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S172199

No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FORD GREENE,
Plaintiff and Appellant,
vs.
MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT,
Defendant and Respondent,

FRIENDS OF CORTE MADERA CREEK WATERSHED AND FLOOD MITIGATION LEAGUE OF ROSS VALLEY,

Interveners and Respondents.

Review of Decision by the Court of Appeal for the First Appellate District
(Case No. A120228)

Superior Court for the County of Marin
The Honorable M. Lynn Duryee, Judge Presiding
(Marin County Superior Court Case No. CV 073767)

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

Statutes:

TABLE OF AUTHORITIES

Page

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Marin County Flood Control District, respectfully petitions for review of a published Opinion of the First District Court of Appeal, Division Five, Presiding Justice Jones, Justice Needham and San Francisco Superior Court Judge Dondero, sitting by designation filed March 11, 2009 (the "Opinion"). Rehearing was denied April 7, 2009.

ISSUES PRESENTED FOR REVIEW

1. Does the voting secrecy requirement of California Constitution, art. II, § 7[1] apply to property-owner "voting" on a property-related fee pursuant to art. XIII D, § 6(c)?

2. Does the voting secrecy requirement of California Constitution, art. II, § 7 apply to property-owner "ballots" on assessments

[1] Unspecified article references in this Petition are to articles of the California Constitution.

subject to art. XIII D, § 4 notwithstanding the contrary direction of subdivision (d) of that § 4 and of Government Code § 53753?[2]

3. If voting secrecy applies in these contexts, must local governments affirmatively inform property owners ballot secrecy will be maintained?

4. May a court overturn property owners' election to approve an assessment or property-related fee because a local government failed to inform property owners that ballot secrecy would be maintained or because a lapse in ballot secrecy occurred?

INTRODUCTION

This case raises important questions regarding the procedures required by Proposition 218 for assessments and property-related fees that require authoritative resolution to avoid needless delay and litigation, to provide direction to all local governments in California as well as to citizens and credit-market participants, and to ensure local governments

[2] Unspecified section references in this Petition are to sections of the Government Code.

have efficient access to credit markets to fund essential local services in a time of fiscal uncertainty.

Review is authorized by California Rules of Court, Rule 8.500(b)(1) to secure uniform application of Proposition 218 and to settle the important legal questions set forth above. The Opinion affects every city, county and special district in California and calls into doubt the procedures mandated by art. XIII D for assessments and property-related fees to fund vital public services.

STATEMENT OF THE CASE

A. Trial Court Proceedings

Appellant filed this election contest on August 9, 2007. Pursuant to Elections Code § 16100, the complaint alleged: (a) no form of ballot was approved by Respondent; (b) the ballot form hid the notice that a failure to sign the ballot would invalidate it; and (c) invalidation of unsigned ballots violated equal protection by unreasonably classifying voters as between those who signed their ballot and those who did not.

The District answered, denying the allegations. On August 28, 2007, the Flood Mitigation League of Ross Valley and Friends of the Corte Madera Creek Watershed filed a Complaint in Intervention seeking declaratory relief that: (a) a majority of lawful ballots cast favored the fee; (b) the vote was consistent with election law and Proposition 218; and (c) the storm drainage fee should be upheld.

On October 15, 2007, after briefing and argument, Marin County Presiding Judge M. Lynn Duryee dismissed the complaint and approved the fee.[3] Her order states in pertinent part:

> "The property fee election ballot sent to identified property owners, fully complied with the applicable law (i.e. California Const. Art. XIII D, and its implementing legislation Govt. Code 53753), requiring voters to sign their ballots in order to be counted.
>
> Plaintiff's reliance on California Const. Art. II 7, and the Election Code Requirements for ballots in other types of elections, is misplaced. (See Govt. Code 53753(e)(4).)"[4]

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[3] AA 284.

The order denied Appellant's equal protection claim, noting the signature requirement applied to all property owners equally, the statutory scheme did not impair property owners' ability to vote, and invalidating unsigned ballots advanced a compelling interest in preventing fraud.[5] Judge Duryee also concluded the election was not governed by the Elections Code and therefore, the ballot form need not conform to absentee-ballot requirements.[6]

B. Court of Appeal Proceedings

Appellant filed his notice of appeal on January 8, 2008 and his opening brief on April 24, 2008. The opening brief urged reversal because: (a) the right to a secret vote under art. II, § 7, is not abrogated by Proposition 218; (b) Government Code § 53753(c) and (e)(4) violate art. II, § 7 and art. XIII D, § 4; and, (c) invalidation of unsigned ballots violated equal protection. Appellant's first two arguments had not been raised in the trial court. Respondent filed its brief June 18, 2008, asserting:

(a) Appellant could not satisfy the burden of his facial challenge to

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[4] *Id.*
[5] *Id.* at 284-285.
[6] *Id.*

§ 53753, a provision of the Omnibus Proposition 218 Implementation Act of 1997 ("the Omnibus Act"); (b) Section 53753 exempts assessment elections from the secrecy requirement of art. II, § 7, and art. XIII D, § 6(c) allows property-related fee elections pursuant to assessment procedures, thereby exempting those elections from voting secrecy requirements, as well; and (c) Appellant's equal protection argument failed because the signature requirement applied equally to all property owners. Also on June 18, 2008, Interveners filed their brief, describing the history of damaging floods necessitating the fee and contending Respondent's procedures complied with Proposition 218 and § 53753. On July 16, 2008, Appellant filed his reply brief.

On December 5, 2008, the Court of Appeal issued a *sua sponte* order requesting supplemental briefs on:

(a) The Court's proposal to take judicial notice of legislative history of § 53753.

(b) The Court's request that Respondent address an argument raised for the first time in Appellant's reply brief that this Court's decision in *Silicon Valley Taxpayer's Ass'n v. Santa*

Clara County Open Space Authority, 44 Cal.4th 432 (2008) ("*Silicon Valley*")[7] altered the standard of appellate review.

(c) Whether *Silicon Valley* undermined precedents exempting property-owner voting from the secrecy requirement of art. II, § 7.

(d) Whether there was any breach of voting secrecy in this case.

(e) Whether there was a basis in Elections Code § 16100 to overturn the property owners' vote notwithstanding the absence of any breach of secrecy "because the voters apparently were provided no assurances on the ballot or in the accompanying materials that their votes would remain confidential."[8]

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[7] This recent decision holds that art. XIII D, § 4 requires independent judicial review of local government determinations that assessments reflect special benefit and that assessments are fairly apportioned among property owners. It does not discuss property-related fees, which are governed by art. XIII D, § 6.

[8] A copy of this order is attached to this Petition as an appendix pursuant to California Rules of Court, Rule 8.504(e)(1)(B).

Respondent and Appellant filed simultaneous supplemental briefs in response to the order on December 15, 2008.[9] Appellant's brief argued: (a) Respondent's elections procedures were not sufficient to prevent any breach in secrecy; and (b) assurances of secrecy by Respondent could not cure failure to comply with art. XIII D, §§ 4 and 6. Respondent's brief argued: (a) Pre-Proposition 218 precedents exempting property-owner voting from secrecy requirements were not undermined by *Silicon Valley;* (b) No breach of secrecy occurred and voters had, in fact, been assured secrecy would be maintained; and (c) there was no basis to overturn the vote of the property owners. On its second point, Respondent requested judicial notice of a ballot notice mailed to voters informing them that ballots would be secret. The Court of Appeal denied the request because the facts regarding what information was or was not provided to voters were disputed and therefore not subject to judicial notice. Slip. Op. at 30, n.17. The case was argued and submitted on December 18, 2008.

On March 11, 2009, the Court of Appeal issued its Opinion, concluding the voters who adopted Proposition 218 intended to incorporate

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[9] Interveners did not file a supplemental brief. Appellant's initial supplemental brief exceeded the page limit; a replacement brief was filed December 17, 2008.

the ballot secrecy rule of traditional elections into property-owner voting under art. XIII D, § 6(c). Slip Op. at 28. The Court of Appeal invalidated Respondent's election, finding property owners were not assured votes would be secret, while conceding the issue was disputed and never tried. Slip Op. at 2; 30, n. 17; and 31. The Court of Appeal recognized that, before adoption of Proposition 218, this Court ruled that constitutional election rules, including voting secrecy, did not apply to property-owner voting.[10] The Court of Appeal recognized *Silicon Valley* "is not directly relevant to this appeal" because it involved not a property-related fee subject to art. XIII D, § 6, but rather judicial review of local agency assessment determinations. Slip Op. at 19. Nevertheless, the Court of Appeal ruled that *Silicon Valley* undermined precedents of this Court exempting property-owner voting from secrecy, the one-person-one-vote doctrine of equal protection, and other requirements for ordinary elections.

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[10] The Court of Appeal cites *Tarpey v. McClure* (1923) 190 Cal. 593, 606 (water district formation); *Potter v. Santa Barbara* (1911) 160 Cal. 349 (permanent road division formation), and *People v. Sacramento Drainage Dist.* (1909) 155 Cal. 373 (drainage district formation). Slip Op. at 17-18. The Court of Appeal also cites *Salyer Land Co. v. Tulare Lake Water Basin Dist.* (1973) 410 U.S. 719, 728 (property owner voting for district providing services to and funded by property owners did not offend one-person-one-vote doctrine) and *Southern Cal. Rapid Transit Dist. v. Bolen* (1992) 1 Cal.4th 654, 655 (same as to transit assessment). Slip Op. at 17, n.13.

Slip. Op. 19-20. Ultimately, the Court of Appeal reversed the trial court and invalidated the election approving the fee.

On March 27, 2009, Respondent filed its Petition for Rehearing. On April 7, 2009 the Court of Appeal denied that petition without changing the Opinion.

STATEMENT OF FACTS

A. History of Devastating Floods in the Ross Valley

The Ross Valley has been beset by flooding for over 50 years. Engineers define a 100-year storm as one that has a 1% chance of occurring in any year.[11] However, the Ross Valley has experienced three such storms in 25 years.[12] Global warming may likely increase Ross Valley's vulnerability to flooding. Most recently, major flood occurred on January 1, 2006, devastating homes and businesses and inflicting some $100 million in damage.[13]

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[11] AA 50 (Storm Drainage Fee Report).
[12] *Id.*
[13] *Id.*

Following this flood, the District consulted city councils, nonprofits, businesses, and members of the public to seek solutions to mitigate future flooding. The District agreed funding was necessary to implement projects to do so and the fee here in issue resulted.[14]

B. The District Conducted an Election Pursuant to Article XIII D, § 6(c) on a Property-Related Flood-Prevention Fee

The District submitted a property-related, flood-prevention fee to a vote of property owners under art. XIII D § 6(c). Article XIII D, adopted by 1996's Proposition 218, sets forth procedures for the levy of an assessment (§§ 4 and 5) or a property-related fee or charge (§ 6). For a fee, art. XIII D, §§ 6(a)(1) and (2) first require a protest hearing. If owners of fewer than half the affected parcels object in writing, the agency must then conduct an "election." (art. XIII D, §6(c).) Article XIII D, § 6(c) does not specify the election procedures to be followed, but states: "[a]n agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision."

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[14] AA 41-42; unnumbered 7-pg. Official Notice to Property Owners at AA 62-64.

Assessment procedures are set forth in art. XIII D, § 4, and the Omnibus Act. As to assessments, § 53753 mandates that an agency mail the record owner of each parcel notice of a proposed assessment and provide an assessment ballot. Section 53753(c) requires that "*each assessment ballot shall be signed* and either mailed or otherwise delivered to the address indicated on the assessment ballot." (Italics added). Section 53753(e)(4) further states that assessment protest proceedings "*shall not constitute an election or voting for purposes of Article II of the California Constitution or of the Elections Code.*" (Italics added.)

The District diligently followed these procedures for its fee election, analogizing to statutory assessment procedures, and notified property owners of a protest hearing.[15] The District counted protests submitted and determined the absence of a majority protest.[16] Accordingly, the District set the matter for a property-owner election.[17] Consistently with art. XIII D, § 4(d)'s and § 53753's mandates for assessment balloting, each ballot stated the property owners' name and address.[18] The ballot implemented § 53753(c)'s requirement that ballots be signed, stating: "in order to be

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[15] AA 62.
[16] AA 66.
[17] AA 66, 71.
[18] AA 78.

counted, a ballot must be signed ... by the record owner as attested to pursuant to the declaration under penalty of perjury."[19] The District's procedures stated: "[t]he clerk shall not accept a ballot ... that does not contain an original signature."[20]

The ballot form noted the signature requirement three times: Its instructions state: "**Sign your name** and write in the date in ink."[21] (Emphasis original.) An admonition is printed below the instructions that "Ballots received without a signature will not be counted."[22] Finally, below the voting box are spaces for the "date," "printed name" and signature of the voter.[23]

C. Property owners voted to impose the fee

Voters cast ballots on June 25, 2007 and the Registrar of Voters tallied the result June 29, 2007. As required by the District's procedures

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[19] AA 72.
[20] AA 73.
[21] AA 77.
[22] *Id.*
[23] AA 78.

and § 53753, the Registrar excluded unsigned ballots and certified these results: [24]

Total **Ballots Cast**	Total **Yes**	Total **No**	Total **Count**	Total **Invalid**
8,059	3,208	3,143	6,351	1,708

Therefore, the District adopted Resolution No. 2007-94 declaring the results of the election and that the measure was approved by a majority vote of property owners.[25, 26]

ARGUMENT

I. THIS CASE MERITS REVIEW

This Petition presents a question of importance to all California local governments and the public they serve – whether the voting secrecy

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[24] AA 84.

