C, section 2(b) provides, "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." This case requires the Court to construe the phrase "impose, extend, or increase."

Appellant contends that the phrase was obviously intended by its drafters and the electorate to cast a wide net. Because the word "impose" by itself could embrace not only an initial imposition, but also a higher, wider or further imposition, it seems clear that the framers, by layering on extra words, intended the phrase to be comprehensive; to capture not just newly enacted taxes, but also any upward or outward expansion of existing taxes.

While respondents will argue that, if that was the drafters' intent, they could have added even more words to express that intent, it will be shown that the words chosen were enough. Courts do not expect initiative amendments to be "so detailed as to have no place in a constitution, which is supposed to set forth the 'organic law.'" *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 63.

A. The Word "Impose"

"In interpreting a constitution's provisions, our paramount task is to ascertain the intent of those who enacted it. To determine that intent, we 'look first to the language of the constitutional text, *giving the words their ordinary meaning.*'"[1] *Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 290 (quoting *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016.

The word "impose" is the verb form of the noun "impost," which is a tax or tariff. Accordingly, the primary meaning of the word "impose" is "to establish or apply by authority [as in] 'impose a tax.'" Merriam-Webster's Online Dictionary (http://www.merriam-webster.com/dictionary/impose). Black's Law Dictionary similarly defines "impose" as "to levy or exact (a tax or duty)." Black's Law Dict. (9th Ed. 2009). Thus, "impose" means not only

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[1] Unless otherwise noted, all emphasis is added.

to "establish" a tax, but also to *"apply"* it or "exact" (*i.e.*, collect) it.

In the case at bar, the City of Huntington Beach, by annexing the territory of Sunset Beach, will be applying taxes to a new geographical area, and exacting those taxes from a community that never before paid them, and never before approved them. This meets the definition of "impose."

B. The Word "Extend"

As if the word "impose" were not enough, the drafters of Proposition 218 added the word "extend." "No local government may impose, extend, or increase any general tax unless and until that tax is [approved]." Cal. Const., art. XIII C, § 2(b).

Giving the word its ordinary meaning, "extend" means not only to lengthen the duration of, but just as commonly means "to increase the scope or application of," "to cause to be of greater area," "to take possession of (as lands)." Merriam-Webster's Online Dictionary (http://www.merriam-webster.com/dictionary/extend).

Respondents will argue that the Legislature defined the word "extend" in Government Code section 53750(e) to mean only "a decision by an agency to extend the stated effective period for the tax."

However, "the Legislature may not change the meaning of a provision in the constitution by legislation." *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 79. This Court's "primary task in interpreting constitutional provisions adopted by initiative is to determine and give effect to the intent of *the voters*." *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 46. "We construe the words from the perspective of the voters, attributing the usual, ordinary, and commonsense meaning to them; we do *not* interpret them in a technical sense or as terms of art." *Howard Jarvis Taxpayers Assn. v. County of Orange* (2003) 110 Cal.App.4th

1375, 1381. Thus, "clearly established rules of constitutional interpretation require that a term used in a constitutional amendment must be construed according to the meaning it had when the amendment was adopted. The Legislature cannot [alter] the meaning of the amendment by subsequent legislation." *Nunes Turfgrass, Inc. v. County of Kern* (1980) 111 Cal.App.3d 855, 862-863. An attempt by the Legislature to restrict the reach of an initiative, by giving common words statutory definitions that blunt their ordinary meaning, would itself "be equivalent to a constitutional amendment." *Id.* The word "extend," then, must be understood to include its ordinary meaning of increasing the scope or application of a thing, covering a greater area, or taking possession of additional land.

Moreover, "[a]s a general rule and unless the context clearly requires otherwise, we must assume that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part." *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *Lungren v. Davis* (1991) 234 Cal.App.3d 806, 823.

