Exactions and Impact Fees in California
2007 Supplement to the 2001 Edition

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CHAPTER ONE
Introduction

Proposition 37 page 5
Delete this section.

The voters rejected Proposition 37 at the November 2000 election by a vote of 48 percent in favor to 52 percent against.

Infrastructure Financing Districts page 12
Add the following note.

In 1999, Carlsbad city officials succeeded in creating the first Infrastructure Financing District. As of mid 2002, it is still the only IFD in existence, although other communities are looking at the concept.

CHAPTER TWO
Defining the Terms

By Margaret Sohagi

Exactions *page 15*
Add at the end of the page, after the last bullet point ["Fees"].

According to the State Controller's Office, fees and service charges account for almost 20 percent of annual local government revenues. Permit fees, development fees, dedications, in-lieu fees, and exactions are especially important in new and growing suburban municipalities, which commonly have high infrastructure costs but lack an established tax base. Depending on the municipality and type of project, residential development fees in California in 1999 ranged from a low of $4,000 per unit to as high as $60,000 per unit. Single-family homebuilders in California paid an average of $24,325 per unit in residential development fees, based on the results of a sample of 89 cities and counties in 1999. Owners of new infill homes paid an average of $20,327 per unit, and apartment developers paid an average of $15,531 per new apartment unit.

For a detailed study of fees charged by various entities in California, see "Pay to Play: Residential Development Fees in California Cities and Counties 1999," published by the Division of Housing Policy Development, California Department of Housing and Community Development (August 2001).

Fees for Benefits and Services page 18
Insert at end of first paragraph in this section

A fee which apportions costs based upon the benefits received, such as a water transportation rate which apportions costs based upon the amount of acre-feet of water delivered, and do not exceed the cost of providing the service are reasonable. (*See Rincon Del Diablo Municipal Water District v. San Diego Water Authority* (4th Dist. 2004) 121 Cal.App.4th 813, 824.

Regulatory Fees *page 20*
Add before last paragraph in this section.

The California Attorney General concluded that counties may require applicants for coastal development permits to defend, indemnify, and hold harmless the county in the event a third party sues to void the permit. (85 Ops.Cal.Atty.Gen. 21(2002).)

Under the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." (Cal. Const., art .XI, § 7.) The regulation of land development is a traditional subject for the exercise of the constitutional police power by a county or city. The opinion concluded that county governments have the authority to impose regulatory fees to cover the costs of issuing a development permit. Such costs may include all those incident to the issuance of the license or permit, including investigation, inspection, administration, maintenance of a system of supervision, enforcement, and litigation. As a matter of public policy, a county may determine whether the litigation costs associated with the granting of a coastal development permit should be borne by the permit holder or by the general taxpayers of the county. No statute precludes a county from making such a determination, and a court will not interfere with a county's decision in this regard. Therefore, a county may enact an ordinance that requires applicants to defend, indemnify, and hold harmless the county in any action by a third party to void the permit.

Note: This ruling applies to cities and the issuance of other types of land use permits as well.

Regulatory Fees page 20
Add before last paragraph in this section.

In California Association of Professional Scientists v. Department of Fish & Game (2000) 79 Cal.App.4th 935, the court considered whether the exactions imposed by Section 711.4 of the Fish & Game Code constitute a regulatory fee or a tax. The court concluded that as long as the cumulative amount of the fees did not surpass the cost of the regulatory program or service, and the record disclosed a reasonable basis to justify distributing the cost among payors, the fee did not become a tax simply because each payor was required to pay a predetermined fixed amount. *Id.* at 939.

Section 711.4 was enacted in 1990 and imposed a flat fee schedule to defray a portion of the costs incurred by the Department of Fish & Game (DFG) in fulfilling its environmental review obligations under the California Environmental Quality Act (CEQA) and the Z'Berg-Nejedly Forest Practices Act (Forest Practices Act). Pub. Res. Code §§ 4511, 21000 et seq. *Id.*

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The DFG presented evidence that $11 million had been collected in fees but the cost of the reviews was in excess of $20 million. Thus the fees were not revenue raising since they did not generate income beyond the cost of the review services provided. *Id.* As such, the regulatory fee did not violate the state constitution. *Id.* at 950.

The court further stated that it need not perform an appellate audit of the DFG's accounting systems to determine reasonableness of the fees. *Id.* at 954. Review of the entire record indicated sufficient evidence to support the trial court's finding that the cost of comprehensive environmental review far surpassed the amount of fees generated under Section 711.4.

San Marcos Legislation page 25
Insert after last paragraph in this section

In *Rincon Del Diablo Municipal Water District v. San Diego Water Authority* (4th Dist. 2004) 121 Cal.App.4th 813, the Court evaluated an ordinance which set the transportation rate, a component of the water rate. The Water District's transportation rate captured the capital costs as well as the operating and maintenance costs of the Water Authority's aqueduct system. Under the ordinance, revenue generated from the transportation rate were placed in the Water Authority's general fund and were not separated to fund capital costs. The *Rincon* Court found that the mere fact that water rates were used to offset capital expenses along with operating expenses did not make water rates a capacity charge pursuant to Government Code Section 66013.

In *The Regents of the University of California v. East Bay Municipal Utility District* ("EBMUD") (2005) 130 Cal.App.4th 1361, the court held that the capital component of East Bay Municipal Utility District's water rate constituted a special assessment under the *San Marcos* purpose test and as such, was subject to the *San Marcos* legislation. The Court distinguished *Rincon*, noting that the claim in *Rincon* was that the transportation rate was an unreasonable capacity charge under Government Code Section 66013 and was totally unrelated to the property tax exemption at issue in the *San Marcos* case.

Excise Taxes and Business License Taxes page 29 or 30
Add at the end of the discussion of Centex *or at the end of the section.*

In December 2003, the Fourth District Court of Appeal found that the City of Riverside did not have the right to require a telecommunications company to pay a $1.50 for each foot of conduit it laid in the City's streets while installing fiber optic cable. *Williams Communications, LLC v. City of Riverside* (4th Dist. 2003) 114 Cal.App.4th 642. The City argued that this charge, like the one in *Centex*, was not a development fee and was valid because it did not conflict with a state statute.

The court disagreed with the City and distinguished this case from *Centex* in which the exaction was a tax, finding that the charge here was instead "compensation" charged for the use of the City's streets. *Williams Communications, supra,* 114 Cal.App.4th at 659. As such, the charges must not exceed the reasonable cost of providing the service. The court explained, "[T]he City of Vallejo in *Centex* had the right to impose an excise tax on the privilege of developing property. But Riverside did not have the right to require Williams to pay $750,103 to use the City's streets for its conduits." *Id.*

The City also argued that the Mitigation Fee Act did not apply to this payment because it was not a fee. The court found, however, that it was an "other exaction" and, thus, subject to the Act. The court also rejected the City's argument that the Mitigation Fee Act was inapplicable because the City did not "impose" the charge on Williams but that it was part of a negotiated agreement between the parties. The court found that "[s]ince the payment was required as a condition of the license agreement, and the license agreement was required before the necessary permits would issue, we must conclude that the payment was imposed on Williams." *Williams Communications, supra,* 114 Cal.App.4th at p. 660.

Assessments page 37
Add at the end of this section

In early 2004, the California Supreme Court, in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, declared that a capacity charge imposed as a condition for making a new connection to a water system, the proceeds of which were used to finance capital improvements, was not an assessment within the meaning of article XIII D. The Court made this distinction by looking at article XIII D's requirement that an agency imposing an assessment identify "all parcels which *will* have a special benefit conferred upon them and upon which an assessment *will* be imposed." (Art. XIII D, § 4, subd. (a) (italics added).) The Court observed that the capacity charge at issue in *Richmond,* would be imposed on property owners who apply for a new service connection. Because the District could only estimate the number of new connection applications and could not identify the specific parcels for which new connection applications would be made, it would be impossible for the District to comply with the identification requirements of XIII D. Furthermore, because many undeveloped parcels would likely be subdivided into an indeterminable number of smaller parcels, for which a connection might be requested, it would be impossible for the District to determine the "proportional financial obligation of the affected property" as required by XIII D. The *Richmond* Court concluded that an assessment within the meaning of XIII D must not only confer a special benefit on real property, but must also be imposed on identifiable parcels of real property. *Richmond v. Shasta Community Services District, supra*, 32 Cal.4th at p. 419.

The Court in *Richmond* explained that its construction of XIII D is consistent with the article's definition of an assessment as a "levy or charge upon real property" since the capacity charge at issue was not imposed upon real property as such, but on individuals who applied for new service connections. Further, the construction is consistent with Proposition 218's aim of enhancing taxpayer consent because the charge was only imposed on users applying for new connections. In other words, whereas any new impositions of costs on existing customers would be subject to article XIII D's voter approval requirements, users who apply for new connections give their consent by the act of applying. *Richmond v. Shasta Community Services District, supra*, 32 Cal.4th at p. 419-20.

Property Related Fees and Charges page 43
Add before the last paragraph of this section

In *Howard Jarvis Taxpayers Association v. City of Fresno* (2005) 127 Cal.App.4th 914, the Court confirmed that requirements for property-related fees and charges in Proposition 218 apply to a City's existing in lieu fee for utilities, even though the City had taken no formal action to extend the fee after the enactment of Proposition 218.

The *Howard Jarvis Taxpayers Association v. City of Fresno* Court also determined that the City's assessment of a fee in lieu of property taxes upon its own utility departments, which was passed through to rate payers, was not a "utilities consumption tax," as the City argued, but was a fee imposed directly on ownership of property. As such, it was subject to the restrictions on property-related fees and charges of Proposition 218. Therefore, the City could not collect this fee in absence of its establishing the cost of actual city services to utility departments. *Howard Jarvis Taxpayers Association v. City of Fresno, supra,* 127 Cal.App.4th at p. 923-27.

CHAPTER THREE
Authority for and Limitations on Exactions - Constitutional Issues

By M. Thomas Jacobson

Limitation: Preemption by State Law *page 49*
Add after last sentence in second to last full paragraph in this section.

Effective January 1, 2002, the statutory authorization to require dedications of land for bicycle paths as part of the subdivision process is no longer subject to the limitation that it only applies to subdivisions of 200 parcels or more. § 66475.1.

Tests for When a Taking Has Occurred *page 51*
Add after second paragraph in this section

In *Lingle v. Chevron USA, Inc.*, (2005) 544 U.S. 528, the U.S. Supreme Court eliminated one half of the 25 year-old *Agins* two-part test for determining whether a regulation amounts to a taking under the U.S. Constitution's Fifth Amendment. While not a case challenging a land use regulation, this case altered the legal standards by which such regulations will be reviewed. The State of Hawaii enacted a law limiting the rent that oil companies may charge to dealers who lease service stations owned by the companies. Chevron challenged the law under the first prong of the *Agins* two-part test for when a regulation amounts to a regulatory taking. This standard said that a regulation (e.g., a "downzoning" in *Agins*) is a taking if it fails to substantially advance a legitimate state interest. (The second part of the *Agins* test is an independent standard: a regulation also amounts to a taking if it denies a property owner all economically viable use of the property.) Chevron alleged that Hawaii's law fails to substantially advance a legitimate state interest in that, in fact, Hawaii's rent cap does not promote the state's claimed interest in controlling retail gas prices.

