No. S151370

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JIMMIE D. BONANDER et al.,
Plaintiffs and Appellants

v.

TOWN OF TIBURON et al.,
Defendants and Respondents;

Review of Decision by the Court of Appeal
for the First Appellate District, Division Three
(Case No. A112539)

Superior Court of Marin County
Honorable James R. Ritchie
(Superior Court Case No. CV 052703)

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT TOWN OF TIBURON

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to Rule 8.520 (f) of the California Rules of Court, the League of California Cities and the California State Association of Counties respectfully request permission to file the amicus curiae brief combined with this application.

Each applicant is an organization that represents public agencies that have a substantial interest in this case because they all are bound by requirements imposed under Proposition 218, Articles XIII C and XIII D of the California Constitution. These requirements apply not only to the assessment in issue in this case, but to other levies that are used to repay municipal debt. The Court's opinion in this case has the potential to jeopardize local government access to credit markets that is secured by the provisions of Code of Civil Procedure §§ 860 et seq. (the "Validation Statutes"). Without the procedural guarantees that are provided under the Validation Statutes, government agencies would lose the ability to efficiently and affordably access credit markets to fund vital programs and services throughout California.

The applicants have a unity of interest and seek to submit the attached brief as *amici curiae* in this matter.

The applicants' attorneys have examined the briefs on file in this case and are familiar with the issues involved and the scope of the presentations.

Applicants respectfully submit that the perspective of local governments throughout California on the following issues, addressed in the brief combined with this application, will assist the Court's determination of this matter:

- Does Proposition 218 require a wholesale disregard of the Validation Statutes, such that taxes and assessments intended to guarantee the repayment of bonds are not protected by the expedited, conclusive and binding provisions of the Validation Statutes, as the credit markets have come to expect?
- Do the procedural consequences of Streets and Highways Code § 10601 depend upon the identity of the party seeking judicial review?
- Did the Legislature intend the statute of limitations of Streets and Highways Code § 10400 as a substitute for the comprehensive remedial scheme of the Validation Statutes?

Therefore, and as further amplified in the Introduction and Interest of Amici portion of the attached brief, the applicants

respectfully request leave to file the amicus curiae brief combined with this application.

Date: November 26, 2007

Respectfully submitted,

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I. INTRODUCTION AND INTEREST OF AMICI.

This case affects every government agency in the state empowered to impose assessments and to issue bonds backed by assessments, because the power to issue bonds is meaningless without the ability to guarantee repayment that is provided by the expedited and conclusive procedural rules set forth in Code of Civil Procedure §§ 860 et seq. (the "Validation Statutes"). Without these procedural guarantees, local governments will lose affordable and efficient access to credit markets, and the financing of public projects will become needlessly expensive.

Appellants' argument that the Validation Statutes are inconsistent with Proposition 218 should be rejected, because Proposition 218 provides no procedural rules for bringing this challenge and therefore cannot conflict with the Validation Statutes. Appellants' unstated grievance is that procedural rules can and do operate to cut off untimely or improperly asserted claims, but this does not mean that procedural rules therefore contradict substantive rights. Moreover, the need for speed and certainty in public finance has long been recognized by the Legislature and the courts of California, and nothing in Proposition 218 evidences intent to eliminate the time-tested, efficient procedures set forth under the Validation Statutes.

Appellants' contention that the *in rem* action required by the Validation Statutes is somehow inimical to the intent of Proposition 218 is similarly misplaced, as demonstrated by the fact that, apart from the publication requirement that Appellants have failed to satisfy, an *in rem* action under the Validation Statutes requires no more of the property owner

than the *in personam* action that Appellants would prefer to prosecute, and with which their trial counsel was apparently more familiar. Moreover, government agencies plainly may initiate *in rem* actions under the Validation Statutes, and apart from the publication requirements, there is no meaningful basis to distinguish the burden placed upon a property owner to respond to such an *in rem* lawsuit, from the burden placed upon the property owner to initiate an *in rem* lawsuit. If the former is not precluded under Proposition 218, why the latter?

In fact, the prospect of applying different procedural rules depending upon the identity of the petitioner – the statutory construction urged by Appellants – would create needless complexity and waste judicial resources. Faced with the threat of piecemeal, *in personam* suits that would threaten the marketability of bonds, government agencies could be expected to race to the courthouse to file an *in rem* suit under the Validation Statutes every time they seek to sell debt, even when a particular levy is without controversy. Nothing in Proposition 218; which is focused on protecting tax-, assessment- and fee-payers from unnecessary financial burden; suggests the voters intended to add a substantial legal services bill to the cost of every municipal bond issue.