The phrase "impose, extend, or increase" is used more than once in Proposition 218. Besides its use in article XIII C, section 2(b), it is also used in article XIII D, section 6(b). This Court "must assume that the meaning of [the] term or phrase is consistent throughout." Yet, in article XIII D, section 6(b) "extend" cannot mean to lengthen a levy's duration. Section 6 regulates "fees or charges for property related services." Cal. Const., art. XIII D, § 3(a). Under section 6, "[n]o fee or charge may be imposed for a service unless that service is actually used by ... the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted." In other words, the fee paid in return for one's use of a property related service does not have a "stated effective period" as the definition in Government Code

section 53750(e) suggests. Fees are pay-as-you-go charges for the actual use of a service. If a person discontinues the service, no fee can be thereafter charged. "Extended" as used in section 6(b) can *only* mean to enlarge an agency's service territory. If the Court "must assume that the meaning of [the] term or phrase is consistent throughout," then "extended" as used in article XIII C, section 2(b) includes enlarging an agency's service territory.

C. The Word "Increase"

Finally, as if the words "impose" and "extend" were not enough, the drafters of Proposition 218 added the word "increase." "No local government may impose, extend, or increase any general tax unless and until that tax is [approved]." Cal. Const., art. XIII C, § 2(b).

This time the Legislature's statutory definition works in appellant's favor. For Government Code section 53750(h) defines the word "increase" to mean "a decision by an agency that does either of the following: (A) Increases any applicable rate used to calculate the tax, assessment, fee or charge; (B) Revises the methodology by which the tax, assessment, fee or charge is calculated, if that revision results in an increased amount being levied on any person or parcel."

Looking at respondent OC LAFCO's action of approving the City's annexation application, that agency action revised all sorts of tax rates and methodologies for the people of Sunset Beach. By law, "[a]ny territory annexed to a city or district shall be subject to the levying or fixing and collection of any previously authorized taxes, benefit assessments, fees, or charges of the city or district." Gov. Code § 57330. By approving the City's application, then, OC LAFCO transferred the residents of Sunset Beach from the County's taxing jurisdiction to the City's. The City's taxes are different from the County's in type, rate and methodology. That outcome certainly fits

the definition of "increase" in Government Code section 53750(h).

Even if the Court looked only at the annexation's effect on the City's taxes, however, the annexation of Sunset Beach still fits the definition of "increase" because it "[r]evises the methodology by which [a] tax ... is calculated, [and] that revision results in an increased amount being levied on [a] person or parcel."

One of the taxes that will be levied on Sunset Beach as a result of the City's annexation is a special property tax, in excess of Proposition 13's one percent ceiling, to pay for city employee pension indebtedness that pre-dated Proposition 13. Newly associated counsel, Howard Jarvis Taxpayers Foundation, has been in litigation over this tax with the City of Huntington Beach before. See *Howard Jarvis Taxpayers Assn. v. County of Orange (City of Huntington Beach, Real Party in Interest)* (2003) 110 Cal.App.4th 1375.

As explained in that case, Proposition 13 limits property taxes to one percent of a parcel's enrolled value, but "contains an exception allowing excess taxes or special assessments 'to pay the interest and redemption charges on any ... (1) [i]ndebtedness approved by the voters prior to July 1, 1978.'" *Id.* at 1377; Cal. Const., art. XIII A, § 1(b). The California Supreme Court had held, in *Carman v. Alvord* (1982) 31 Cal.3d 318, that public employee pension benefits approved by voters prior to July 1, 1978, qualified for Proposition 13's exception. The issue in the *Huntington Beach* case was whether the City could override Proposition 13's one percent limit to fund additional retirement benefits granted *after* July 1, 1978, on the theory that they were simply aspects of the California Public Employees Retirement System, participation in which the voters had previously approved. *Huntington Beach*, 110 Cal.App.4th at 1383. The Court answered no, "'indebtedness' does not encompass benefits the City added after the passage of Proposition 13." *Id.* at 1387.

Applying the holding of *Huntington Beach* to the case at bar, the City has a finite pension indebtedness for benefits that were in effect prior to July 1, 1978. It cannot override Proposition 13 to collect one penny more than the amount of revenue needed to service that debt. The annexation of Sunset Beach adds 1200 new property owners to the pool that will share the cost of that finite indebtedness. That means the methodology for calculating the tax will change: the denominator will be larger. The property owners in Huntington Beach will pay less, but the property owners of Sunset Beach will pay more–because they were not previously subject to the tax. This circumstance qualifies as an "increase" under the Legislature's definition, because it "revises the methodology by which the tax, assessment, fee or charge is calculated, [where] that revision results in an increased amount being levied on any person or parcel." Gov. Code § 53750(h).

