

Case No. H042484

In the Court of Appeal, State of California

SIXTH APPELLATE DISTRICT

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**Monterey Peninsula Taxpayers' Association, et al.,**  
*Plaintiffs and Appellants*

vs.

**Board of Directors of the Monterey Peninsula Water  
Management District, et al.,**  
*Defendants and Respondents*

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Appeal from the Superior Court of the State of California  
County of Monterey, Case No. M123512  
Honorable Efren N. Iglesia, Judge Presiding

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**CALIFORNIA SPECIAL DISTRICT ASSOCIATION  
APPLICATION FOR PERMISSION TO FILE  
AN AMICUS CURIAE BRIEF IN SUPPORT OF  
DEFENDANTS AND RESPONDENTS;  
AMICUS CURIAE BRIEF**

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**APPLICATION FOR PERMISSION TO FILE AMICUS  
CURIAE BRIEF**

**TO THE HONORABLE PRESIDING JUSTICE:**

Pursuant to California Rules of Court, Rule 8.200(c), the California Special District Association (“CSDA”) respectfully applies to this Court for permission to file the amicus curiae brief that is combined with this application in support of Defendants and Respondents Monterey Peninsula Water Management District and its board of directors. CSDA respectfully submits that good cause exists to grant this application even though the normal 14-day window for filing an amicus brief closed many months ago.<sup>1</sup> CSDA’s amicus brief addresses a single question of law, whether the legislative action of a local government to establish a property-related fee is subject to referendum? CSDA believes the answer to that question, both before and after the adoption of Proposition 218, was and is “no”. Furthermore, following completion of the briefing in this case, CSDA learned

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<sup>1</sup> Rule 8.200 (c) (1) states, “Within 14 days after the last appellant's reply brief is filed or could have been filed under rule 8.212, whichever is earlier, any person or entity may serve and file an application for permission of the presiding justice to file an amicus curiae brief. For good cause, the presiding justice may allow later filing.” Appellant’s Reply Brief was filed on February 25, 2016.

that issue is pending in at least two other courts. (*Howard Jarvis Taxpayers Association, et al. v. Amador Water Agency, et al.*, Amador County Superior Court Case No. 16-CVC-09564, appeal pending, Third District Court of Appeal Case No. C081757; *Ebinger, et al. v. Yorba Linda Water District, et al.* Orange County Super. Ct., Case No. 30-2016-00829548.) Thus, the issue as presented in this case is no longer a mere local dispute as seemed to be the case when the principal briefing was filed, but has become a matter of statewide concern warranting CSDA's amicus participation and a reported decision by this Court.

CSDA is a California non-profit corporation consisting of in excess of 1,000 special district members throughout California. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA monitors litigation of concern to

its members and identifies those cases that are of statewide significance. CSDA has identified this case as being of such significance. CSDA members are California local governments that sustain their operations through taxes and other imposed revenue sources such as property-related fees. For sound policy reasons, the California Constitution, statutes, and judicial precedent have excluded revenue actions of local governments from the scope of the people's right of referendum under article II, section 8 of our Constitution which protects revenues for the usual and current expenses of government. That exemption from the referendum power is not so limited as Appellant suggests. Rather, it is broad, covering all revenues imposed to fund the operations of government.

In *Rossi v. Brown* (1995) 9 Cal. 4<sup>th</sup> 688, the California Supreme Court clearly explained the policy reasons that local revenues are exempt from the referendum. Unlike an initiative which, if adopted, makes new law prospectively, a referendum has the immediate effect of preventing a law from taking effect. Therefore, if an action imposing a tax or other revenue measure were subject to referendum, a local government's ability to raise funds needed for current operating expenses would be delayed

and might be frustrated. As a result, local governments (such as CDSAs members) would be unable to carry out their purposes, comply with the law, or to provide essential services to residents of the communities they serve. (*See id.* at 703.) Following *Rossi*, Proposition 218 added Article XIII C, Section 3 to the California Constitution, which reads::

Notwithstanding any other provision of this Constitution, including, but not limited to Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

