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OPINION	:	No. 79-724
of	:	November 1, 1979
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SUBJECT: IN-LIEU FEE—An in-lieu fee imposed by a county as a condition for issuing a building permit for the purpose of providing housing for low and moderate income persons is a "special tax," and if imposed after July 1, 1978, requires approval of two-thirds of the qualified electors of the county.

The Honorable Clair A. Carlson, County Counsel, County of Santa Cruz, has requested an opinion on the following question:

Is an in-lieu fee imposed by a county as a condition for issuing a building permit for the purpose of providing housing for low and moderate income persons a "special tax" within the meaning of section 4 of article XIIIA of the California Constitution, thus requiring the approval of two-thirds of the qualified electors of the county?

CONCLUSION

An in-lieu fee imposed by a county as a condition for issuing a building permit for the purpose of providing housing for low and moderate income persons is a "special tax" within the meaning of section 4 of article XIIIA of the California Constitution, and if

imposed after July 1, 1978, requires approval of two-thirds of the qualified electors of the county.

ANALYSIS

In 1978, the Board of Supervisors of Santa Cruz County submitted, pursuant to Elections Code section 3750, Ordinance No. "J" for approval of the voters of the county. On June 6, 1978, the voters of the county approved this ordinance which added chapter 13.41, "Growth Management," to the Santa Cruz County Code. The purpose section (§ 13.41.010) of this chapter provides:

> "One purpose of this Chapter is to state clearly various policies which should govern the future growth and development of Santa Cruz County. A further purpose is to provide for the enactment of a Growth Management System, to regulate the character, location, amount, and timing of future development so as to achieve the stated policies. *A further purpose of this Chapter is to provide for increased housing opportunities for persons with average and below average incomes who wish to reside in Santa Cruz County.* Finally, it is the purpose of this Chapter to protect the public health, safety, and welfare by regulating the future use and development of land in Santa Cruz County." (Emphasis added.)

The chapter then sets forth a series of findings, including, as pertinent here, section 13.41.020(f):

> "*Housing Crisis*. Santa Cruz County is experiencing a housing crisis. Increasingly, persons with average and below average incomes whose work or other connections with the County of Santa Cruz lead them to wish to live here are unable to locate housing at a price they can afford.
>
> "Economically disadvantaged citizens are increasingly excluded from living in Santa Cruz County. The increasing demand for housing in Santa Cruz County which has accompanied the rapid population growth and development now taking place has aggravated the housing crisis, and any growth management system designed to minimize or prevent the problems caused by rapid population growth and development must simultaneously provide a positive program to increase the availability of housing for people with average and below average incomes."

Section 13.41.030 sets forth policies designed to manage future growth and development in Santa Cruz County, including subdivision (e):

> "It shall be the policy of Santa Cruz County that at least 15 percent of those housing units newly constructed for sale or rental each year shall be capable of purchase or rental by persons with average or below average incomes."

Section 13.41.040 directs the Board of Supervisors to enact by ordinance a Growth Management System ". . . to regulate the character, location, amount, and timing of future residential and other development in Santa Cruz County . . ." and shall provide ". . . an annual population growth goal which shall limit population growth during that year to an amount which represents Santa Cruz County's fair share of statewide population growth. *Said ordinance or ordinances shall likewise carry out the other policies and provisions specified in this Chapter."* (Emphasis added.)

Pursuant to that latter mandate, the Board of Supervisors, on March 20, 1979, adopted Ordinance No. 2645, adding chapter 13.60 to the Santa Cruz County Code. The chapter is entitled 'Density Bonuses and In Lieu Fees for Low and Moderate Cost Housing." Section 13.60.020 declares that the purpose of Ordinance No. 2645 is to assure that future housing development contributes to the attainment of the housing objectives specified in Measures [Ordinance No.] J . . .," and provides:

> ". . . In order to assure that the remaining developable land is utilized in a manner consistent with the County housing policies and needs, the County declares that at least 15% of the total number of units of all new developments containing five or more units shall be affordable by households of average and below average income."

Chapter 13.60 then sets forth detailed requirements (§§ 13.60.040–13.60.080) for new residential construction projects of five or more units, whether ownership or rental, to assure that at least 15 percent of the total number of units within the development are "inclusionary units," that is affordable by households with an average income or below average income (§ 13.60.030(k)).