[25] AA 87-88.

[26] Appellant claims he conducted a "recount" of invalid ballots and determined they were sufficient, if counted, to defeat the fee. This "recount," as described at AA 98-108, is inherently unreliable, lacks foundation, and does not constitute a valid count. Should the need arise, the District is prepared to demonstrate that the manner of Appellant's review of the ballots protected voter secrecy by concealing from him property owners' names and addresses. Because the Court of Appeal entertained these issues for the first time on appeal, the District never had opportunity to present its evidence other than via a request for judicial notice, which the Court of Appeal denied.

requirement of art. II, § 7 applies to property-owner "voting" on a property-related fee pursuant to art. XIII D, § 6(c). Since its enactment, Proposition 218, especially its peculiarly drafted fee provisions, has required interpretation by this Court several times. (*Silicon Valley Taxpayer's Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal. 4th 431 (open-space assessment failed to sufficiently demonstrate special benefit and proportionality), *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205 (fees for continuing service to existing water connection are property-related fees subject to art. XIII D, § 6); *Richmond v. Shasta Community Services District* (2004) 32 Cal. 4th 409 (water connection fees for new development are not property-related fees); *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830 (fee on landlords to fund housing code enforcement not property-related fee).) Once again, particularly in this time of fiscal crisis, review by this Court is necessary so California's local governments can know with certainty the procedures for assessments and property-related fees under Proposition 218.

The Opinion also creates uncertainty regarding the application of the voting secrecy rule of art. II, § 7 to assessments (Slip. Op. at 14, n.12; 22,

n.14) and, by applying secrecy to property-related fees, it raises substantial questions as to how to balance secrecy with transparent vote tallies. It suggests secrecy can be entrusted to computers, even though the Legislature has forbidden use of electronic voting systems which do not provide a paper audit trail. Slip. Op. at 13-14; Elections Code § 19250(c) (voting systems must provide paper trail).

Lastly, the Opinion creates uncertainty as to what meaning, if any, should be given to the last sentence of art. XIII D, § 6(c), which authorizes local governments to adopt procedures for elections on property-related fees "similar to" those mandated by art. XIII D, § 4 for assessments. If the Court of Appeal has not read this sentence out of the Constitution, it is difficult to know what meaning is left to it.

Review of this case will avoid expensive and protracted litigation as the lower courts sort out these questions in both the assessment and property-related fee contexts. Review will also serve the interests of those who depend on local governments for essential public services and of those who lend to local governments. Finally, such uncertainty undermines public confidence that local procedures comply with law, diverting public attention from the substance of what services should be provided and how

they should be funded to procedural issues, inviting needless dissension and distraction into every municipal budget discussion.

These needs are especially pressing in light of the statutory mandate to plan for a need to adapt to a warmer world. The Global Warming Solutions Act of 2006, Health & Safety Code, §§ 38500 *et seq.* declares that global warming threatens "a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences" (Health & Saf. Code, § 38501(a)) and mandates adoption of a "scoping plan" to mitigate these impacts (Health & Saf. Code, § 38561(a)). Section 65080 *et seq.*, also requires metropolitan planning agencies to prepare "sustainable communities strategies" to curb the impacts of global warming. Just as local governments are grappling with these mandates – and the current crisis in world credit markets – they are confronted with daunting uncertainty created by the Opinion, which can only impede and make more expensive efforts to do so.

Article XIII D, § 6(c) establishes two methods for approval of fees: A local government may seek approval "by majority vote of the property owners of the property subject to the fee" or "by two-thirds vote of the electorate residing in the affected area." Article XIII D, § 6(c) authorizes

an agency to "adopt procedures similar to those for increases in assessments in the conduct of elections under [art XIII D, § 6 (c)]." Identifying uncertainty regarding Proposition 218's requirements for property-related fees and assessments, the Court of Appeal stated:

> "Those procedures in some ways suggest a nonsecret process, but they may also be followed while maintaining secrecy in voting. Therefore, this particular phrase does not clarify whether voting in a section 6(c) fee election must be secret."[27]

Thus, even though assessments were not in issue, the case makes uncertain the law of *both* assessments and property-related fees. The Opinion expressly reserves to future litigation whether voting secrecy applies to assessment ballot proceedings despite plain indications in art. XIII D, § 4 to the contrary, and unanimous legislative direction provided immediately after approval of Proposition 218 in the form of § 53753.

This petition should be granted for an alternative but equally compelling reason: the Court of Appeal's newly created duty to conduct secret elections on weighted property-owner balloting raises uncertainty as to whether local governments must affirmatively tell property owners their

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[27] *Id.*

ballots will be secret and the legal consequences of any failure to do so or of any lapse of secrecy. The Court "set aside the District's fee election because the voters ... were given no assurances that the ballot would be kept confidential."[28] Yet, despite inviting briefing on the issue immediately before oral argument, the Opinion cites no authority for this requirement, which does not appear in art. II, § 7. That section simply states, as it has since 1849, that: "Voting shall be secret." It does not state that voters must be assured that voting will be secret – just that voting shall be secret. Nor does this new disclosure requirement appear in the Elections Code. Rather, the statutory Voter Bill of Rights provides, "There shall be a Voter Bill of Rights for voters, available to public, which shall read: ... You have the right to cast a secret ballot free from intimidation." Elections Code § 2300(a)(1)(B)(4). Nor do the provisions of Proposition 218 or the Omnibus Act require property owners be assured of ballots secrecy. These provisions require only that an agency provide property owners a general summary of assessment ballot procedures. Art. XIII D, § 4 (c); § 53753(c).

[28] Slip Op. at 31-32.

The Opinion's decision overturning the will of property owners here is without support in precedent or analysis.[29]

Moreover, depublication of the Opinion cannot put this genie back in its bottle – once identified, the issue will spawn endless litigation until authoritatively resolved.

II. THE COURT OF APPEAL ERRED

A. THE VOTERS WHO APPROVED PROPOSITION 218 DID NOT INTEND SECRECY TO APPLY TO PROPERTY-OWNER VOTING UNDER § 6(c)

1. Contemporaneous Construction of Proposition 218 by Its Proponents Indicates Ballot Secrecy Was Not Intended to Apply to Property Owner "Voting" under § 6(c)

A September 5, 1996 Annotation of Proposition 218 prepared by the Howard Jarvis Taxpayers Association (HJTA) – a proponent of the initiative – reveals the meaning ascribed to the measure by its drafters.

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[29] Respondent's Petition for Rehearing (at 3-5) apprised the Court of Appeal of the absence of authority for this novel rule, but the Court of Appeal denied the petition without altering the Opinion.

Carman v. Alvord (1982) 31 Cal.3d 318, 331, n.10 (recognizing portions of letter by the late Howard Jarvis constituted an "after-the-fact" declaration of intent worthy of limited consideration because Jarvis proposed Proposition 13, but operative standard remained the intent of voters.) The Annotation states regarding all of art. XIII D, § 6:

> The purpose of this section is to prevent the exploitation of 'fees' as a means to avoid the new restrictions on assessments. Because flat rate parcel taxes have avoided the strictures of Proposition 13 simply by being called 'assessments,' the drafters are concerned that the same will happen with 'fees' – that is, circumventing taxpayer protections by manipulating the label of the levy.[30]

This reveals the close relationship between art. XIII, § 4 and § 6 – both are intended to give property owners, as opposed to government or registered voters, control over revenues derived from property owners. Ultimately, the framers of Proposition 218 viewed property-related fees and assessments as essentially the same, especially in terms of a property

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[30] Respondent's Request for Judicial Notice filed in the Court of Appeal on March 27, 2009, Exhibit B, at 13.

owner's relationship with government. Consequently, the Opinion's application of ballot secrecy to property-owner voting on fees under art. XIII D, § 6(c), but not necessarily to protests on assessments under art. XIII D, § 4, disserves this intent.

2. The Omnibus Act Is Authoritative Evidence Voting Secrecy was not Intended

Immediately upon adoption of Proposition 218 in November 1996, local government and taxpayer advocates – including the HJTA, the proponent of Proposition 218 – collaborated on what became the Omnibus Act – signed by Governor Wilson on July 1, 1997 – barely 9 months after adoption of Proposition 218.[31]

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[31] Exhibit 11, Appellant's Request for Judicial Notice ("RJN"), at 4-5, entitled "Unfinished Business Analysis of Senate Bill 919 prepared by the Office of Senate Floor Analysis," shows the following supporters: Association of California Water Agencies; California Association of Bond Lawyers; California Association of County Treasurers and Tax Collectors; California Association of Sanitation Agencies; California State Association of Counties; California Taxpayers' Association; Contra Costa Water District; Cities of Carlsbad, Claremont, Los Angeles, Stockton, Poway, and Del Mar; Counties of San Bernardino, Santa Barbara, and Madera; Howard Jarvis Taxpayers Association; League of California Cities; and the Regional Council of Rural Counties.

The legislation expressed a consensus as to the intent of Proposition 218 shared by local governments, taxpayer advocates and, of course, the Legislature – indeed, it drew not a single "no" vote in either the Assembly or Senate.[32] As such, the Omnibus Act is entitled to greater deference than the Court of Appeal afforded it. *E.g., Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 ("presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions in mind;" such statutes enjoy "significant weight and deference by the courts"); *San Francisco v. Industrial Acc. Com* (1920) 183 Cal. 273, 279-280.

Moreover, in the 12 years since its adoption, the Omnibus Act has provided guidance to local governments, taxpayer and property owner advocates, lenders and other creditors, beneficiaries of government services and all who depend on stable and predictable local government finance. These substantial reliance interests are worthy of judicial respect.

The Omnibus Act specifically states that assessment protest proceedings "shall not constitute an election for voting purposes of Article II of the California Constitution or of the Elections Code." § 53753(e)(4).

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[32] Exhibit 6 of Appellant's RJN, "The procedural history of Senate Bill 919 from the January 29, 1998, Senate Weekly History."

The Opinion, however, refuses to give effect to the Act's provisions allowing non-secret balloting for assessments or to the last sentence of art. XIII D, § 6(c), which provides that those non-electoral, assessment procedures may be the basis of locally adopted, "similar" rules for elections on property-related fees.

Review is therefore warranted to address uncertainty regarding the validity of the Omnibus Act in light of the Opinion.

3. Voters Intended to Exempt Property-Owner Proceedings under § 6(c) from Ballot Secrecy

Articles XIII C and XIII D require some processes that are unambiguously elections subject to Election Code and constitutional requirements. So, for example, the imposition, extension, or increase of a general tax under art. XIII C, § 2(b), or the ratification of taxes adopted in 1995 and 1996 under art. XIII C, § 2(c), must first "be submitted to the electorate and approved by a majority vote." Similarly, the imposition, extension or increase of special taxes must be approved by two-thirds of the electorate under art. XIII C, § 2(d) and art. XIII D, § 3(a)(2).

Other provisions of Proposition 218 plainly require something other than an election. The procedures for the approval of assessments under art. XIII D, § 4 are implemented by § 53753(e)(4), which states such proceedings "shall not constitute an election or voting for purposes of Article II of the California Constitution or of the Elections Code." While the Opinion reserves whether ballot secrecy applies to such proceedings,[33] it suggests this was not likely the voter's intent. Commenting on art. XIII D, § 4(g), the Opinion states:

> This provision tends to demonstrate that the voters did *not* intend assessment balloting under article XIII D, section 4 to be a 'vote' within the ordinary or constitutional meaning of the term, absent a federal legal ruling to the contrary.[34]

The text of art. XIII D, § 6(c) states that, for voter approval of new or increased property related fees or charges:

> An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

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[33] Slip Op. at 14, n. 12; 22, n.14.
[34] *Id.* at 12, n. 10.

This sentence, which the Opinion acknowledges to be "critical," (Slip Op. at p. 4) expresses that property-owner proceedings under art. XIII D, § 6(c) are not intended to be traditional elections for at least two reasons. First, no meaning can be given to this sentence other than to allow use of procedures "similar to" assessment protest proceedings under art. XIII D, § 4, which the Opinion acknowledges are apparently not intended to be traditional elections. Second, there would be no need to empower "an agency" – defined by art. XIII D, § 2(a) as a local government – to adopt election procedures "similar to" those for assessment protests if traditional elections were intended. Procedures for such elections are well defined by state law and local governments have only limited authority to establish them. *E.g., Steinkamp v. Teglia* (1989) 210 Cal.App.3d 402, 404 (statutes preempt local legislation regarding election of officers of counties and non-charter cities); *Howard Jarvis Taxpayers Ass'n v. City of San Diego* (2004) 120 Cal.App.4th 374, 388-389 (local initiative requiring supermajority vote for fiscal matters preempted by Government and Election Codes); *Francis v. Stanislaus County* (1967) 249 Cal.App.2d 862, 865 (neither board of supervisors nor voters may enact ordinance in conflict with state laws).

