S224779

SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Citizens for Fair REU Rates, et al.
Plaintiffs and Appellants,
vs.
City of Redding, et al.,
Defendants and Respondents.

ANSWER BRIEF ON THE MERITS

Review Of a Published Decision of the
Third Appellate District, Case No. C071906

Reversing a Judgment of the Superior Court of
the State of California for the County of Shasta,
Case No. 171377 (Consolidated with Case No. 172960)
Honorable William D. Gallagher, Judge Presiding

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2. Does the exception for "reasonable costs to the local government of providing the service or product" apply to the PILOT (Cal. Const., art. XIII C, § 1, subd. (1)(e)(2))?

3. Does the PILOT predate Proposition 26?

II. INTRODUCTION

On November 2, 2010 the voters of California approved Proposition 26, an initiative measure amending Article XIIIC of the California Constitution to address the phenomenon whereby the Legislature and local governments have disguised new taxes as "fees" to obtain more revenue from California taxpayers, circumventing the Constitutional rights of the citizenry to vote on new taxes. The findings and declaration of purpose reinforce the remedial intent of Proposition 26, noting that despite the enactment of Proposition 218 – which made the right to vote on special and general taxes a Constitutional right per Article XIIIC §2 – there had ben no abatement in exactions because the Legislature and local agencies had simply changed the labels on new "taxes" to call them "fees." Therefore, per the findings and declarations of Proposition 26 (emphasis added):

> (f) In order to ensure the effectiveness of these constitutional limitations, **this measure . . defines a "tax" for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as "fees."** (Prop. 26, § 1, subds. (b), (c), (e), (f), reprinted at Historical Notes, 2B West's Ann. Cal. Codes (2013) foll. art. 13A, § 3, pp. 296-297).

Proposition 26 became effective the day after the election, December 3, 2010.

The focus and impact of Proposition 26 is in the paradigm shift it made in defining "taxes" and "fees," together with shifting the burden to the government to prove that an exaction truly is a "fee" as opposed to a disguised "tax." Under the prior construct of California law the Legislature and local agencies were free to create exactions imposed on the public and call them "fees," then place the burden on the tax-paying public to challenge the exaction in court, where the taxpayer would be required to carry the burden of proof and overcome a highly deferential standard of review favorable to the government (*Homebuilders Association of Tulare/Kings Counties, Inc. v. City of LeMoore* (2010) 185 Cal.App.4th 554, 562 (*Homebuilders*): "The plaintiff has the burden of proof with respect to all facts essential to its claim for relief and that burden remains" and 561: "Judicial review is limited to an examination of the proceedings before the City to determine whether its action was arbitrary, capricious, or entirely lacking in evidentiary support.") Proposition 26 reversed the analytic route the court must follow, by broadly defining "tax" in Article XIIC §1(e) as "any levy, charge, or exaction of any kind imposed by local government, except the following..." It is then incumbent on the local agency to carry the burden of proof,

by a preponderance of the evidence, that the exaction fits within one of the seven listed exceptions to the broad definition of "tax."

The dispute in this case concerns what Citizens For Fair REU Rates (hereinafter "Citizens") contend are artificially inflated electric rates, adopted as a 7.84% rate increase by the City of Redding (hereafter "City") when the City Council approved Resolution No. 2010-179 on December 7, 2010 (and therefore subject to Proposition 26) (4 AR 1041-1045). The gravamen of Citizens' claim is that the rates are a "tax" rather than a "fee" because the City increases and designs its rates to recover the amount of a planned transfer of rate revenues from the electric utility to the general fund which the City denominates as a "Payment In Lieu Of Taxes" or "PILOT." This portion of the rates is purported to be calculated so as to mimic the amount the City might pay in property taxes on its electric utility assets *if* the City were ever to pay such taxes (which it does not). The so-called PILOT amount of the rates approved in Resolution 2010-179 was about $5,968,220. There is no evidence in the record that this "PILOT" amount of the rate revenue was connected to any cost of service for electricity, and it is undisputed that City has no cost of service study or analysis for its rate increase. The funds transferred from the electric utility to the general fund are not restricted as to their use; like other proceeds of taxes, the City may and does spend the monies freely for any purpose deemed worthy.