Section 13.60.100 then provides for in-lieu participation fees for new residential construction of four or less units:

> "For new residential construction of four or less units, the County deems that the provision of inclusionary units will constitute an extreme hardship and the applicant shall instead pay an in-lieu participation fee rather than providing the inclusionary units required of residential projects of five or more units. The amount of the in-lieu-participation fee shall be determined and collected at the time of issuance of the building permit. The amount of

the in-lieu-participation fee shall be determined pursuant to Resolution of the Board of Supervisors."

By Resolution No. 153–79 the Board of Supervisors has set the in-lieu fees on a graduated scale of between $500 and $1500 for each project, depending on the square footage involved. Thus, as a condition of obtaining a building permit, any persons seeking to build residential units, with a single family or more units up to five, must pay the in-lieu participation fee.

The County Counsel informs us that at present, all money received from the in-lieu participation fee, is held in a trust account. Although not yet determined by ordinance, it is the intention of the Santa Cruz County Board of Supervisors to apply the proceeds from the in-lieu-participation fee to subsidize local housing. The Board of Supervisors, we are further informed, has adopted resolutions relating to acquisition for a county low income housing plan and creating a county housing development fund. Pursuant to California Constitution, article XXXIV, it is intended to submit these resolutions to the voters for approval.

In June 1978, the voters of the state added article XIIIA to the Constitution by initiative measure known as Proposition 13.[1] Section 4 of that article imposes a limitation

[1] 1 Article XIIIA provides:

"SEC. 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1 %) of the full cash value of such property. The one percent (1 %) tax to be collected by the counties and apportioned according to law to the districts within the counties.

"(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

"SEC. 2. (a) The full cash value means the county assessor's valuation of real property as shown on the 1975–76 tax bill under 'full cash valuation' or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975–76 full cash value may be reassessed to reflect that valuation. For purposes of this section, the term 'newly constructed' shall not include real property which is reconstructed after a disaster, as declared by the Governor, where the fair market value of such real property, as reconstructed, is comparable to its fair market value prior to the disaster.

"(b) The full cash value base may reflect from year to year the inflationary rate nor to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction or other factors causing a decline in value.

on the taxing powers of counties, among other agencies:

> "SEC. 4. Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

The question presented, then, is whether the in-lieu participation fee established by the Santa Cruz County Board of Supervisors, having been enacted after the effective date of article XIIIA (July 1, 1978), is a "special tax" within the meaning of section 4, and therefore subject to the requirement of a two-thirds vote of the qualified electors. It is our conclusion that such fees are special taxes within the meaning of that constitutional provision. We will first examine the nature of the in-lieu participation fee[2] and whether it is a tax. We will then attempt to discern whether the term 'special tax" has any defined, or well established meaning in the California Constitution or whether the courts or Legislature have so defined the term. Our conclusion is that in the context of article XIIIA, there is no established meaning of this term. Finally, from the purposes and objectives of article XIIIA, we conclude that the term "special tax" means any new or additional tax imposed for revenue purposes by one of the enumerated agencies, and that the in-lieu participation fee of Santa Cruz County is such a tax.

> "SEC. 3. From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by nor less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.
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> "SEC. 4. Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.
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> "SEC. 5. This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.
>
> "SEC. 6. If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect."

[2] We express no opinion on the validity of the Growth Management Ordinance, the inclusionary unit or in-lieu fee requirements of Ordinance No. 2645 or the in-lieu fee schedule of Resolution No. 153–79 of Santa Cruz County.

1. The Santa Cruz In-Lieu Participation Fee Is a Tax

In Opinion CV 78–123 (62 Ops. Cal. Atty. Gen. 254) we examined the school impact fees imposed pursuant to Government Code section 65974 and concluded that those fees constitute special taxes within the meaning of section 4 of article XIIIA. We stated in that opinion (62 Ops. Cal. Atty. Gen. at 256):

> ". . . [W]e preliminarily note that the character of a fee or charge is ascertained from its incidents, not its label. (See *Ainsworth v. Bryant* (1949) 34 Cal. 2d 465–473; *Ingels v. Riley* (1936) 5 Cal.2d 154, 159.)
>
> "As commonly defined, a (tax) is a compulsory exaction imposed by legislative power upon persons or property for the purpose of raising revenue to fund a governmental endeavor. (See *Westfield -Palos Verdes Co. v. City of Rancho Palos Verdes* (1977) 73 Cal. App. 3d 486, 495–496; *Associated Homes Builders, etc., Inc. v. City of Newark* (1971) 18 Cal. App. 3d 107, 109–111; *Dare v. Lakeport City Council* (1970) 12 Cal. App. 3d 864, 868.) It may be levied to raise revenue for a general or specific purpose and can cover a wide or narrow range of persons, property, or activities." (See also discussion on what are taxes, Opinion 79–712, 62 Ops. Cal. Atty. Gen. 663.)