In its *Text of Proposition 218 With Analysis*, the Howard Jarvis Taxpayers Association, drafters of Proposition 218, explain the purpose of article XIII C, section 3 as follows:

This section merely “constitutionalizes” the principles of *Rossi v. Brown*, (1995) 9 Cal.4th 688, a recent decision of

the California Supreme Court upholding the right of the electorate to use the local initiative power to reduce or eliminate government imposed levies via the initiative power.<sup>2</sup>

Thus, even the drafters of Proposition 218 recognize that it does not alter the scope of the referendum power. In addition, Proposition 218 established specific approval requirements for property-related fees, including a voter approval requirement for some, but not all, such fees. Subjecting property-related fees to referendum would be inconsistent with these requirements as interpreted by the California Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205. In *Bighorn*, the court wrote, “That the voters who enacted Proposition 218 did not intend to authorize initiative measures imposing voter-approval requirements on future water delivery charge increases is confirmed by an examination of section 6 of California Constitution article XIII D.” As discussed below in the brief, the

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<sup>2</sup> This document can be found at <http://www.hjta.org/propositions/proposition-218/text-proposition-218-analysis/> <last visited June 29, 2016>.

examination of section 6 also leads to the conclusion that the referendum power does not extend to property-related fees.

CSDA's members have a significant interest in ensuring the certainty of their revenues so they can stabilize their finances, plan for and provide reliable services, and be worthy of the credit necessary to construct capital-intensive utility systems. CSDA submits there is good cause to permit it to file this focused brief to bring this interest to the attention of the Court and to alert the Court that the issue this case raises is pending in at least two other courts.

For the reasons stated in this application and further developed in the proposed brief, CSDA respectfully requests leave to file the amicus curiae brief that is combined with this application. The amicus curiae brief was authored pro bono by Daniel S. Hentschke. No other person made a monetary contribution to its preparation and submission.

Dated: July 14, 2016

Respectfully submitted:



Daniel S. Hentschke  
Attorney for  
California Special District  
Association

## AMICUS CURIAE BRIEF

### I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

CSDA is an organization of special districts. A special district is a separate local government that delivers public services to a particular area. (Cal. Gov. Code § 16271). The services CSDA members provide include: water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. Some of CSDA's member districts provide a single service, others provide many. However, they all have two things in common – they are local governments with powers limited to those expressly stated or necessarily implied by the Legislature in either the general law or specific statute under which each is formed (*See Turlock Irrigation Dist. v. Hetrick* (1999) 71

Cal.App.4th 948)<sup>3</sup>, and they need revenue to exercise those powers. Thus, all of CSDA's members exist to perform essential governmental functions pursuant to authority conferred by the Legislature and impose revenue measures pursuant to that same authority. Impairment of those revenues would frustrate the very purpose for which special districts exist. This case involves the significant question whether property-related fees imposed by a special district are subject to referendum. The answer to this question to date has been "no" and Amici respectfully submit the answer remains "no."

## **II. FACTS AND PROCEDURAL HISTORY**

The facts and statements of the case are somewhat differently stated in the briefs of Appellants and Respondents. CSDA must accept the case as it finds it.

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<sup>3</sup> This principle is frequently expressed in the statute under which the district is formed. In the case of Respondents, its governing act provides that it "may exercise the powers which are expressly granted by this law, together with such powers as are reasonably implied from such express powers and necessary and proper to carry out the objects and purposes of the district." (West's Annot. Cal. Wat. C. Append. §118-301.)

### III. ARGUMENT

#### A. FEES THAT FUND OPERATION OF LOCAL GOVERNMENT ARE “TAXES” EXEMPT FROM THE REFERENDUM PROCESS

As discussed in the application above, the California Supreme Court confirmed in *Rossi v. Brown* that local revenue measures are exempt from referendum but subject to alteration by initiative. Unlike an initiative which, if adopted, makes new law prospectively, a referendum prevents a law from taking effect. Therefore, if an action imposing a tax or other revenue measure were subject to referendum, a local government’s ability to raise funds it needs for current operating expenses would be delayed and might be frustrated.