D. ***AB Cellular v. City of Los Angeles***

The only case that has construed the term "increase" as used in article XIII C, section 2(b) is *AB Cellular v. City of Los Angeles* (2007) 150 Cal.App.4th 747. That case is analogous to the case at bar because it too involved the application of an unchanged tax ordinance to a larger tax base, and the question was whether that constituted an "increase" requiring voter approval.

In a nutshell, the City of Los Angeles amended its telephone users tax in 1993 to extend the tax to cellular services. At the time, however, federal law permitted taxation of air time only to the extent a call originated or terminated in the city. In 1996, Proposition 218 was passed. In 2002, Congress enacted the Mobile Telecommunications Sourcing Act which gave local governments authority to tax all air time associated with cellular phones registered or billed to an address within the city, regardless of where the calls

originated or terminated. The City on March 1, 2003, instructed cellular carriers to begin collecting the tax on all customer air time. The carriers sued contending that, before applying its tax to a larger base, the City needed voter approval under Proposition 218. *AB Cellular*, 150 Cal.App.4th at 752-53.

As the court recited, "The issue in this proceeding is whether, on March 1, 2003, the City changed, not the cell tax itself ... but its methodology in calculating the cell tax in a way that results in an increased amount being levied upon the customers of [the carriers]." *Id.* at 757. "According to the City, its methodology has been static .... [T]he City posits that even though ... federal boundaries expanded to permit the City to calculate the cell tax on a broader base than before ... its methodology was never revised." *Id.* at 760-61.

The Court disagreed. "In practical terms, a tax is increased if the math behind it is altered so that either a larger tax rate *or a larger tax base* is part of the calculation." *Id.* at 763. "We arrive at this conclusion after employing a liberal construction of Proposition 218 [that] enhance[s] taxpayer consent." *Id.* at 761.

Applying *AB Cellular* to the present case, the City of Huntington Beach is enlarging its tax base by adding new taxable territory to the equation, which, under *AB Cellular*, revises the methodology of the tax by altering "the math behind" the billing. Although the City's ordinance has not changed, this is nonetheless an "increase" when that term is liberally construed, as it must be.

E. Proposition 218's Liberal Construction Clause

Any doubt as to the meaning of the phrase "impose, extend, or increase" must be resolved by adopting a broad construction of the language. "Courts construe constitutional phrases liberally." *Carman v. Alvord* (1982) 31 Cal.3d 318, 327.

The people too, in adopting Proposition 218, specifically commanded

that it be "liberally construed to effectuate its purposes." Prop. 218, § 5; Historical Notes, West's Ann. Cal. Const., art. XIII C, § 1. The purposes of Proposition 218 appear like bookends at the beginning of the measure (in its Findings and Declarations Clause) and at the end (in its Liberal Construction Clause): "This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers *without their consent*." Prop. 218, § 2; Historical Notes, West's Ann.Cal.Const., art. XIII C, § 1. "The provisions of this Act shall be liberally construed to effectuate its purposes of ... *enhancing taxpayer consent*." *Id.*, § 5. Thus, in the event of ambiguity, Proposition 218 always favors the interpretation that "enhanc[es] taxpayer consent." As the Court in *AB Cellular* noted, "We arrive at this conclusion after employing a liberal construction of Proposition 218 [that] enhance[s] taxpayer consent." 150 Cal.App.4th at 761.

In the present case, then, while appellant believes this Court can determine the electorate's intent in Proposition 218 simply by consulting the dictionary definitions of the words "impose, extend or increase," and by looking at how that phrase is used elsewhere in the initiative, if this Court believes some ambiguity remains, it must resolve that doubt in favor of the taxpayers of Sunset Beach and against the "local governments [that want to] exact revenue from taxpayers without their consent." The construction that favors taxpayer consent is the one that gives Sunset Beach residents a vote on paying new taxes before those taxes are imposed, extended or increased through the annexation of their territory by the City of Huntington Beach.