In Opinion 9–712 (62 Ops. Cal. Atty. Gen. 663) we analyzed the fees imposed by a local agency pursuant to Government Code section 66484 of the Subdivision Map Act, which are exacted to defray the cost of constructing bridges over waterways, railways, freeways and canyons, or to construct major thoroughfares. We concluded from an analysis of the fees in question that they constitute a special assessment of benefit to the subdivided land and are therefore not special taxes within the meaning of section 4 of article XIIIA. (62 Ops. Cal. Atty. Gen. at ____.)

We believe it would be appropriate at this point to discuss that form of exaction denominated as "fees." Although the courts have not articulated this point, we discern from the cases that there are three types of government exactions which are generally categorized as "fees," although other terms such as charge, rate, toll, excise, or license may be used. The three types are revenue raising fee, regulatory fee, and compensatory fee.

General law cities are given the power to ". . . license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city, . . ." (Gov. Code, § 37101.) Charter cities, of course, have the same power unless limited by the charter. (See *Flynn v. San Francisco, supra*, 18 Cal. 2d at 213.) Such levies frequently are for both revenue and regulation purposes. (*City of Glendale v. Trondsen* (1957) 48 Cal. 2d 93, 103.)

> "A 'tax,' under a strict and technical construction of the term, probably includes only charges imposed for the purpose of producing revenue, as distinguished from charges imposed for purposes of regulation in the exercise of the police power. It has been said by some authorities in other states that a license fee or charge imposed solely for regulatory purposes is in no proper sense a tax, and we may concede that this holding is technically correct. But the term 'license tax' has often been used in this state by both the legislature and by this court, as including license charges imposed for regulatory purposes, and we have no doubt that, in its popular meaning, it includes any charge imposed for a license, whether the object be regulation, or revenue, or both regulation and revenue . . . ." *John Rapp & Son v. Kid* (1911) 159 Cal. 702, 706–707; see 45 Ops. Cal. Atty. Gen. 23,25 (1965).)

In some cases, however, a municipality may, by preemption, be precluded from levying a license fee for regulatory purposes, but may still levy it for revenue purposes. (*Weekes v. City of Oakland, supra*, 21 Cal. 3d at 395; *Oakland Raiders v. City of Berkeley* (1976) 65 Cal. App. 3d 623, 626–627.) The converse is also true, that although a government may not have authority to levy an exaction for revenue purposes, it may do so for regulatory purposes. (*County of Plumas v. Wheeler* (1906) 149 Cal. 758 at 761, 763.)

If the fees are for regulatory purposes only, there is a rule that the fees must generally be equated to the costs of the governmental agency to administer the regulations.

> ". . . Even where the taxing authority has no power to impose fees for revenue, an enactment imposing fees will not be held invalid unless it clearly appears that an arbitrary or unreasonable burden has been imposed upon the pursuit of an occupation under the guise of regulation. The taxing authority max fix the license fees at a sum sufficient to cover all expenses which may be reasonably anticipated and 'is not limited to the exact amount of the expense, as it may subsequently develop.' (*County of Plumas v. Wheeler*, 149 Cal. 758, 765.)" (*Urban v. Riley* (1942) 21 Cal. 2d 232, 236; see also *John Rapp & Son v. Kiel, supra,* 159 Cal. at 706; 9 Ops. Cal. Atty. Gen. 284, 285 (1947).)

There are, of course, government exactions which appear to be for neither revenue nor regulatory purposes, but which are designed to compensate the governmental agency for services rendered.

> "The features which distinguish the charges here from normal taxes, imposts, or assessments are that the charges here are for the specific purpose of reimbursing the public entity for a service rendered, that the amount of the

> charges are by law limited to the public entity's expenses, and that they are not levied on a regular or routine basis . . . ." *(Crawford v. Herringer, supra,* 85 Cal. App. 3d at 550; costs of printing an election pamphlet on candidate qualifications.)