In *Rossi*, the Supreme Court explains:

The constitutional and charter exemptions from the referendum (statutes and ordinances calling elections, levying taxes, appropriating funds for current expenses, and other “urgency” measures) are measures having special urgency, a delay in the implementation of which could disrupt essential governmental operations. County ordinances fixing the amount of money to be raised by taxes and those fixing the tax rate therefore go into effect

immediately, while the effective date of other ordinances is delayed. (Elec. Code, §§ 9141-9143.) When a referendum petition qualifies prior to the effective date of a county ordinance, the ordinance is suspended pending reconsideration and repeal of the ordinance by the board of supervisors or submission of the measure to the voters at a regular or special election. The ordinance does not become effective unless and until a majority of the voters approves it at the referendum election. (Elec. Code, §§ 9144, 9145.) Therefore, if a tax measure were subject to referendum, the county's ability to adopt a balanced budget and raise funds for current operating expenses through taxation would be delayed and might be impossible. As a result, the county would be unable to comply with the law or to provide essential services to residents of the county.

For that reason, when taxes levied to support essential governmental services arguably are involved in a referendum, the general rule requiring that referendum provisions be liberally construed to uphold the power is inapplicable. "If essential governmental functions would be seriously impaired by the referendum process, the courts,

in construing the applicable constitutional and statutory provisions, will assume that no such result was intended. [Citations.] One of the reasons, if not the chief reason, why the Constitution excepts from the referendum power acts of the Legislature providing for tax levies or appropriations for the usual current expenses of the state is to prevent disruption of its operations by interference with the administration of its fiscal powers and policies.” (*Geiger v. Board of Supervisors, supra*, 48 Cal.2d at pp. 839-840.)

We concluded in *Geiger, supra*, that the same reasoning applied to referenda directed to acts of a county board of supervisors. Managing the county government’s financial affairs, we reasoned, was entrusted to elected representatives, and was an essential function of the board which could not accurately estimate income if tax ordinances were subject to referenda. (48 Cal.2d at p. 840.)

(*Rossi v. Brown, supra*, 9 Cal. 4th 703.)

The courts of this State have recognized that the term “tax” is a term without fixed definition. As aptly described in *Mills v. County of Trinity* (1980) 108 Cal. App. 3d 656, 660:

The word may be construed narrowly or broadly depending on its particular context and the purpose for which the definition is to be used. In its broadest sense, a tax includes all charges upon persons or property for the support of government or for public purposes. In narrower contexts, the word has been construed to exclude charges to particular individuals which do not exceed the value of the governmental benefit conferred upon or the service rendered to the individuals. (Citations omitted.)

In the context of the referendum, the courts have concluded that fees imposed to generate revenue to pay the operating expenses of the local government are “taxes.” (*Fenton v. City of Delano* (1984) 162 Cal. App. 3d 400, 405-406; *Dare v. Lakeport City Council* (1970) 12 Cal. App. 3d 864, 868.) This makes sense for the policy reasons stated so clearly by the Supreme Court in *Rossi*, and continues to make sense in the context of a property-related fee subject to articles XIII C and D.<sup>4</sup>

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<sup>4</sup> In 2010 California’s voters adopted Proposition 26, amending the Constitution by adding definitions of the term “tax” for the purposes of the restrictions established by California Constitution article XIII A, section 3 on the process for adopting statutory changes that result in any taxpayer paying a higher state tax and article XIII C’s restrictions on local taxes. (Cal.

In addition to defining a new class of property related fees and establishing procedures for their approval, Proposition 218 also confirmed that the “Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the **initiative** power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge.” (Cal. Const. art. XIII C, § 3, emphasis added.) Article II, section 8 establishes the initiative power.<sup>5</sup> Article II, section 9 establishes and defines the referendum power as follows:

“The referendum is the power of the electors to approve or reject statutes or parts of statutes **except** urgency statutes, statutes calling elections, and **statutes providing for tax levies or appropriations for usual current expenses of the State.**”

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Const. art. XIII A, § 3, subdiv. (b); Cal. Const. art. XIII C.) But, application of these added definitions is limited to articles XIII A and C. Accordingly, the use of the term “tax” in article II continues to be governed by common law.