Aside from the amount of the electric rates necessary to recover the PILOT amount of about $6 million (which repeats annually, and for purposes of this litigation *cumulatively*), Citizens have not challenged the remainder of the rates as to whether they are otherwise representative of the cost of service to provide electricity to the ratepayers. Thus, this action concerns what is in

essence the overcharging of electric rates, and the so-called "PILOT" is merely the metric of that overcharge.

One might think that – given these undisputed facts – there would be no difficulty or resistance to applying the remedial definition of "taxes" to the increased electric rates adopted by the City after Proposition 26 had become effective, but that would underestimate the tenacity and creativity of the City. The primary defense mounted by the City is that its history of overcharging ratepayers caused the PILOT calculation to acquire a life of its own, largely because the City has planned on exacting the amount of the PILOT in its biennial budget-making process to transfer it to the General Fund, and therefore this long-standing practice pre-existed the approval of Proposition 26 sufficient to give it a "grandfathered" status.

The logical and legal disconnect in the City's central defense is that the "PILOT" is nothing more than a standard line item notation in the City's budget indicating the City's intention to transfer that amount from the electric utility to the General Fund. It sits alongside thousands of other line items for transfers and expenditures in the City budget. Prior to this controversy it received no special treatment, nor was it ever independently processed as any sort of fee, charge, exaction, surcharge, or assessment cognizable under any statutory scheme for such matters. The mere fact that the City adopts its budgets by resolution does not confer a special status on the PILOT or a thousand other transfers, expenditures, collections, etc. contained within the budget. There is no basis whatsoever in California law to find that this metric for an interfund transfer has evolved into anything independently legally cognizable; the City has provided no legal authority for such a novel proposition, because there is none. To be more precise for the purposes of Proposition 26 analysis, it is

undisputed that the planned interfund transfer in the amount of the PILOT notated in the City budget is not itself a "fee" or "charge" as those terms are used in Article XIIIC §1(e) (See City Respondent's Brief from the proceedings below, at p. 19, fn. 15, and at p. 22 – acknowledging that the projected interfund transfer in the amount of the PILOT is not a "fee" or "charge" or "rate," and calling it a "cost funded by utility resources"). There is nothing to "grandfather" as to Proposition 26.

The City's other defenses argued in its opening brief melt away with only slight scrutiny: (•) that the City should be allowed to make a "modest profit"; (•) that the PILOT amount allegedly could have been paid from power sales; (•) that the City's rates are reasonable based on market comparison to other utilities in the state. These are addressed *post* only as may be needed to protect Citizens for rebuttal purposes. Citizens are mindful that, strictly speaking, none of the defenses referenced immediately above are permissible for briefing under the Court's April 29, 2015 order for briefing and argument to be limited to the 3 specific issues in the order.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

There is no dispute as to any of the material facts in this case. On November 2, 2010, the voters of the State of California approved Proposition 26, amending Article XIII C of the California Constitution to place significant limitations on the ability of local governments to raise, extend or impose charges for government services or products by further clarifying the definition of a local "tax" requiring approval by the electorate. In particular, Section

1(e)(2) provides that a charge is exempt from the voter approval requirements for taxes only if the charge for the government service or product "does not exceed the reasonable costs to the local government of providing the service or product" (2 CT 402-403). Also added to Article XIII C of the California Constitution was the provision placing the burden *on the local government* to prove "by a preponderance of the evidence that a levy, charge or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity" (2 CT 403).

On December 7, 2010, little more than one month after the general election of November 2, 2010 approving Proposition 26, the City of Redding City Council adopted Resolution 2010-179, increasing the rates charged by the Redding Electric Utility ("REU") a total of 15.68% between January and December 2011 (4 AR 1041). This rate increase included an embedded "Payment In-Lieu of Taxes" ("PILOT") charge, a charge collected through REU rates and transferred to the City's general fund (3 CT 736). The PILOT charge is calculated using an amount based on 1% of the Redding Electric Utility fund's total fixed assets, and is meant to mimic the amount of property taxes the City would have to pay on REU's assets if the City had to do so (3 CT 736), (though, as explained below, it in fact does not). The calculation of the PILOT is made without any reference to the cost of operating the Redding Electric Utility.