Furthermore, Appellants recognize (as they must) that Streets and Highways Code § 10601 provides that an action brought by the public agency to determine the validity of an assessment *is* subject to the Validation Statutes. Thus, pursuant to Code of Civil Procedure § 863, when proceedings have not been brought by the public agency under the

Validation Statutes, any interested person may do so. Appellants' remedy is therefore provided under Code of Civil Procedure § 863, and authorization for this action under Streets and Highways Code § 10601 is not required. Nor is resort to the general remedy of mandamus where the more specific remedy of Code of Civil Procedure § 863, deemed more apt for the purpose by the Legislature, has been established by statute.

Finally, this Court should reject the argument that the limitations period set forth in Streets and Highways Code § 10400 renders the Validation Statutes "entirely unnecessary and irrelevant." Reply at p. 6. As discussed below, the Validations Statutes are a statutory scheme that establish more than just a limitations period for filing a complaint, and a statute of limitations will not alone provide the certainty that the Validation Statutes afford.

The League of California Cities ("League") is an association of 474 California cities[1] united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, comprised of twenty-four city attorneys representing all sixteen geographical divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as this one, that are of statewide significance to all cities.

The California State Association of Counties ("CSAC") is a non-profit corporation the members of which include all 58 of California's

[1] All but 4 of California's 478 cities are members of the League.

counties. CSAC sponsors a Litigation Coordination Program administered by the County Counsels' Association of California and overseen by that Association's Litigation Overview Committee, comprised of County Counsels from throughout the state. The CSAC Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case affects all counties.

II. FACTS AND PROCEDURAL HISTORY.

In the interest of economy, Amici adopt the Statement of Facts and Procedural History set forth by the Town of Tiburon in its Answer Brief.

III. ARGUMENT.

While Appellants no doubt wish this Court to consider the merits of their claims (and waste no opportunity to lament the Town's alleged disregard of Proposition 218), Appellants' substantive claims are not at issue.[2] Instead, this Court is asked to decide whether the Validation Statutes apply to a Proposition 218 challenge to a property-owner approved assessment that will fund the repayment of bonds issued pursuant to the Municipal Improvement Act of 1913. Fortunately for the communities served by local government agencies throughout California, the answer is a resounding "yes."

A. Proposition 218 Does Not Preempt The Validation Statutes.

[2] Thus, Amici do not address statements such as "The Town's position is that government agencies continue to maintain the unfettered right to apportion and measure special benefits as necessary to satisfy their overall project budgets and ensure voter approval, regardless of whether assessments on specific properties exceed special benefits or pay for general benefits conferred upon other properties," (Reply at p. 4), other than to note that the record reflects no such position taken by the Town.

Ignoring the fact that this appeal involves a single, clearly defined, procedural dispute, Appellants argue that this case is about the substantive protections of Proposition 218. Appellants Opening Brief on the Merits ("AOB") at p.5. This position is belied by the fact that the Validation Statutes are procedural in nature, and do nothing to dilute the substantive provisions of Proposition 218. While it is true that procedural rules can operate to cut off untimely or improperly presented substantive claims, the theory that Proposition 218 is somehow uniquely inconsistent with procedural safeguards that have been a long-standing and ordinary part of California's law of public revenues is novel and without basis in law. It is therefore unsurprising that Appellants identify no legal authority to support their theory that the Validations Statutes do not apply to a Proposition 218 challenge.

Moreover, if Appellants correctly argue that the Validation Statutes do not apply to the case at bar, then local governments will lose efficient and affordable access to credit markets, and government programs and services that are funded by voter- and property-owner-approved levies will become more expensive to provide – precisely the opposite of the taxpayer protection Proposition 218 was intended to achieve. To borrow Appellants' terminology, the impact of such a rule would be drastic, because (as Appellants explain) more than 200 statutes invoke the Validation Statutes (AOB at 26), and validation actions are most commonly used to secure a judicial determination that a government agency's proposed issuance of bonds or other credit instruments is valid, so that lenders can be induced to

extend credit backed by those instruments. *Kaatz v. City of Seaside*, 143 Cal.App.4th 13, 39 (2007). An inability to obtain efficient and affordable access credit markets, and the resulting increased expense to provide government services, were plainly not the goals of Proposition 218. Nor can Appellants point to any provision of Proposition 218, or anything in the Proposition 218 Omnibus Implementation Act,[3] suggesting that property owners have a constitutional right to have their grievances heard on an *in personam* basis, even when the Legislature has determined that the conclusive and binding *in rem* procedure established under the Validation Statutes is necessary to protect the marketability of government bonds.