The Opinion states: "it is unclear from the language of article XIII D, section 6(c) whether the fee election required by that subdivision may be conducted without ensuring secrecy in voting."[35] As this Court instructs, this question turns on what the voters who adopted Proposition 218 intended. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212; *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 759.

As detailed below, the legislative history and text of Proposition 218 demonstrate voters intended art. XIII D, § 6(c) proceedings involving *registered voters* to be subject to ballot secrecy and other election law requirements, but did not intend to apply those rules to art. XIII, § 6(c) proceedings involving *property owners.* This distinction ensures property-owner control without interference from election requirements as the one-person-one-vote rule. Why else would the measure give local governments incentive to allow property owners to make these decisions by allowing a simple majority of property owners to approve a property-related fee, but requiring a two-thirds vote of registered voters to do so?[36] Article XIII D, §

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[35] *Id.* at 15.

[36] Indeed, the disfavored choice to allow a registered-voter election may have reflected the same caution regarding a possible problem under the

6(c) promotes property-owner elections. Ballot secrecy frustrates that intent by preventing weighted voting, for weighting requires the identity of the voter to be discernible from the ballot itself; otherwise recounts are impossible.

4. Transparent Tallies of § 6(c) Elections Cannot be Accomplished if Ballots are Secret

As the Opinion acknowledges, ballot secrecy and weighted voting are not easily reconciled. Slip. Op. at 13-14. Because the voters plainly provided for the latter, their intent to avoid the former can be implied.

Article XIII D, § 4(e) requires that property-owner assessment ballots "be weighted according to the proportional financial obligation of the affected property." Article XIII D, § 6(c) is less explicit; it allows (but does not require) weighted voting among property owners.

Under art. XIII D, § 6(c), decision on a property-related fee is determined by "a majority vote of the property owners of the property subject to the fee or charge." Neither art. XIII D, § 6 nor the Omnibus Act defines what constitutes a "majority vote," *i.e.*, whether a majority is

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one-person-one-vote rule stated in art. XIII D, § 4(g) as discussed at p.12, n.9 of the Opinion.

determined per capita, one vote-per-parcel, or by votes weighted according to the financial obligations of property owners – the standard for assessments under art. XIII D, § 4. Rather than impose a one-size-fits-all definition, Proposition 218 leaves local legislation to determine these questions sensitively to the time and place the rule is to apply. Of course, local legislation is subject to a standard specified by Proposition 218: "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision." Art. XIII D, § 6(c). Given that such procedures must be "similar to" the detailed assessment procedures of art. XIII D, § 4, it is plain that such procedures may allow for weighted voting.

The Opinion acknowledges application of ballot secrecy to weighted voting is problematic and struggles to reconcile them:

> On the other hand, an agency could comply with article XIII D, section 4 while maintaining secrecy in voting. The information on the ballot need not be publicly disclosed at the public hearing. The persons tabulating the ballots could use the information on the ballot (even if all gathered on a single piece of paper) to validate, weight, and count the ballots but

keep the information confidential in the absence of a challenge to the balloting resulting in a court disclosure order. Indeed, this was the procedure prescribed for the District's fee election under the Election Procedures.

Alternatively, the voter and parcel identifying information could be placed on the outside of an envelope that contains the ballot, in the manner of absentee voting. (See Elec. Code, §§ 3010-3011.) The voter's qualification could then be confirmed and the weight to be accorded the ballot calculated before the ballot was opened. *There would need to be a mechanism to associate the actual vote with the weight of the ballot, but this could be done using computer coding to avoid public disclosure of any individual property owner's vote (i.e., the association of a particular voter to a particular vote would be hidden within the computer data bank* unless ordered disclosed on a challenge to the balloting) or by some other mechanism strictly limiting the disclosure of

information that would link the identity of a voter to a yes or no vote."[37]

These proposed resolutions – unsupported by legal or legislative precedent – have consequences that cannot have been the voters' intent. Applying ballot secrecy weighted voting prevents the public from auditing the vote tally without filing an election challenge. Absence of secrecy allows any member of the public to examine the ballots to confirm they were tallied correctly, as the Legislature has determined the voters intended for assessment ballots. § 53753(e)(1) ("During and after the tabulation, the assessment ballots shall be treated as disclosable public records ... and equally available for inspection by the proponents and the opponents of the proposed assessment.")

Entrusting the weighting of ballots to information "hidden within the computer data bank" evidences greater confidence in the integrity of electronic voting systems – and the human beings who operate them – than the Legislature has shown after exhaustive study and public debate. *American Ass'n of People with Disabilities v. Shelley* (C.D. Cal. 2004) 324 F.Supp.2d 1120, 1123 (upholding decertification of electronic voting

[37] Slip Op. at pp. 13-14 (emphasis added).

systems that do not provide paper trail); Elections Code § 19250(a) (prohibiting use of such voting systems).

Given the anti-government sentiment which animated Proposition 218, the voters surely did not want local governments to create a computer database to weight ballots so as to prevent transparent tallies. It is far more likely the voters who adopted Proposition 218 did not intend to apply ballot secrecy to property owner "votes" under art. XIII D, § 6(c) than that they intended to constitutionalize a process that frustrates transparency and accountability in tallying those "votes."

5. Proposition 218's Legislative History Uses "Election" and "Vote" Inconsistently and Those Terms Shed No Light on Its Intent

The Court of Appeals concluded that the ballot material regarding Proposition 218 "supports a construction of article XIII D, section 6(c) to require secret voting."[38] However, Proposition 218 and its legislative history use the words "vote" and "election" so inconsistently and imprecisely that they shed little light on its intent. Rather than parse the

[38] Slip Op. at 23.

many uses of electoral language to refer to assessment protest proceedings (which are not elections) and of non-electoral language to refer to tax elections and initiatives (which are elections) via text, it is more economical to present this information as follows:

Document	**Text**	**Election Language**	**Election Proceeding**
Title & Summary	"Voter Approval for Local Government Taxes. Limitations on Fees, Assessments and Charges. Initiative Constitutional Amendment."[39]	Yes	Yes
Impartial Analysis	"Finally, local governments must hold a mail-in election for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to vote. Ballots cast in these elections would be weighted ...."[40]	Yes	No
Same	"In addition, the measure specifies that before adopting a *new* property-related fee (or increasing an *existing* one), local	Yes	No

[39] Respondent's Request for Judicial Notice filed in the Court of Appeal on March 27, 2009, Exhibit A at p.1.

[40] Appellant's RJN, Exh. 15, at pp. 32-33. Exhibit 15 is approximately 99 pages, not all numbered. The Legislative Analyst's Impartial Analysis is four pages beginning on page 31.

	governments must: mail information about the fee to every property owner, reject the fee if a majority of the property owners protest in writing, and hold an election on the fee (unless it is for water, sewer, or refuse collection service)."[41] "Local governments would also have to mail information to every property owner and hold elections."[42]		
Same	Finally, local governments must hold a mail-in election for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to vote. Ballots cast in these elections would be weighted based on the amount of the assessment the property owner or renter would pay. For example, if a business owner would pay twice as much as a homeowner, the business owner's vote would "count" twice as much as the homeowner's vote.[43]	Yes	No
Same	"Proposition 62 – a statutory measure approved by the voters in 1996 – requires new local	Yes	Yes

[41] Appellant's RJN, Exh. 15, at 32-33 (original emphasis).
[42] *Id.*
[43] *Id.*

	general taxes to be approved by a majority vote of the people."[44] "The measure states that all *future* local general taxes, including those in cities with charters, must be approved by a majority vote of the people. The measure also requires existing local general taxes established after December 31, 1994, without a vote of the people to be placed before the voters within two years."[45]		
Same	"Within two years, local governments also would be required to hold elections on some recently imposed taxes and existing assessments. ... If voters do not approve these existing taxes and assessments, local governments would lose *additional* revenue."[46]	Yes	Yes & No (both tax elections and assessment ballot proceedings discussed)
Same	The measure's restrictions and voter-approval requirements would constrain new and increased fees, assessments and taxes.[47]	Yes & No (election & non-election language)	Yes & No (tax and fee elections, assessment proceedings discussed)
"Yes" argument	Proposition 218 guarantees your right to vote on local tax increases – even when they are	Yes	No

[44] *Id.* at p. 33.
[45] *Id.* (original emphasis)
[46] *Id.* (original emphasis)
[47] *Id.*

	called something else, like "assessments" or "fees" and imposed on homeowners.[48]		
Rebuttal to "yes" argument	"Read Proposition 218 yourself and see how large corporations, big landowners and foreign interests gain more voting power than you."[49] "Promoters say you get 'tax reform' ... you may actually get serious cutbacks in local service and FEWER VOTING RIGHTS for millions of California citizens."[50] "Blocks 3 million Californians from voting on tax assessments. The struggling young couple WILL HAVE NO VOTE on the assessments imposed on the house they rent."[51] "Grants special land interests more voting power than average homeowners. The 'elderly widow' promoters cite will be banned from voting if she is a renter, or her voting power dwarfed by large property owners."[52] "Gives non-citizens voting rights on your community taxes."[53]	Yes	No

[48] Appellant's RJN, Exh. 15, p. 29.
[49] *Id.*
[50] *Id.* (original ellipses and emphasis)
[51] *Id.* (original emphasis)
[52] *Id.*
[53] *Id.*

"No" argument:	"PROPOSTION 218 DILUTES VOTING RIGHTS, HURTS LOCAL SERVICES."[54] "In the disguise of tax reform, Proposition 218's Constitutional Amendment REDUCES YOUR VOTING POWER and gives huge voting power to corporations, foreign interests and wealthy landowners."[55] "YOU LOSE RIGHTS: CORPORATIONS, DEVELOPERS, NON-CITIZENS GAIN VOTING POWER."[56] "Section 4(e) of Proposition 218 changes the Constitution to give corporations, wealth landowners and developers MORE VOTING POWER THAN HOMEOWNERS. It lets large outside interests control community taxes – against the will of local citizens."[57] "EXAMPLE: An oil company owns 1000 acres, you own one acre: the oil corporation gets 1000 times more voting power than you."[58] "While Prop. 218 gives voting power to outside	Yes	No

[54] Appellant's RJN, Exh. 15, at p. 23 (original emphasis). Exhibit 15 has approximately 99 pages, not all numbered. The "Argument Against Proposition 218" is at p. 23.
[55] *Id.* (original emphasis)
[56] *Id.*
[57] *Id.*
[58] *Id.* (original emphasis)

	interests, Section 4(g) denies voting rights to more than 3,000,000 California renters."[59] "Reducing American citizens' Constitutional rights, it grants voting rights to corporations and absentee landowners – even foreign citizens."		
Rebuttal to "no" argument	Proposition 218 expands your voting rights. It CONSTITUTIONALLY GUARANTEES your right to vote on taxes.[60]	Yes	Yes
Same	Under Proposition 218, only California registered voters, including renters, can vote in tax elections. Corporations and foreigners get no new rights.[61]	Yes	Yes
Same	Current law already allows property owners, including nonresidents to act on property assessments based on the assessment amount they pay. This is NOT created by Proposition 218.[62]	No	No

Thus, the ballot materials use electoral and non-electoral language inconsistently and imprecisely. The Opinion's parsing of the electoral

[59] *Id.*
[60] *Id.* (original emphasis)
[61] *Id.*
[62] *Id.* (original emphasis)

terminology to determine voters' intent as to applying ballot secrecy is fruitless – the materials provide support for either interpretation.

The better means to determine voters' intent is to look to the language of the Constitution itself – art. XIII D, § 4(c) requires property owner's names and address to appear on protest ballots and art. XIII D, § 6(c) authorizes local governments to adopt procedures "similar to" these provisions for elections on property-related fees. What the Constitution says is sufficiently plain that resort to imprecise language in the ballot arguments is neither necessary nor helpful. *Silicon Valley, supra*, 44 Cal.4th at 444-45 ("If the language is clear and unambiguous, the plain meaning governs.").

III. THE OPINION READS THE LAST SENTENCE OF ARTICLE XIII D, § 6(C) OUT OF THE CONSTITUTION

A court interpreting multiple provisions of the Constitution must prefer a construction which harmonizes them and gives each a sphere of operation and disfavor a construction which allows one to trump another. *E.g., Serrano v. Priest* (1971) 5 Cal.3d 584, 596; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735. The Opinion, however, essentially reads the

last sentence of art. XIII D, § 6(c) out of the Constitution by requiring the ballot secrecy of art. II, § 7 to apply despite the express direction of the former provision that: "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision." What the Constitution says an agency may do, the Opinion says it may not.