The City first included an accounting of the transfer of the PILOT charge in its 1988-89 budget (5 AR 1134 – 6 AR 1540, Tab 173), though it should be noted that the PILOT was never (and has never been) approved or voted on as a separate and specifically

approved charge by the City (and see again City Respondent's Brief from the proceedings below, at p. 19, fn. 15, and at p. 22 – acknowledging that the projected interfund transfer in the amount of the PILOT is not a "fee" or "charge" or "rate," and calling it a "cost funded by utility resources"). Prior to this, between 1971 and 1988, the City moved money from its Electric Utility Fund to its General Fund via an "operating transfer", a transfer in a fixed amount established by the City budget (3 AR 640, Tab 111). As of the 1988-89 budget, the City replaced this fixed amount transfer with the transfer of a PILOT charge from REU to the City's General fund, calculating the PILOT using an amount based on 1% of the Redding Electric Utility fund's total fixed assets. As stated above, the calculation of the PILOT is meant to mimic the amount of property taxes the City would have to pay on REU's assets if the City had to pay such taxes (which it does not) (3 CT 736).

The manner in which the City calculates the PILOT charge has changed over the years. In the City's budget for fiscal year 1988-89, the method chosen for calculating the PILOT was to assess the value of REU's property and equipment and subtract estimated depreciation of equipment, furnishings and vehicles (2 AR 380, Tab 42); in the City's adoption of its 1991-92 budget, the City amended this calculation to include the value of capital construction works in progress but not completed (2 AR 416, Tab 59); in the City's adoption of its 2001-2003 budget, the calculation was amended to include a maximum 2 percent annual growth in accessed valuation (3 AR 693, Tab 126); in the most recent change to the PILOT calculation formula, the City states that the PILOT calculation was amended to include the value of joint-venture assets in which REU has a share (2 CT 530). Each adjustment of the formula for calculation of the PILOT charge has resulted in additional assets or

asset values being allowed for inclusion in the formula. As is apparent from the foregoing, the formula for calculation of the PILOT bears no relation to the actual cost of operating the utility – it is merely a calculation of 1% of the assets currently held by REU.

At this point it should be noted that in the City's Opening Brief, the City misrepresents the method by which the PILOT was and is calculated. The City states in its Opening Brief at page 8 that a 1999 review of its PILOT, conducted by the firm of R.W. Beck, Inc. (at Tab 119, 3 AR 663-665), indicated that the City was not using the method used by the State Board of Equalization when calculating property taxes for Independently Operated Utilities (IOUs) but then adjusted the PILOT to adopt the Board of Equalization methodology in its 2001-2003 budget. The City's Opening Brief then states incorrectly that the Board of Equalization method was to value assets using original, rather than depreciated, values, and cites the Beck report for this finding. In fact, the report correctly states "the State Board of Equalization uses the *depreciated* value when calculating property taxes for the IOUs", not the original value, and that at the time the City of Redding was not using this method (at 3 AR 664, 1st ¶, emphasis added) nor has the City ever adopted this method[1]. The report goes on to indicate that "if Redding were to deem it desirable to more closely approximate methodologies used for property tax assessment, then the Board of Equalization model for electric utility plant would be a good model" (at 3 AR 664, 1st ¶)

[1] See also Tab 3, 1 AR 12-117, Handbook Titled "The Appraisal of Public Utilities," from the Valuation Division of the Property Department of the California State Board of Equalization: "The original cost figure are trended to produce a trended historical cost or reproduction cost. The reproduction cost is depreciated by the use of percent good tables based on a present worth concept, while historical cost is depreciated on the basis of the straight line method required by the regulatory commission" (1 AR 64).

and to recommend that the City may want to "[m]odify the bases for In-Lieu of Tax calculations to be the depreciated or book value of assets; or for the power plant, the market value of the asset. This will more closely track methodologies used for property tax assessments, particularly those used by the California Franchise Tax Board for IOUs" (3 AR 665, 1st ¶).

Far from adjusting the PILOT to adopt the state's method, as the City's Opening Brief incorrectly claims, the City apparently rejected this recommendation, and expressed concerns with this approach in its Notes on the changes in Electric Utility In-Lieu Tax calculation methodology, referencing the Beck report and indicating that basing the in-lieu tax assessment on depreciated value to be more consistent with the State Franchise Tax Board "could lead to consideration of alternative methods of establishing valuation, such as income approach which is based on a projection of the future income expected to be derived from the asset" (Tab 121, 2 AR 668 at ¶ 5).