1. The Validation Statutes Are Entirely Consistent With Proposition 218.

Appellants ask this Court to respect the plain language of Proposition 218. ("A court begins with what appears to be the plain language of the constitutional and charter provisions." AOB at p. 20). Amici wholeheartedly agree, but note the complete absence of any Constitutional language, plain or otherwise, governing the procedural requirements in this case other than those establishing the Legislature's plenary power to legislate judicial procedures. In fact, the text of both Proposition 218 and the Proposition 218 Omnibus Implementation Act are silent on the procedural requirements for assessment challenges. Apparently the framers

[3] The Proposition 218 Omnibus Implementation Act includes Government Code §§ 53750 et seq. and was adopted immediately following the 1996 adoption of Proposition 218 as urgency legislation to clarify the implementation of the measure. As urgency legislation, it received 2/3 approval of each chamber of the Legislature and was signed into law by then-Governor Wilson in July 1997 – just 8 months after the November 1996 adoption of the measure.

of the Proposition 218 and the voters who adopted it were content with the procedural law for assessment challenges, because they made no change to that law, while making meaningful changes to the process by which assessments are approved – transferring authority to do so from local elected officials to property owners. Article XIIID, section 4. Notwithstanding Appellants' arguments to the contrary, the Legislature's power to require compliance with the Validation Statutes cannot be foreclosed by the mere silence of Proposition 218. Nor is there any support for the position that Proposition 218 is somehow so comprehensive that it preempts other bodies of law, even where those other bodies of law are entirely consistent with Proposition 218.

Perhaps recognizing that Proposition 218 is silent on the procedural requirements for bringing this action, Appellants argue the provisions of the measure shifting the burden to prove that a particular program provides special benefit to assessed property (Article XIII D, Section 4(f)), restating prior law that assessing agencies must identify and segregate the general and special benefits of programs (Article XIII D, Section 4(a)), and restating the requirement that assessment amounts be proportional to the special benefit an assessment program confers on assessed property (Article XIII D, section 4(a)) are somehow inconsistent with the Validation Statutes. AOB at pp. 36 - 40. Yet how could a procedural rule for contests of an agency's compliance with these substantive requirements ever be inconsistent with the substantive requirements themselves? Any remedy at all will suffice to avoid conflict, and surely Appellants cannot convincingly contend that the

long-standing Validation Statutes are no remedy at all. A remedy with which their trial counsel was unfamiliar, perhaps; but surely a meaningful and effective remedy nonetheless.

Apart from the naked assertion that such a conflict exists (AOB at pp. 37 - 38), Appellants offer no reasoned explanation as to how the Validation Statutes, governing the process for testing compliance with the substantive requirements of Proposition 218, could somehow eliminate those substantive requirements. Presumably, Appellant is aggrieved that the Validation Statutes cut off causes of action a proponent has failed to timely and correctly file, but the notion that procedural requirements can cut off substantive claims is not the least bit controversial. Indeed, such procedural rules are essential to the rational functioning of any system of adjudication and especially necessary here, given the Legislature's recognition of the need for a speedy and conclusive determination of the lawfulness of a revenue stream pledged to support debt.

In fact, Appellants admit that the 30-day limitations period set forth under Streets and Highways Code § 10400 does ***not*** conflict with Proposition 218. AOB at pp. 40 - 41 (citing *Barratt American v. City of San Diego*, 117 Cal.App.4th 809 as holding "Proposition 218 does not conflict with process or procedures relating to the timing of legal challenges to such an assessment"). Thus, Appellants recognize that statutes of limitations and timing requirements do not conflict with Proposition 218. However, it was a failure to complete timely publication under the Validation Statutes which led to dismissal of Appellants complaint. If Appellants admit that the

Legislature may impose a statute of limitations on their claims, what bar is there to requiring them to serve their action by publication? Amici are simply at a loss to understand why the timing requirements set forth under Streets and Highways § 10400 for filing suit do not conflict with Proposition 218, whereas the timing requirements set forth under the Validation Statutes for completing publication of summons conflict so deeply with Proposition 218 as to eliminate its substantive provisions. There is simply nothing in Proposition 218 that comports with the application of § 10400 but not with the application of the Validation Statutes, and no reasoned distinction can be made, other than the fact that Appellants are subject to a procedural bar under the Validation Statutes, whereas their claims would not be precluded if the procedural rule were supplied by § 10400. In the end, however, neither the Validation Statutes nor § 10400 conflicts with the substantive provisions of Proposition 218, as nothing in that measure limits the Legislature's power to establish reasonable, procedural requirements for assessment challenges and to provide a speedy and time-tested means to eliminate uncertainty about the lawfulness of revenue measures that are to support debt.