The trial court heard testimony from economists from both parties, finding Chevron's economist "more persuasive" and, on that basis, that the regulation amounted to a taking. Upheld on appeal, the case caused concern for those imposing regulations on behalf of government. Would the courts now routinely engage in an active review of evidence supporting the positions of the parties in a takings claim (here, the expert opinions of "dueling economists"), abandoning the traditional deference accorded government?

But the U.S. Supreme Court determined that the critical issue presented in this case was even more basic. Is the "substantially advances" portion of the *Agins* test appropriately part of deciding when a taking has occurred? The Court determined that it is not. The Court rejected the first prong of *Agins* as a takings test. Rather, the Court said, it is a standard for determining whether there has been a denial of due process under the 14th

Amendment of the U.S. Constitution (which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law").

Thus, *Agins* now provides a basis for finding a regulatory taking only when the regulation denies the property owner all economically viable use of the property.

The Takings Clause and Exactions *page 52*
Add after third paragraph in this section

In *Lingle v. Chevron USA, Inc.*, 125 S.Ct. 2074 (2005), the U.S. Supreme Court made several statements clarifying the legal basis under which exactions can be challenged as takings. In its opinion, the Court expressly addressed whether eliminating the first prong of the *Agins* test for whether a regulatory taking has occurred -- whether the regulation substantially advances a legitimate state interest -- would disturb the Court's rulings on exactions. (See the discussion above of the *Lingle* holding that the "substantially advances a legitimate state interest" component of *Agins* should not be utilized as a takings test.) As discussed on pages 52 through 55, the Court articulated standards for determining when an exaction amounts to a taking in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. While it has been commonly stated (including in this book) that the basis for the "essential nexus" and "rough proportionality" requirements from those cases derive from the "substantially advances" component of the *Agins* test, and legal challenges were routinely based on that standard, the Court corrected this common misconception. (Arguably, the Court itself created the basis for the misconception, see, e.g., *Nollan* at 835, which the Court seemed to acknowledge: "It might be argued that this formula played a role in our decisions in *Nollan* … and *Dolan*"). The Court went on to explain the actual legal basis for its standards for evaluating whether an exaction amounts to a regulatory taking.

The Court said that *Nollan* and *Dolan* rely on a "special application of the doctrine of 'unconstitutional conditions'." Each case involved a takings challenge to a development condition requiring an easement dedication for public access across the subject properties. Both cases recognized that, had government simply appropriated the easement absent an application for a development approval, this would have been a *per se* physical taking. The issue in both cases was whether the easements could be required as conditions for a granting a development permit the government was entitled to deny. The Court had concluded in *Nollan* that the easement exaction could be required, provided it would substantially advance the same government interest that would provide a basis for denying the permit application. *Lingle* at 547. The Court had gone on, in *Dolan*, holding that the easement exaction must also be "'roughly proportional' … both in nature and extent to the impact of the proposed development." *Lingle* at 547.

The *Lingle* Court explained that the question in *Nollan* and *Dolan* was not whether *some* legitimate state interest was advanced by the exactions at issue in those cases. Rather, it was whether the exactions substantially advanced the same interests as would have allowed government to deny the land use approvals being sought. The Court had described the doctrine of "unconstitutional conditions" and its application in *Dolan* in this way: "… the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for public use – in exchange for a discretionary benefit conferred by the government *where the benefit has little or no relationship to the property*." *Lingle* at 547, quoting *Dolan* at 385 (emphasis added).

The Requirement of "Essential Nexus *page 52*
Add after the first paragraph in this section

As described in the discussion of "The Takings Clause and Exactions" in this supplement, the U.S. Supreme Court has now clarified that its decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), was not based on the now-discredited first prong of the *Agins* regulatory takings test, but on the doctrine of "unconstitutional conditions."

Applicability of "Rough Proportionality" to Regulations That Restrict Development *page 56*
Add after first paragraph in this section.

Temporary Moratorium on Development Is Not a Compensable Taking.

The United State Supreme Court on April 23, 2002 decided in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, that local governments and other planning agencies who impose temporary development moratoria do not automatically have to compensate landowners for the temporary loss of their development rights.

In a 6–3 ruling, the Supreme Court rejected the petitioner's argument that whenever the government imposes a deprivation of all economically viable use of property, no matter how brief, it effects a taking, and the property owner should be compensated under the *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, "categorical" rule. The petitioners presented what the Supreme Court coined as a "conceptual severance" argument, under which they sought to bring this case under the rule announced in *Lucas* by arguing that the Court should sever the 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria.

The Supreme Court rejected the petitioner's segmentation argument because it entirely ignored the admonition in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, that in regulatory takings cases a court should focus on "the parcel as a whole." The Court held that when evaluating the property interest as a whole, the duration of the restriction is but one of the important factors that a court must consider in the appraisal of a takings claim. Under this rational, a permanent deprivation of the owner's use of the entire area is a taking of the parcel as a whole, whereas a temporary restriction that merely causes a diminution in value is not. The Court found that the property subject to the moratoria was not permanently deprived of all economically viable use because the property will recover its value when the moratorium is lifted.

The Court stated that "[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication."

Add at end of this section

In *Breneric Associates v. City of Del Mar,* 69 Cal.App.4th 166 (1998), the court rejected the notion that the "heightened scrutiny" standard articulated by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) applies to a design review decision. This more demanding standard, the court said, applies only to development exactions (e.g., dedications of land and fees required as conditions to development approvals). Here, the land use decision at issue was an application of the City's ordinance requiring a design review permit as a condition to obtaining a building permit for certain types of remodeling projects. The court determined that the applicable "standard of review" for design review cases is the deferential "substantial evidence" test. That is, in reviewing a challenge to a city's design review decision, the court must uphold the city's decision if there is substantial evidence to support the city's findings and if those findings support the city's decision. The burden is on the challenger of that decision to show that the evidence on which the city relied is insufficient. Furthermore, the court must resolve all reasonable doubts in favor of the city and reverse the city's decision only if, based on the evidence before the city, a reasonable person could not have reached the city's conclusion.

Applicability of Essential Nexus and Rough Proportionality Standards to Development Fees *page 59*
Add after last paragraph in this section.

San Remo Hotel v. City and County of San Francisco. In San Remo Hotel v. City and County of San Francisco (20 02) 27 Cal. 4th 643, the California Supreme Court upheld San Francisco's "Hotel Conversion Ordinance," pursuant to which the plaintiff had paid a $567,000 "housing replacement" in lieu fee. In reaching its decision, the court rejected application of the "heightened scrutiny" standard articulated by the U.S. Supreme Court in *Nollan v. California Coastal Commission and Dolan v. City of Tigard.* Rather, because the fee in question was legislatively-enacted and for general application, the court applied a more deferential standard.

San Francisco's Hotel Conversion Ordinance (HCO) was first enacted in 1981 to "benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." *San Remo* at 650. The HCO makes it unlawful to eliminate a residential hotel without obtaining a conversion permit. Such a permit requires a "one-for-one" replacement of converted units. An applicant may satisfy this requirement by either constructing or rehabilitating other types of housing for low income, disabled, or elderly persons, or by paying an in lieu fee equal to the replacement site acquisition costs plus a portion (established by the HCO) of the replacement construction costs.

Under the HCO, San Remo was required to pay a $567,000 in-lieu housing replacement fee. San Remo paid the fee under protest and challenged it as an unconstitutional taking under the California Constitution. San Remo did not seek relief for violation of the takings clause of the Fifth Amendment to the U.S. Constitution, explicitly reserving its claims under federal law. Rather, San Remo's brought its claim based on the California Constitution 's counterpart provision to the U.S. Constitution's prohibition against the "taking" of private property for public use without just compensation. Article 19 of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation. . . has first been paid. " Noting the similarity between the federal and California provisions, the court analyzed San Remo's taking claim under the relevant decisions of both the California and United States Supreme Courts.

As a threshold question, the court considered the applicable standard of review. San Remo urged applying the "heightened scrutiny" standard for reviewing exactions articulated by the U.S. Supreme Court in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374. The court noted that *Nollan* requires an "essential nexus" between a condition imposed on development and the impact of the development the condition is intended to address. *Dolan*, the court went on, addressed the question that follows finding essential nexus—what is the required "degree of connection" between an exaction and the projected impact of the proposed development? The U.S. Supreme Court settled on a "rough proportionality " standard, one that re q u i res an individualized determination that the required exaction is related both in nature and extent to the development's impacts. The Court also found that the burden for establishing rough proportionality fell on the public agency imposing the condition.

Both *Nollan and Dolan* were concerned with exactions requiring dedication of a portion of the applicant's real property. In *San Remo*, the court noted, the exaction was monetary, and looked to its earlier decision in *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, for guidance. There, the court had addressed whether the heightened scrutiny required in *Nollan* and *Dolan* applies to development conditions requiring the payment of a fee (*see* page 56). The *Ehrlich* court held that development fees are subject to heightened scrutiny when imposed on an ad hoc basis (i.e., when the developer is singled out for a development fee not imposed on others). But when a development fee is "legislatively enacted" for general application it is not subject to heightened scrutiny.

In *San Remo*, the Court of Appeal had held that housing replacement fees assessed under the HCO were subject to heightened scrutiny because they were only applied to a small number of property owners, and were exacted in a discretionary manner. The California Supreme Court rejected this characterization, holding that the HCO does not provide the city with any discretion as to the imposition or size of a housing replacement fee. The applicant, the court pointed out, must meet the housing replacement requirement by selecting one of the available options. The amount of the in lieu fee, if that approach is selected by the applicant, is determined by a set formula. "Thus, no meaningful government discretion enters into either the imposition or the calculation of the in lieu fee." *San Remo* at 669.

Furthermore, the court said, the city did not single San Remo out for payment of the housing replacement fee—it applies to every residential hotel in the city. A condition of general application need not apply to every other property in the city, but only to all property in the class logically subject to it (e.g., all residential hotels). Here, the HCO applies to more than 500 properties with more than 18,000 guest rooms. "The HCO is generally and non-discriminatorily applicable within a class of properties reasonably defined according to the purpose of the ordinance." *Id* . at 669, n.12. The court distinguished the Recreational Mitigation Fee found to be subject to heightened scrutiny in *Ehrlich*. That fee was not based on a specific legislative mandate to impose the fee, nor on a legislatively set formula to calculate its amount.

In justifying limiting heightened scrutiny to ad hoc fees, the court pointed to the "ordinary restraints of the democratic political process" that apply to legislatively-enacted fees. "A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election." *Id.* at 671. Ad hoc development fees, which, the court said, affect fewer citizens and evade systematic assessment, are more likely to escape such political controls. Thus, they are more likely to be subject to arbitrary treatment for "extortionate motives".