F. Opinions of the Attorney General

Although the application of Proposition 218 to the island annexation statute is a question of first impression, the Attorney General has issued an opinion on a closely related issue; that is, the relationship between Proposition

218 and the *regular* annexation process that gives residents a vote on whether they want to be annexed.

In Opinion No. 99-602 (82 Ops.Cal.Atty.Gen. 180), the Attorney General was asked, "If a local agency formation commission conditions approval of a change of organization or reorganization upon a requirement that the subject agency levy or fix and collect a previously established and collected tax, benefit assessment, or property-related fee or charge on parcels being annexed to the agency, do the voter and landowner approval requirements set forth in the Constitution relating to taxes, assessments, fees, and charges apply?"

The Attorney General opined that the "voter and landowner approval requirements set forth in the Constitution," that is, Proposition 218, need not be read as requiring a *separate, additional* election.

The Attorney General first noted that every annexation *necessarily includes* imposing the annexing agency's taxes upon the territory annexed. You can't have one without the other: "Section 56844 thus authorizes a LAFCO to impose conditions that would require the subject agency to levy or fix and collect a previously established and collected tax, benefit assessment, or property-related fee or charge on the parcels to be annexed. Even in the absence of such a condition, annexed parcels not previously subject to the particular taxes, benefit assessments, fees, or charges would become subject to them by virtue of the general provisions of section 57330."[2] *Id.* at 186.

The Attorney General then noted that "[t]he Act contains its own approval process" through which residents of the subject territory can, by

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[2] Section 57330 provides, "Any territory annexed to a city or district shall be subject to the levying or fixing and collection of any previously authorized taxes, benefit assessments, fees, or charges of the city or district."

submitting enough protests, immediately defeat the attempted annexation, or call an election at which voters can approve or disapprove the annexation. *Id.*

Because elections are expensive, and a second election would be redundant (since the election to approve the proposed annexation necessarily includes the question of paying the annexing agency's taxes), the Attorney General opined:

> "We believe that the provisions of the Constitution and the Act may be harmonized to promote efficient governmental operations .... Those who would become subject to the established taxes, assessments, fees, and charges upon the change of organization or reorganization have the opportunity to reject the imposition of the previously approved taxes, assessments, fees, and charges by rejecting the annexation proposal. (§§ 57075-57078.) The Act's provisions thus coincide with the constitutional requirements; an additional election under article XIII C or XIII D would be wasteful of taxpayer funds." *Id.* at 187.

The Attorney General concluded that, because "[t]he Act provides a protest and election process for approving the proposed changes ... the Act complements articles XIII C and XIII D rather than conflicts with them." *Id.* at 188.

While the 1999 opinion is not a model of clarity, it seems clear that the Attorney General found no conflict between Proposition 218 and the regular annexation process *because* the regular annexation process affords residents an opportunity to approve or reject the annexing agency's taxes by approving or rejecting the annexation itself.

In 2006, the Attorney General clarified that this was in fact the meaning

of his 1999 opinion. In the 2006 opinion about the incorporation of a new city, a question arose whether Proposition 218 required a separate election (besides the election on the question of incorporation) to approve a general tax that the new city would collect. The Attorney General wrote:

> "In 82 Ops.Cal.Atty.Gen. 180 (1999), we concluded that a LAFCO could condition approval of a change of organization upon the continued collection of a previously established and collected tax. In the circumstances presented there, we found that the approval process of the Act in effect 'complements' the constitutional requirements for voter approval of taxes, fees, and charges when they have previously been established and approved by the electorate: '... The Act provides a protest and election process for approving the proposed changes. (§§ 57075-57078.) In effect, the Act complements articles XIII C and XIII D rather than conflicts with them.'
>
> 'Articles XIII C and XIII D' referenced in our 1999 opinion generally require voter approval before imposing any taxes, assessments, fees, or charges. (See Cal. Const., art. XIII C, § 2; art. XIII D, § 3.) With respect to a city's imposition of general taxes, subdivision (b) of section 2 of article XIII C provides: '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. ... The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing

body.'