Therefore, Appellants' argument that "Proposition 218 conflicts with and renders unconstitutional contradictory procedures or process leading to the adoption or levy of an assessment falling within its ambit" (AOB at p. 37) is simply a distraction, because the Validation Statutes do not contradict Proposition 218. The Validation Statutes do not address "the adoption of levy of an assessment." They address suits to challenge an assessment that

has been adopted and levied. The Validation Statutes address procedural issues entirely distinct from the substantive requirements of Proposition 218, and the fact the procedural requirements of the Validation Statutes must be satisfied to enforce substantive rights under Proposition 218 does not amount to a contradiction. Indeed, every substantive right that can be enforced by a court is necessarily subject to the procedural rules necessary to the rational functioning of courts.

2. Proposition 218 Does Not Demand In Personam Relief.

A property owner can prosecute an *in rem* Proposition 218 challenge under the Validation Statutes to contest the assessing agency's determination that a program of services or facilities provides a special benefit to his or her individual property alone. Thus, Appellants' position that an action subject to the Validation Statutes would be unduly expensive or involve such complexity and onerous burden as to render Proposition 218 ineffective is inconsistent with the long-standing presence of the Validation Statutes in the law of this state and simply cannot be credited. Moreover, this position ignores the fact that Proposition 218 does not contemplate the piecemeal invalidation that Appellants seek to obtain through *in personam* litigation.

a. Proposition 218 Does Not Allow Partial Invalidation of an Assessment on Multiple, Benefited Properties.

Appellants argue that "a property owner who seeks a special benefits challenge under the principles of Proposition 218 is really seeking judicial

review of the evidence establishing the application of the alleged benefit allocations as related to the property owner's individual property." AOB at P. 42. Thus, Appellants argue, "the recognition of an individual property owner's Proposition 218 rights and a local agency's related liability would not jeopardize the viability of the entire proposed project, or the related bonds to finance it." AOB at p. 43.

Quite aside from the fact that the claims filed by Appellants are not limited to an individualized determination as to the validity of the assessment on their properties,[4] this explanation ignores the fact that nothing in Proposition 218 requires piecemeal litigation of challenges to assessments. To the contrary, Proposition 218's requirements implicate an entire assessment scheme. For example, the requirement that an assessment on property be proportional to the special benefit conferred on that property carries with it the unavoidable mathematical requirement that if an assessment is reduced for one property owner, it must be increased for another – allocation of the cost of an assessment program is a zero-sum game. Thus, a conclusion that the determination of special benefit was erroneous to even a single property requires reexamination of the entire assessment scheme allocating the benefits and burdens of an assessment

[4] As noted by the Town's Answer Brief, the first cause of action alleges that the Town adopted an inadequate Resolution of Intention, unlawfully formed the district's boundaries through gerrymandering and tainted voting, and imposed disproportionate costs on Appellants' properties and other, similarly situated properties. The second and third causes of action allege that the Town illegally refused to consider evidence that the district violates the California Constitution, the Municipal Improvement Act of 1913 and the Town's published undergrounding policies. The fourth cause of action requests a declaration that Resolution No. 21-2005 is invalid. Answer Brief at p. 29. Thus, Appellants' claims are hardly limited to individualized determinations regarding their own properties.

program among the property owners who benefit from it.

Similarly, subdivision (h)(1)(b) of § 53750 of the Government Code, adopted by the Proposition 218 Omnibus Implementation Act, provides that an assessment is "increased" if a revised methodology "results in an increased amount being levied on *any* person or parcel." (Emphasis added.) Thus, Appellants' scenario of an individual assessment challenge that does not otherwise affect the assessment district is naïve, at best. The fact they themselves brought a more broadly stated petition suggests they understand this to be so.

Appellants' argument fails for still two further reasons. First, where would the funding be found to make up for a credit awarded to a property owner who won an individual challenge? Appellants blithely assign this liability (which ultimately translates into liability to repay the bonds that financed the project) to the assessing local government (AOB at p.42), but this ignores the fact that the local agency might not have available funds,[5] which is, of course, the reason that the credit markets demand the *in rem* certainty afforded by the Validation Statutes. Indeed, special-assessment financing is intended to fund programs of benefit to private property, such that general tax dollars provided by all taxpayers are not used to fund the program. The evidence in the record shows that property owners in the district will have significant safety, service reliability and aesthetic benefits

[5] Special districts, for example, often lack general, discretionary funds and have only revenues restricted by law to particular purposes – water rates to provide water service and assessments to fund service extensions, for example.

and, presumably, higher property values as a result. Why should residents of the Town not so benefited subsidize these benefits to others?