The court went on to describe the more deferential standard applicable to legislatively-enacted fees, established by constitutional limitations and by California's Mitigation Fee Act (Govt.Code § 66000). The relationship between such a fee and the impact it is intended to address need not be as close or thoroughly established as is required by heightened scrutiny. However, the more deferential standard of review that does apply still requires a "reasonable relationship," in both intended use and amount, between the fee and the impacts that the fee was intended to mitigate. "[T]he arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." *Id.*at 671.

The court then applied this deferential standard to San Remo's allegations, which challenged the HCO's housing replacement provisions both on their face and as applied to the San Remo Hotel. With regard to the facial challenge, the court found that the HCO's methodology for determining the amount of the housing replacement fee is reasonably related to the loss of housing resulting from hotel conversions. "Plaintiffs fail to demonstrate from the face of the ordinance that fees assessed under the HCO bear no reasonable relationship to housing loss in the *generality* or *great majority* of cases, the minimum showing we have re q u i red for a facial challenge to the constitutionality of a statute." *Id.* at 673 (emphasis in original).

Likewise, the court rejected San Remo's as-applied challenge, which was based on the claim that the $567,000 fee imposed bears no connection to tourist use of the San Remo Hotel. The court noted that, under the HCO, the fee was based on the number of units reported as being in residential use on September 23, 1979, that were proposed for conversion to tourist use. San Remo had made no allegations specifically relating to the San Remo Hotel's use as of that date. "Nowhere do plaintiffs allege that the San Remo Hotel was, in 1979 or at any time, entirely in tourist use, as would be required to support their claim that the housing replacement fee has 'no connection at all' to the hotel's historical use." *Id.* at 678.

In addition to the addressing the challenge to the HCO's replacement requirement, the court also found that the city properly required the plaintiffs to obtain a conditional use permit to change the San Remo Hotel's use to a tourist hotel.

Access to Federal Courts for Takings Challenges to Exactions *page 61*
New section; add above "Equal Protection"

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), the U.S. Supreme Court addressed whether a plaintiff was entitled to a review of its exactions-related takings claim in the federal courts. This case is part of the ongoing saga of the San Remo Hotel's objection to having to pay San Francisco's Hotel Conversion Ordinance fee. This fee was enacted in order to offset the effect that converting residential hotels to tourist use would have on the City's affordable housing stock. San Remo challenged the ordinance and its application, which required San Remo to pay a $567,000 housing replacement in lieu fee, under the California Constitution's prohibition against taking or damaging private property without just compensation. In its challenge, San Remo expressly reserved its claims under the Takings Clause of the Fifth Amendment of the U.S. Constitution. In 2002, the California Supreme Court upheld the HCO ordinance and its application to San Remo.

San Remo then sought review of its federal takings claim in the federal courts. In doing so, however, San Remo ran afoul of the federal "full faith and credit" statute. That statute, 28 U.S.C. § 1738, generally provides that judicial proceedings in any state shall be recognized in every other court within the United States. The effect of the statute is to prevent relitigating issues and claims already decided. San Remo's attempt to preserve a federal takings claim distinct from its California takings claim was thwarted by the fact that the California Supreme Court's decision was based on federal takings jurisprudence. The California Supreme Court had noted its practice of construing the federal and California takings clauses "congruently," and utilized "the relevant decisions of both this court and the United States Supreme Court." *San Remo*, 27 Cal 4th at 656.

San Remo argued that takings claims present a unique circumstance, justifying an exception to the full faith and credit statute. San Remo pointed out that a claim that state or local government has violated the Fifth Amendment's Takings Clause cannot be heard in federal court until the property owner has been denied just compensation through available state compensation procedures. See, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Thus, San Remo maintained that since bringing a federal takings claim first in state court is required, plaintiffs should also be able to bring that claim in federal court despite the strictures of the full faith and credit statute. This, San Remo maintained, would ensure the opportunity of have federal takings claims considered on their merits in federal court. San Remo argued that when, as here, plaintiffs in a state court action reserve a federal court claim, federal courts should review such reserved claim, regardless of what issues the state court may have decided or how it may have decided them.

The Court declined the invitation to create an exception to the full faith and credit statute. Thus, the Court noted that while San Remo could certainly reserve some of its federal claims, such reservation would be effective only if the state courts did not decide those claims (for instance, plaintiffs might reserve federal claims when they first sought state court review limited to state law claims). The reservation would be of no effect when the state courts decide plaintiff's federal law claims; in that circumstance, the attempted reservation would not keep the state court judgment from precluding relitigation of the same claim in federal court. The issues San Remo wanted heard in federal court, subsequent to the California Supreme Court's ruling in 2002, had been decided in valid state court judgments. This, the Court held, deprived San Remo of the ability to have the same claims heard in federal court.

Equal Protection *page 61*
Add at end of this section

In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the U.S. Supreme Court held that, for the purposes of the "equal protection clause" of the Fourteenth Amendment to the U.S. Constitution, a challenge can be brought on behalf of a "class of one." At issue in *Olech* was an easement required as a condition of connecting to a municipal water supply. Faced with an easement condition wider than that required of others connecting to the water supply, plaintiffs alleged a violation of equal protection. Although the plaintiff was not part of a class or group, the Court concluded that the number of individuals in a class is immaterial for equal protection analysis.

CHAPTER FOUR
Exactions--Statutory Authority and Limitations

By M. Thomas Jacobson

Dedications for bicycle paths *page 68*
Replace last sentence under this section with the following:

Effective January 1, 2002, the statutory authorization to require dedications of land for bicycle paths as part of the subdivision process is no longer subject to the limitation that it only applies to subdivisions of 200 parcels or more § 66475.1.

Dedications for transit facilities *page 68*
Replace entire paragraph under this section

Effective January 1, 2002, the statutory authorization to require dedications of land for local transit facilities (e.g., bus turnouts, shelters, benches) as part of the subdivision process is no longer subject to the limitation that it only applies to subdivisions with the potential for 200 dwellings units or of 100 acres or more. § 66475.2. Also deleted is the requirement that the governing body find that transit services are or will within a reasonable time period be made available to the subdivision. The exception for condominium projects and stock cooperatives consisting of the subdivision of airspace in an existing apartment building more than five years old has likewise been deleted. The statute now provides that subdivision of airspace in existing buildings into condominium projects, stock cooperatives, or community apartment projects, as those terms are defined in section 1351 of the Civil Code, are covered by this section. However, only the payment of in lieu fees may be required for these subdivisions.

Parkland dedication and in lieu fee requirements (the "Quimby Act) *page 71*
Add at the end of this section

In *Branciforte v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, a developer sought credit for "private open space" within a development under Section 66477(e) of the Subdivision Map Act. Under the provisions of the Map Act that govern parkland dedication requirements (commonly referred to as the "Quimby Act"), "Common interest developments, as defined in Section 1351 of the Civil Code, shall be eligible to receive a credit, as determined by the legislative body, against the amount of land required to be dedicated, or the amount of the fee imposed, pursuant to this section, *for the value of private open space within the development which is usable for active recreational uses*." Government Code Section 66477(e) (emphasis added). The developer here sought credit for an amount equal to the value of the usable open space included as common area in the development and the improvements to that land. The City refused this request, as its land use regulations had no provision for granting credit for private open space.

In determining whether a subdivider is entitled to a credit for private open space under Section 66477(e), the court noted the ambiguity of that section. Considering whether that section mandates a credit, or merely authorizes it, the court compared Section 66477(e) with Section 66477(a)(9), which clearly requires credit for the value of park and recreational improvements to land dedicated under the requirements of the Quimby Act. Relying on legislative history of the two provisions, enacted in the same year, the court concluded that, "As subdivision (e) of Section 66477 now reads, local legislatures retain the flexibility to implement a private open space credit as they determine reasonable under local conditions." As the City had not adopted legislation providing a credit for private open space under Section 66477, the court held the City had no duty to provide Branciforte with a specific amount of credit for private open space. However, the court did note that it did not need to reach the question of whether the City could be compelled to enact an ordinance providing some credit for private open space consistent with Section 66477(e), as Branciforte did not seek such relief.

Storm drainage and sanitary sewer off-site improvements *page 75*
Place sidebar on page 10 of this supplement {For whom the "Fee Bell" Tolls} next to this section.

For whom the "Fee Bell" Tolls

On April 16, 2001, the Attorney General answered the following question posed on behalf of the City of Santa Clarita by Assemblyman Runner (R-Lancaster):

> May a city impose storm drainage pollution abatement charges with respect to property owned by school districts and the California Department of Transportation within the city's boundaries to fund the city's activities in meeting federal storm water discharge requirements? (84 Ops.Cal.Atty.Gen. 61(2001).)

The Attorney General concluded that such fees were permissible as to school districts if they funded services rather than capital facilities, and that they were not permissible as to Cal-Trans because that agency separately complies with the federal storm water program for its properties in Santa Clarita.

The Attorney General stated that Health and Safety Code section 5471 is express authority for storm water fees. The Attorney General cited the rule of *San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal. 3d 154, that the express exemption from property taxes afforded to public property by Article XIII, section 3(b) of the Constitution impliedly exempts such property from assessments imposed to fund capital facilities, but not fees for services. *Id* . at 161. In an opinion issued after *San*

Marcos, the Attorney General suggested that the line between permissible fees and impermissible assessments be drawn as follows:

> The court pointed out that normally a special assessment: (1) covers the cost of constructing a capital improvement, (2) is based upon the value of the improvement to the property benefited, (3) is compulsory in nature and unrelated to actual use of the improvements, and (4) is often imposed as a one-time charge. The court observed that a typical fee: (1) covers the furnishing of goods or services, (2) is based upon the amount of usage, (3) is voluntary in nature since actual use triggers the fee, and (4) is often imposed as a monthly or other ongoing charge. (71 Ops.Cal.Atty.Gen. 163, 165 (1988).)

Thus, the Attorney General concluded "the fees cannot be collected from school districts or the Department if they are used to fund the construction of capital improvements."

In its dispute with Santa Clarita, the state had relied upon Government Code section 6103, the statute that exempts government agencies from court filing fees, as well as other fees "for the performance of any official service." The Attorney General rejected the application of this section, stating:

> A user fee is not a fee for an "official service" such as filing court documents. Government Code section 6103 does not exempt agencies from paying for the goods and services that they use. (Citations omitted.) Furthermore, as observed by the court in *Anaheim City School Dist. v. County of Orange* (1985) 164 Cal. App. 3d 697, 702, it appears from the legislative history of Government Code section 6103 that an "official service" is one for which fees are prescribed by law. Like the fees to use the county's solid waste disposal site in the *Anaheim* case, the fees here are not prescribed by law but rather are discretionary.