The City's Opening Brief is therefore incorrect in stating that the method used by the City to calculate its PILOT is that used by the California State Board of Equalization and Franchise Tax Board; the City's Opening Brief correctly states, however, that the method used by the City to calculate the PILOT is to use original, rather than depreciated, asset values. This method is clearly demonstrated in Attachment A to Resolution 2011-111, the City's Electric in-Lieu Computation worksheet (11 AR 2469, Tab 203), where the only depreciated assets listed are "Vehicle, Equipment. Furn." (line 2), amounting to approximately $8.6 million out of a total of $438,027,371 in "Appreciating assets" (line 14) – less than 2%. While this distinction seems to take us a bit into the weeds, it just goes to demonstrate the falseness of the City's claim that the City's

calculation of the PILOT mimics what the City would receive in tax revenue if the utility were privately owned, further illustrating the arbitrariness of the calculation and the absence of any connection to the actual cost of providing electric service to the City's ratepayers.

On December 16, 2008, the City adopted Resolution No. 2008-191, increasing REU rates (4 AR 821, Tab 144). This was the most recent increase prior to the December 7, 2010 increase that is the subject of this action. At the hearing on the Resolution, the City's Electric Utility Director, Mr. Hauser, in response to public questions about the PILOT, stated that it was correct that the calculation of the PILOT was not related to REU's cost of providing services (2 CT 388-389).

This admission by the City's Electric Utility Director that the PILOT is in no way a reflection of the calculation of any particular cost or expense incurred by REU to provide electric services to its customers is borne out by the events that occurred after the December 16, 2008 rate approval and increase, and which led up to the December 7, 2010 increase in the REU rates that is the subject of this action.

Between 2007 and 2011, the City constructed a Power Generation Plant, Power Plant Unit 6. This added $64,500,000 in assets to REU between FY 2007-08 and FY 2010-11 (City of Redding Capital Improvement Plan at 3 CT 648). At 1%, this amounted to a $645,000 increase in the PILOT charge over this period of time, with $356,008.60 of that amount added after the December 16, 2008 rate increase (City of Redding Capital Improvement Plan at 3 CT 648).

A significant change in the formula REU uses for calculating the PILOT amount occurred in the 2010 Fiscal Year, again after the 2008 rate increase and, most significantly, shortly before the 2010 rate approval and increase. As evidenced by Attachment A to

Resolution 2011-111, the City's Electric in-Lieu Computation worksheet (11 AR 2469, Tab 203), the City changed its concept of "assets" and changed its formula for the PILOT to include the City's share of assets actually owned by joint powers authorities of which the City is a member. The value of the City's share in joint-venture assets added for FYE 2010 is considerable – totaling $98,025,133, which, at 1%, accounted for a $980,251 increase in the PILOT charge (See line items 6 – 8, FYE 2010 at 11 AR 2469, Tab 203). This significant addition in REU assets of course translates into a significant increase in the PILOT to be transferred from REU into the City's General Fund – from $4,832,090 for FY 2008-09 (as indicated in the City's 2008 & 2009 Biennial Budget at 3 CT 671) to $6,055,950 for FY 2009-10 and $5,968,220 for FY 2010-11[2] (as indicated in the City's 2010 & 2011 Biennial Budget at 3 CT 677). Further demonstrating that the purported "Payment In Lieu of Taxes" does not actually mimic the amount the City would receive in property taxes if the utility were privately owned is the fact that two of these power generation joint ventures are not even located within the state of California, let alone the boundaries of the City of Redding. The "MSR" plant (valued at $54,580,050 – Tab 203, 11 AR 2469, at line 8) is located in New Mexico (1 RT 72-73, lines 25-9) and the Tank COTP (valued at $637,748 – Tab 203, 11 AR 2469, at line 7) is an electric line that runs from Tracy, California into Oregon. This practice flatly contradicts the approach taken in the California State Board of Equalization's Appraisal of Public Utilities handbook, which states that "California has no authority to levy a property tax against property located in other states" and that, though some public

[2] (the slight decrease from the $6,055,950 PILOT transfer in FY 2009-10 is due to depreciation of assets with no addition of major capital facilities in that fiscal year)

utilities have unitary tangible assets located outside of California, "[t]hese assets are not subject to California property tax, and their values must be excluded from the unitary value" (1 AR 52).

On December 7, 2010, the City Council held a public hearing to consider adopting increased electric rates that include the amount represented by the PILOT. Plaintiffs objected to approval of the increased rates on the grounds that inclusion of amounts for the PILOT violated Proposition 26 and would result in the imposition of an unlawful tax created without voter approval.