Secondly, if an assessment could remain generally valid, even if the assessment of a single parcel were defective, where would this license to get it wrong – but just a bit – end? Would defective benefit determinations of ten properties be permissible? Fifty? One Hundred? There is simply no reasoned basis by which to draw such a line, especially in a judicial proceeding without legislative guidance. Therefore, Appellants' argument that *in personam* actions regarding the determination of a special benefit for a single property would not affect the assessment as a whole or the rights of other property owners within the district is just wrong. Simply put, Proposition 218 does not contemplate piecemeal invalidation of an assessment as to one or a few properties; the assessment scheme must stand or fall as a whole.

Finally, Appellants' argument regarding the necessity of *in personam* litigation would establish an unworkable double standard. As noted above, Appellants themselves have identified over 200 statutes (most involving the issuance of bonds) that invoke the Validation Statutes. If this Court understands the Legislature to have allowed a government agency to utilize the Validation Statutes, but not to have required a property owner to do so, the result would be an inevitable "race to the courthouse," in which the government agency would seek to file its action first, in order to obtain an *in rem* determination that would serve to protect the marketability of its bonds and to prevent multiple lawsuits, and property owners would seek to assert

their individual, *in personam* actions first. This race to file would occur even when the levy was uncontroversial, in order to assure the credit markets that the debt was salable and not subject to multiple, belated attacks. The Court should be reluctant to reach this conclusion in the absence of any evidence the Legislature intended this result, and in the complete silence of Proposition 218 on the subject.

b. An *In Rem* Action Does Not Involve Onerous Burden.

Appellants argue that if this Court affirms the trial court's ruling for the Town:

> "a property owner who seeks individual redress under the principles of Proposition 218 will be forced into challenging the entire validity of the district related to the procedures leading to the assessment's adoption on all district properties, rather than contesting the application of special benefits to the specific property". AOB at p. 6.

Thus, Appellants take the position that it would be impermissibly onerous to require property owners to prosecute an *in rem* action in order to challenge an assessment.

This argument fails for four reasons. First, as discussed above, Proposition 218 does not contemplate piecemeal invalidation. Therefore, a

property owner is not required to demonstrate that an assessment is improper as to each and every property in the district in order to prevail in an *in rem* action. Rather, a property owner need only demonstrate that an assessment is invalid as to his or her individual property to obtain relief.

Second, as Appellants admit:

> "To properly give meaning to the substantive principles set forth in Sections 4(a) and (f) [of Article XIIID], courts must strictly and independently review the entire record in the assessment challenge, including independent evidence submitted by the property owner, as well as the administrative record of proceedings created by the assessing agency's partisan engineers, to determine whether the agency has satisfied its burden." AOB at p. 43 through 44.

Thus, Appellants recognize that even an *in personam* action would involve an in-depth evaluation of the assessment as a whole. What then, apart from the publication requirements, is the additional burden of an *in rem* action?

Third, although Appellants' "David and Goliath" tone attempts to garner sympathy for the individual property owner, Appellants do not explain exactly how the Validation Statutes impose an unfair burden upon an individual property owner. Here, Appellants not only published their summons (albeit belatedly) in an unsuccessful attempt to comply with the

Validation Statutes, they claim to have mailed information regarding this lawsuit to each and every property owner in the undergrounding district. Thus, Appellants do not (and cannot) contend that the publication requirements set forth under the Validation Statutes are onerous, as they voluntarily assumed a greater notification burden than the law requires. Instead, Appellants gloss over the obvious motivation for their quarrel with the Validation Statutes (*i.e.*, their own failure to timely complete correct publication) and argue that the *in rem* nature of a validation action is somehow inconsistent with Proposition 218. Because they fail to provide any meaningful explanation as to why an *in rem* action is more onerous than an *in personam* action, Appellants' contention should be rejected.

Finally, the suggestion that an *in rem* action imposes upon a property owner an impermissibly onerous burden proves too much. If an *in rem* action is somehow too onerous a means for an individual property owner to challenge an assessment under Proposition 218, how can this Court require an individual property owner to answer a validation action that is instigated by a government agency, under one of the 200 statutes that Appellants have identified, when the agency seeks to assure the marketability of its bonds? Such an action is undeniably *in rem*. As Appellants note, the government agency bears the burden of proof in a Proposition 218 assessment challenge, and this is true regardless of who initiates the action. Thus, apart from the publication of summons that Appellants belatedly managed to accomplish, the obstacles faced by a property owner under the Validation Statutes are the same, whether the action is initiated by the property owner or by the

government agency. If these obstacles are somehow inconsistent with Proposition 218 (and Appellants offer no meaningful analysis as to why this might so), then it would follow logically that judicial relief should not fall short of barring government agencies from instigating an *in rem* action under the Validation Statutes to begin with, at least where a Proposition 218 challenge could conceivably be raised. This, of course, is plainly at odds with the procedural regime long established by the Legislature, implemented by the courts, and left undisturbed by Proposition 218.