Other General Limitations on Imposing Exactions *page 87*
Add at end of section

Road Impact Fees Preempted by Vehicle Code Section 9400.8

In *County Sanitation District No. 2 v. County of Kern*, 127 Cal.App.4th 1544 (2005), the court addressed, among other issues, whether California Vehicle Code section 9400.8 prohibited a county's "biosolids impact fee" charged for each ton of biosolids (a sewage by-product used as a soil amendment) applied within the county. Section 9400.8 prohibits local fees for the privilege of using roads. The biosolids impact fee was intended to mitigate the impacts to County infrastructure caused by transporting biosolids. The County argued that the fee was not for road use, but was distinguishable as an "impact fee." Thus, the fee was subject to the Mitigation Fee Act, with which the County complied, and not Section 9400.8. The court, however, found no basis for a distinction between fees for the privilege of using roads and fees that address effects caused by a specific type of road use. Thus, the court held, Section 9400.8, enacted after the Mitigation Fee Act and stating that it applied notwithstanding other provisions of state law, must be construed to prohibit a local agency from imposing fees on loads that are hauled on its roads. Noting, however, that the biosolids impact fee addressed purposes other than road maintenance and repair, the court concluded that the appropriate relief was to invalidate the fee only to the extent it addressed purposes that violated Section 9400.8, and remanded the case to determine the extent to which the biosolids impact fee addressed other purposes.

CHAPTER FIVE
Overview of the Fee Adoption Process – AB 1600 Nexus Legislation

By William W. Abbott

Fees for Development Projects

Accounting *pages 101-102*
Add after the last paragraph in section

While development agreements are generally exempt from the Mitigation Fee Act (66000(b)), the accounting and reporting requirements still apply to agreements entered into after January 1, 2004. See Government Code section 65865(e).

Timing *pages 103-104*
Add after last sentence of second bullet

There are no words of limitation on how far back you can look for previous expenditures. The section says, "the fees or charges are to reimburse the local agency for expenditures previously made." With this in mind, there is no limitation on looking back to previous expenditures when making the findings required for new fees.

Expenditure of Fees Solely for Purpose for Which the Exaction was Imposed *page 104*
Replace the section with the following
Fees may only be expended for the purpose for which the fee was collected. Fees may not be levied, collected, or imposed for general revenue purposes. (Gov. Code, § 66008; also see § 66006.)

Procedures for Adopting Various Fees

Ordinance and Resolution Necessary *page 106*
Add after the last sentence in this section

Ordinarily, if local government takes action by ordinance, any amendment to that action must also be by ordinance, following the equal dignities doctrine. For example, rezoning of use districts or changes of uses and restrictions within a district can be accomplished only through an amendment of a zoning ordinance, and the amendment must be made in the same mode as its original enactment. *City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550. With respect to fee amendments, the agency may use a resolution to amend the fee schedule previously set by ordinance. *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 ("*SCSD*").

In *SCSD*, the issue was whether a water district's increase of its two component water connection fee violated Proposition 218's voter approval requirement. The district adopted an ordinance that established a capacity fee and a fire suppression fee for new water service connections. Later, the district adopted a resolution which amended the ordinance. Several owners within the district challenged the resolution, alleging that: (1) the resolution imposed an assessment with the meaning of article XIIID, but the district failed to satisfy the constitutional requirements (i.e., voter approval) for imposing an assessment; (2) the fire suppression fee was a fee or charge within the meaning of article XIIID, and it violated the prohibition against fees or charges for general governmental services; and (3) the original ordinance could only be amended by another ordinance, not a mere resolution.

The California Supreme Court reversed, holding that both the capacity and fire suppression fees imposed as a condition of making a new connection to a water system are not "property assessments" or "property-related fees" subject to the voter approval requirements of article XIIID. With respect to the use of a resolution to amend the ordinance, the court held:

> "Government Code section 66016, part of the Mitigation Fee Act (Gov. Code, § 66000 et seq.), provides in subdivision (b): 'Any Action by a local agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge shall be taken only by ordinance or resolution.' We agree with the Court of Appeal that this provision authorizes the District to use a resolution to increase existing connection fees, and that this authorization applies even when the fees were initially imposed by ordinance."

Recovery of Costs *page 107*
Place sidebar after "Recovery of Costs."

<u>Impact Fees as CEQA Mitigation: A Primer</u>

Properly administered impact fee programs can operate to streamline CEQA review of later development projects. At the same time, impact fee programs which are not implemented in accordance with the original expectations or which are founded upon unrealistic assumptions may offer the lead agency and affected applicant little or no real legal relief, and may be a trap for the unwary.

Impact fees are controlled by Government Code sections 66000-66022. Fees may be imposed based upon a comprehensive impact fee program (*Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal. App. 4th 164) or as calculated on an ad hoc basis (*Erlich v. City of Culver City* (1996) 12 Cal.4th 854). The methodology (*broad-based vs. ad hoc*) determines which findings must be adopted by the imposing agency. (*Loyola*

Marymount University v. Los Angeles Unified School District (1996) 45 Cal.App.4th 1256.) Generally, impact fees of broad application receive less judicial scrutiny. (*Erlich v. City of Culver City,* supra at p. 875.)

CEQA requires lead agencies to mitigate the impacts associated with project approvals. For a developer, it is far simpler to pay an impact fee than it is to design, engineer, and construct an offsite improvement. From this perspective, impact fees are a cost-effective means by which project impacts can be properly mitigated. Moreover, impacts are considered mitigated, even when the fee funded facility is constructed after the project that contributes to the need for the facility. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99.) In this context, paying impact fees could well be the lesser of two evils. However, recent cases illustrate that simply paying the local impact fee does not constitute full absolution of CEQA responsibilities in every instance.

In *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342, the court of appeal found that a pre-existing fee program failed to provide the "mitigation cover" to avoid a determination that a project impact may be cumulatively significant. The County previously adopted a Napa Airport traffic fee, and collected over $2 million pursuant to this fee. However, the improvements necessary to maintain an adequate circulation totaled over $70 million and although the current project was obligated to pay its fair share of fees, the evidence showed that the necessary improvements would never be funded. As a result, there could be no assumption that cumulative impacts would be mitigated simply by paying the adopted fee.

A different result was reached in *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, supra. In this case, the petitioners challenged a development project approval located in scenic Carmel Valley. One of the legal challenges was to the payment of traffic impact fees as a form of mitigation. The project approval followed the 1995 enactment of a Carmel Valley road impact fee, which called for funding of improvements consistent with the Carmel Valley Master Plan. The fee was set at $16,000 per unit, with annual increases tied to the construction cost index. The mitigation program called for regular monitoring of traffic conditions to determine if specified thresholds were met, which in turn would call for construction of specified improvements. The appellate court characterized the fee program as a "pay-as-you-go" program. The project also contributed to Highway 1 congestion improvements, based upon a mitigation measure called for developer pro-rata contribution to these improvements. The appellate court found sufficient evidence upon which it could conclude that a reasonable commitment to mitigation was demonstrated. In these circumstances, the use of previously adopted fees, as well as ad-hoc fees imposed as part of the project approval constituted effective mitigation.

Two more recent cases have delineated the outer limits of the ability to use fee programs as mitigation for traffic impacts. In *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, the appellate court held that paying a "fair-share fee" is permissible as effective mitigation if the fees are "part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing." Project opponents challenged the use of an impact fee to mitigate cumulative traffic effects in the EIR for a proposed Wal-Mart Supercenter. The court held that a fee program would be permissible as long the mitigation measure specified the amount of the fee and the percentage of future improvements for which this developer would be responsible. The court also emphasized that the fees must be a reasonable, enforceable part of an improvement plan that will actually mitigate the cumulative effects. But *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777 again demonstrates how an incomplete mitigation measure will not allow the fee program to operate as CEQA mitigation. Opponents challenged a fee program to fund road improvements needed due to a proposed residential development. The appellate court held that there was no evidence of a firm and certain plan for improvements because the record showed only the existence of a fee program as well as a planned study to identify needed improvements. The court said, "Since there is no evidence here of what improvements will be funded by the fee programs…we cannot find the mitigated project is consistent with the general plan," and held that the fee program was not adequate mitigation under CEQA.

What's the key? In order to count on a previously adopted fee program, or project imposed "fair share" fees, the lead agency must have reasonable evidence in the record to find that the program is sufficiently certain and can be implemented <u>in its entirety</u> over time. "We do not believe, however, that CEQA requires that the EIR set forth a time-specific schedule for the County to complete specified road improvements. All that is required by CEQA is that there be a reasonable plan for mitigation." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors*, supra at p. 139.) Where improvements call for significant state or federal funding and that funding is in doubt, then assumed mitigation of cumulative impacts is doubtful and reversal is likely.

In 2006, the discussion of impact fees and CEQA mitigation was revisited by the California Supreme Court in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341. There, the court addressed the refusal of a state university campus to pay funds toward the construction of offsite improvements. The campus claimed that it lacked the legal authority to pay those fees. The California Supreme Court disagreed, and introduced into the fee lexicon the phrase "voluntary mitigation," inviting significant speculation as to where the duty to mitigate (and in appropriate circumstances, pay impact fees) ends.

Remedy for fees with both valid and invalid purposes *page 107 [New Section]*
Insert after section entitled "Recovery of Costs"

The court held in *County Sanitation District No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544 that the appropriate relief when a fee is imposed for both valid and invalid purposes is to uphold the fee to the extent that the funds generated are otherwise severable from invalid ones.

<u>Fees for Specific Purposes</u>

Definitions *page 107*
Add to the end of the third bullet [Capacity charges].

> See *N.T. Hill Inc. v. City of Fresno* (1999) 72 Cal.App.4th 977, 983. (Water fees constitute "capacity charges" because they were to be used to pay "for facilities in existence" or "for new facilities to be constructed in the future that are of benefit to the person or property being charged.")

Accounting of Capital Facility Funds *page 108*
Add to last paragraph in this section [before Annual Report].

Accounting requirements apply to capacity charges. *N.T. Hill Inc. v. City of Fresno* (1999) 72 Cal. App. 4th 977, 984.

Exceptions to Sections 66013(c) and (d) Requirements *page 108*
Add at end of section

In *Richmond v. Shasta CSD* (2004) 32 Cal.4th 409, landowners challenged the actions of the Shasta CSD in establishing fees for new connections. The District operates a water system for its users as well as a volunteer fire department and in 1994 it adopted an ordinance which established a fee for new water connections. The connection fee consisted of a capacity charge for future water improvements and a fire suppression charge. The money from these fees was used for capital improvements and purchasing water and fire equipment. In 1997, after Proposition 218 was passed, the District passed a resolution amending the ordinance and increasing the capacity charge. Landowners within the District challenged the resolution on three grounds: 1) the resolution was an assessment under Article XIIID and the District had not satisfied the applicable constitutional requirements; 2) the fire suppression fee was a fee and violated Article XIIID's prohibition against fees or charge for general governmental services; and 3) the original ordinance could only be amended by an ordinance.

The court held that because the capacity charge was not imposed on identifiable parcels, but instead on individuals who request a new water connection, the charge is not an assessment within the meaning of Article XIIID and is not subject to the notice and vote requirements. The court also held that the fire suppression charge was not imposed as an incident of property ownership, but instead was done at the request of the property owner as part of a new connection. Since it is not a property-related fee or charge under Article XIIID, it is not subject to Proposition 218's requirements. Finally, the court held that Government Code section 66016 gave the District the authority to amend an ordinance by resolution.