> Accordingly, when a LAFCO conditions approval of the incorporation of a city upon voters within the proposed city approving a general tax, such voter approval may be given by majority vote in keeping with the mandate of article XIII C. [Moreover], the electorate's approval of the tax may take place at the same time the incorporation itself is approved. ... [T]he election must take place on a 'regular election date' (§ 57132), thus satisfying the constitutional requirement of being 'consolidated with a regularly scheduled general election' (art. XIII C, § 2, subd. (b); see Elec. Code §§ 324, 1000)." Opinion No. 06-210, 89 Ops.Cal.Atty.Gen. 173, 175.

In both opinions, then, the Attorney General found that Proposition 218's "right to vote on taxes" was satisfied in the LAFCO process because the process afforded voters an opportunity to approve or reject the reorganizing agency's taxes by approving or rejecting the reorganization itself.

The island annexation statute at bar, however, is quite different. It denies the residents of the territory to be annexed any opportunity to protest against, or vote on, the annexation of their land. Gov. Code § 56375.3. Applying the 1999 and 2006 Attorney General opinions to the case at bar, the island annexation statute does not "complement[] the constitutional requirement for voter approval of taxes." Rather, it conflicts with that requirement. The Sunset Beach residents' right to vote on taxes is not protected by the election on the question of annexation because there is no election on the question of annexation. By removing the election on annexation, section 56375.3 thus revives the constitutional requirement of an election to approve the taxes.

In sum, the trial court erred when it held that "Proposition 218 does not apply to the facts of this case because the annexation of Sunset Beach will not involve the imposition, extension or increase of any new general or special taxes." Minute Order at 2 (see Motion to Augment Record, filed 01/25/12). Proposition 218 does apply; therefore the voters of Sunset Beach were entitled to vote on paying new taxes before those taxes were imposed, extended or increased through the annexation of their territory by the City of Huntington Beach.

II

THE TRIAL COURT ERRED BY NOT REQUIRING THAT AN ELECTION TAKE PLACE BEFORE OC LAFCO AND THE CITY FINALIZED THE ANNEXATION OF SUNSET BEACH

As the Attorney General observed, "annexed parcels not previously subject to the [annexing agency's] taxes ... become subject to them by virtue of the general provisions of section 57330." 82 Ops.Cal.Atty.Gen. at 186. Therefore, annexation is the governmental action that, in this case, imposes new taxes on Sunset Beach and its residents.

Appellants say "in this case" because not every annexation will involve new taxes. If an annexing city collects no unique taxes, but only those taxes that residents of the county already pay, then the island annexation statute can be utilized without an election, and no constitutional conflict arises. But in a case like this, where a city's proposed annexation will impose new taxes on a community of people who were never before politically subject to them, the constitution requires either that the city proceed under the regular annexation statutes, which provide an election on the question of annexation, or that the city hold an election on the question of new taxes before proceeding under the island annexation statute.

By not requiring that a tax election take place before OC LAFCO and the City of Huntington Beach finalized the annexation of Sunset Beach, the trial court erred. Appellant will address the reasons given by the trial court for its ruling, and show that they do not withstand scrutiny.

A. ***The Court Need Not Substitute its Judgment for the Legislature's***

The trial court accepted the City's contention that it could not require an election on taxes without "replacing its judgment for the legislative mandate of the OC LAFCO to approve the island annexation." Minute Order at 1 (see Motion to Augment Record, filed 01/25/12). The Court stated, "Respondent OC LAFCO is *required* to approve the annexation of Sunset Beach if all provisions of [the island annexation statute] are met. ... The Court may not replace its judgment for the *legislative mandate* of Government Code § 56375.3." *Id.* at 2 (emphasis in original).

This was error because nowhere in the island annexation statute did the Legislature prohibit the holding of a Proposition 218 election on taxes. Nor could it.

"[T]he California Constitution is 'the supreme law of the state' to which all statutes must conform." *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 963 (quoting *Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 579). "Wherever statutes conflict with constitutional provisions, the latter must prevail." *People v. Navarro* (1972) 7 Cal.3d 248, 260; *Hotel Employees & Restaurant Employees Union v. Davis* (1999) 21 Cal.4th 585, 602.