The City Council passed Resolution No. 2010-179, increasing REU rates by 7.84%, effective January 2011, and again by 7.84%, effective December 2011. Between the 2008 rate increase and this rate increase, the PILOT charge to be transferred from REU to the City's general fund grew by $1,136,130 due to the addition of the Power Generation Plant and REU's joint venture assets. Resolution No. 2010-179 acknowledges the role of the additional PILOT charge in the increased rates, stating on its face that one of the purposes for the increase is "to obtain funds necessary to maintain such intra-City transfers as authorized by law" (at §3, at 4 AR 1041, Tab 163, though Appellants dispute that this transfer is "authorized by law").

On June 22, 2011, the City Council adopted Resolution No. 2011-111, approving the City's 2012 & 2013 Budget (11 AR 2466-2469, Tab 203). This Resolution contained language, findings and pronouncements relating to electric utility rates and the PILOT charge that had never been included in any prior Budget Resolution. On its face, the extra language included in Resolution No. 2011-111 appeared to be a re-affirmation and approval of the incorporation of the PILOT charge in the REU rate increases previously adopted by Resolution No. 2010-179 and therefore, to protect Appellants' rights,

Appellants filed a second complaint, as indicated in the Procedural History, below.

B. PROCEDURAL HISTORY

On February 4, 2011, Appellants filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Shasta County Case No. 171377) against the City of Redding and Redding City Council on the grounds that Resolution 2010-179, increasing REU rates, was adopted by the City of Redding on December 7, 2010, in violation of Article XIII C of the California Constitution insofar as this increase included the PILOT charge, because the PILOT is a tax within the meaning of this Article (1 CT 2). On March 9, 2011, Respondents City and City Council of Redding demurred to all causes of action (1 CT 29). On June 6, 2011, the trial Court denied Respondents' demurrer, ordered Respondents to file a response and issued a briefing schedule (2 CT 474). The respondents answered on June 16, 2010, denying all claims and contentions (2 CT 486). On August 5, 2011, Respondents filed a Certification and Lodgment of Administrative Record for four volumes (Volume I-IV), pages 0001-1106 (2 CT 494, 2 CT 496).

On June 22, 2011, the City adopted Resolution No. 2011-111 approving the City's 2012 & 2013 Biennial Budget (2 CT 530). Contained in this Resolution was language relating to electric utility rates and the PILOT charge which appeared to be an attempt by Respondents to affirm, ratify, validate and re-approve the REU rate increase adopted in Resolution No. 2010-179, which was the subject of Plaintiff's initial Petition. In order to protect Plaintiff's rights, Plaintiff filed a second Complaint against Respondents on August 29, 2011, for Declaratory Relief and Refunds/Damages (Shasta County Case No. 172960), on the same grounds as the initial

Complaint, and seeking a refund of improperly collected fees on the grounds that the illegal tax constituted an unconstitutional taking under the 5th Amendment of the United States Constitution and Article I, §19 of the California Constitution, and on breach of contract and common count grounds. (Prior to the filing of Appellant's second Complaint, on June 20, 2011, Appellant Fee Fighter LLC submitted a Claim for refunds of the unlawful portion of the rates paid by 348 utility customers who had assigned their rights to Fee Fighter. No response was received after 45 days and, pursuant to Gov. Code §912.4, the claim was deemed rejected). On August 29, 2011, Appellants filed a Notice of Related Case with the first Petition, Case No. 171377 (2 CT 535). The Respondents Answered the Complaint on September 27, 2011, denying all claims and contentions (2 CT 557).

The first matter proceeded to trial on November 8, 2011, after briefing by both parties in accordance with the briefing schedule ordered by the Court (Appellants filed their opening brief on September 6, 2011 (2 CT 538); Respondents filed a response brief on October 5, 2011 (3 CT 607); Appellants filed a reply brief on October 21, 2011 (3 CT 686)). On December 21, 2011, the Court issued its Ruling After Judgment, denying Appellants' Petition.

On January 25, 2012, the Parties stipulated to consolidation of the actions, agreeing that the second trial would continue without briefing, and the court so ordered (3 CT 713 and 3 CT 716). On February 15, 2012, Respondents filed a second Certification and Notice of Lodgment of the Administrative Record for an additional ten volumes (Volume V – XIV), pages 1107-3241. The second matter proceeded to trial on April 30, 2012. The Court issued its Memorandum of Decision on June 22, 2012, again denying Appellant's Complaint (3 CT 724).