The court has held that a charge for fire hydrant services of so much per month is not a tax:

> "Defendants' characterization of plaintiffs' charges as a 'tax' is unfounded. A charge for services rendered is in no sense a tax. (*Arcade County Water Dist. v. Arcade Fire Dist.* (1970) 6 Cal. App. 3d 232, 240; see also *Linnell v. State Dept. of Finance, supra*, 203 Cal. App. 2d at 469; parking fees.)

If, however, the charges exceed the cost, the exaction may be declared a tax (*cf. City of Madera v. Black, supra*), and some exactions which appear to be compensatory service fees have been declared to be excise taxes. (See *Associated Homebuilder v. City of Livermore, supra*, 56 Cal. 2d at 852; *Dare v. Lakeport City Council, supra*, 12 Cal. App. 3d at 868.)

A review of the Santa Cruz County in-lieu participation fee leads us to conclude that although it is part of a regulatory scheme, its primary purpose and effect is to raise revenue. The Growth Management Ordinance and Ordinance 2645 are regulatory measures relating to land management in Santa Cruz County. The in-lieu participation fee provision, however, does not by itself seek to regulate land or its use or users (builder, renter, or owner). Instead it provides for payment of a fee which relieves the users of regulation. Further, the fee is in no way tied to the cost of the regulation required by these ordinances. Indeed, the intent is to raise revenue which in connection with other county plans will be used for housing subsidies. In our judgment, these fees are intended primarily to raise revenue, and consequently constitute a tax.

We must now examine whether this tax is a special tax as that term is used in section 4 of article XIIIA.[3]

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[3] We express no opinion as to whether either a regulatory fee or a compensatory fee constitutes a special tax within the meaning of section 4 of article XIIIA. Note should be made of the Legislature's views in this regard (Stats. 1979. ch. 903 (S.B. 785)) which authorizes counties and cities to impose "special taxes" (undefined) upon a constitutional vote. Proposed new Government Code section 50076 would provide:

> "As used in this article, 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."

2. The Term 'Special Tax" Has No Established Or Well-Defined Legal Meaning

Our primary objective in this quest is to ascertain what the people meant and intended when they provided the restrictions on local taxation contained in section 4 of article XIIIA, and used the phrase "special taxes." Our first inquiry will be to determine whether the phrase has any established or well-defined legal meaning. We conclude it does not.

We should note at the outset that the Court of Appeal in *County of Fresno v. Malmstrom* (1979) 94 Cal. App. 3d 974, 983 in discussing article XIIIA stated:

> ". . . A 'special tax' is a tax collected and earmarked for a special purpose, rather than being deposited in a general fund . . . ."

This statement was dictum in light of the court's conclusion that the exaction in question was a special assessment and thus not a special tax within the meaning of section 4 of article XIIIA. As our discussion will show, the two cases cited in support of the statement do not stand for that proposition, and the statement itself in relation to section 4 will not withstand analysis.

Our review of the California Constitution as it now exists does not reveal the use of the term 'special taxes" other than in section 4 of article XIIIA. Section 1(b) of that article uses the term "special assessments" in connection with the term "ad valorem taxes" in a provision allowing property taxes to exceed the one percent of full cash value limitation of section 1(a) to pay the interest and redemption charges on indebtedness approved by the voters prior to July 1, 1978. Similarly, section 3 (g) of article XIII, which exempts certain cemetery property from property taxation provides: "This [cemetery] property is also exempt from special assessment." Article XVI, section 19 contains a provision on special assessments, constituting a limitation on the power of charted cities and counties to impose such exactions. That section twice uses the phrase "special assessments or other special assessment taxes." As we concluded in Opinion No. 79–712 (62 Ops. Cal. Atty. Gen. 663), supra, and as the court held in *County of Fresno v. Malmstrom, supra*, special assessments are not generally considered taxes and are not such within the meaning of section 4 of article XIIIA.

At times in the past the phrase "special taxes" has appeared in the Constitution. In 1902 the voters amended section 6 of article IX to read:

> "SEC. 6. The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and

> technical schools as may be established by the Legislature, or by municipal or district authority. The entire revenue derived from the State school fund and from the general State school tax shall be applied exclusively to the support of primary and grammar schools; *but the Legislature may authorize and cause to be levied a special State school tax for the support of high schools and technical schools, or either of such schools, included in the public school system, and all revenue derived from such special tax shall be applied exclusively to the support of the schools for which such special tax shall, be levied."* (Emphasis added.)