<sup>5</sup> “The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” (Cal. Const. art. II, § 8, subdiv. (a).)

(Cal. Const. art. 9, subdiv. (a).) Thus, by definition, the referendum power is limited and this limitation applies to local government ordinances and state statutes alike. (*Fenton v. City of Delano* (1984) 162 Cal.App.3d 400 [no referendum of city general tax].)

Importantly, there is no mention in this language of any expansion of the **referendum** power. Under the usual canon of construction labeled “expressio unius est exclusio alterius” (to say one thing is to exclude another), the meaning of article XIII C, section 3 is plain – initiatives may affect government revenues, but referenda may not. (E.g., *Howard Jarvis Taxpayers Association v. Padilla* (2016) 62 Cal. 4th 628, 645 [citing the expressio unius rule].) As discussed in the application above, article XIII C, section 3 merely “constitutionalizes” *Rossi v. Brown*.

**B. SUBJECTING PROPERTY-RELATED FEES TO REFERENDUM IS INCONSISTENT WITH THE EXPRESS PROVISIONS OF ARTICLE XIII D, SECTION 6**

Furthermore, subjecting property-related fees to referendum would be inconsistent with the approval process Proposition 218 established for such fees. This process is laid out

in article XIII C, section 6, subdivisions (a), (b) and (c).

Subdivision (a) establishes a notice and protest process before the governing body may take action to impose a new or increased fee.<sup>6</sup> Subdivision (b) specifies certain substantive limitations for property-related fees.<sup>7</sup> Subdivision (c) then provides for voter approval of some, but not all property-related fees as follows:

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<sup>6</sup> Cal. Const. art. XIII D, § 6, subdiv. (a)'s procedural requirements include:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At 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.

<sup>7</sup> Cal. Const. art. XIII D, § 6, subdiv. (b)'s substantive limitations include:

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.

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- (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
  - (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
  - (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
  - (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
  - (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

Section 6 of California Constitution article XIII D embodies “the electorate’s intent as to when voter-approval should be required, or not required, before existing fees may be increased or new fees imposed, and the electorate chose not to impose a voter-approval requirement for increases in water service charges.” (*Bighorn-Desert View Water Agency v. Verjil*, *supra*, 39 Cal. 4th 205, 219.) In *Bighorn*, the Supreme Court determined that article XIII C, section 3’s authorization of initiatives to prospectively reduce a fee did not also authorize initiatives imposing a voter-approval requirement for future fee increases:

We have concluded that under section 3 of California Constitution article XIII C, local voters by initiative may reduce a public agency’s water rate and other delivery charges, but also that section 3 of article XIII C does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency’s governing board may then raise other fees or impose new fees without prior voter approval.

(*Id.* at 220.)

Thus, under article XIII D, property-related fees for water, sewer, and refuse collection service are expressly exempt from any voter pre-approval, while property-related fees for other purposes cannot be imposed absent approval by local voters. Because a referendum operates to preclude a fee from taking effect without later voter approval, the corollary to the rule that local voters cannot establish a voter approval requirement by initiative is that they likewise cannot subject a fee to voter approval by referendum. As the Supreme Court stated in *Bighorn*, the electorate chose not to impose a voter-approval requirement for increases in water service charges.” (*Id.* at 219.)