Respondent respectfully urges this Court to grant review to consider whether a construction that applies ballot secrecy to votes of "the electorate" under art. XIIID, § 6(c) but applies non-secret procedures "similar to" assessment ballot to property owner "voting" under that section better harmonizes these constitutional provisions than does the Opinion.

IV. THE OPINION IMPAIRS THE FLEXIBILITY PROPOSITION 218 GAVE LOCAL GOVERNMENTS TO FRAME TRANSPARENT PROCEDURES

As noted above, art. XIII D, § 6(c) expressly allows local governments to adopt local procedures for the conduct of property-owner "elections" on property-related fees "similar to" those provided for weighted assessment ballots under art. XIII D, § 4. Proposition 218 could

easily have specified those procedures, but did not. What purpose might the framers of Proposition 218 have had in delegating this authority to local governments? Those purposes may include allowing flexibility to address local circumstances – the needs of Los Angeles are different from the needs of a rural, road district serving a few hundred parcels. Local rules can better balance voter secrecy, easily accommodated with ballots of equal weight, with the desire to weight ballots to ensure fair allocation of decision-making power among affected property owners (as fractional votes for a couple who own a parcel as community property or weighted votes by an owner who will pay a larger fee), a process that makes secrecy problematic, if not impossible. Moreover such procedures can provide for transparency and accountability in tallies, an important public policy sacrificed by the Opinion's one-size-fits-all conclusion that the voting secrecy requirement of art. II, § 7 necessarily applies to every property owner vote under art. XIII D, § 6.

V. THE OPINION SUGGESTS JUDGES MAY OVERTURN PROPERTY OWNER DECISIONS WITHOUT EVIDENCE A PROCEDURAL FAILURE AFFECTED THE OUTCOME

There is no dispute Ross Valley property owners are entitled by art. XIII D, § 6(c) to decide whether to pay for enhanced flood protection. Yet, the Opinion invalidates their decision without finding the result would have differed if the rules the Opinion requires (and of which neither the District nor its property owners could have had notice when the balloting was conducted) had been followed. As the Opinion notes:

> "[I]t is a primary principle of election law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citations.] ... The contestant has the burden of proving the defect in the election by clear and convincing evidence. [Citations.]" *Wilks v. Mouton* (1986) 42 Cal.3d 400, 404; *Gooch v. Hendrix* (1993) 5 Cal.4th 266, 277.[63]

[63] Slip Op. at 28.

Appellant here has never been asked to provide such proof and plainly has not done so. This record contains *no* evidence to support the remedy the Court of Appeal granted.

Similarly, although the Opinion acknowledges that in *Alden v. Superior Court* (1963) 212 Cal.App.2d 764, 766-767, ballot secrecy did not apply to a weighted-vote, property-owner election to form a water district, it distinguished *Alden* as a pre-Proposition 218 case overtaken by *Silicon Valley*.[64] However, the Opinion fails to discuss *Alden's* remedial holding that:

> "A failure to comply with some technical direction of the statute, where due alone to mistake or inadvertence on the part of those whose duty it is to prepare and furnish the ballot, should not disfranchise the entire vote of the district and vitiate the election, unless it be made to appear that by reason of the irregularity the result was different from what it would otherwise have been, or that it prevented the voter from freely, fairly, and honestly expressing his choice of the

[64] *Id.* at 18. Respondent notes that the independent standard of judicial review announced by *Silicon Valley* is inapplicable to a property-related fee under § 6. Rather, that case involved judicial review of factual determinations made by local governments regarding assessments.

candidate for the office." *Alden, supra*, 212 Cal.App.2d at 772 *quoting Dennen v. Jastro* (1913) Cal.App. 264, 267.

Thus, it is long-established law, essential to the preservation of voter- and property-owner election rights, that an election cannot be overturned absent compelling evidence a procedural error actually affected the outcome. *See also Preston v. Culbertson* (1881) 58 Cal. 198, 209 (question is whether "qualified electors have been deprived of a fair opportunity of expressing their preference;" "[m]ere irregularities which do not affect the final outcome should be disregarded"); *Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430 ("a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation.").

Similarly, *Gooch v. Hendrix*, *supra*, 5 Cal.4th 266, which the Opinion cites to support invalidating the vote of the Ross Valley property owners applies the same rule – an election is not overturned absent substantial evidence that election defects affected the outcome. In *Gooch* this Court found "widespread illegal voting practices ... permeated [the]

election – including fraud and tampering," that violations of the Elections Code were clearly established, "that nearly all of the candidates ... took part in ... 'soliciting' absentee votes in violation of specific Elections Code provisions," and that "large percentages ... of illegal ballots [were] cast and counted ...." *Id.* at 284-85. This Court concluded, unsurprisingly, that these findings constituted "sufficient, essentially uncontroverted circumstantial evidence in support of the conclusion that 'it appear[ed]' the illegal votes affected the outcomes of the consolidated elections." *Id.* Moreover, in *Gooch,* substantial evidence supported the trial court's factual finding after trial that a significant number of ballots were illegally cast. *Id.* at 274-77.

Gooch is plainly distinguishable because the trial court here never reached the disputes whether ballot secrecy was afforded, whether any violation of such secrecy occurred, and whether any violations affected the outcome. Indeed, the Opinion acknowledges that Respondent's Election Procedures, "if followed, might have been sufficient to preserve the secrecy in voting."[65]

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[65] *Id.* at 29.

Clearly, one challenging an election must present compelling evidence the results would have been different if not for the alleged misconduct. Here, the Court of Appeals invalidated the property owners' decision with no such evidence.

CONCLUSION

The City respectfully requests that the Court grant this petition for review to settle important questions of law, provide certainty to all with a stake in local government finance, and to resolve the questions opened by the Opinion with requiring protracted litigation to do so.

DATED: April 17, 2009

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

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DATED: April 17, 2009

Respectfully submitted,

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Filed 3/11/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FORD GREENE, Plaintiff and Appellant, v. MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, Defendant and Respondent; FLOOD MITIGATION LEAGUE OF ROSS VALLEY ET AL., Interveners and Respondents.	A120228 (Marin County Super. Ct. No. CV 073767)

A county flood control and water conservation district held an election on whether to impose a new storm drainage fee. The election was mandated by article XIII D of the California Constitution, which was adopted by voter initiative in 1996 as Proposition 218. In the district's election, voters' names and addresses were printed on the ballots and voters were directed to sign their ballots. The fee was approved. However, a voter contested the election, claiming the election procedures violated the voting secrecy requirement of article II, section 7 of the California Constitution. The superior court denied the election contest.

This appeal requires us to construe article XIII D and specifically article XIII D, section 6, subdivision (c)[1], which imposes the election requirement for certain new or increased real property fees. We conclude the voters who adopted Proposition 218 intended voting to be secret in these fee elections. We set aside the district's election results because voters' names were printed on the ballots and ballots had to be signed, yet voters were provided no assurances that their votes would be kept secret.

BACKGROUND

In 1996, voters approved Proposition 218 to close perceived loopholes in the restrictions on property taxes imposed by Proposition 13.[2] (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838-839 (*Apartment Assn.*); *Howard Jarvis Taxpayers Association v. City of Riverside* (1999) 73 Cal.App.4th 679, 681 (*Riverside*).) Proposition 13 limited ad valorem property taxes to 1 percent of a property's assessed valuation, limited increases in assessed valuation to 2 percent per year unless and until the property changed hands, and "prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate." (*Riverside*, at p. 681-682; Cal. Const., art. XIII A[3].) In 1992, the Supreme Court held that

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[1] California Constitution, article XIII D, section 6, subdivision (c) states: "Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision."

[2] Proposition 13, which was adopted by voters on June 6, 1978, added article XIII A to the California Constitution. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 140 (*Knox*).)

[3] All article references are to articles of the California Constitution.

a property assessment[4] was not a special tax within the meaning of Proposition 13. (*Knox, supra,* 4 Cal.4th at p. 141.) According to the proponents of Proposition 218, *Knox* created a loophole in Proposition 13's voter approval requirements, which local governments subsequently exploited to a degree that assessments were " 'limited only by the limits of the human imagination.' "[5] (Ballot Pamp., General Election (Nov. 5, 1996) argument in favor of Proposition 218, p. 76.)

Proposition 218 added articles XIII C and XIII D to the Constitution. (*Riverside, supra,* 73 Cal.App.4th at p. 682.) Those articles "allow[] only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge." (*Ibid.*) Article XIII C imposes restrictions on general and special property taxes in addition to those imposed under article XIII A. Article XIII D restricts property assessments, and fees or charges.[6]

For new or increased property assessments, article XIII D requires agencies to obtain an engineer's report on the assessment and mail detailed notice to affected property owners, explaining the reason for and the method of calculating the assessment and identifying the amount chargeable to the owner's particular parcel. (Art. XIII D, § 4, subds. (b), (c).) The notice must provide the date, time, and place of a public hearing on the assessment, include a ballot "whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment," and conspicuously describe the procedures for tabulation of those ballots. (Art. XIII D, § 4, subds. (c), (d).) When tabulated at the public hearing, the

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[4] A property assessment is a levy or charge on real property for a special benefit that is conferred upon the real property. (Art. XIII D, § 2, subd. (b); *Knox*, *supra,* 4 Cal.4th at pp. 141-142 ["a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement' "].)

[5] Greene's request for judicial notice of the legislative history of the act, filed May 20, 2008, is granted.

[6] "Fee" and "charge" appear to be synonymous in article XIII D. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214, fn. 4 (*Bighorn*).) Hereafter, we use the term "fee" to refer to both.

ballots are weighted according to the proportional financial obligation of each affected parcel. (Art. XIII D, § 4, subd. (e).) If a majority of the weighted ballots oppose the assessment, it may not be imposed. (*Ibid.*)

For new or increased property-related fees, the initiative also requires detailed mailed notice to affected property owners, explaining the proposed fee and announcing a public hearing. (Art. XIII D, § 6, subd. (a)(1).) However, no formal balloting is required at this stage of the process. (*Ibid.*) Instead, "[a]t the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." (Art. XIII D, § 6, subd. (a)(2).) If a majority protest does not occur, the fee (with some exceptions not relevant here) still may not be "imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Art. XIII D, § 6, subd. (c) (section 6(c)).) Critical to the issues raised in this appeal, the initiative provides: "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision." (*Ibid.*)

In July 1997, the Legislature enacted the Proposition 218 Omnibus Implementation Act. (Stats. 1997, ch. 38.) The Act prescribes detailed procedures for the imposition or increase of assessments. (Gov. Code, § 53753; enacted by Stats. 1997, ch. 38, § 5; amended by Stats. 2000, ch. 220, § 1; amended by Stats. 2001, ch. 636, § 1; amended by Stats. 2007, ch. 670, § 113.) These procedures require "assessment ballots" to be signed. (Gov. Code, § 53753, subd. (c).) The ballot must be "in a form that conceals its contents once it is sealed by the person submitting the assessment ballot" and, once received by the agency, must "remain sealed until the tabulation of ballots . . . commences." (*Ibid.*) However, during and after the tabulation, the ballots are "disclosable public records . . . equally available for inspection by the proponents and the opponents of the proposed assessment." (Gov. Code, § 53753, subd. (e)(1).) Finally, the statute expressly provides that the tabulation of assessment ballots (described in § 53753,

subd. (e)) "shall not constitute an election or voting for purposes of Article II of the California Constitution or of the California Elections Code." (*Id.*, subd. (e)(4).) The implementation legislation does not prescribe detailed procedures for fee elections under article XIII D, section 6(c). Significantly, this 1997 Act does not expressly prescribe detailed procedures for *fee elections* under article XIII D, section 6(c).

Marin County Storm Drainage Fee

In 2007, the Marin County Flood Control and Water Conservation District (District) proposed a new storm drainage fee to be imposed on the owners of property within Zone 9 (Ross Valley) of the district, which includes the communities of Greenbrae, Larkspur, Corte Madera, Kentfield, Ross, San Anselmo, and Fairfax. The purpose of the fee was to partially fund a flood protection plan, which involved the removal of constrictions in creeks that drain water from the area and the addition of detention basins upstream from those creeks to hold back or slowly release water. The area had a 50-year history of chronic flooding, which included a flood on or about December 31, 2005 that displaced residents, closed down businesses, and caused an estimated $100 million in property damage. The flood protection plan and proposed fee were developed after months of collaboration among municipalities, government agencies, and community organizations. Intervenors Flood Mitigation League of Ross Valley and Friends of the Corte Madera Creek Watershed participated in this process.[7]

In February 2007, the District's director recommended a drainage system fee methodology. The District's board of supervisors (Board) approved the methodology and directed preparation of an engineering report, which was completed in March. Legal

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[7] Intervenors' request for judicial notice, filed June 17, 2008, is denied. The submitted newspaper articles about the 2005 flood and about this lawsuit are not proper matters for judicial notice and are not relevant to the legal issues we must decide in this appeal. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064, 1065 [truth of the contents of a newspaper article is not judicially noticeable] (*Mangini*), overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1262; *Mangini*, at p. 1063 [only relevant material is a proper subject of judicial notice]; Evid. Code, §§ 450-452, 459.)

counsel for the District drafted procedures for mailed notice, conduct of a public hearing, and tabulation of written protests at that hearing (Written Protest Procedures). The Written Protest Procedures stated they were adopted "for the purposes of assuring compliance with the requirements of Section 6" of article XIII D.