This section was substantially amended in 1920 and the special tax language removed. In the context of the times, when the special tax language was added in 1902, the primary state and local source of revenue was the property tax. Since 1879, section 6 of article IX contained the requirement that all the proceeds of the State school tax, a property tax, be devoted to the grammar schools. As the court noted in *People v. Lodi High School Dist.* (1899) 124 Cal. 694, 700, the Legislature had the power to authorize counties to levy a special tax for the support of high schools even before the Constitutional Amendment. In this context, the term special tax seems to have been used to contrast the general school tax, the proceeds of which were dedicated to support of grammar schools and to denote an additional tax for high school support. Similarly, the term was used in the sense of a property tax. Section 4 of article XIIIA, of course, prohibits any additional property taxes. We are, then, unable to conclude that the term "special taxes" has any uniform or well-defined constitutional meaning.

The courts have occasionally used the term "special taxes," but here again. no precise definition or use has evolved. In discussing special assessments, that is exactions on property for improvements of corresponding benefit to that property, the courts will sometimes distinguish 'general taxation." As the court noted in *Northwestern Etc. Co. v. St. Bd. of Equal.* (1946) 73 Cal. App. 2d 548, 552, quoting from 48 Am. Jur., pp. 565–567:

> ". . . Taxes for revenue, or 'general taxes' as they are sometimes called by distinction, are the exactions placed upon the citizen for the support of the government, paid to the state as a state, the consideration of which is protection or public service by the state, whereas special or local assessments, sometimes called 'special taxes,' are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area . . . ."

(See also *Anaheim Sugar Co. v. County of Orange* (1919) 181 Cal. 212, 216–217; *cf. City of Los Angeles v. Offner* (1961) 55 Cal. 2d 103, 108–109.)

We previously noted *People v. Lodi High School District, supra*, (124 Cal. 694) in which the court upheld a statutory "special tax" (Pol. Code, § 1670, subds. 14 and 15) for support of high schools. This was a property tax which a county high school board could have the board of supervisors impose. The court carefully distinguished the high school tax from the general school fund and school tax, and was apparently describing an additional tax. (124 Cal. at 697–698.)

In *Modern Barber Col. v. Cal. Emp. Stab. Com*. (1948) 31 Cal. 2d 720, the court discussed, for purposes of determining a court's injunctive powers under article XIII, section 32 as it then read, the taxes imposed under the Unemployment Insurance Act. The court concluded that the anti-injunction provision did not apply and stated (31 Cal. 2d at 724):

> " . . . It would seem, however, that contributions under the Unemployment Insurance Act, while in the nature of taxes, are not taxes levied under the provisions of article XIII. They are not specifically mentioned therein, and they do not appear to be included within the general provisions of article XIII relating to taxes for revenue. On the contrary, the Act specifically provides (§ 19) that contributions shall be held in a specific fund, separate and apart from all public moneys or funds of the state, and shall be administered exclusively for the purposes of the Act. *The contributions therefore constitute special taxes for a special purpose distinct from the general revenues of the state. . . ."* (Emphasis added)

The Court of Appeal in *City of Oceanside v. Pacific Tel. & Tel. Co*. (1955) 134 Cal. App. 2d 361, in analyzing a levy of two license taxes on telephone companies by the city (and holding them invalid) referred to the tax of two dollars per year for each pay phone located within the city as a "special tax on pay telephones." The court gave no explanation of why it used that term.

Finally, there are a series of cases relating to the term "special taxes' as used in particular charter provisions of cities, two of which were cited by the court in *County of Fresno v. Malmstrom, supra*, to support its statement of what constitutes a special tax: *City of Glendale v. Trondsen, supra*, 48 Cal. 2d 93 and *City of San Diego v. Atlas Hotels, Inc.* (1967) 252 Cal. App. 2d 591. In the *Glendale* case, the Supreme Court was responding to an attack on a rubbish collection fee imposed by the City of Glendale, a charter city. The city charter contained a provision (Art. XI, § 12) that the city council could submit to the voters a proposition providing for a "special tax" or the issuing of bonds. (48 Cal. 2d at 99.) The court held that this provision, in juxtaposition with other charter provisions, was limited to property taxes, and since the rubbish collection fee was an excise tax, no voter approval was required. (48 Cal. 2d at 99–100, 106.) (See also *City of Glendale v. Crescenta,*

Etc. Water Co. (1955) 135 Cal. App. 2d 784, 789.) The Court of Appeal in the San Diego case examined an ordinance establishing a transient room tax. The charter of the City of San Diego placed a specific dollar limit on property taxes and provided (§ 76) "no special taxes shall be permitted except as especially authorized by this charter." (252 Cal. App. 2d at 592.) The court, relying on *City of Glendale v. Trondsen, supra*, and *Hunt v. Mayor and Council of Riverside* (1948) 31 Cal. 2d 619, held that the charter provision applied only to ad valorem property taxes and not to all taxes, including the transient room tax.