Not only would such a determination hamper local government access to credit markets, it would result in the wholesale invalidation of some 200-plus statutes that invoke the Validation Statutes. Thus, Appellants' argument that *in rem* proceedings are impermissibly onerous proves far too much.

B. Section 10601 And The Validation Statutes Should Be Read Literally.

Amici join Appellants' invitation to this Court to interpret unambiguous statutory language according to its plain meaning. Under the plain meaning of Streets and Highways Code § 10601, the Town was authorized to bring a validation action. Under the plain meaning of Code of Civil Procedure § 863, when the Town did not do so, Appellants were authorized to bring a reverse validation action. Under the plain meaning of Code of Civil Procedure § 869, a party that is authorized to bring a reverse validation action has no other remedy. Moreover, the fact that § 10601 authorizes a contractor to bring a validation action under Code of Civil

Procedure § 860 (as opposed to a reverse validation action under Code of Civil Procedure § 863) does not open the door to any remedy outside of the Validation Statutes for any other claimant. Therefore, Appellants are plainly not allowed to seek a writ.

1. A Validation Action Is Authorized Under Section 10601.

Streets and Highways Code § 10601 provides as follows:

> "An action to determine the validity of the assessment, bonds, contract, improvement or acquisition may be brought by the legislative body or by the contractor pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure [the Validation Statutes]. For such purpose an improvement or acquisition shall be deemed to be in existence upon its authorization and an assessment upon its confirmation. Notwithstanding any other provisions of law, the action authorized by this section shall not be brought by any person other than the legislative body or the contractor, nor except when permitted by Section 10400 shall the action be brought after the date fixed for the beginning of work."

Amici do not dispute Appellants' argument that by its terms, § 10601

does not authorize any party other than the assessing legislative body or the contractor who is to construct an assessment-funded capital improvement to bring an action pursuant to the Validation Statutes. Clearly, however, the Town was authorized to bring a validation action. This authorization then triggered the application of Code of Civil Procedure § 863, which creates the balanced remedial regime that both fundamental fairness and a practical system of local government finance require. [6]

2. Appellants Are Authorized To Bring A Reverse Validation Action Under § 863.

The first sentence of Code of Civil Procedure § 863 provides:

> "If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter."

[6] It is true that Section 10601 cannot mean what it says, when read in isolation, for it provides a remedy to an assessing government and its contractor, but not to owners of assessed property. Appellants urge this Court to search the body of the law for a remedy for property owners and to find it in the general mandamus statutes. Amici and the Town, by contrast, suggest this Court look less far afield to the more specific remedy the Legislature plainly intended to apply in cases where local governments have standing under the Validation Statutes – the reverse validation remedy of CCP § 863. This interpretation provides a remedy for property owners as fairness requires, but reflects legislative intent to insure access to credit markets and avoids the inefficient "race to the Courthouse" that will result from looking outside the Validation Statutes to general mandamus to provide a remedy to property owners.

Section 863 provides that, whenever a public agency that is authorized to initiate a validation action under § 860 does not do so, any interested person may bring a reverse validation action, and the authorization provided to the public agency to proceed under § 860 is alone sufficient to trigger the application of § 863. Here, Streets and Highways Code § 10601 authorized the Town to bring a validation action. Because the Town did not initiate such an action, Appellants were authorized to bring a reverse validation action under the plain and unambiguous language of Code of Civil Procedure § 863. Thus, Appellants' argument that Streets and Highways Code § 10601 does not authorize them to bring a reverse validation action is a red herring, because Code of Civil Procedure § 863 provides that authorization once the Town has authority to validate under any other statute. Because Appellants cannot avoid the fact the Town was authorized to bring a validation action under Streets and Highways Code § 10601, they cannot avoid the conclusion that their remedy was under § 863.

3. The Validation Statutes Provide An Exclusive Remedy.

Appellants understandably prefer remedies additional to those specified in the Validation Statutes, because their trial counsel failed to publish the summons within the time permitted by the Validation Statutes. Thus, they argue that relief under the Validation Statutes is not their sole and exclusive remedy. Reply at p. 11. This position is refuted by the plain language of Code of Civil Procedure § 869, entitled "Exclusive provisions;

other remedies":

> "No contest except by the public agency or its officer or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified. The availability to any public agency, including any local agency, or to its officers or agents, of the remedy provided by this chapter, shall not be construed to preclude the use by such public agency or its officers or agents, of mandamus or any other remedy to determine the validity of any thing or matter."