Road Usage Fees *page 109 [New Section]*
Add this section after the section entitled "Special Rules"

A road usage fee, imposed upon permittees receiving biosolids, was banned by Vehicle Code section 9400.8 which provides in part:

> "No local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads after December 31, 1990, unless the local agency has imposed the fee prior to June 1, 1989."

This limitation was not trumped by the Mitigation Fee Act, as Kern County's fee was largely based upon road usage. To the extent that the fee was imposed for valid purposes, imposition of a portion of the fee may be valid. *County Sanitation District No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544.

<u>Local Agency Zoning and Permit Fees - Section 66014</u>

Reasonable Fee or Two-Thirds Vote Required *page 109*
Add at the end of this section

Regulatory fees cannot exceed the reasonable cost of providing the services for which the fee is charged. *California Farm Bureau v. California State Water Resources Control Board* (2007) 146 Cal.App.4th 1126. Over the objection of the State Water Resources Control Board, the Legislature took away general fund support for many of the SWRCB's duties. In converting the existing state funded program to a fee based system, the SWRCB shifted a disproportionate share of the costs onto a selected class of water rights holders. Pursuant to California water law, holders of riparian, pueblo, and pre-1914 appropriative rights are not subject to SWRCB permitting authority and these users represent 38% of the water diverted in the state. The SWRCB records indicated that a substantial portion of its budget was for the general public or water users not otherwise subject to permit fees. On these facts, the SWRCB was unable to carry its burden of proof to sustain its fee program. While this case does not involve regulatory fees charged by cities and counties for permit processing, by inference it establishes potential limits on how planning and regulatory work of benefit to the public cannot simply be rolled into a fee charge imposed in conjunction with entitlement processing.

Costs of Preparation and Revision of Plans *page 110 [New Section]*
Add this section before the section entitled "Judicial Challenge"

Cities and counties may now include within processing fees an amount reflecting the reasonable costs necessary to prepare and revise plans and policies the city or county is required to adopt before it can make necessary findings. (Gov. Code, § 66014(b).) This should embrace the full range of amendments to land use documents triggered by an application.

Judicial Challenge *page 110*
The code section on judicial challenge has been renumbered and should now read Section 66014(c).

Judicial Challenge *page 110*
Insert at end of sentence on page 110

The court held that building permit fees are not "development fees" under the Mitigation Fee Act (Gov. Code, §§ 66000-66025) and thus the remedy for excessive permit fees is limited to a reduction of future fees through a challenge to the enacting resolution. (Gov. Code, § 66022.) Section 66014(a) permits local agencies to impose building inspection and permit fees not in excess of the estimated reasonable cost of providing the service for which the fee is charged. *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685.

CHAPTER SIX
School Facilities

By William W. Abbott

Stirling Fees

Sidebar *page 112*
The passage of Proposition 1D by the voters in November 2006 had the effect of extending the preemptive quality of the Stirling fee provisions. Thus the *Murrieta*, *Hart*, and *Mira* case holdings remain in legislative limbo.

Triggering Events for Increasing Fee Level *page 114 [New Section]*
Add before section entitled "Pre-SB 50 Analysis"

According to the Attorney General, the triggering event authorizing an increase from Level II to Level III fees is as set forth in the statute, but not as provided for by regulation of the State Allocation Board. (85 Op.Atty.Gen.Cal. 25.) By statute, this trigger is pulled when the State Allocation Board ("SAB") is "no longer approving apportionments". (Ed. Code, §§ 17072.20-17072.35.) The SAB adopted a regulation providing that as soon as requests for funds exceeded remaining funds, that for purposes of increasing fees, the statutory trigger was satisfied. Not so according to the Attorney General. As long as state funds were available for apportionment, then the threshold event leading to Level III fees could not occur.

Exceptions *page 118*
Add at end of paragraph

Residential projects located within redevelopment areas are not exempt from SB 50 impact fees. *Warmington Old Town Associates, L.P. v. Tustin Unified School District* (2002) 101 Cal.App.4th 840

AB 1600 *page 119-121*
Insert at page 120 at end of last full paragraph

<u>Shapell</u> was applied in *Warmington Old Town Associates, L.P. v. Tustin Unified School District* (2002) 101 Cal.App.4th 840 to invalidate the application of a fee study to a project involving the demolition of existing units (56 multi-family) and replacement with 38 new single family homes, as the school study, as most do, focus on the impacts of new students joining the district in new homes. Thus, the agency failed to meet the requirements that there be a reasonable relationship between the fee's use and type of project and the need for the public facility and the type of project on which the fee is imposed. (Gov. Code, §§ 66001(a)(3) and (4).) The court also stated that impact fee

studies do not have analyze the effect of individual development projects, and rather must analyze the class of development projects generally.

Legal Protests *page 126-127*
Add to end of section

A developer who successfully challenges the nexus underpinnings of a school impact fee is entitled to a refund plus interest at 8%, not 10%. *Warmington Old Town Associates, L.P. v. Tustin Unified School District* (2002) 101 Cal.App.4th 840, 868

Sidebar

<u>CEQA Charity and Voluntary Mitigation</u>

In *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, the California Supreme Court decided in part the duty to consider extraterritorial impacts. The state university ("CSU") assumed the legal position that it was not authorized to mitigate for offsite impacts, and on that basis, the Trustees rejected the feasibility of mitigation measures sought by a local city (Marina) and a base reuse authority (Fort Ord Reuse Authority or "FORA").

FORA, responsible for the redevelopment of Fort Ord, had statutory authority very similar to a city or county, including the authority to impose fees and assessments. FORA previously prepared a plan for the eventual development of the base, including the required infrastructure. FORA's plan assumed that the CSU campus would be responsible for financing some of the required infrastructure, to the tune of about $20.5 million. In conjunction with the adoption of a master plan for CSU Monterey Bay, the Trustees certified an EIR. The master plan acknowledged that the eventual growth of the Monterey campus would lead to a population of approximately 25,000 students. The EIR identified five significant impacts which could not be mitigated to a less than significant level: water supply, drainage, wastewater management, traffic, and fire protection.

With respect to roads and fire protection, no agreement had been reached between FORA and CSU and CSU had not committed any funds directly. CSU ultimately concluded that the mitigation responsibility was that of another responsible agency (FORA), and that it lacked legal authorization to expend money for these purposes. With regards to drainage, water supply, and wastewater management, CSU took the position that these matters were the responsibility of FORA, and that the improvements proposed by FORA would provide the necessary mitigation, assuming that the parties completed the statutory negotiations pursuant to Government Code section 54999 *et seq.* To justify the certification of the EIR and the adoption of the master plan, the CSU Trustees adopted a statement of overriding considerations, and FORA petitioned for review. Eight years later, the Supreme Court finally weighed in on the issues.

First, the court considered the Trustees' finding that they could not feasibly mitigate the environmental effects of the master plan campus expansion. The Trustees claimed that they were prohibited from contributing funds to FORA as mitigation and relied on *San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal.3d 154 in support of their assertion. The court disagreed, and held that while *San Marcos* addressed compulsory assessments imposed on public entities, voluntary payments were not discussed in that case. The court said, "An assessment connotes, at the very least, a compulsory charge imposed by the government on real property…FORA has imposed no charge on the Trustees, let alone a compulsory one." CEQA requires avoidance or mitigation, if feasible, of significant environmental effects and voluntary payments to FORA may be a feasible way to mitigate those effects. A payment made for purposes of mitigation, is not compulsory or an assessment merely because it is a feasible method of mitigation under CEQA. The court reiterated the duty to mitigate and said,

> "…if campus expansion requires that roads or sewers be improved, the Trustees may do the work themselves on campus, but they have no authority to build roads or sewers off campus on land that belongs to others. Yet the Trustees are not thereby excused from the duty to mitigate or avoid CSUMB's off campus effects on traffic or wastewater management, because CEQA requires a public agency to mitigate or avoid its projects' significant effects not just on the agency's own property but on the environment."

The court also held that there was no prohibition against CSU making voluntary payments to FORA, notwithstanding the lack of specific legal authorization by the Legislature. After *San Marcos*, the Legislature enacted Government Code section 54999 et seq., which authorizes public utilities to charge public-entity customers a fair share of capital costs. Though this statute did not literally apply because FORA had not imposed an assessment or capital facilities fee, the court held that a negotiated agreement between the Trustees and FORA for mitigation of significant effects resulting from the campus expansion would likely satisfy CEQA requirements. Also, the fact that the legislature had spoken to three of the five issues in section 54999 (drainage, water supply and wastewater), did not operate as a prohibition against voluntary payments for the remaining matters (roads and fire protection). The court said, "We discern…no evidence of intent to bar the Trustees from voluntarily contributing, as a way of meeting their CEQA obligations, their fair share of the cost of improvements to roads and fire protection necessitated by CSUMB's expansion."

CSU also argued that mitigation would not be feasible, as there was no assurance that the fees would be used to provide the required mitigation. Acknowledging that there might be some uncertainty as to the success of long term mitigation, the court found that this was <u>not</u> a basis to reject its own ability to make a voluntary payment. The Supreme Court then favorably cited *First Anderson* and *Save our Peninsula* for the position that payment of fair share impact fees can constitute adequate CEQA mitigation for cumulative impacts. Though the court emphasized that that the payment of fees without a showing that mitigation would actually occur is inadequate for CEQA purposes, it found that here there was no reason to believe that FORA would not meet its obligation. *Save our Peninsula* was used to illustrate the notion that there need only be a "reasonable plan" for mitigation, and FORA's plan met that requirement.

Undaunted, the Trustees also argued that mitigation was the sole responsibility of FORA and that the CSU did not have the responsibility to mitigate environmental effects under Public Resources Code section 21081 (a)(2). However, the court drew a careful distinction. While true that FORA had the legal authority to construct the offsite improvements, this did not mean that CSU lacked the authority to make a supporting financial contribution. In other words, the impact areas of offsite mitigation were not *exclusively* the responsibility of FORA. It is true that the Trustees cannot enter the land of another to make improvements, and the court pointed to Public Resources Code section 21004, which says that "in mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law…" But the court also highlighted the fact that CEQA does not limit that agency's obligation to mitigate those significant effects. Payment to FORA to mitigate would be a feasible alternative.

A similar line of reasoning, as it applies to community colleges, is found in *County of San Diego v. Grossmont-Cuyamaca Community College District* (2006) 141 Cal.App.4th 86. Feasibility, and its counterpart infeasibility, is an integral part of CEQA analysis. Feasibility is defined by the Guidelines as follows: ". . . capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364) A mitigation measure may be determined by the lead agency to be infeasible and on that basis, would not be required as a condition of project approval. Unlike other areas of CEQA practice, there has been less frequent and less critical analysis of what constitutes a valid finding of infeasibility. A recent court decision begins to shed light on what is likely to be a new chapter of CEQA challenges.