Therefore, if the island annexation statute conflicted with Proposition 218, the former would have to yield. But courts have a duty, if possible, to construe a potentially conflicting statute in such a way as to *cure* the conflict by harmonizing the statute with the constitution. "[W]henever possible, we will interpret a statute as consistent with applicable constitutional provisions,

seeking to harmonize Constitution and statute." *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594. *People v. Leng* (1999) 71 Cal.App.4th 1, 13.

That can be easily done here. The island annexation statute states, "(a) In addition to those powers enumerated in Section 56375, a commission shall ... (1) Approve, after notice and hearing, the change of organization or reorganization of a city, and waive protest proceedings ... if all of the following [criteria are met]." Gov. Code § 56375.3.

The statute requires OC LAFCO to approve the annexation and "waive protest proceedings," that is, the proceedings by which residents ordinarily could protest *the annexation*. Nowhere does the statute prohibit a Proposition 218 election on *taxes*.

Although the statute gives LAFCOs no discretion to *deny* an annexation application where the statutory criteria are met, the statute *preserves* their discretion, in approving an island annexation, to exercise their other "powers enumerated in Section 56375." Section 56375 empowers LAFCOs to approve annexations "with or without amendment ... or conditionally."

OC LAFCO liberally exercised its Section 56375 powers to add other conditions to the City's annexation of Sunset Beach, such as a condition requiring the City to execute a Memorandum of Understanding, to use its "best efforts" to maintain the identity of Sunset Beach, including maintaining the Sunset Beach greenbelt and marking "Sunset Beach" on maps and public signage, to create a Sunset Beach subcommittee of the City Council, etc. CT Vol. 1 at 153-57. If OC LAFCO had authority to require these conditions, then it did not lack authority to require the City to comply with Proposition 218.

Thus, the island annexation statute can be harmonized with the constitution by construing it to allow OC LAFCO to amend or condition the

City's annexation of Sunset Beach with a requirement that it give Sunset Beach residents their right to vote on taxes before the annexation is finalized and the new taxes are a *fait accompli*.

Respondents will no doubt argue that giving Sunset Beach residents a vote on taxes will defeat the purpose of the island annexation statute, which is to encourage the annexation of county islands by nearby cities; if the City here cannot impose its taxes on the residents of Sunset Beach because they voted against them, then the City cannot go forward with the annexation.

That may be true in this case (although no one can foretell the outcome of an election). But it is not necessarily true in all cases. The residents of many islands may want to be annexed, and to that end are willing to pay a new tax. In any event, the constitutional right of individuals to vote on taxes trumps the governmental interest in annexation. Our Supreme Court has held that once the general right to vote on annexation was created by the Legislature, it joined the ranks of the right to vote in other contexts and would be treated as a fundamental right by the courts that cannot be denied to one class of citizens simply for the sake of convenience or because they might vote the "wrong" way. *Citizens Against Forced Annexation v. Local Agency Formation Com.* (1982) 32 Cal.3d 816, 822; *Curtis v. Board of Supervisors* (1972) 7 Cal.3d 942, 952-53. The same is true for the right to vote on taxes.

Appellant's complaint sought either (1) a writ of mandate or injunction prohibiting OC LAFCO and the City from finalizing the annexation of Sunset Beach until the constitutionally required election on taxes was held, or (2) a declaration of the parties' rights and duties. CT Vol. 2 at 457. The relief sought did not ask the trial court to substitute its judgment for the Legislature. As shown above, the most natural reading of the statute is one that is consistent with the constitution.

B. *Prop 218's Ballot Materials, Because Silent, Prove Nothing*

Besides believing that it could not rule for the residents of Sunset Beach without improperly substituting its judgment for the Legislature's, the trial court also believed that the absence of any reference to LAFCO proceedings in the ballot materials for Proposition 218 indicated voter intent that LAFCO proceedings would be exempt. In so ruling, the court borrowed the following excerpt from the 1999 Attorney General opinion:

> "We have examined in detail the voters' pamphlet with respect to Proposition 218 ... Nothing therein suggests that the proposed voter approval requirements were to be added to the voter approval requirements of the Act. The ballot materials regarding Proposition 218 simply do not support an intent by the electorate to subject LAFCO proceedings to the requirements of articles XIII C and XIII D." Minute Order at 2 (see Motion to Augment Record, filed 01/25/12).