In neither the *Glendale* nor the *San Diego* case did the court define what constitutes a "special tax" other than to limit the particular charter provision to property taxes, and in neither case did the court hold or state that special taxes are those collected and limited to a special purpose as opposed to being deposited in a general fund.

The cases from other jurisdictions also show a lack of any precise definition of the term "special tax." Courts in many jurisdictions have wrestled with the distinction between a tax and a special assessment. See, e.g., *Lamar Water & Electric Light Co. v. City of Lamar* (1895) 128 Mo. 188 [31 SW. 756, 759]; *Higgins v. Bordages* (1895) 88 Tex. 458 [31 SW. 52, 53–55]; *Madison v. Bonneville Irr. Dist*. (1925) 65 Utah 571 [239 P. 781, 785].) As the New Mexico Supreme Court stated:

> ". . . We are not unmindful that the term 'special taxes' has frequently been used to include an assessment for street improvements. The term 'special taxes' has also been used as including income tax and inheritance tax. . . ." A 'special tax,' as the term is used in the statutes, is sometimes held to mean an additional tax over and above the general tax. (*City of Albuquerque v. Middle Rio Grande C. Dist.* (1941) 45 N.M. 313 [115 P.2d 66, 72].)

In New York, transfer (inheritance) and estate taxes are considered "special taxes" as opposed to general taxes, with the consequence that the tax provisions are construed strictly against the taxing authority. (*In re McAlpin's Estate* (1938) 166 Misc. 333 [2 N.Y.S.2d 260, 265]; *In re Reid's Estate* (1929) 134 Misc. Rep. 232 [236 N.Y.S. 21, 24]*; In re Revnolds' Estate* (1916) 163 N.Y.S. 803, 809.) And see *Louisiana & A. Ry. Co. v. Shaw* (1908) 46 So. 994, 995 [121 La. 997] (special taxes are additional taxes over and above the general tax authorized by the Constitution).

The Legislature also has never with any degree of care determined what is a special tax. A random sampling of past and present tax levy or authorization statutes reveal that although the Legislature has from time to time levied or authorized a levy of "special taxes," it has not done so with any consistency which reveals a definition of such term for all purposes.

For example, in 1872, the Legislature, while operating under the 1849 Constitution, authorized particular counties to levy taxes for particular purposes including: For a court house and jail for Stanislaus County, to levy a "tax" annually, meaning a property tax (Stats. 1871–1872, ch. 41, § 9); for a bridge in Alameda County, to levy "such additional tax" as the Board of Supervisors may judge and decree necessary (Stats. 187 1–1872, ch. 176, § 5); for bridges in Los Angeles County, to levy "a special tax" (Stats. 1871–1872, ch. 177, § 8); for a courthouse and jail in Sutter County, an "ad valorem tax" (Stats. 1871–1872, ch. 246, § 1); and for hospital and other purposes in Plumas County, to levy a "poll tax" and a "property tax (Stats. 1871–1872, ch. 247, §§ 1, 3).

The 1893 Legislature provided for the levying of a "special tax" by the Sutter County Levee District Number Two. (Stats. 1893, ch. 169.) That same session of the Legislature approved the charter of the City of Sacramento which included a provision for the levy of "a direct special school tax" to supplement funds received from the state and county for school purposes. (Stats. 1893, Res. ch. 7, p. 586.)

The Legislature in 1901 authorized general law cities to levy, after an election, "a special tax" not to exceed 50 cents for each $100 of assessed value for municipal improvements. (Stats. 1901, ch. 137.) This statute was codified in 1949 in Government Code sections 43225 et seq. until repealed in 1977. (Stats. 1977, ch. 309.) The purposes for which the tax could be levied were described as:

> ". . . the acquisition, construction, or completion of any municipal improvements, including bridges, water works, water rights, sewers, light or power works or plants, buildings for municipal uses, fire apparatus and street work, or other works, property or structures necessary or convenient to carry out the objects, purposes and powers of the municipality, the cost of which will be too great to be paid out of the revenues of the municipality to be received during the fiscal year, or years, in which such improvement is proposed to be made . . . ."