Thus, interpreting the statute according to the plain meaning of its unambiguous language, a "matter under this chapter," including matters that may be determined pursuant to a reverse validation action, cannot be litigated "other than within the time and the manner" specified under the Validation Statutes. The exception to this rule applies only to public agencies, and only when the public agency is the party seeking to determine the validity of its own action. *Millbrae School District v. Superior Court*, 209 Cal.App.3d (1989) (writ relief unavailable to public agency seeking to invalidate the action of another public agency; third-party public agencies not exempt from the Validation Statutes).

It is telling that Appellants cite no authority for their claim that when a reverse validation action is authorized, as it is here, other remedies are also

available. Instead, Appellants create confusion by noting that "[v]alidation is not even the sole remedy afforded a Town in this respect." Reply at p. 11. The fact that § 869 allows a public agency to seek a writ as an alternative remedy does nothing to further Appellants' case, however, because Appellant is not a public agency seeking to determine the validity of its own actions and § 869 plainly denies writ relief to a third-party which has standing to file a reverse validation suit under § 863. Thus, the exception provided under § 869 does not apply to Appellants. Instead, the general rule set forth under § 869 precludes Appellants from seeking a writ.

In short, Amici agree that statutes should be interpreted according to the plain meaning of unambiguous language. Here, the Town was authorized to initiate a validation action under Streets and Highways Code § 10601. This authorization, and the Town's decision not to bring a validation action, triggered the application of Code of Civil Procedure § 863, allowing Appellants to bring a reverse validation action. Code of Civil Procedure § 869 provides that this remedy is exclusive, and Appellants do not fall within the exception applicable to public agencies seeking to determine the validity of their own actions. Therefore, having failed to complete a timely publication of summons under the Validation Statutes, Appellants may not petition for a writ.

4. Authorization For A Contractor To Bring A Validation Action Does Not Authorize Writ Relief by Others.

As noted above, Streets and Highways Code § 10601 provides that a

validation action may be brought by either an assessing legislative body or a contractor who is to build assessment-funded improvements. Therefore, while prosecuting a validation action under Code of Civil Procedure § 860 (as opposed to a reverse validation action under § 863) is generally the prerogative of a public agency, a contractor may bring such an action under § 10601.

This rule recognizes a contractor's unique interest in determining the validity of an assessment when bonds are issued under the Improvement Act of 1911 (the "1911 Act", Division 7 of the Streets and Highways Code, §§ 5000 et seq.).[7] Under the 1911 Act, a contractor receives warrants against individual parcels, and these warrants evidence an entitlement to be paid directly by the property owner. When the property owner does not pre-pay the contractor, the public agency issues bonds to the contractor, and each bond is in the amount of a separate assessment against a particular parcel and secured by a lien against that parcel alone. *See*, *Thompson v. Clark*, 6 Cal.2d 285, 293-294 (1936); Streets and Highways Code § 6422. Thus, while public agencies issuing bonds in the current market generally proceed under the more complex scheme set forth under the 1915 Bond Act, § 10601 of the Municipal Improvement Act of 1913 recognizes the unique (and now

[7] Although modern bonds are generally issued under the provisions of the Improvement Bond Act of 1915 (the "1915 Bond Act," Streets & Highways Code, §§ 8500 et seq.), § 10600 of the Streets and Highways Code provides that assessments levied under the Municipal Improvement Act of 1913, such as the assessment at issue in this case, may be used to fund the repayment of bonds issued under either the 1911 Bond Act or the 1915 Bond Act. Thus, the drafters of § 10601 anticipated the unique status of a contractor as to bonds issued under the 1911 Bond Act.

outdated) interest of a contractor under the 1911 Bond Act.[8]

The fact that a contractor becomes a bond holder with respect to unpaid warrants against individual parcels under the 1911 Bond Act, and is therefore uniquely authorized under § 10601 to prosecute a validation action under Code of Civil Procedure § 860, has nothing to do with Appellants' claims. Here, Appellants are neither a public agency seeking to determine the validity of its own action, nor a contractor holding bonds issued under the 1911 Bond Act. Thus, Appellants are not authorized under § 10601 to bring a validation action under Code of Civil Procedure § 860. Instead, Appellant's remedy was to bring a reverse validation action under Code of Civil Procedure § 863. In any event, both the Town's § 860 remedy and Appellants' § 863 remedy are governed by the Validation Statutes, and Appellants cannot trade on the unique role played by a contractor under the 1911 Bond Act to gain the authority for writ relief here.