On the director's recommendation, the Board accepted the final engineer's report, adopted the Written Protest Procedures, scheduled a public hearing on the fee for May 1, 2007, and directed the mailing of notices to affected property owners. On May 1, the Board declared by resolution that there was no majority protest at the public hearing and it called a "special election" on the fee "to be held on Monday, June 25, 2007, solely by mailed ballot, pursuant to and in accordance with Section 6 and the procedures . . . attached hereto." Those procedures (Election Procedures) provided that the "mail ballot election shall constitute an election for the purposes of Section 6 of Article [XIII D] of the California Constitution . . . [and shall] be conducted in substantial compliance with the requirements of the California Elections Code to the extent feasible, and otherwise in accordance with these procedures." The procedures designated the clerk and deputy clerk or clerks to conduct the election, who would be the only persons to have access to the ballots, and prohibited them from disclosing any individual's vote absent a court order. The procedures required ballots to be signed and specified that unsigned ballots would not be counted.

The ballots actually mailed to voters were pieces of card stock printed on both sides. One side provided voting instructions (instruction side) and the other was used for the actual voting (voting side). The instruction side directed the recipient to follow four steps in order to vote on the proposed fee: 1. Read the enclosed information about the proposed fee; 2. Check Yes or No on the voting side of the ballot; 3. Sign your name and write the date, in ink; and 4. Return the ballot to a specified address by June 25, 2007. The voting side of the ballot was printed with the address of a specific parcel, the amount of the fee that would be charged to that parcel if the fee was approved, and the name and address of the record property owner. It set forth the issue to be voted on, i.e., whether the district should impose the specified fee, briefly described how the fee would be used,

and provided check boxes for voters to vote yes or no on the question. Finally, the voting side of the ballot provided a space for the voter to print his or her name and date and sign the ballot over text declaring under penalty of perjury that he or she was authorized to vote on behalf of the identified parcel. The ballots apparently were mailed with an unaddressed return envelope that stated prominently on its face, "OFFICIAL PROPERTY OWNER BALLOT INSIDE."

The official canvass of the votes was 8,059 total ballots cast; 3,208 yes votes; 3,143 no votes; 1,708 invalidated votes. On July 10, 2007, the Board declared that the measure passed. On July 17, 2007, the Board implemented the fee.

Election Contest

On July 16, 2007, "Ford" Greene (Greene), a property owner affected by the fee who voted in the election, demanded a recount of the election results pursuant to Elections Code section 15620. The record does not include any written response to the recount demand or any official declaration of the results of a recount. (See Elec. Code, § 15633 [requiring recount results to "be posted conspicuously in the office of the elections official"].)

On August 9, 2007, Greene filed a "Verified Complaint for an Election Contest" pursuant to Elections Code section 16100 et seq.[8] The District answered and pursuant to the trial court's authorization, Flood Mitigation League of Ross Valley and Friends of the Corte Madera Creek Watershed filed their complaint in intervention, joining the District in opposing appellant's election contest complaint.

As relevant to this appeal, Greene argued that requiring voters to sign their ballots violated article II, section 7, which requires that voting be conducted secretly, and that the form of the ballot violated Elections Code requirements for voting by mail. The District and Intervenors responded that neither article II nor the Elections Code applied to a property fee election conducted under article XIII D, section 6(c) because section 6(c)

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[8] In his verified complaint, Greene alleges that a recount took place and resulted in a determination the fee would have been rejected if the *unsigned* ballots were counted. This is disputed by the District and Intervenors.

"specifically allows for property fee elections to mirror the requirements set forth for the conduct of elections in assessment fees." They argued the District's fee election complied with Government Code section 53753's assessment balloting procedures.

The trial court denied the election contest. It ruled that the election ballot complied with both article XIII D and Government Code section 53753, which required ballots to be signed. The court wrote, "Plaintiff's reliance on California Const. Art. II, § 7, and the Election[s] Code requirements for ballots in other types of elections, is misplaced." In doing so, it cited Government Code section 53753, subdivision (e)(4), which provides that those laws do not apply to assessment balloting.

DISCUSSION

The California Supreme Court has declared that the " 'right to a secret ballot . . . is the very foundation of our election system.' " (*Scott v. Kenyon* (1940) 16 Cal.2d 197, 201 (*Scott*).) It is the "right to vote one's conscience without fear of retaliation." (*McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 343; see *Burson v. Freeman* (1992) 504 U.S. 191, 200-207 (*Burson*), plur. op. of Blackmun, J. [describing problems of intimidation and electoral fraud that led to adoption of secret ballot by all 50 states].) The right is "an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and situation may be supposed to exercise." (*Robinson v. McAbee* (1923) 64 Cal.App. 709, 714 (*Robinson*).) The right to secrecy encompasses not only the right to cast one's vote in private (*Peterson v. City of San Diego* (1983) 34 Cal.3d 225, 230; *Wilks v. Mouton* (1986) 42 Cal.3d 400, 408, superseded by statute on other grounds as stated in *Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1019; *Scott* at p. 201), but also the right to maintain the confidentiality of one's vote following an election (*Scott*, at pp. 201, 203; *Patterson v. Hanley* (1902) 136 Cal. 265, 269-270; *Robinson*, at p. 714).

At issue here is whether the right to secrecy in voting applies to an "election" to approve a property-related fee conducted pursuant to article XIII D, section 6(c). More specifically, by passing Proposition 218 and therefore voting to require an "election" before agencies could impose certain types of property-related fees—with the important

qualification that the agencies could use procedures similar to those for increases in assessments—did the electorate intend that voting would be secret? For the reasons discussed below, we conclude they did. After explaining the basis for this conclusion, we turn to the question whether judgment should have been granted in the District's favor on Greene's election contest.

I. *Standard of Review*

The scope of our review in an election contest is no different from that in other appeals: we review factual findings for substantial evidence and questions of law de novo. (*Gooch v. Hendrix* (1993) 5 Cal.4th 266, 278-279 (*Gooch*).) The trial court determined that the election contest raised pure questions of law and decided the case based on briefing and argument without holding an evidentiary hearing. Therefore, our review is de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-800; see also *Apartment Assn., supra,* 24 Cal.4th at p. 836 [interpretation of article XIII D is question of law].)

II. *Article XIII D, Section 6(c) Requires Secret Voting*

In construing Proposition 218, "we apply the familiar principles of constitutional interpretation, the aim of which is to 'determine and effectuate the intent of those who enacted the constitutional provision at issue.' [Citation.] 'The principles of constitutional interpretation are similar to those governing statutory construction.' [Citation.] If the language is clear and unambiguous, the plain meaning governs. [Citation.] But if the language is ambiguous, we consider extrinsic evidence . . . . [Citations.]" (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445 (*Silicon Valley*).) "To decipher the purpose of an ambiguous statute, a court may consider the ostensible objects to be achieved by the statute, the statutory scheme of which the statute is a part, the evils to be remedied, public policy, the legislative history, and the wider historical circumstances of the enactment. [Citations.]" (*AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 758-759.)

A. *Plain Language of Article XIII D Section 6(c)*

As summarized above, article XIII D, section 6 prescribes a two-step process for approval of a property-related fee: (1) a noticed public hearing at which affected property owners may submit written protests, and if no majority protest occurs at that hearing, (2) an "election" on the fee. At issue here is the second requirement. Specifically, did the voters intend by the following relevant language that voting on the fee be secret? "*Voter Approval for New or Increased Fees and Charges.* [With exceptions not relevant here], no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved *by a majority vote* of the property owners of the property subject to the fee or charge or, at the option of the agency, *by a two-thirds vote of the electorate* residing in the affected area. The *election* shall be conducted not less than 45 days after the public hearing. *An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.*" (Art. XIII D, § 6, subd. (c), italics added.)

1. *"Election," "Majority Vote," and "Voter Approval"*

The plain language of article XIII D, section 6(c) is silent on the issue of whether voting in an election under that subdivision must be secret. However, section 6(c) uses the terms "voter approval," "majority vote," "vote of the electorate," "election," and "elections." By way of comparison, article XIII D, section 6, subdivision (a) (section 6(a)), which sets forth the requirements for majority protest proceedings on a proposed fee (which is the only voter approval requirement for sewer, water, and refuge collection fees, and is the first phase of voter approval for other property-related fees), does not use any of these terms. Other provisions of Proposition 218 use "election" and "vote" to refer to votes by the general electorate that presumably are governed by article II. (Art. XIII C, § 2, subds. (b), (c), (d); see *Bighorn, supra,* 39 Cal.4th at pp. 213-214 ["[W]hen a word has been used in different parts of a single enactment, courts normally infer that the word was intended to have the same meaning throughout"].) Similarly, Proposition 13, the predecessor of Proposition 218, uses the word "election" in that sense. (Art. XIII A, § 4; see *Apartment Assn., supra,* 24 Cal.4th at pp. 838-839

["Proposition 218 is Proposition 13's progeny . . . [and] must be construed in that context"].) Arguably when used in the context of real property taxation elections, the terms "vote" and "election" suggest a secret ballot election of the sort used to elect candidates or pass initiatives.

On the other hand, article XIII D, section 6(c) includes a significant express qualification on the terms "vote" and "election." It provides, "An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision." (Art. XIII D, § 6(c).) Our interpretation of this qualifying statement entails three subsidiary inquiries. First, what is meant by the "procedures . . . for increases in assessments?" Second, what is meant by "similar to?" Third, what is the significance of the fact that the qualifying statement applies to "the conduct of *elections* under this subdivision?" (Italics added.)

2. *"Procedures . . . for Increases in Assessments"*

The District argues that "procedures . . . for increases in assessments" encompass the specific procedures that were adopted by the Legislature *after* Proposition 218 passed to implement the initiative, specifically Government Code section 53753. However, the voters could not have intended to approve procedures that did not exist at the time they approved the initiative. Nor can "procedures . . . for increases in assessments" reasonably be read as a reference to statutory procedures that were in effect at the time Proposition 218 was adopted. The initiative imposed new procedural requirements on increases in assessments, which were clearly intended to supersede the existing statutory procedures.

We conclude, therefore, that "procedures . . . for increases in assessments" must mean the assessment procedures that are imposed by Proposition 218 itself. Article XIII D, section 4, subdivisions (c) to (e) sets forth those procedures. Section 4 does not use the terms "election" or "vote." It does refer to "ballots": it requires a "ballot" to be sent to the property owners who will be affected by a proposed assessment, along with a conspicuous notice of the procedures applicable to the "completion, return, and tabulation of the *ballots*" and a disclosure that "a majority protest, as defined in subdivision (e), will

result in the assessment not being imposed." (Art. XIII D, § 4, subd. (c), italics added.) Majority protest is defined as "*ballots* submitted in opposition to the assessment exceed the *ballots* submitted in favor of the assessment." (Art. XIII D, § 4, subd. (e), italics added.)[9]

These balloting requirements are silent as to whether the balloting must or may be secret. Several of the requirements suggest a nonsecret vote. The ballot must be one "whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment,"[10] which suggests that these three pieces of information will appear on a single piece of paper in contrast to the typical election ballot that does not identify the voter. (Art. XIII D, § 4, subd. (d).) The ballots must be tabulated "[a]t the public hearing," which suggests the information on the ballot might become public at the hearing. (Art. XIII D, § 4, subd. (e).) Finally, ballots must be "weighted according to the proportional financial obligation of the affected property," which requires the person actually tabulating the ballots to take the identity of

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[9] Article XIII D, section 4, subdivision (g) provides: "Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the *right to vote* for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds *vote of the electorate* in the district in addition to being approved by the property owners as required by subdivision (e)." (Italics added.) This provision tends to demonstrate that voters did *not* intend assessment balloting under article XIII D, section 4 to be a "vote" within the ordinary or constitutional meaning of the term, absent a federal legal ruling to the contrary.