Section 4 required that the proceeds of the special tax be segregated in a special fund.

The 1911 Legislature authorized the levy of a "tax," by cities after an election, not to exceed 50 cents per $100 of assessed valuation "to provide and maintain parks and music, and for advertising purposes." The tax was declared to be "in addition to all other taxes authorized by law. . . ." (Stats. 1911, ch. 420; codified as Gov. Code, § 43200 *et seq*. in 1949; repealed by Stats. 1977, ch. 309.) In contrast, the tax which the Board of Supervisors was authorized to levy for advertising purposes is described as a "special tax." (Gov. Code, § 26100 *et seq*., derived from Pol. Code, § 4041.5, Stats. 1929, ch. 755.)

We previously noted that Political Code section 1670, subdivisions 14 and 15, authorized the levy of a "special tax," meaning a property tax, for high school purposes, as discussed in *People v. Lodi High School District, supra*. In 1903, the Legislature enacted a two-year "ad valorem" tax to be levied by the state to be deposited in a "state high school fund" in the State Treasury, and to be apportioned for support of high schools in the state. (Stats. 1903, ch. 60.) Although this was a supplemental or additional state property tax for high school purposes, it was not denominated a "special tax."

With the exception of the "poll tax" in the 1872 statutes, all of the above taxes are property taxes, many stemming from the days when the property tax was the only or major source of state or local government revenue. There still remain on the books, several property tax provisions denominated as "special taxes." For example, Government Code section 60000 authorizes cities to form "special municipal tax districts" in which a "special tax" may be levied for purposes of (a) acquiring, constructing or operating any public improvement or utility, or (b) the furnishing or performing of "any special local service, including music, recreation, or advertising." Military and Veterans Code section 1262 authorizes counties to levy a "special tax" of two and one-half mills per dollar of assessed value to provide and maintain buildings for the use or benefit of veterans associations. Health and Safety Code section 850 authorizes counties to levy "a special sanitary tax" not to exceed one-half mill per dollar of assessed valuation. Both of these latter stem from the 1920's. (Stats. 1921, ch. 348; Stats. 1929, ch. 755.)

Streets and Highways Code section 1550 authorizes counties to levy a property tax in each road district, while sections 1550.1 and 1550.2 authorize the creation of "special road maintenance districts" and the levy of a "special maintenance tax" for such districts. Finally, Streets and Highways Code section 1553 authorizes the counties to levy a "special road fund tax," not to exceed two mills per dollar of assessed valuation.

The use of the term "special tax," however, has not been limited to a property tax context. In 1967, the Legislature added part 17 (§ 37001 *et seq*.) to the Revenue and Taxation Code providing for the levy of "special taxes" for rapid transit construction. Prior to its repeal in 1976 (Stats. 1976, ch. 1333), the act authorized the imposition of one-half of one percent sales tax for the specified purpose. (Rev. & Tax. Code, § 37021.)

Finally, in recent legislation, the Legislature has made reference to special taxes in the context of article XIIIA, but has not sought to define the term. See Statutes 1979, chapter 395 (A.B. 618) authorizing the imposition of a special tax for fire protection and prevention and for police protection on approval of two thirds of the voters voting on the proposition. (See also Stats. 1979, ch. 903 (SB. 785), *supra*, authorizes general law cities to impose special taxes upon the requisite voter approval. But see SB. 1050, held in committee.)

From the above review,[4] we can only conclude that the term special taxes has not acquired any well-defined or established meaning. It is true that the term has usually, due to historical factors, been used in connection with the imposition of a property tax, but even then, not with any consistency allowing the discernment of a well-defined or established meaning. The term has not, however, been limited to that source of revenue. Further, an attempt to apply such a limitation to article XIIIA would negate section 4, since that section contains an absolute prohibition on any new property taxes. We must, then, look to the intent of the drafters of article XIIIA to ascertain the meaning of the term.

3. The Framers of Article XIIIA Intended "Special Taxes" to Mean Any New or Additional Local Tax Levied for Revenue Purposes

In Opinion 79–7 12 (62 Ops. Cal. Atty. Gen. 663 (1979)), *supra*, we examined the purposes of article XIIIA, particularly noting the analysis of the article made by the Supreme Court in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208. We stated there (62 Ops. Cal. Atty. Gen. at 667).