The language quoted by the trial court does not support its ruling. First and fundamentally, all of the pieces of the ballot pamphlet, from the title and summary to the arguments for and against the measure, are subject to concise word limits set by the Elections Code. It is unreasonable to expect the ballot descriptions of a lengthy and multi-faceted measure such as Proposition 218 to include in their cramped space a discussion of something so esoteric and infrequently encountered as LAFCO reorganizations. In any event, when the people amend the constitution by initiative, they are not required "to anticipate and specify in advance every change in existing statutory provisions which could be expected to result from the adoption of that measure." *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 257; *Ventura Group Ventures Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1099.

Second, courts are not to consult ballot materials as a first resort, but only as a last resort, if the intent of the voters cannot be gleaned from the language of the constitutional amendment itself. "To determine [voter] intent, we look *first* to the language of the constitutional text, giving the words their ordinary meaning. ... *Absent ambiguity*, we presume that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. *Where there is ambiguity* in the language of the measure, ballot summaries and arguments may be considered." *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1381-82 (citations omitted).

Here, the trial court identified no ambiguity in Proposition 218, but went straight to the *absence* of information in the ballot pamphlet to support a narrow construction of the constitutional text (in violation of the usual rule and Proposition 218's own command that it be liberally construed), one that ignores the ordinary meaning of the words "impose, extend or increase."

Finally, the quoted Attorney General excerpt does not say that Proposition 218 provides no right to vote on taxes in the island annexation context (where the right to an election on the annexation itself has been eliminated). The quoted language states, "Nothing [in the ballot pamphlet] suggests that the proposed voter approval requirements were to be *added* to the *voter approval requirements of the Act*." In other words, where there is a voter approval requirement *in the Act*, Proposition 218 need not be read as requiring an *additional* election. Here, however, there is no voter approval requirement in the Act. Where the Act does not supply an election on the ultimate question of annexation, the constitutional requirement of a tax election is revived.

C. ***Metropolitan Water Dist. v. Dorff is Inapplicable***

The trial court's final justification for ruling that Proposition 218 does

not apply to island annexations was the case *Metropolitan Water Dist. v. Dorff* (1979) 98 Cal.App.3d 109. The trial court said, "while the [*Dorff*] case involved Proposition 13 and is not directly on point with the facts of this case, it was helpful to this Court." However, it is precisely because *Dorff* involved Proposition 13 and different facts that the case is not helpful.

In *Dorff*, Calleguas Municipal Water District, a water purveyor that purchases water at wholesale from the Metropolitan Water District and distributes it to retail customers, wanted to annex four parcels of land so that it could serve them with water. Annexation by Calleguas would include the four parcels within the territory of Metropolitan as well. Although Metropolitan's board approved the annexation, its executive officer, Karen Dorff, resisted filing the necessary paperwork because she believed that Proposition 13 would not allow Metropolitan to collect from the four parcels a special property tax like the one here, in excess of Proposition 13's one percent ceiling, to repay bonds issued by Metropolitan prior to 1978. The board sued Dorff. The question for the court was whether the four parcels would be subject to Metropolitan's special tax.

The court of appeal noted that, "[a]s a general rule, *in the absence of statute or constitutional provision to the contrary*, territory annexed to a municipal corporation or district is liable to pay its proportionate share of the existing indebtedness of the corporation or district to which it is annexed." 98 Cal.App.3d at 113. The question therefore was whether Proposition 13 was a "constitutional provision to the contrary."

The court held that Proposition 13 itself provided an exemption from its one percent ceiling for "ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to [July 1, 1978]." Cal. Const., art. XIII A, § 1(b). The court went on to

conclude, "In creating an exception to the one percent tax limitation, section 1(b) specifies only the indebtedness to which the exception is applicable; it is silent regarding the property included within the exception. At this point, [Water Code] section 374 steps in and provides that taxable property annexed to Metropolitan is subject to taxation for payment of authorized or outstanding obligations of Metropolitan. Thus, section 374 complements article XIIIA, section one, and effect may be given to both." 98 Cal.App.3d at 114-15.