[10] Greene argues that the use of the word "may" in this passage means that the property owner has the choice whether or not to identify him or herself on the ballot. This is not a reasonable construction of the passage. "May indicate" applies not only to the voter's name, but also the identity of the parcel and the property owner's vote. Those pieces of information are essential to counting (and weighting) the property owner's vote. Therefore, the use of "may" in the passage has no more significance than if the passage stated that the agency must provide a ballot whereby the property owner may vote. To the extent it implies voluntariness, it is the choice whether to vote at all. If the property owner wants to cast a vote, he or she must provide the listed information.

the parcel (and thus of the property owner) into account, again suggesting a nonsecret procedure. (*Ibid.*)

On the other hand, an agency could comply with article XIII D, section 4 while maintaining secrecy in voting. The information on the ballot need not be publicly disclosed at the public hearing. The persons tabulating the ballots could use the information on the ballot (even if all gathered on a single piece of paper) to validate, weight, and count the ballots but keep the information confidential in the absence of a challenge to the balloting resulting in a court disclosure order. Indeed, this was the procedure prescribed for the District's fee election under the Election Procedures.[11]

Alternatively, the voter and parcel identifying information could be placed on the outside of an envelope that contains the ballot, in the manner of absentee voting. (See Elec. Code, §§ 3010-3011.) The voter's qualification could then be confirmed and the weight to be accorded the ballot calculated before the ballot was opened. There would need to be a mechanism to associate the actual vote with the weight of the ballot, but this could be done using computer coding to avoid public disclosure of any individual property owner's vote (i.e., the association of a particular voter to a particular vote would be hidden within the computer data bank unless ordered disclosed on a challenge to the

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[11] The persons designated to conduct the election ("the Clerk") were directed to "date stamp the return envelopes of the unopened ballots [upon receipt] and deposit the unopened, date-stamped envelopes into a secure container (the 'Lock Box') to be kept in the office of the Clerk for such purpose. The Clerk shall keep the ballots in the Lock Box until the commencement of canvassing the ballots, ... [¶] Only the Clerk and the Clerk's deputies shall have access to the Lock Box and to the ballots in the Lock Box. . . . No ballot shall be removed from its return envelope prior to the time specified for commencement of canvassing ballots. [¶] . . . [¶] During and after the canvass of ballots, neither the Clerk nor any person deputized by the Clerk . . . shall disclose the contents of any individual ballot that identifies how a voter voted to any person or entity, including any member of the Board, District staff or any member of the public, unless ordered to do so by a court of competent jurisdiction. [¶] No report, in written, electronic or other form, shall be produced, nor shall any record (other than the ballots themselves) be maintained in such a manner that would disclose how any voter voted."

balloting) or by some other mechanism strictly limiting the disclosure of information that would link the identity of a voter to a yes or no vote.

In sum, we conclude that the phrase "procedures . . . for increases in assessments" in article XIII D, section 6(c) are the procedures described in article XIII D, section 4, subdivisions (c) to (e). Those procedures in some ways suggest a nonsecret process, but they may also be followed while maintaining secrecy in voting. Therefore, this particular phrase does not clarify whether voting in a section 6(c) fee election must be secret.[12]

3. *"Similar to"*

The qualifying statement in article XIII D, section 6(c) authorizes the use of procedures "similar to," not "the same as," assessment balloting procedures. (Art. XIII D, § 6(c).) This language introduces additional ambiguity into the provision. If "similar to" encompasses "the same as," the provision authorizes the use of procedures that comply with article XIII D, section 4, subdivisions (c) to (e) without qualification. "Similar to," however, might indicate that agencies may use such procedures only if they do not conflict with the "election" requirement. For example, the provision might authorize the use of the mail balloting and vote weighting procedures that appear in section 4 without also authorizing nonsecret voting (assuming for purposes of argument that section 4 authorizes nonsecret voting). The "similar to" phrase is ambiguous in this respect.

4. *"Conduct of Elections under this Subdivision"*

The qualifying statement authorizes the use of procedures similar to those for increases in assessments in the "conduct of *elections* under this subdivision." (Art. XIII D, § 6(c), italics added.) Article XIII D, section 6(c) describes two types of elections: "a majority vote of the property owners of the property subject to the fee or charge *or*, at the option of the agency, [ ] a two-thirds vote of the electorate residing in the affected area." (*Ibid.*, italics added.) If we construe "similar to" to authorize an

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[12] We need not and do not decide whether secret voting is required in assessment balloting under article XIII D, section 4.

agency to conduct a section 6(c) election using the procedures for increases in assessments in article XIII D, section 4, and if we conclude those procedures do not include a secret vote, section 6(c) would appear to authorize an agency to conduct a general vote of the electorate in that manner. This startling consequence strongly suggests that "similar to" in the qualifying statement of section 6(c) only authorizes the use of the section 4 assessment balloting procedures if the procedures are compatible with the "election" requirement.

5. *The Article XIII D, Section 6(c) "Election" Requirement is Ambiguous*

In sum, it is unclear from the language of article XIII D, section 6(c) whether the fee election required by that subdivision may be conducted without ensuring secrecy in voting. The initiative's use of the term "elections" and "vote" strongly suggest a secret ballot procedure. Although the "election" requirement is expressly qualified by a provision authorizing the use of "procedures similar to those for increases in assessments," those procedures (set forth in article XIII D, section 4, subdivisions (c) to (e)) do not clearly permit nonsecret voting. Even if they did, section 6(c) only authorizes procedures "similar to" the assessment balloting procedures and it requires the agency to conduct "elections." The qualifying statement could reasonably be construed to authorize mail balloting (for any fee election) and vote weighting (for fee elections restricted to property owners) without authorizing nonsecret voting.

Because the meaning of the article XIII D, section 6(c) "election" requirement is ambiguous, we turn to principles of constitutional construction and extrinsic aids to resolve the ambiguity. (See *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 562-563; *Silicon Valley, supra,* 44 Cal.4th at pp. 444-445.) We consider the coequal constitutional secret voting requirement and whether and how it should be harmonized with article XIII D, section 6(c); the initiative's language indicating its proper construction; the ballot pamphlet as evidence of voter intent; the historical context of Proposition 218 (i.e., existing assessment approval practices at the

time voters adopted the initiative); and the significance of the Proposition 218 implementing legislation, including Government Code section 53753.

B. *Construing Article XIII D, Section 6(c) in Light of Article II, Section 7*

Discussing the interpretation of a constitutional provision, the Supreme Court has explained: "It is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject. [Citation.] The goal, of course, is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole. [Citations.]" (*Fields v. Eu* (1976) 18 Cal.3d 322, 328; see also *Serrano v. Priest* (1971) 5 Cal.3d 584, 596 ["where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted"]; *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 866 ["It is well settled that a constitutional amendment is to be construed in harmony with the existing framework of which it forms a part, so as to avoid a conflict"].)

A coequal article of the California Constitution, which governs voting and elections, provides, "Voting shall be secret." (Art. II, § 7.) "Voting" is not qualified in article II, section 7 to make it inapplicable to a fee election, and "election" and "vote" are not qualified in article XIII D, section 6(c) to make article II, section 7 inapplicable. On their face, therefore, article XIII D, section 6(c) and article II, section 7 are most easily harmonized by construing the "election" required by article XIII D, section 6(c) to be a secret-ballot election.

The District observes that the Supreme Court held long ago that article II does *not* apply to assessment elections. However, the rationale of those cases has been undermined by the passage of Proposition 218 itself, as the Supreme Court recently acknowledged in *Silicon Valley, supra,* 44 Cal.4th 431.

1. *Imposition of Fees and Assessments on Real Property before* Silicon Valley

Before the passage of Proposition 218, no election or other form of voter approval was constitutionally required before an assessment or fee could be imposed on property owners. Due process required only that property owners be given notice and an opportunity to be heard on two issues: whether the land included within an assessment district would be benefited by the proposed improvements (the substantive basis for the assessment), and whether the assessment imposed on an individual property owner was accurately determined. (See *Fallbrook Irrigation District v. Bradley* (1896) 164 U.S. 112, 167, 174-175; *In re Orosi Public Utility Dist.* (1925) 196 Cal. 43, 50-51.)

When the Legislature *chose* to require voter approval, the Legislature determined how the voting or taxpayer approval would be conducted. State constitutional provisions governing elections, including the provision requiring voting to be secret, did not apply. (*Tarpey v. McClure* (1923) 190 Cal. 593, 606 (*Tarpey*) [citing cases].)[13] "[T]he state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. . . . It is in accord with the progressive spirit of our government to give to the people, or any part of them, the largest possible control in matters peculiarly affecting them and their interests. It is a concession to this spirit, and not the compulsion of the law, which prompts the legislature to give the landowners so large a voice in the management of these affairs." (*People v. Sacramento Drainage Dist.* (1909) 155 Cal. 373, 382 (*Drainage Dist.*) [rejecting argument that former art. I, § 11, and former art. IV, § 25 (predecessor of current art. IV, § 16), prohibiting certain special laws, applied to

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[13] Neither was the voting or taxpayer approval process subject to the one person one vote principle of the federal and state equal protection clauses. That principle is inapplicable to an election to form a limited purpose assessment district that will have a disproportionate effect on property owners. (*Salyer Land Co. v. Tulare Water District* (1973) 410 U.S. 719, 728; *Southern Cal. Rapid Transit Dist. v Bolen* (1992) 1 Cal.4th 654, 665.) Voting on such assessments may be restricted to property owners and weighted according to the value of the voter's property without violating the constitution. (*Salyer*, at p. 728, 733-734; *Bolen*, at p. 659.)

assessment election] *id.* at pp. 381-382; see *Potter v. Santa Barbara* (1911) 160 Cal. 349, 355-356 (*Potter*) [following *Drainage Dist.* and rejecting argument that former art. I, § 24 (predecessor of current art. I, § 22), which prohibited property qualification for right to vote, applied to assessment elections]; see *Tarpey*, at p. 606 [following *Potter* and rejecting argument that constitutional secret voting requirement applied to assessment elections].)

In *Alden v. Superior Court*, for example, the court considered whether an election on the formation of a water district (a type of assessment district) was invalid because the paper used for the ballots was so thin that the votes were not kept secret. (*Alden v. Superior Court* (1963) 212 Cal.App.2d 764, 766-767.) The court held the constitutional requirement for secrecy in voting did not apply. "The creation of such a district is a legislative act, and the Legislature may enact conditions, upon the performance of which the district shall be regarded as organized. (*Tarpey*[, *supra,* 190 Cal. at p. 600].) The constitutional provisions which govern elections held in the ordinary course of civil government do not control such formation elections." (*Alden,* at p. 770.)

Before the adoption of Proposition 218, the courts also held that legislative determinations on the *substantive* standards for assessments (i.e., whether the assessment would benefit the affected land) were subject only to very narrow judicial review. In so ruling, the courts relied on a similar rationale: "[T]he establishment of a special assessment district takes place as a result of a *peculiarly legislative process* grounded in the taxing power of the sovereign. . . . The scope of judicial review of such actions is accordingly quite narrow." (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683-684 (*Dawson*), italics added; see also *Knox, supra,* 4 Cal.4th at p. 147.)

2. Silicon Valley *Changes the Landscape*

In *Silicon Valley*, the California Supreme Court held that the passage of Proposition 218 undermined the legislative-function rationale for the deferential standard of review on the substantive requirements for assessments. (*Silicon Valley, supra,* 44 Cal.4th at pp. 450-451.) "Before Proposition 218 became law, special assessment laws were generally *statutory*, and the constitutional separation of powers doctrine served as a

foundation for a more deferential standard of review by the courts. But after Proposition 218 passed, an assessment's validity, including the substantive requirements, is now a constitutional question. 'There is a clear limitation [ ] upon the power of the Legislature to regulate the exercise of a constitutional right.' [Citation.]." (*Silicon Valley, supra,* 44 Cal.4th at p. 448.) The court concluded that an agency's determination whether an assessment met the substantive requirements of article XIII D, section 4 is subject to independent rather than deferential judicial review. (*Id.* at p. 450.)

While the specific holding of *Silicon Valley, supra,* 44 Cal.4th 431 is not directly relevant to this appeal, the Court's analysis provides a template for ours. The *Tarpey* line of cases held that article II, section 5 (now art. II, § 7) and other constitutional provisions governing elections were inapplicable to assessment elections because voter approval procedures for assessments were matters of legislative discretion and were not constitutionally compelled. (See *Tarpey, supra,* 190 Cal. at p. 606.) Under Proposition 218, however, voter approval procedures for assessments and fees now have constitutional status. (Art. XIII D.) The Legislature is no longer free to impose an assessment "without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees." (*Drainage Dist., supra,* 155 Cal. at p. 382.) An election now takes place not because of the progressive spirit of the Legislature, but due to the "compulsion of the law." (Cf. *ibid.*) Therefore, the rationale of the pre-Proposition 218 cases no longer applies.

The District argues that Proposition 218 *adopted* the *Tarpey* approach and thus confirms that assessment balloting and fee elections are different from ordinary elections and fall outside the scope of constitutional provisions such as article I, section 22, and article II, section 7. The District specifically relies on article XIII D's requirement that assessment balloting (and authorization that fee elections) be limited to property owners, which ordinarily would violate article I, section 22. (See *Potter, supra,* 160 Cal. at p. 355 [approving property qualification despite constitutional prohibition]; *Tarpey, supra,* 190 Cal. at p. 606 [same].) These *express* article XIII D provisions limiting balloting or voting to property owners, however, *expressly* provide that article I, section 22 does not

apply to article XIII D assessment balloting or fee elections despite the new constitutional status of the ballot and election requirements. Article XIII D is *silent* as to voting secrecy. Thus, the constitutional "election" requirement in article XIII D, section 6(c) is unqualified as far as voting secrecy is concerned. The *Tarpey* line of cases is irrelevant: the cases shed no light on whether nonsecret voting is constitutionally permissible in the new post-Proposition 218 context of constitutional voter approval requirements, just as the *Dawson* and *Knox* cases are no longer helpful in determining the appropriate standard of review on the substantive standard for assessments under Proposition 218. (See *Silicon Valley*, *supra,* 44 Cal.4th at p. 450.)