Appellants timely filed a Notice of Appeal in the consolidated cases on August 20, 2012 in the Third District Court of Appeals. After the initial briefing, the Court requested simultaneous supplemental briefs on five issues. Oral argument was heard on October 6, 2014, and pursuant to Respondent's request, the court ordered the parties to submit supplemental briefing as to whether the PILOT was created by the City's budget and therefore expired with the biannual budget passed by the City for Fiscal Years 2009-2011, or was a continuing appropriation intended by the City to be permanent. Supplemental briefing on this issue was completed on November 6, 2014, and the Court of Appeal issued its published decision on January 20, 2015, holding that the PILOT constitutes a ta under Proposition 26 unless Redding could prove the amount collected represents its reasonable costs to provide electric service and remanding the case for this factual determination.

Respondents petitioned this court for review on March 2, 2015, and review was granted on April 29, 2015.

IV. STANDARD OF REVIEW

There is no dispute as to the material facts necessary to the decision of this matter, and the issues to be resolved are substantive requirements affecting the Constitutional rights of the Plaintiffs. In such cases the Court on appeal must exercise independent judgment and conduct a de novo review of the matter before it.

As explained by the Appellate court in its decision in this matter, in 1978, California voters adopted Proposition 13 (Cal. Const., art XIII A) to require that any "special taxes" for cities, counties, and special districts be approved by a vote of the qualified electorate (Art. XIII A, § 4). In 1996, voters adopted Proposition 218 (Articles XIII C and XIII D), with one of its aims being "to tighten the

two-thirds voter approval requirements for 'special taxes' and assessment imposed by Proposition 13." (*Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 CA 4th 195 at 197. To this end, Proposition 218 added article XIII C, §1 to require that new taxes imposed by a local government be subject to a vote of the electorate of either a majority for a "general tax" or two-thirds for a "special tax." The voters amended article XIII C in 2010 when they passed Proposition 26, further defining "tax" to include "any levy, charge, or exaction of any kind imposed by local government", with certain listed exceptions (Art. XIII C, § 1, amended by Prop. 26, as approved by voters, Gen. Elec., Nov. 2, 2010 (Proposition 26)).

The provisions of Proposition 218 relating to the construction of the voter approval requirements of Article XIIIC for special and general taxes are instructive as to the standard of review. Section 5 of Proposition 218, the Right to Vote on Taxes Act, stated that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent" (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), text of Prop. 218, §5, p. 109). The provisions of the Right to Vote on Taxes Act included those requiring voter approval of any special or general tax imposed by a local government – the provisions at issue here. In interpreting the provisions of Article XIIIC relating to special and general taxes in this matter, therefore, the court must liberally construe its provisions to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

The California Supreme Court's decision in *Silicon Valley Taxpayers Assoc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-450 [*Silicon Valley Taxpayers*], is also instructive in that it analyzes the scope of review for Article XIIID §4(f) – an

analogous provision enacted by the earlier (1996) Proposition 218 that places the "burden ... to demonstrate" constitutional compliance on the government in the context of "assessments." In rejecting arguments that traditional deferential review should be given to the government's decision-making on assessments, the Court stressed that the new rules created by the voter approved proposition create "substantive requirements" in "constitutional provisions of dignity at least equal to the constitutional separation of powers doctrine. ... Thus, a local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect. We must "'enforce the provisions of our Constitution and may not lightly disregard or blink at a clear constitutional mandate. [citations]'". Though Proposition 218 did not specify the quantum of proof that the government was required to "demonstrate," the Court found that the implication of constitutional rights required *independent, de novo review* of the local agency decision.[3]

It would appear that the drafters of Proposition 26 took note of the *Silicon Valley Taxpayers* 2008 decision and used extra care to specify that the government has the "burden of proof" by a "preponderance of the evidence" (Ca. Constitution Article XIIIC §1(e)). The constitutional requirements for compliance with Proposition 26 are no less "substantive" than those for Proposition 218. (Compare Prop 26, Article XIIIC §1(e)(2) – charge "which does not exceed the reasonable costs to the local government of providing the service of product," and Prop 218, Article XIIID §4(a) – assessment "which exceeds the reasonable cost of the proportional

[3] The Court overturned the Appeal Court decision according the agency decision deferential "substantial evidence" review.