The Grossmont-Cuyamaca Community College District prepared a master plan, approving twenty new and remodeling construction projects. The EIR forecasted substantial increases in student population, triggering a significant increase in offsite traffic impacts. With respect to those impacts, the District found that it was legally and economically infeasible for the District to pay for offsite improvements. The County of San Diego disagreed with the infeasibility determination, and filed suit to set aside the EIR and master plan approval.

With respect to offsite mitigation of traffic impacts, the appellate court reviewed the relevant statutes governing community college construction. First, as a general proposition, the court confirmed that CEQA by itself does not create the legal basis for mitigation. Rather, the authority to mitigate must be based upon separate legal authority. Next, the court found no words of limitation which would support the District's position that it lacked the legal authority to expend funds offsite on improvements in the control of the County. The court then reviewed the Districts claim of economic infeasibility. As local governments are already aware (but apparently not the District), a claim of economic infeasibility must be based upon substantial evidence in the record. In this case, there was none." The administrative record contains no estimate of the District's proportional share of off-campus traffic mitigation measures identified in the final EIR. Without evidence of the amount of any such cost, we must conclude there is no substantial evidence to support the District's claim that mitigation of the adverse project-related off-campus traffic impacts is economically infeasible."

CHAPTER SEVEN
Uniform Protest Provisions for Fees, Taxes, Assessments, Dedications, Reservations, or Other Exactions

By Margaret Sohagi

Procedures, *page 137*
Add excerpt (to the right) adjacent to the two bulleted paragraphs.

One of the important benefits of AB 1600 is that it allows a developer or subdivider to pay under protest or to make satisfactory arrangements to pay the fee or complete the non-fee obligation. By contrast, in tax disputes a complaining party must pay first, then litigate. *Flying Dutchman Park, Inc. v. City and County of San Francisco (1st Dist. 2001) 93 Cal.App.4th 1129.*

Statute of Limitations *page 140*
Add after the last paragraph of the 2002 supplement discussing this section [immediately preceding Challenges to Fees or Charges for Water and Sewer Connections and Zoning Permits]

The theory of continuous accrual applied in *Howard Jarvis* is not applicable where a statute expressly gives a statute of limitations. For example, in *Barratt American, Inc. v. City of San Diego* (1st Dist. 2004) 117 Cal.App.4th 809, a residential developer challenged a City resolution authorizing a facilities benefit assessment for a certain property. The developer claimed its lawsuit was timely under the theory of continuous accrual applied in *Howard Jarvis*. The Court rejected this argument and refused to adopt a different date of accrual where California Code of Civil Procedure section 329.5 expressly states that the statute runs from the date the assessment is levied. *Barratt* at 820.

In rejecting the theory of continuous accrual, the *Barratt* court likened the case to *Utility Cost Management v. Indian Wells Valley Water District* (2001) 26 Cal.4th 1185, in which the California Supreme Court found that an action seeking a refund of allegedly excessive capital facilities fees was barred by the limitations period given in the Government Code. *Barratt* at 820. (See also *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 774 (rejecting theory of continuous accrual and holding challenges based on later-enacted state statutes must be brought within the limitations period of the first time the challenge could be brought).)

Statute of Limitations *page 138*
Add at end of section on page 140

Citing *Exactions and Impact Fees in California*, the Third Appellate District ruled that the Subdivision Map Act (Gov. Code, §§ 66410 et seq.) 90-day statute of limitations trumped the longer Mitigation Fee Act (Gov. Code, §§ 66000 et seq.) timeline when reviewing a legal challenge to a subdivision map denial by the City of Chico. The case is *Thomas Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537

The facts involved a developer's request to develop Lot Q with 80 to 160 dwelling units. On appeal, the City Council adopted a motion of intent to reduce the number of units to 80, but otherwise affirm the approval. The City Council then had a change of heart and several months later voted to preclude development.2 The basis for the denial was based upon aesthetic impacts and a desire to preserve open space.

The applicants framed a written objection under the Mitigation Fee Act. A lawsuit was filed and served just after the 90 day file-and-serve requirement of the Subdivision Map Act (Gov. Code, § 66499.37). The trial ruled that the claim was untimely. The appellate court affirmed, holding that the Mitigation Fee Act litigation provisions (Gov. Code, § 66022) apply to exactions such as fees and land dedications, but not decisions based upon use considerations.

Statute of Limitations *page 140*
Add after the last paragraph in this section (immediately proceeding Refund or Return of Payment).

In *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal. 4th 809, plaintiffs, three taxpayer advocacy groups and three La Habra taxpayers, sued the City of La Habra for imposing and collecting a utility users tax. The city contended that the suit was barred by the three-year statute of limitations applicable to a liability created by statute. Code Civ. Proc.§ 338(a). The taxpayers argued that the statute began to run when the Supreme Court of California declared Proposition 62 to be constitutional, or in the alternative that the limitations period starts to run anew with each collection of taxes.

Proposition 62 was approved by the voters in November 1986, and was a statewide initiative providing that local governments may not impose any general tax without being submitted and approved by the majority of voters. A few years after the passage of Proposition 62, an appellate court declared its voter approval requirements to be unconstitutional. In December of 1992, the city established a utility users tax by ordinance to raise revenue for general governmental purposes. The city did not submit the ordinance to the voters for approval. In September of 1995, the California Supreme

[2] The City Council effectively allowed for a density transfer to an adjacent parcel, apparently owned by the same applicant.

Court decided in *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal. 4th 220, that the voter approval requirements of Proposition 62 were constitutional. In March 1996, the taxpayers filed their lawsuit.

The Court rejected the taxpayers' first argument that the statute of limitations began to run when *Guardino* was decided. "Plaintiffs were free to challenge the tax when it was first imposed, and might, as in *Guardino*, have obtained a favorable result in the Court of Appeal despite the adverse *City of Woodlake v. Logan* (1991) 230 Cal.App3d. 1058 decision." However, the Court agreed with the plaintiffs' alternative argument that the limitations period starts to run anew with each collection of taxes. The Court held that "plaintiffs have alleged an ongoing violation of Proposition 62's commands, for which they seek relief in mandamus (Code Civ. Proc. § 1085(a)), and a presently existing actual controversy between themselves and the city over the validity of the utility tax, which they seek to resolve by declaratory judgment (Code Civ. Proc. § 060); those causes of action are not barred merely because similar claims could have been made at earlier times as to earlier violations, or because plaintiffs do not at this time also seek a refund of taxes paid." *Howard Jarvis Taxpayers Association* at 821–822. Thus, where the three-year limitations period for action on a liability created by statute applies, and no other statute or constitutional rule provides differently, the validity of a tax measure may be challenged within the statutory period after any collection of the tax, regardless of whether more than three years has passed since the tax was enacted. *Id*. at 825.

Challenges to Fees or Charges for Water and Sewer Connections and Zoning Permits
page 145
Insert after first full paragraph [citing N.T. Hill, Inc. v. City of Fresno].

In *Utility Cost Management v. East Bay Municipal Utility District* (1st Dist. 2000) 79 Cal. App. 4th 1242, Utility Cost Management (UCM) filed a complaint against the East Bay Municipal Utility District (EBMUD) seeking a refund of sums paid by the Berkeley Unified School District (BUSD) for water and wastewater fees. The complaint was based on Government Code section 54999.3, which limits the amount a municipal utility can charge a school district for capital improvements the utility has constructed or will construct. The trial court granted EBMUD's motion for summary judgment based on the argument that UCM's claim was barred, as a matter of law, by the 120-day statute of limitations contained in Government Code section 66022 and by the 120-day statute of limitations in Public Utilities Code section 14402.

The appellate court affirmed the trial court decision holding that the 120-day statute of limitations set forth in Government Code section 66022 applies to an action under Government Code section 54999.4. Government Code section 66022 applies only to fees, capacity charges, and services charges described in and subject to sections 660 13 and 66014. The court focused on Government Code section 66013, which sets forth rules that apply when a local agency imposes fees for water connections or capacity fees. The court found that UCM was seeking reimbursement for fees that were synonymous with the term "capacity charges" as defined in section 66013(b)(3) and thus the statute of limitations in section 66022 was applicable.

The Supreme Court of California recently decided a sister case, *Utility Cost Management v. Indian Wells Valley Water District* (2001) 26 Cal. 4th 1185, in which it reversed an appellate court's ruling expressly rejecting the reasoning in *Utility Cost Management v. East Bay Municipal Utility District*. The Supreme Court decision solidifies that the 120-day statute of limitations set forth in Government Code section 66022 applies to an action by a public agency to recover amounts paid to a public utility for capital improvements. The fees for which UCM sought reimbursement fell directly within the definition of "capacity charges" as defined in Government Code section 66013 and were thus subject to Government Code section 66022's 120-day statute of limitation.

The Fifth District Court of Appeal refined the distinctions set forth in *N.T. Hill* in 2003 in a case in which a developer challenged a 1997 ordinance establishing connection charges for users of the County's water and sewer services. *California Psychiatric Transitions, Inc. v. Delhi County Water District* (5th Dist. 2003) 111 Cal.App.4th 1156. The court specified that where there is an "adjudicatory" determination of a fee, "that determination…is itself a 'resolution or motion' establishing the fee." Therefore, the statute of limitations is 120-days under section 66022 and begins to run with the adoption of the resolution or motion. *Id.* at 1162-63.

Taking Claims; The Need for Ripeness *page 146*
Insert after last full paragraph in this section [immediately proceeding Attorney Fee Awards].

In *Home Builders Association of Northern California v. City of Napa* (1st Dist. 2001) 90 Cal. App. 4th 188, the city enacted an inclusionary zoning ordinance that required a residential developer to set aside ten percent of new units for low or moderate income housing. Developers had two options: (1) satisfy the requirement through an alternative equivalent proposal such as a dedication of land, or the construction of affordable unites on another site; or (2) pay an in-lieu fee to satisfy the requirements. The court held that the ordinance did not constitute a taking on its face, because the city had the ability to reduce or completely waive the requirements imposed by the ordinance. Nor did the ordinance fail to substantially advance a legitimate government interest. The Mitigation Fee Act portion of the opinion was not certified for publication.

Attorney Fee Awards page 148
Add after last paragraph of this section

However, a court may grant attorneys fees where it can be shown that plaintiffs have incurred fees out of proportion to their personal, non-pecuniary interests in the due process rights at stake. In *Bowman v. City of Berkeley* (1st Dist. 2005) 131 Cal.App.4th

173, the Court awarded attorneys fees to a group of seven neighbors, two of whom lived directly adjacent to a proposed housing project for senior citizens which the group successfully opposed on due process grounds. The *Bowman* Court distinguished the plaintiffs from the homeowner in *Williams v. Board of Permit Appeals,* finding that their personal nonpecuniary interests, although similar to those of the *Williams* homeowner, were "far more attenuated" since they filed their petition on behalf of 250 other residents and received financial support from approximately 40 other citizens. *Bowman v. City of Berkeley, supra,* 131 Cal.App.4th at 182.