In short, § 10601 does not create a remedy for owners of assessed property, and Appellants' remedy must therefore lie elsewhere. As between § 863 and a writ, the former reflects the Legislature's intent, because it provides a parallel, speedy, certain and time-tested remedy that was specifically adopted to provide public agencies affordable access to the credit markets. There is no need to search the body of the law for a remedy

[8] Under a 1911 Act bonding scheme, each bond is specific to a particular property and the credit-worthiness of that bond turns on the financial wherewithal of that property owner and the value of that property. Under more modern schemes, bonds are issued backed by all assessments in an entire assessment district and the credit-worthiness of the bond turns on the pooled financial wherewithal of the property owners and the pooled value of all the assessment property. This method of spreading risk to reduce the cost of debt is fundamental to insurance and modern credit instruments. Under the older scheme, the contractor was effectively the lender and had a unique stake in the lawfulness of the bonds.

and the general mandamus remedy – and its concomitant race to the Courthouse – need not be assumed to have been the Legislature's intent.

C. The Legislature Did Not Intend Section 10400's Statute of Limitations As A Substitute For The Validation Statutes.

Appellants argue that the limitations of Streets and Highways Code § 10400 renders the Validation Statutes "entirely unnecessary and irrelevant":

> "Given the strict 30-day statute of limitations under § 10400 related to the filing of any and all claims challenging assessments, the Validation Statutes are entirely unnecessary and irrelevant. An agency's actions will effectively become valid and immune from attack after 30-days from the date the assessments are levied, and not 60-days, as proscribed by Code of Civil Procedure 863. Thus, § 10400 turns out to be controlling, and will help to insure the marketability of bonds to finance the project." Reply at p. 6 (footnote omitted).

This argument is flawed. Even if Appellants were correct in their argument that § 10400 provides a reasonable safeguard against lawsuits filed after the sale of bonds, § 10400 would still fail to render the Validation Statutes "entirely unnecessary and irrelevant." The Validation Statutes

provide a comprehensive statutory framework for establishing the validity (or invalidity) of a government action; and its provisions go beyond merely establishing a limitations period. Thus, Appellants' argument ignores the fact that (1) an action brought under the Validation Statutes is *in rem* (Code of Civil Procedure § 860), (2) the Validation Statutes require publication of summons within a specified time period (Code of Civil Procedure § 861), (3) the Validation Statutes provide a cut-off date for interested persons to appear (Code of Civil Procedure § 862), (4) the Validation Statutes require the consolidation of actions and trial court calendar preference (Code of Civil Procedure §§ 865 and 867), (5) the Validation Statutes require a court to disregard any error that does not affect substantial rights (Code of Civil Procedure § 866), and (6) the Validation Statutes establish a 30-day across-the-board limitation period for filing an appeal (Code of Civil Procedure § 870). The Legislature deemed each of these procedural requirements necessary to provide swift and certain resolution of disputes regarding credit instruments to ensure local governments in California have access to credit markets on affordable terms. A mere statute of limitations is no substitute for this comprehensive, well-considered, and time-tested procedural scheme.

IV. CONCLUSION.

For all these reasons, amici respectfully submit that Appellants' suit is barred based upon their trial counsel's failure to timely publish the summons as required by the Validation Statutes, and the Superior Court's ruling granting the Town's Motion to Dismiss should therefore be affirmed.

Date: November 26, 2007

Respectfully submitted,

COLANTUONO & LEVIN, P.C.

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Michael G. Colantuono
Attorney on behalf of Applicants
League of California Cities and
California State Association of
Counties

CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.204(c)(1)

Pursuant to California Rules of Court 8.204(c)(1), the foregoing *Amicus Curiae* Brief of the League of California Cities and the California State Association of Counties contains 6,043 words (including footnotes, but excluding the tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on November 26, 2007, at Los Angeles, California.

COLANTUONO & LEVIN, P.C.

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Michael G. Colantuono
Attorney on behalf of Applicants
League of California Cities and
California State Association of
Counties

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and am not a party to the within action; my business address is 555 West Fifth Street, Los Angeles, California. On November 26, 2007, I served the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT TOWN OF TIBURON** on all interested parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Clerk of the Court
California Court of Appeal
First Appellate District Court - Div. 3
350 McAllister St.
San Francisco, CA 91402

Hon. James R. Ritchie
Marin County Superior Court - Dept. E
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BY MAIL: The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or

postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on November 26, 2007, at Los Angeles, California.

_____

Kimberly Nielsen