> "In light of these authorities, we reach one paramount conclusion as to the scope of section 4 of article XIIIA. Section 4 is intended to act as a device to stop any circumventing of the property tax relief provided by sections 1 and 2. Thus, any exaction imposed by a local government agency must be measured by this purpose of section 4. If this exaction is designed to raise revenue for the benefit of the taxing agency, it must be carefully scrutinized to see if it either (1) is a prohibited ad valorem tax on real property or a transaction or sales tax on the sale of real property, or (2) a special tax requiring a two-thirds vote of the qualified electors. Conversely, if the purpose and effect of the exaction is not to raise revenue for the benefit of the governmental agency as distinguished from the persons or property from whom or which it is exacted, it may well be beyond the proscription of section 4."

The Supreme Court in *Amador Valley* had noted that sections 3 (a limitation on state taxes) and 4 limitation on local taxes) were designed to preserve the property tax relief obtained by sections 1 and 2:

> ". . . Moreover, since any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or

[4] We wish to emphasize that our review of statutes has only been random and does not purport to be a complete historical analysis or review of all current tax statutes. We express no opinion on the validity of the current property tax statutes mentioned in light of section 1 of Article XIIIA.

> local levies other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes. . . ." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra*, 22 Cal. 3d at 230.231.)

The Ballot arguments in support of the initiative measure clearly disclose the purpose and meaning of section 4. Ballot arguments amount to the equivalent of legislative history. (*People v. Knowles* (1950) 35 Cal. 2d 175, 182; also see *Schmitz v. Younger* (1978) 21 Cal. 3d 90,97.)

> "Limits property tax to 1 % of market value, requires two-thirds vote of both houses of the legislature to raise any other taxes, limits yearly market value tax raises to 2% per year, and *requires all tax raises to be approved by the people* . . . ." (Ballot Pamp., argument in favor of Initiative Prop. No. 13 as presented to the voters, Primary Election (June 6, 1978).) (Emphasis added.)

It is our conclusion, from that Ballot argument statement and from the purposes and objectives of article XIIIA, that the term "special taxes" as used in section 4 refers to any new or increased exactions imposed by a city, county, or special district for revenue purposes.[5] Any narrower construction would, as noted by the court in *Amador Valley*, allow the basic tax relief obtained to be subverted and lost contrary to the intent of the people in enacting article XIIIA.

Thus, the definition of a special tax offered by dictum in *County of Fresno v. Malmstrom, supra,* of "a tax collected and earmarked for a special purpose, rather than being deposited in a general fund" (94 Cal. App. 3d at 983) would allow a city or county, without a vote, to avoid section 4 by enacting general or other taxes and depositing the proceeds in a special as opposed to the agency's general fund. That would clearly be contrary to the purpose and intent of section 4.

It has been suggested that the term "special taxes" should be interpreted as limited to taxes which are property related. This theory stems from two premises: First, that historically the term "special taxes" has meant property taxes, and secondly, that article XIIIA was intended to supplant only the property tax. Thus, the theory goes, any new exaction should be examined, and only if it impacts on ownership or possession of real property is it a special tax. We are unable to accept either premise. As our analysis above shows, the term "special tax" has not any established or well-defined meaning even if

[5] We express no opinion at this time as to what constitutes a "special district" within the meaning of section 4 of article XIIIA.

historically it has been used frequently in relation to property taxes. Secondly, such an approach would allow all the property tax benefits obtained by article XIIIA to be avoided without a vote by imposition of a tax or series of taxes which did not have a property relationship. We do not believe the purpose of section 4 was so narrow. The people intended to and did severely restrict local (and state) taxation in order ". . . to assure an effective tax relief program." (*Amador Valley Joint Union High Sch. Dist. v. State Bd*. of *Equalization, supra*, 22 Cal. 3d 232.)

4. The In-Lieu Participation Fee Is a Special Tax Within the Meaning of Section 4 of Article XIIIA

Our final task is to apply the above principles to the in-lieu participation fees imposed by Santa Cruz County. As we concluded earlier, those fees constitute taxes and are intended to raise revenue for the county. They thus constitute special taxes within the meaning of section 4 of article XIIIA. Since the fees were imposed after July 1, 1978, the effective date of article XIIIA, they require approval of two thirds of the qualified electors of Santa Cruz County.[6]

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[6] We express no opinion as to whether any person who has paid this fee to date, having done so voluntarily and having accepted the benefits by obtaining a permit, is entitled to a refund. We also express no opinion on the meaning of the phrase "a two-thirds vote of the qualified electors."