#### **IV. CONCLUSION**

In its reply brief, Appellants acknowledge that cases decided before Proposition 218 hold that fees and other types of imposed government revenues are taxes exempt from the referendum power, but suggest that these cases can be ignored because they predate Proposition 218. (Appellants’ Reply Brief at pp. 31-32.) But, as explained above, Proposition 218 does nothing to change the pre-existing limitations on the referendum power. And while Proposition 218 does say that the power to

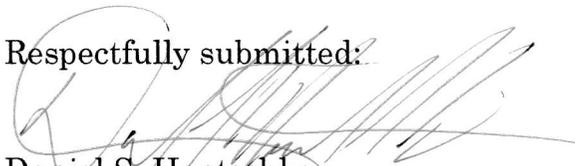
prospectively reduce local revenues through an **initiative** cannot be limited, that provision merely parrots the holding of *Rossi v. Brown*, which clearly explains that while the Constitution limits the power of referendum to affect local revenues, those limits do not, by negative implication, apply to initiatives. (Hence, the Howard Jarvis Taxpayer’s Association acknowledgment quoted above that section 3 of article XIII C merely “constitutionalizes” *Rossi*.)

In consequence, while fees imposed to fund the core purposes of a local agency are not subject to referendum, they may require pre-approval by the voters for other reasons (e.g. a statutory or constitutional pre-approval requirement), except that property-related fees for water, sewer, or refuse collection services are exempt from any Constitutional requirement for voter pre-approval (Cal. Const. art. XIII D, § 6, subdiv. (c)), and they may also be altered by initiative. (Cal. Const., art. XIII C, § 3.) An initiative, not a referendum, is appellants’ remedy here.

Accordingly, Amici urge this Court to affirm the trial court’s conclusion in the case at bar that the attempt to referendum the fee to fund the respondent Water Management District’s water service charges could not succeed.

Dated: July 14, 2016

Respectfully submitted:

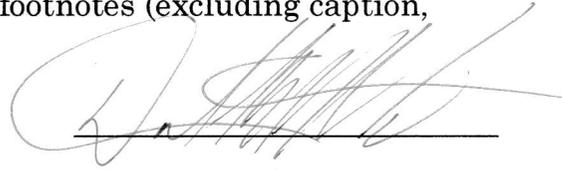
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Daniel S. Hentschke  
Attorney for Amicus Curiae  
California Special District  
Association

## WORD CERTIFICATION

I, Daniel S. Hentschke, counsel for amicus curiae California Special District Association, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing "CALIFORNIA SPECIAL DISTRICTS ASSOCIATION APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS; AMICUS CURIAE BRIEF," certify that it contains 3719 words including footnotes (excluding caption, tables, and this certification).

Dated: July 14, 2016

A handwritten signature in black ink, appearing to read "Daniel S. Hentschke", is written over a horizontal line.

Daniel S. Hentschke

**PROOF OF SERVICE**

*Monterey Peninsula Taxpayers Association, et al. v.  
Board of Directors of the Monterey Peninsula Water Management  
District, et al.*

Court of Appeal, Sixth District, Case No. H042484  
Monterey County Superior Court Case No. M123512

I, Daniel S. Hentschke, declare:

I am an attorney licensed in the State of California. I am over the age of 18 and not a party to the above titled action. My business address is 411 E. Cliff Street, Solana Beach, CA 92075-1335.

On July 19, 2016, I served the document described as:

**California Special District Association Application for permission to file an amicus curiae brief in support of defendants and respondents; amicus curiae brief**

on the interested parties in this action by placing a true copy thereof addressed as follows:

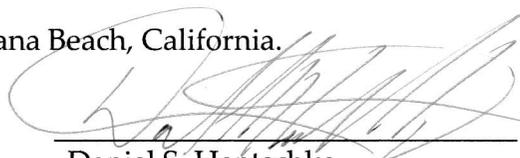
**SEE ATTACHED SERVICE LIST**

X BY SUBMISSION: through TrueFiling (www.truefiling.com), by which counsel will automatically receive e-mail notices with links to true and correct copies of said documents.

X 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 Solana Beach, 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 July 19, 2016, at Solana Beach, California.

  
\_\_\_\_\_  
Daniel S. Hentschke

**SERVICE LIST**

*Monterey Peninsula Taxpayers Association, et al. v.  
Board of Directors of the Monterey Peninsula Water Management  
District, et al.*

Court of Appeal, Sixth District, Case No. H042484  
Monterey County Superior Court Case No. M123512

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