Insert at page 140 above "Refund or Return of Payment:

In *Branciforte v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, the court held that the statute of limitations applicable to a claim related to the Subdivision Map Act's provisions regarding credit for "private open space" was that established by the Mitigation Fee Act. The court rejected the City's argument that the applicable statute of limitations was the 90-day statutory period, running from the time of the challenged decision, generally applicable to Map Act challenges. Section 66020 of the Mitigation Fee Act authorizes a party to protest an exaction imposed on a development project by serving a written notice on the applicable governing body that the required payment is tendered under protest. Such protest must be filed at the time of approval of the development or within 90 days of the date the exaction is imposed. Local agencies must provide project applicants with written notice at the time of project approval or at the time the exaction is imposed that the 90-day period in which the applicant may protest has begun. If a timely protest has been filed, the project applicant has 180 days from date of this notification to file an action challenging the exaction.

Based on its review of legislative history, the court concluded that where a party properly avails itself of the fee protest provisions of Mitigation Fee Act's Section 66020, the limitations period is the one established by that section. If a party does not comply with Section 66020's fee protest procedures to challenge conditions based on the Quimby Act, an action must be brought within the 90-day statute of limitations generally applicable to subdivision decisions under the Map Act's section 66499.37.

Also, the court rejected the City's claim that a developer seeking credit for "private open space" against parkland dedication requirements was required to comply with the claim presentation requirements of the California Tort Claims Act. The Tort Claims Act generally bars lawsuits for money or damages against local public entities unless a written claim has been timely presented, a requirement that the City alleged Branciforte had failed to meet. The court, however, noted that even though the payment of money may be involved, an action to compel the return of a specific sum of money belonging to a party under applicable law is not a claim "for money or damages" for the purposes of the Tort Claims Act. Here, the court said, Branciforte sought to enforce what it asserted to be the City's express statutory duty to provide open space credit. Such a claim comes under those actions seeking to enforce performance of a duty to return money and, thus, is not subject to claim presentation requirements of the Tort Claims Act.

Insert at page 144 after "Challenges to fees or charges for water and sewer connections and zoning permits"

In *Branciforte v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, the court rejected the City's allegation that a developer should be barred from challenging the City's failure to grant a credit for "private open space" against its parkland dedication requirements, because the developer had failed to exhaust administrative remedies. The City had no provisions for such credit in its land use regulations. The City maintained that the developer should have requested a credit using the administrative procedure available under the City's subdivision ordinance for requesting modifications to the provisions of that ordinance. By not doing so, the City argued, Branciforte had failed to exhaust its administrative remedies. The court disagreed, holding that the City's procedure did not provide a mechanism for obtaining administrative review of the City's decision not to grant credit for private open space. The procedure allows a subdivider to seek minor adjustments to the requirements of the subdivision ordinance under certain limited circumstances. Here, by contrast, the subdivider sought creation of an entirely new provision, granting private open space credit, not provided for in the subdivision ordinance.

CHAPTER EIGHT
Meeting Local Needs Through Exactions and Other Techniques

By William W. Abbott

Poaching Sales Tax From Neighboring Municipalities *page 160 [New Section]*
Add at end of chapter

In *City of Carson v. City of La Mirada* (2004) 125 Cal.App.4th 532, the court held that a Corporate Express distribution center was a "big box store" under AB 178. (Health & Saf. Code, § 33426.7 and Gov. Code, § 53084). AB 178 was passed to address the problem of sales tax "poaching" by municipalities. Because big box stores generate large amounts of sales taxes for municipalities' general funds, the Legislature wanted to prevent the use of public money to lure them away from neighboring areas.

CHAPTER NINE
Ongoing Funding of Neighborhood-Specific Infrastructure and Amenities

By Harriet A. Steiner and Seth Merewitz

Mello-Roos Special Taxes *pages 162-163*
Add after the last paragraph in this section

In 2002, AB 2851 made modifications to the Mello-Roos Act. Of significance, it added section 53343.1. This measure requires any Mello-Roos district formed after January 1, 1992, on request by a resident or property owner located in the district, to prepare an "annual report" within 120 days of the end of its fiscal year. The report must contain the following:

- (a) The amount of special taxes collected for the year.
- (b) The amount of other moneys collected for the year and their source, including interest earned.
- (c) The amount of moneys expended for the year.
- (d) A summary of the amount of moneys expended for the following:
    - (1) Facilities, including property.
    - (2) Services.
    - (3) The costs of bonded indebtedness.
    - (4) The costs of collecting the special tax under § 53340.
    - (5) Other administrative and overhead costs.
- (e) For moneys expended for facilities, including property, an identification of the categories of each type of facility funded with amounts expended in each category, including the total percentage of the cost of each type of facility that was funded with bond proceeds or special taxes.
- (f) For moneys expended for services, an identification of the categories of each type of service funded with amounts expended in each category, including the total percentage of the cost of each type of service that was funded with bond proceeds or special taxes.
- (g) For moneys expended for other administrative costs, an identification of each of these costs.
- (h) A certification and explanation by the district of how the moneys described in subdivisions (d), (e), (f), and (g) comply with Section 53343[3].

The district may recover the costs of preparing the report by charging a fee. The report must contain references to the relevant sections of the resolution of formation to confirm that bond proceeds and special taxes are being used for authorized purposes.

[3] Section 53343 requires that any charges collected may only be used for facilities and services authorized by the Mello-Roos Act.

Retail Transactions and Use Tax *page 164* [New Section]
Add this section after the section entitled "Public Library Special Tax"

The Local Transportation Authority and Improvement Act (Pub. Util. Code §§ 180000-180264) authorizes counties to create local transportation authorities empowered to impose a retail transactions and use tax of up to one percent to fund transportation improvements and services in the county. Pub. Util. Code § 180202. The revenues may be used for the construction and improvement of state highways, the construction, maintenance, improvement, and operation of local streets, roads, and highways, and the construction, improvement, and operation of public transit systems. Pub. Util. Code. § 180205. The board of supervisors determines the membership of the authority with the concurrence of a majority of the cities having a majority of the population in the incorporated area of the county. Pub. Util. Code. § 180051. Each member of the authority must be an elected official of a local government entity within or partly within the county. Pub. Util. Code. § 180051.

In order to adopt a retail transactions and use tax ordinance, the following must occur: (1) the ordinance must be adopted by a two-thirds vote of the authority; (2) it must be approved by a majority of the electors, or by any otherwise applicable voter approval requirement, voting in a special election; and (3) the authority must adopt a transportation expenditure plan. Pub. Util. Code. § 180201. The transportation expenditure plan must set forth the expenditure of the revenues expected to be derived from the tax and must be adopted prior to the special election. In addition, the Attorney General has opined that an authority may not reimpose a retail transactions and use tax for an additional period of time without first adopting a new county transportation expenditure plan. (87 Ops. Cal. Atty Gen. 5 (2004).)

Procedures for Adoption of Special Assessments Under Proposition 218 *pages 165-166*
Add after first full paragraph in this section

In another Proposition 218 case, *Not About Water Committee v. Solano County Board of Supervisors* (2002) 95 Cal.App.4th 982, the Court of Appeals stated that weighted voting in accordance with property interests does not violate due process standards. In *Not About Water*, a group of property owners challenged the formation of an assessment district and subsequent levy of an assessment on the real property encompassed within it.

The court held it was not irrational to allocate voting power in a special district referendum in proportion to the financial impact of the assessments to be imposed. "Such an allotment scheme reasonably reflects the benefits and burdens to property owners of the district's operation. Moreover, application of the per capita voting scheme -- the 'one person, one vote' formula petitioners contend is required by the Fifth Amendment -- in these circumstances, would have produced an anomalous disproportionality under which,

for example, a property owner assessed for fire protection service in the sum of approximately $3,000 would exercise the same voting power as a property power assessed approximately $20,000 for multiple water and fire suppression services."
The court went on to say that Proposition 218 requires, as a matter of state constitutional law, the use of weighted voting schemes in all referenda on proposed assessments, which include special assessments and benefit assessments.

Proposition 218 exempts from its enactment procedures preexisting assessments "imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems, or vector control." (Art. XIII D, § 5(a).)4 In *Keller v. Chowchilla Water District* (2000) 80 Cal.App.4th 1006, the Appellate Court found that the Chowchilla Water District's preexisting standby charge was exempt under this provision. In 1997, the District approved a preexisting standby charge of $52.50 per acre to be levied on all property capable of receiving water from the District. The District used the standby charge for the purchase of water. Property owners challenged the standby charge because the District did not follow Proposition 218's notice and majority protest procedures. Proposition 218 provides that standby charges shall be classified as "assessments" and must comply with the relevant enactment procedures.

The Appellate Court found that the standby charge met Proposition 218's exemption provision. The court reasoned that the purchase of water was a "cost of maintenance and operation" of the District's improvements. Because the standby charge was a preexisting assessment and imposed exclusively for maintenance and operation expenses for the provision of water, the charge was exempt from Proposition 218's enactment procedures.

Procedures for Adoption of Special Assessments Under Proposition 218 *pages 165-166*
Add after first full paragraph in this section

In another Proposition 218 case, *Not About Water Committee v. Solano County Board of Supervisors* (2002) 95 Cal.App.4th 982, the Court of Appeals stated that weighted voting in accordance with property interests does not violate due process standards. In *Not About Water*, a group of property owners challenged the formation of an assessment district and subsequent levy of an assessment on the real property encompassed within it.

The court held it was not irrational to allocate voting power in a special district referendum in proportion to the financial impact of the assessments to be imposed. "Such an allotment scheme reasonably reflects the benefits and burdens to property owners of the district's operation. More o v e r, application of the per capita voting scheme—the "one person, one vote" formula petitioners contend is required by the Fifth Amendment—in these circumstances, would have produced an anomalous

[4] Subsequent increases in these assessments are subject to the procedures and approval process of Proposition 218.

disproportionality under which, for example, a property owner assessed for fire protection services in the sum of approximately $3,000 would exercise the same voting power as a property owner assessed approximately $20,000 for multiple water and fire suppression services.

The court went on to say that Proposition 218 requires, as a matter of state constitutional law, the use of weighted voting schemes in all referenda on proposed assessments, which include special assessments and benefit assessments.

Proposition 218 Case Law Relating to Utility Charges and Fees page 168 [New Section]
Add after section entitled "Impact of Proposition 218 on Maintenance Assessments"

Bighorn-Desert View Water Agency v. Verjil. The decision in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, handed down in July of 2006, is a critically important decision regarding the applicability of Proposition 218 to consumption-based water rates.

Although at issue in *Bighorn* was the water agency's refusal to place on the ballot an initiative which would have repealed water rates and also required voter approval before the agency could subsequently increase water rates, to reach its decision the Court considered the applicability of Proposition 218 to consumption-based water rates. Proposition 218 defines a "fee" or "charge" subject to its provisions as any levy other than an ad valorem tax, a special tax, or an assessment, imposed as an incident of property ownership, including a user fee or charge for a property related service. Cal. Const., art. XIIID, § 2. Reinforcing the dicta in *Richmond v. Shasta Community Services District* (2004) 32 Cal. 4th 409 (see below), the Court ruled that consumption-based water rates are subject to Proposition 218 because they are "'fees' or 'charges'" for ongoing "property-related" services.