Dorff does not support the judgment in this case. First, *Dorff* presented a different question. The question in *Dorff* was whether Metropolitan's property tax would apply to the annexed property. In the case at bar, no one contends that the City's property tax, or utility tax, would not apply to Sunset Beach. Appellant agrees that, under Government Code section 57330, application of the City's taxes would be automatic.

Dorff did not involve the question of whether the owners of the four parcels had a right to vote on paying the new tax, or an equivalent right to vote on the annexation. The 1977 predecessor to today's LAFCO Act was in existence at the time of *Dorff* and nothing in the case suggests that the owners of the four parcels were not given their right to vote on the annexation. In fact, they probably initiated the annexation to obtain water service. The fact that they made no appearance in the case suggests that they had no objection to the annexation or to paying the tax.

The question here is whether Proposition 218 gives the residents of Sunset Beach the same right that the *Dorff* parcel owners presumably had: some sort of right to vote on paying new taxes before the annexation is finalized. Nothing in *Dorff* suggests that residents do not have that right.

Dorff is further distinguishable by the fact that, in *Dorff*, it was Proposition 13 itself that provided the exemption from the application of its

one percent ceiling. Here, OC LAFCO and the City claim that a *statute*, the island annexation statute, exempts island annexations from the application of Proposition 218's right to vote on taxes. As explained earlier, a statute cannot take away a right guaranteed by the constitution. (Nor does this statute, when properly read, purport to do so.)

Because *Dorff* is not precedent for denying residents a right to vote on new taxes they will have to pay if annexed, it does not support the judgment.

D. If Not Reversed, the Judgment Will Produce Much Mischief

If affirmed, the judgment below will open a gaping loophole in Proposition 218. Restated as a legal principle, the judgment below stands for the proposition that, when the voters residing within the initial boundaries of a given jurisdiction have approved a tax, and the jurisdiction's boundaries are then enlarged by annexing new territory without the consent of its residents, the tax automatically applies to the newly annexed territory; residents of the territory have no right to vote on their annexation or the tax. The mischief invited by this judgment is easy to foresee.

Imagine that a city wants to impose a tax to fund a citywide conversion of electric utilities from overhead wires to underground wires. The city hires a consultant who polls the electorate and learns that there is strong support for the idea among wealthy residents whose ocean views are impeded by the overhead wires. The rest of the city, however, is strongly opposed to paying a new tax.

The city then forms a tax district, the boundaries of which encompass only the wealthy coastal neighborhoods. It holds an election, and the tax passes handily. The city then enlarges the boundaries of that initial district by adding new territory, 150 acres at a time. The residents of the newly annexed territory are given no vote on whether they want to join the district, or pay for

undergrounding their utilities. According to the judgment below, they are not injured, because they have no rights in this matter.

The trial court, while acknowledging that it was not compelled by any precedent to rule against the voters of the territory being annexed in the case at bar, nonetheless construed Proposition 218 narrowly, contrary to its Liberal Construction Clause, in order to find that "Proposition 218 does not apply to the facts of this case." That finding is error, and should be reversed on appeal.

CONCLUSION

Article XIII C, section 2(b) of the California Constitution, which provides that "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," applies when a city seeks, by annexation, to extend its taxes to land that is currently unincorporated, so as to increase the tax burden of a community of people by imposing on them certain taxes they were never before required to pay. The Court below erred in holding otherwise. The judgment should be reversed.

DATED: February 9, 2012.

Respectfully submitted,

Trevor A. Grimm
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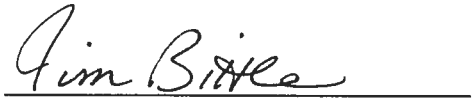

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 8,620 words.

DATED: February 9, 2012.

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PROOF OF SERVICE

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I, Cindy Perez, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California 95814. On February 9, 2012 I served the foregoing document described as: **APPELLANT'S CERTIFICATE OF INTERESTED ENTITIES OR PERSONS and APPELLANT'S OPENING BRIEF** on the interested parties below, using the following means:

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