We conclude that article XIII D, section 6(c) and article II, section 7 are best harmonized by construing "election" in article XIII D, section 6(c) as a secret ballot election.

C. Liberal Construction to Further the Purposes of Proposition 218

Proposition 218 itself provides guidance for our construction of ambiguous provisions of the initiative. Section 5 (an uncodified section of the initiative measure) provides, "The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, Ballot Pamp., General Election, *supra*, text of Prop. 218, § 5, p. 109; see *Silicon Valley*, *supra*, 44 Cal.4th at p. 448 [relying in part on Prop. 218, § 5 for guidance in construing article XIII D].) Section 2 (also uncodified) elaborates on the measure's purpose: "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Ballot Pamp., General Election, *supra,* text of Prop. 218, § 2, p. 108; *Silicon Valley*, at p. 446 [relying in part on Prop. 218, § 2 ("Proposition 218's preamble") for guidance in construing article XIII D].)

As rephrased by the Supreme Court, "Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; . . . and limit the methods by which local governments exact revenue from taxpayers without their consent. [ ] Proposition 218's underlying purpose was to limit government's power to exact revenue and to curtail the deference that had been traditionally accorded legislative enactments on fees, assessments, and charges . . . ." (*Silicon Valley, supra,* 44 Cal.4th at p. 448; see also *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420 ["[T]he aim of Proposition 218 [is] to enhance taxpayer consent"].)

Requiring secret voting furthers Proposition 218's twin purposes of limiting the government's power to exact revenue and to enhance taxpayer consent. In an article XIII D, section 6(c) fee election, the agency conducting the election is a proponent of the proposed fee. Conflict is not unlikely between public officials' desire to finance costly services and taxpayers' resistance to the financial burden of such fees. (See *Ventura Group Ventures, Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1103 ["Proposition 13 put local government on a strict budget and thus required it to make painful choices"]; *Apartment Assn., supra,* 24 Cal.4th at pp. 838-839 ["Proposition 218 is Proposition 13's progeny . . . [and] must be construed in that context"].) Secrecy in voting enhances free taxpayer consent to approve or reject a proposed fee in the face of local controversy about its merits and it makes it more difficult for government to extract revenue from unwilling taxpayers. Therefore, in liberally construing Proposition 218 to further its purposes, we construe the terms "election" and "voting" to mean secret voting.

D. *Ballot Pamphlet*

If the words of a constitutional provision are ambiguous, we may consult the provision's legislative history for evidence of the enacting party's intent, which in the case of a voter initiative is the ballot pamphlet. (*Silicon Valley, supra,* 44 Cal.4th at pp. 444-445; *City and County of San Francisco v. County of San Mateo, supra,* 10 Cal.4th at p. 563; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 (*Amador Valley*).)

In the ballot pamphlet for Proposition 218, both the Legislative Analyst's analysis and the ballot arguments communicated to voters that the initiative implicated their *voting rights* and there was no indication that the right to a secret ballot would be impaired.

The Legislative Analyst's analysis of the initiative used the words "election" and "vote" for both the assessment balloting procedure prescribed by article XIII D, section 4, and for the fee election required by article XIII D, section 6(c). (Ballot Pamp., General Election, *supra*, analysis of Prop. 218 by the Legislative Analyst, pp. 73-74.) In contrast to existing law, which "generally require[d] local governments to reject a proposed assessment if more than 50 percent of the property owners *protest[ed] in writing*," Proposition 218 would require local governments to "hold a mail-in *election* for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to *vote*. *Ballots* cast in these elections would be weighted . . . ." (*Id.* at p. 73-74, italics added.) On fees, the issue directly relevant here, the analyst wrote that under Proposition 218 local governments would first have to "mail information about the fee to every property owner, reject the fee if a majority of the property owners *protest in writing*" and, if not, "hold an *election* on the fee . . . ." (*Id.* at p. 73, italics added.) In sum, the Legislative Analyst contrasted "written protest" procedures, which were applicable to assessments before Proposition 218 and that would be applicable to initial fee approval under Proposition 218, to the "election" and voting that would be required for final approval of assessments *and* fees (with some exceptions) under the initiative. That is, the initiative would establish taxpayer voting rights with respect to assessments as well as fees.[14]

The overwhelming focus of the arguments in support of and in opposition to the initiative was also on the issue of voting rights. Proponents of the measure argued that the initiative would "guarantee[] your right to vote on local tax increases—even when

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[14] Again, the issue of whether assessment balloting under article XIII D, section 4 may be conducted without secret voting is not before us.

they are called something else, like 'assessments' or 'fees' . . . ." (Ballot Pamp., General Election, *supra,* argument in favor of Proposition 218, p. 76.) After describing how local politicians had used assessments to create loopholes in Proposition 13's requirement of voter approval for taxes, the proponents argued, "TAXPAYERS HAVE *NO RIGHT TO VOTE* ON THESE TAX INCREASES AND OTHERS LIKE THEM [i.e., assessments] UNLESS PROPOSITION 218 PASSES!" (*Ibid.*) The proponents repeatedly argued that the initiative "gives taxpayers the right to vote on taxes." (*Id.* at p. 77.) Opponents of the measure also focused on voting rights, but alleged that those rights would be infringed because of the property qualification for voting on assessments and the weighting of assessment ballots. The opponents did not suggest that voting rights would be further infringed by the absence of a secret ballot. Neither did the proponents. Voters reading these ballot arguments would reasonably conclude that "voting rights" were at issue and that those rights arguably were infringed by limiting one's voting rights according to property qualifications and weighted ballots. In other respects, however, voting rights were preserved or enhanced.

In sum, the ballot pamphlet strongly suggested to voters that the impact of Proposition 218 was to enhance the voting power of taxpayers, with the sole qualification that votes on property assessments and fees could be limited to property owners and weighted by the impact of the exaction on each individual voter. The pamphlet gave no indication that the right to a secret ballot would be infringed and consequently suggested it would be preserved. The ballot pamphlet, therefore, supports a construction of article XIII D, section 6(c) to require secret voting.

E. *Proposition 218 Implementation Legislation*

Generally, legislative implementation of constitutional amendments adopted by initiative are traditionally accorded considerable weight by courts construing the amendments. *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 693;

Delaney v. Lowery (1944) 25 Cal.2d 561, 568-569.[15] Yet a cornerstone of this deference is evidence that the construction by the Legislature is "contemporaneous" with the initiative. (*Amador Valley, supra,* 22 Cal.3d at pp. 245-246 (citing cases).)

Significantly, the passage of Proposition 218 entrusts to the courts heightened obligations to *assess* whether a "local agency acting in a legislative capacity . . . exercise[s] its discretion in a way that violates constitutional provisions or *undermines their effect*." (*Silicon Valley, supra,* 44 Cal.4th at p. 448, italics added.) Since *Silicon Valley*, courts cannot " ' " ' "lightly disregard" ' " ' " this " ' " ' "clear constitutional mandate." ' " ' " (*Ibid.*) Therefore, Proposition 218 and the lead case evaluating it, *Silicon Valley*, present a fundamental shift in the role of courts vis a vis real property fees passed by local government.

With these principles in mind, we now review the Proposition 218 Omnibus Implementation Act (Act) and the District's analysis of its impact. The District argues that the Legislature interpreted article XIII D, section 6(c) *not* to require secret voting when it enacted and subsequently amended Government Code section 53753 as part of the Proposition 218 Omnibus Implementation Act (Act). (Stats. 1997, ch. 38, Legis. Counsel's Digest, § 1.) We disagree. Government Code section 53753 addresses only assessment procedures, not fee elections under article XIII D, section 6(c), and the Act otherwise is either silent on the conduct of such elections or it suggests they should be conducted with secret voting.

As relevant here, the Act amended section 4000 of the Elections Code and added two articles to the Government Code: article 4.3 (section 53739), and article 4.6 (sections 53750, 53753, and 53753.5). (Stats. 1997, ch. 38, §§ 2, 4, 5.) Effective January 1, 2008, a new section was added to Government Code article 4.6 (section 53755).

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[15] The Legislature, of course, has no power to legislate in conflict with a constitutional provision where the meaning of that provision is clear. (*Silicon Valley, supra,* 44 Cal.4th at p. 448.)

Government Code section 53750 defines many terms "[f]or purposes of Article XIII C and Article XIII D of the California Constitution and this article [4.6]." (Gov. Code, § 53750.) The statute refers to taxes, assessments, and fees. (*Ibid.*) Some of its subdivisions are expressly applicable to taxes and fees (*id.*, subds. (e), (h)(2)), some to taxes, assessments, and fees (*id.*, subds. (h)(1), (h)(3)), and some to assessments and fees (*id.*, subds. (g), (i)). All three subdivisions of Government Code section 53739 expressly apply to taxes, assessments, and fees. (Gov. Code, § 53739, subds. (a), (b)(1), (b)(2).)

In contrast, Government Code sections 53753 and 53753.5, which address the notice, protest, and hearing requirements for assessments under article XIII D, section 4, expressly apply only to *assessments*. (Gov. Code, §§ 53753, 53753.5.) They do not refer to fees at all. The logical conclusion is that the Legislature did not intend these sections to apply to fees in addition to assessments. If the Legislature believed the assessment balloting procedure was sufficient for the conduct of an article XIII D, section 6(c) fee election, we would have expected the Act to say so.

Moreover, Elections Code section 4000 draws a distinction between "election[s]" and "*assessment* ballot proceeding[s]" conducted under Proposition 218. (Elec. Code, § 4000, subd. (c)(8), italics added.) It provides that an "election or assessment ballot proceeding required or authorized by Article XIII C or XIII D of the California Constitution" may be conducted by mail. (*Ibid.*) The quoted phrasing is significant for two reasons. First, it confirms that the Legislature intended the ballot proceeding

described in section 53753 to apply only to assessments.[16] In case there were any doubt about this intent, the amendment further provides: "when an assessment ballot proceeding is conducted by mail pursuant to this section, the following rules apply: [¶] (A) The proceeding shall be denominated an 'assessment ballot proceeding' *rather than an election*. [¶] (B) Ballots shall be denominated 'assessment ballots.' " (Elec. Code, § 4000, subd. (c)(8), italics added.)

Second, the phrasing of Elections Code section 4000, subdivision (c)(8) acknowledges two types of procedures that are required or authorized under Proposition 218 and might be conducted via a mailed ballot: elections and assessment ballot proceedings. It emphasizes the fact that those procedures are different because it imposes requirements on an "assessment ballot proceeding" that do not apply to an "election." Moreover, the very purpose of those additional requirements appears to expressly *distinguish* an "assessment ballot proceeding" from an election to voters. A subdivision of Government Code section 53753 likewise distinguishes an assessment ballot proceeding (there denominated a majority protest proceeding) from an election: "The majority protest proceedings described in this subdivision [i.e., the tabulation of the ballots] shall not constitute an election or voting for purposes of Article II of the

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[16] Despite some variation in the language of the Act, it is clear that "assessment ballot proceeding" is a reference to the procedures set forth in Government Code section 53753. Section 53753 never uses the full phrase "assessment ballot proceeding," but it frequently refers to "assessment ballots." (See Gov. Code, § 53753, subds. (b) ["procedures for the completion, return, and tabulation of the assessment ballots"]; *id.*, subds. (c), (e)(1), (e)(2) [numerous references to "assessment ballot" or "assessment ballots"].) There are a few references to "majority protests" (Gov. Code § 53753, subds. (c), (e)(2), (e)(3)), and the tabulation part of the procedures are referred to as "majority protest proceedings" (*id.*, subd. (e)(4)). However, there is nothing else in the Act that could constitute "assessment ballot proceeding[s] required or authorized by Article [XIII C] or [XIII D] of the California Constitution." Because this was the only legislation enacted to implement Proposition 218 at the time "assessment ballot proceeding" was added to Elections Code section 4000, subdivision (c)(8), we can also reasonably assume the phrase is not a reference to some other statutory assessment ballot proceeding.

California Constitution or of the California Elections Code." (Gov. Code, § 53753, subd. (e)(4).)

Both at the time the Act was first passed and at the time of the District fee election at issue, the only voter approved procedure discussed in the Act relating to Proposition 218 real property fees was an "election." (Elec. Code, § 4000, subd. (c)(8).) In sum, the conduct of an article XIII D, section 6(c) fee election is not addressed in the Act, other than to provide that it may be conducted by mail. (Elec. Code, § 4000, subd. (c)(8).)