To reach its decision, the Court deemed irrelevant the fact that the rates were consumption-based as opposed to a fixed monthly fee. This reinforces the recent decision of *Howard Jarvis Taxpayers Assoc. v. City of Fresno* (2005) 127 Cal. App. 4th 914, analyzed below.

A California Supreme Court decision, *Richmond v. Shasta Community Services District* (2004) 32 Cal. 4th 409, discusses assessment and fees subject to the procedures under Proposition 218. In 1994, the Shasta Community Services District adopted an ordinance establishing a water connection charge of $2,000 for new users, which included a capacity charge and a fire suppression charge. In 1997, after the passage of Proposition 218, the District increased the connection fee to $3,176. Property owners proposing development under a tentative subdivision map challenged the increase, maintaining that adoption of the charges did not adhere to the provisions under Proposition 218 regarding special assessments and fees. The owners claimed that the assessment must be adopted by a vote of the electorate, and that, furthermore, the fire suppression charge was prohibited as a fee for general government services. (Under Proposition 218, no fee or charge may be imposed for general governmental services that are available to the public at large in substantially the same manner as they are to property owners.)

The court held that water capacity or connection charges are triggered by the voluntary decision of individuals to seek governmental services and are therefore not "assessments" subject to Proposition 218. In addition, the court explained that an assessment must not only confer a special benefit on real property, but also must be imposed on identifiable parcels of real property. Because the capacity charge was imposed only on property owners who applied for a new service connection, the District was unable to identify the future parcels upon which the capacity charge would be imposed. Therefore it was impossible for the District to comply with Proposition 218's notice and majority protest requirements.

As to the fire suppression charge, the court held that because a connection charge is not imposed "as an incident of property ownership" it is not a fee or charge subject to Proposition 218. A fee for making a new connection to a water system is not imposed simply by virtue of property ownership, but instead results from the owner's voluntary decision to apply for the connection. In fact, going beyond that, in dicta the court suggested that ongoing fees for water service would be imposed as an incident of property ownership and therefore be subject to Proposition 218 because they require nothing more than the ownership and use of property.

Howard Jarvis Taxpayers Assoc. v. City of Roseville and *Howard Jarvis Taxpayers Assoc. v. City of Fresno*. These two cases both involve in-lieu franchise fees for utility services. In *Howard Jarvis Taxpayers Assoc. v. City of Roseville* (2002) 97 Cal. App. 4th 637 the Third District Court of Appeal reviewed in-lieu franchise fees imposed by the City of Roseville on its municipal water, sewer, and garbage services. Local agencies often impose in-lieu fees on municipal utilities as a substitute for the franchise fees paid by private utilities for the use of public streets and rights-of-way. In 1992, Roseville began levying a 4% in-lieu fee on each utility's annual budget. The fee went into the city's general fund. Howard Jarvis Taxpayers Association ("HJTA") challenged the fees claiming they violated Proposition 218 by imposing a fee for a property related service that was greater than the cost of providing that service. The Appellate Court ruled that the in-lieu fees fell within the scope of Proposition 218 because (1) Roseville's municipal code tied these utility services to property ownership and (2) the fees were not based on utility consumption. The court then concluded that the in-lieu fees violated Proposition 218 because they did not represent the cost of providing the respective utility service.

However, until *Howard Jarvis v. Fresno*, and now *Bighorn*, many cities distinguished the Roseville case by tying their in-lieu fees to consumption-based, metered utility charges. This practice is now in question. In this case, the Fifth District Court of Appeal reviewed an in-lieu fee authorized by the Fresno City Charter that required each city utility to pay to the City's general fund 1% of the assessed value of fixed assets of the utility. The City passed these fees on to customers by blending the fee into the utility's regular user fees.

HJTA challenged the in-lieu fees for water, sewer, and solid waste services alleging they violated Proposition 218 because (1) they exceeded the cost of providing the service, (2) revenues derived from the fees were used for a purpose other than that for which they were imposed, and (3) fees were deposited in the City's general fund and therefore violated the requirement that no fee may be imposed where a service is available to the public at large in the same manner as it is available to property owners.

The Appellate Court first found that, by its terms, as of July 1, 1997, the substantive provisions of Proposition 218 extend to existing fees regardless of whether they have been extended, imposed, or increased by the agency. The court then concluded that the in-lieu fees were subject to Proposition 218. The court found persuasive the California Supreme Court dicta in *Richmond* suggesting that ongoing fees for water service are imposed as an incident of property ownership. The court also found persuasive the ruling in *Howard Jarvis v. Roseville*. In making its decision, however, the court failed to distinguish metered or consumption based charges from flat charges. The court concluded that the in-lieu fees violated Proposition 218 because Fresno did not even try to establish that these fees correlated to the costs of providing city services to the utilities. The court did state, however, that if Fresno calculated the actual costs of these services (such as road repair), the City could recover its actual expenditures.

Geologic Hazard Abatement District *page 170* [New Section]
Add this section after the section entitled "Landscape and Lighting Act of 1972"

One of the methods of maintaining public improvements that remediate a geologic hazard is through the creation of a Geologic Hazard Abatement District. A GHAD may be formed for the "prevention, mitigation, abatement, or control of a geologic hazard," or the "mitigation or abatement of structural hazards" that are caused by geologic hazards. Pub. Res. Code § 26505. A "geologic hazard" is defined as an actual or threatened landslide, land subsidence, soil erosion, earthquake, fault movement, or any other natural or unnatural movement of land or earth. Pub. Res. Code § 26507.

The formation of a GHAD is similar to that of a CSD. *See* Pub. Res. Code §§ 26525 *et seq.*

Benefit Assessment Act of 1982 *pages 170-171*
Replace sentence "The 1982 Act requires voter approval" with the following sentence

The approval of new or increased assessments under the 1982 Act, as amended, is governed by Government Code section 53753, which is the procedure employed under Proposition 218, as outlined above.

LAFCo Requirements for a General Tax for Incorporation of a New City
Add after Other Mechanisms heading page 171

Although this chapter focuses on special taxes and assessments, we wanted to note a 2006 Attorney General opinion regarding the authority of LAFCo to require voter approval of a general tax as part of an incorporation of a new city. In Opinion Number 06-210, the AG confronted the issue of a local agency formation commission ("LAFCO") conditioning its approval of the incorporation of a city upon voters within the proposed city approving a general tax by majority vote.

The first of two questions analyzed by the AG is if Proposition 218 requires voter approval of a general tax, can a LAFCO condition an incorporation upon the approval of such a tax? The AG answered in the affirmative. The AG reasoned that since LAFCOs have the authority to impose conditions when approving a city's incorporation, including general taxes (Gov. Code § 56886(s)), and then must hold a vote on that incorporation and associated conditions, the LAFCO approval vote serves as the mandated vote under Proposition 218. In other words, in the words of the Opinion, the LAFCO approval vote "complements" Proposition 218.

The second question analyzed by the AG in the Opinion is whether providing for a majority vote in such a manner violates Proposition 62, which requires a supermajority of the taxing authority (in this case LAFCo) for general taxes. *See* Gov. Code § 53724(b). To this, the AG responded that the LAFCO is not ultimately imposing a tax here—rather the voters and that, therefore, in this case, the requirement that the local entity legislative body approve submitting the tax to the voters by a supermajority vote of that body did not apply. .

Based on this opinion, LAFCo, at least for an incorporation or formation of a special district would have authority to require voter approval of taxes as a condition of approval of the new local entity.

Community Services Districts *page 171-172*
Replace first paragraph with the following

Another device to fund maintenance is the creation of a community services district (CSD). (§ 6100 et. seq.) In 2005, effective January 1, 2006, the Legislature enacted its first comprehensive overhaul of the laws governing community services districts. All CSDs are subject to the new law immediately.

A CSD may fund the following services: maintenance of police departments, library buildings, streets, public airports, sewer, water, and flood protection works and facilities. The new law adds additional permissible services, such as weed and rubbish abatement, animal control, postal services, and environmental mitigation. *Id.*

Replace second paragraph in this section with the following paragraph

A CSD can be formed in two ways: (1) by petition signed by 25 percent of the registered voters residing within the district; or (2) by "Resolution of Application" adopted by the legislative body of any county or city that contains territory proposed to be included in the district. (§§ 61011, 61013.) Although legislation in 2005 formally exempted the formation of a CSD from the requirements of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (§ 56000 *et seq.*), the formation of a CSD must generally be conducted in accordance with that Act.

Replace third paragraph in this section with the following paragraph

The petition for formation or the Resolution of Application must contain a description of the boundaries, methods by which the district will be financed, the proposed name of the district, and a detailed list of reasons for formation. (§§ 61011, 61013.) The petition or resolution must also specify the "chief petitioners," specify the number of members on the board of directors and the method for their selection, and state the purpose of the district and the powers that the district will be authorized to provide. *Id.*

Replace third and fourth full paragraphs on page 172 with the following paragraph

The petition or Resolution must be filed with the local agency formation commission (LAFCO). (§§ 61011, 61013.) LAFCO holds a hearing to determine whether the formation is consistent with its adopted plans and policies and establishes a set of terms and conditions that will govern the formation of the district. § 56650 et seq. Once LAFCO approves the formation, an election is conducted, unless a majority protest its creation under the LAFCO procedure. § 61014. The formation of the district may be conditioned on the approval of a special tax or assessment. § 61014(c). Once the requisite votes are cast, the LAFCO commission will declare by resolution that the CSD is duly organized. (§§ 57125 *et seq.*)

Replace the third full paragraph on page 172 with the following paragraph

Once formed, a CSD may be further authorized to provide additional services through the passage of special legislation. *See* § 61105.

Public/Private Partnerships *page 173*
Add sidebar to the right

When Public//Private Cooperation May Be Too Much of a Good Thing

Public-private cooperation may come at a hidden price. As a result of new legislation enacted in 2001, an innovative, cooperative agreement between a public agency and a developer may backfire by causing all of the proposed developments to become a "prevailing wage project," significantly raising development costs.

Public-private innovation may take many forms, including but not limited to land write-downs, in-vestment of public funds, fee waivers, or reinvestment of project-generated tax proceeds into infrastructure cost, debt, or O&M. SB 972, passed during the 2001 legislative session and effective January 1, 2002, may make the spirit of cooperation too expensive. This legislation extends the requirement for "prevailing wages" for projects that are paid in whole or part from public funds.

Labor Code section 1720(b) now provides that the phrase "paid for in whole or in part out of public funds" includes "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates or other obligation that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations." This new definition significantly broadens the prevailing wage requirement and is likely to render infeasible many projects that historically had been financed through a public/private partnership. As this supplement goes to print, the Department of Industrial Relations is working on proposed regulations implementing SB 972. It is likely that clarifying amendments may be considered by the legislature this year as well.