F. *Legal Principles Compel Our Conclusion the Secret Ballot is Part of a Fee Election*

The plain language of Proposition 218 requires an "election" and voting for approval of new or increased property-related fees (with exceptions not relevant here). (Art. XIII D, § 6(c).) "Election" is used in other parts of Proposition 218 and its predecessor Proposition 13 to refer to voting by the general electorate that inferentially is conducted by secret ballot. A secret ballot election is also the meaning of "election" that is most familiar to the voters who passed the initiative.

In an important qualifying statement, article XIII D, section 6(c) permits agencies to use "procedures similar to those for increases in assessments in the conduct of elections under this subdivision." "[P]rocedures . . . for increases in assessments" refers to the assessment procedures in article XIII D, section 4, subdivisions (c) to (e), and those procedures do not clearly require or permit nonsecret balloting. Section 6(c) authorizes procedures "similar to," not "the same as," those in section 4 and it authorizes such procedures not only for property owner fee elections but also for general electorate fee elections. We determine this language permits the use of procedures such as mail balloting and vote weighting that are not inconsistent with the "election" requirement of section 6(c), and not to authorize nonsecret voting.

A coequal provision of the constitution, article II, section 7 provides, "Voting shall be secret," and is most reasonably harmonized with article XIII D, section 6(c) by construing "election" in article XIII D, section 6(c) to require secret voting. The initiative itself directs us to construe the statute liberally to further its purposes, which

include enhancing taxpayer consent and restricting government's ability to extract revenue from property owners. These interpretive aids support a construction of section 6(c) to require secret voting. The ballot materials also support that interpretation. They emphasized the fact that the initiative implicated voting rights and qualified the ordinary understanding of those rights only by explaining that voting in some circumstances could be limited to property owners and weighted by the burden of an exaction on those property owners. No mention was made of a nonsecret ballot. Finally, the implementing legislation for Proposition 218 does not authorize the use of nonsecret voting in an article XIII D, section 6(c) fee election.

Having considered the plain language of the initiative, a coequal provision of the California Constitution, and extrinsic aids to our interpretation of the constitutional provisions, we conclude the voters who approved Proposition 218 intended the voting in an article XIII D, section 6(c) fee election to be secret.

III. *Greene's Election Contest*

Greene contested the election results on the ground that "eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote." (Elec. Code, § 16100, subd. (e).) He asked for a recount and an order annulling and setting aside the election results. (Elec. Code, §§ 16500, 16601, 16603.)

" 'It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citations.] . . . The contestant has the burden of proving the defect in the election by clear and convincing evidence. [Citations.]" (*Wilks v. Mouton, supra,* 42 Cal.3d at p. 404.) On the other hand, " 'preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election.' [Citation.]" (*Gooch, supra,* 5 Cal.4th at p. 278.) " '[T]o uphold an election in the face of illegalities which affected the result [creates] a situation in which the will of the people may be thwarted by upholding an election.' [Citation.]" (*Ibid.*) "[A] court must not 'sacrifice the integrity of the [elective] process on the altar of electoral finality.' [Citation.]" (*Id.* at p. 282.)

Greene initially framed his election contest claim as a challenge to the *signature* requirement on the ballot. He speculated that voters who did not sign their ballots did so in order to preserve the secrecy of the ballot. However, even without a signature the ballots were printed with the address of the parcel and name and address of the record owner of the parcel. Greene does not explain why a voter who wanted to vote secretly would submit such a ballot, signed or unsigned. Greene clarified at oral argument, and his appellate briefs, and the record of the trial court proceedings confirm, that his central legal argument in this litigation has always been that article II, section 7's secret voting requirement applies to an article XIII D, section 6(c) fee election. We have concluded this argument is correct.

The District argues that a lack of secrecy in the election is not a ground for setting aside the election results pursuant to Elections Code section 16100, subdivision (e), which was the basis for Greene's election contest. However, "[t]he power of the court to invalidate a ballot measure on constitutional grounds is an exception to [the statutory] limitation on election contest proceedings." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192 & fn. 17; *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 131 (*Canales*).) The grounds for invalidating an election that are enumerated in Elections Code section 16100 must be construed to include violations of citizens' constitutional secret voting rights "if the judiciary is to remain available for the vindication of the fundamental rights at stake." (*Canales*, at p. 131.)

Because the trial court held that secret voting was not required under article XIII D, section 6(c), it never reached the factual issue of whether the election as conducted by the District preserved secrecy in voting. We note that the District's Election Procedures provided that only designated persons would have access to the ballots, required the ballots to remain under seal until tabulation, and expressly barred the disclosure of any individual's vote absent a court order. These procedures, if followed, might have been sufficient to preserve the secrecy of the voting. However, insofar as the record indicates, voters were not provided any assurances that their votes would remain confidential both before and after tabulation of the ballots. Although the Election

Procedures were public documents, they were not mailed to voters and the materials provided to voters to describe the election procedures (and included in the record) did not assure them of voting secrecy.[17] Voters who are required to cast their votes on ballots that disclose their names and identify the property they own and that must be signed to be counted, and who are not provided assurances that their votes will be kept permanently confidential, may reasonably be said to have been "denied their right to vote" (Elec. Code, § 16100, subd. (e)) as that right is protected by article II, section 7. That is, they have been denied their right to vote freely with the confidence that their votes will remain secret before and after tabulation of the ballots.

"An election shall not be set aside on account of eligible voters being denied the right to vote, unless it appears that a sufficient number of voters were denied the right to vote as to change the result." (Elec. Code, §§ 16204, 16402.5 [identical statutes].) In *Gooch*, the Supreme Court construed similar language and concluded, "In utilizing the phrase 'it appears,' we think the Legislature contemplated circumstances, such as those at hand, in which illegal votes cannot be attributed to any one candidate, but nevertheless 'appear' sufficient in number or effect to have altered the outcome of the election." (*Gooch, supra,* 5 Cal.4th at pp. 282-283 [construing former Elec. Code, § 20024].)[18] In

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[17] On December 15, 2008, the District asked us to take judicial notice of a Ballot Notice that its Director avers was sent to all voters in the fee election along with the ballots. Greene avers that he did not receive the notice with his ballot and he questions the authenticity of the notice. Because the facts of which the District wants us to take judicial notice—that the District published the notice and mailed it to voters with their ballots—are disputed, they are not proper subjects of judicial notice. The request is denied.

[18] Election Code former section 20024 was identical to current section 16203, which provides: "An election shall not be set aside on account of illegal votes, unless it appears that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person." (See *Gooch, supra,* 5 Cal.4th at p. 282 [quoting Elec. Code former § 20024]; see Stats. 1961, ch. 23.)

Gooch, the Court concluded that 930 illegal ballots had been cast in five school board races and as to each race the illegal ballots could have affected the outcome of the election. (*Id.* at pp. 270, 276.) Because the illegal ballots had been mixed in with the legal ballots, however, it was impossible to identify them and determine if those specific ballots had actually changed the results of the election. (*Id.* at p. 276.) The Court nevertheless concluded that in light of "widespread illegal voting practices that permeated th[e] election" on behalf of the winning candidates, the election results should be set aside. (*Id.* at p. 285; see also *id.* at p. 282; see also *Canales, supra,* 3 Cal.3d at pp. 126-128 [relying on circumstantial evidence that illegalities affected outcome to set aside an election].)

Here, the lack of secrecy in the District's fee election was a widespread violation of a constitutional safeguard of free elections. Although the record does not demonstrate that particular votes were affected by the lack of secrecy in a manner that changed the outcome, such a showing is unnecessary under *Gooch*. (*Gooch, supra,* 5 Cal.4th at p. 282.) Our conclusion is consistent with a long line of cases recognizing that violations of *mandatory* provisions of election laws vitiate an election, and even violations of merely directory provisions vitiate an election where it can be shown that the violation affected the outcome or "injuriously affected" the "rights of the voters" or where the violation was so severe as to allow unfairness to be presumed. (*Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430, 432; *Tebbe v. Smith* (1895) 108 Cal. 101, 111-112; *Atkinson v. Lorbeer* (1896) 111 Cal. 419, 422; see *Gooch*, at p. 278, fn. 7 [explaining that *Rideout* principle has been incorporated into Election Code as to statutory violations].) The constitutional violation at issue here is analogous to a mandatory statutory requirement (see *Atkinson*, at p. 422 [Australian ballot system is in many respects mandatory]; *Burson, supra,* 504 U.S. at pp. 202-203 [explaining Australian system was designed to secure secrecy in voting]), and it deprived every voter of his or her right to vote freely with the knowledge that his or her vote would remain confidential.

We set aside the District's fee election because the voters were instructed to cast signed ballots with their names and addresses printed on the face of the ballots and were

given no assurances that the ballot would be kept confidential. The votes cast were not a reliable expression of the popular will. (See *Canales, supra,* 3 Cal.3d at p. 127; *Gooch, supra,* 5 Cal.4th at p. 284.)[19]

DISPOSITION

We reverse the judgment and direct the trial court to enter judgment for Greene and to set aside and annul the July 25, 2007 election on whether to approve a storm drainage fee for Zone 9 of the Marin County Flood Control and Water Conservation District. The District shall pay Greene's costs.

DONDERO, J. *

We concur:

JONES, P. J.

NEEDHAM, J.

* Judge of the Superior Court of San Francisco City and County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[19] Because we set aside the election on the ground that it violated Article II, section 7, we need not address Greene's arguments that voters were not given adequate notice of the signature requirement and that the failure to count unsigned ballots violated equal protection principles.

Trial Court	Marin County Superior Court
Trial Judge	Honorable Lynn Duryee
For Plaintiff and Appellant	Ford Greene In propria persona
For Defendant and Respondent	Patrick K. Faulkner, County Counsel Sheila Shah Lichtblau, Deputy County Counsel
For Interveners and Respondents Friends of the Corte Madera Creek et al.	Ogletree, Deakins, Nash, Smoak & Stewart Thomas M. McInerney

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FORD GREENE,

Contestant and Appellant,

v.

MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT,

Defendant and Respondent.

FLOOD MITIGATION LEAGUE OF ROSS VALLEY ET AL.,

Intervenors and Respondents.

A120228

(Marin County
Super. Ct. No. CV 073767)

By the Court:

1. On its own motion, the Court is considering taking judicial notice of the committee reports on Senate Bill No. 55 (1997-1998 Reg. Sess.), as filed September 22, 1998, and Senate Bill No. 1477 (1999-2000 Reg. Sess.), as filed August 22, 2000 that are available at www.leginfo.ca.gov/bilinfo.html. (Evid. Code, §§ 452, subd. (c), 459, subd. (a).) These reports appear to shed light on the Legislature's interpretation of California Constitution article XIII D section 4, subdivisions (c) to (e), and indirectly on article XIII D section 6, subdivision (c). The court intends to "afford each party reasonable opportunity, . . . before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed." (Evid. Code, § 455, subd. (a).) On or before Monday, December 15, 2008, the parties may present that information to the court.

2. The court requests that Respondents respond to Appellant's argument at pages 4 to 8 in his reply brief that the Supreme Court's recent decision in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431 has

undermined the authority of *Alden v. Superior Court* (1963) 212 Cal.App.2d 764 and *Martinelli v. Morrow* (1916) 172 Cal. 472; see also *Tarpey v. McClure* (1923) 190 Cal. 593, 606. Assume that *Silicon Valley* concluded the deferential standard of review employed by courts to review the substantive validity of assessments and fees before the passage of Proposition 218 is no longer justified in light of the language in the initiative. Does this undermine the pre-Proposition 218 judicial decisions concluding that article II section 7 does not apply to assessment elections because the imposition of an assessment is a purely legislative act? (See *Tarpey, supra,* 190 Cal. at p. 606 [citing cases]; *Potter v. Santa Barbara* (1911) 160 Cal. 349, 355; *People v. Sacramento Drainage Dist.* (1909) 155 Cal. 373, 382.)

3. The court requests that all parties respond to the following questions. In light of the election procedures adopted by the board of supervisors of Respondent district—which designate certain persons to conduct the election, require that ballots remain sealed in their envelopes until tabulation of the ballots, provide that only the designated personnel shall have access to the ballots, and prohibit the disclosure of any individual voter's vote (App. Appx. at pp. 71-74)—was there any breach of voting secrecy in this election? If not, and assuming a secret voting requirement applies, was there nevertheless a violation of voting rights that is cognizable under Election Code section 16100, subdivision (e) because the voters apparently were provided no assurances on the ballot or in the accompanying materials that their votes would remain confidential? (App. Appx. at pp. 63, 76-78.)

Briefs shall be in the form specified in California Rules of Court, rule 8.204, and shall not exceed 10 pages, and shall be filed on or before December 15. 2008. Responses to this order shall be served on all opposing parties by facsimile transmission on the same day they are filed with the court.

Date DEC 05 2008

Jones, P.J.
P.J.

PROOF OF SERVICE
Ford Green v. Marin County Flood Control District, et al.
Court of Appeal *Case No. A120228*

I, Kimberly Nielsen, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 555 West 5th Street, 31st Floor, Los Angeles, California 90013. On April 20, 2009, I served the document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

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BY MAIL: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 20, 2009, at Los Angeles, California.

Kimberly Nielsen