No. S151370

First Appellate District Court of Appeal, Div. 3, Case No. A112539

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JIMMIE D. BONANDER, et al.,
Plaintiffs and Appellants

vs.

TOWN OF TIBURON, et al.,
Defendants and Respondent

On Appeal from the Superior Court of Marin County
Superior Court Case No. CV 052703
Honorable James R. Ritchie

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

The issue presented to this Court is straightforward – does a property owner who files a lawsuit challenging the validity of an assessment district formed under the Municipal Improvement Act of 1913 (Sts. & Hy Code, §§ 10000-10706) have to comply with the statutes governing validation actions found at Code of Civil Procedure section 860 et seq. It is purely a legal, procedural issue.

Nonetheless, Appellants[1] attempt to needlessly complicate the issue before the Court by introducing facts and issues that are irrelevant to the narrow issue presented. First, Appellants misconstrue the procedural issue presented as a Proposition 218 issue. Proposition 218, the "Right to Vote on Taxes Act," was adopted by the electorate in 1996, which added Articles XIIIC and XIIID to the California Constitution. (See Historical Notes, 2A West's Ann. Constitution (2005 Supp.) foll. Art. 13C, § 1, p. 68.) Essentially, Proposition 218 supplements the assessment district formation process provided by various statutes, including the Municipal Improvement Act of 1913, by modifying the district formation procedures and the substantive analysis regarding the proportionality of the assessments. Appellants rely on Proposition 218's provisions governing the proportionality of assessments to challenge the validity of the district formed by the Town. Despite Appellants' claims, the grounds on which Appellants challenge the validity of the district are irrelevant in analyzing the issue presented to this Court. There is no provision in Proposition 218 that governs the procedure for how an individual challenges the formation of the district in court. Any procedural issues that Proposition 218 address relate to the procedure of forming the district. Rather, to determine whether special procedural statutes govern a lawsuit involving an action by the public entity, the courts look to the statute that

[1] "Appellants" refer to Petitioners/Appellants Jimmie Bonander, Jean Bonander, Frank Mulberg and Shelley Mulberg.

authorized the public entity's action. In this matter, the Parties agree that the Town acted under the authority of the Municipal Improvement Act of 1913. The Municipal Improvement Act of 1913, specifically Section 10601 of Streets and Highways Code, provides that a court action challenging the validity of the district shall comply with the validation proceeding statutes, Code of Civil Procedure section 860 et seq.

Second, Appellants also attempt to distract the Court by arguing the merits of the underlying claim, which remain in dispute and are irrelevant. Neither the trial court nor the First Appellate District Court of Appeal made any findings of fact related to the merits of the underlying claim because Appellants' lawsuit was dismissed on procedural grounds. The merits of Appellants' claims are simply irrelevant, and moreover, were never developed in the lower courts. Likewise, Appellants' introduction of facts to this Court through judicial notice is without merit due to their lack of relevancy. Appellants' focus on disputed, irrelevant facts, is a ploy to garner the sympathy of the Court because as shown in further detail below, their arguments concerning the procedural issue are without merit.

In considering similar issues in the past, this Court has noted: "The facts underlying this lawsuit, and the merits of the appeal, are immaterial to the narrow procedural issue…." (*Planning and Conservation League v. Dept. of Water Resources* (1998) 17 Cal.4th 264, 267 "*Planning*".) Similarly, the only fact that is relevant here – the statute under which the Town acted – is undisputed. Thus, the issue of whether Appellants should have complied with Code of Civil Procedure section 860 et seq. turns on the statutory construction of Section 10601 of Streets and Highways Code, the relevant provision of the Municipal Improvement Act of 1913, and of Code of Civil Procedure section 860 et seq. As is shown in greater detail below, the language of section 10601 of Streets and Highways Code and the legislative intent of Code of Civil Procedure section 860 et seq. require Appellants

to comply with the special procedures governing validation actions because they sought to invalidate the improvement district formed. Furthermore, application of Code of Civil Procedure section 860 et seq. to Appellants' action was consistent with Proposition 218's provisions, and actually advances some of the policies behind Proposition 218. Likewise, requiring Appellants to comply with the special procedures governing validation actions would not violate their federal due process rights. Finally, Appellants have failed to offer any valid reason as to why they should be excused from complying with Code of Civil Procedure section 860 et seq. For these reasons, which are discussed in further detail below, the Court should affirm the First District Court of Appeal's opinion and uphold dismissal of Appellants' action.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Pursuant to Rule of Court 8.500(c)(2), as a policy matter, the Court generally accepts the statement of facts from the Court of Appeal's Opinion. Therefore, the statement of facts contained herein is based on the Appellate Court's Opinion, with accompanying Joint Appendix cites. [2]

A. Formation of Assessment District.

Appellants are the owners of real property commonly known as 56 and 66 Hacienda Drive, Tiburon, California (Assessment Parcel Nos. 039-221-01 and 039-221-02). (*Bonander, et al. v. Town of Tiburon, et al.* (A112539) ("Opinion"),

[2] In addition, because of the standard of review set forth in Rule of Court 8.500(c)(2), the Town opposes Appellants' Request for Judicial Notice of Exhibits L (Rules of Professional Conduct), M (excerpt from administrative record in *Town of Tiburon v. All Persons Interested in the Validity of the Del Mar Valley Utility Undergrounding Supplemental District*, Marin County Superior Court Case No. CV 062153) and N (Assessment Appeals Manual). These exhibits relate to facts that are not in the Appellate Court's Opinion, in fact, were never before the Appellate Court and are irrelevant. Therefore, the Court should not consider these facts. (See e.g., *People v. Peevy* (1998) 17 Cal.4th 1184, 1207-08.)

p. 7; 3 Joint Appendix ("JA") 669.) Appellants' properties are within the border of the assessment district, the Del Mar Valley Utility Undergrounding District ("District"), which is the subject of this lawsuit. (*Ibid.*; see also 3 JA 715.)[3]

In Spring of 2003, numerous property owners petitioned the Town Council to form an assessment district for the undergrounding of utilities (electric, telephone and cable). (Opinion, p. 8; 2 JA 359-67, 359-68.) In June 2003, the Town Council adopted a "Resolution of Intention" declaring its intention to form an assessment district to finance the undergrounding of the utilities pursuant to the Municipal Improvement Act of 1913. (Sts. & Hy. Code, §§ 10000-10706). (Opinion, p. 8; 2 JA 370-75; see also 2 JA 368, 536.)[4] Following the adoption of the Resolution of Intention, the Town hired engineers to prepare a report that would explain the aesthetic, service reliability and safety benefits to the properties within the District, and the proposed assessments for affected property owners ("Engineer's Report"). (Opinion, p. 8; see also 3 JA 677-710.)

Contrary to Appellants' claim that they were denied an administrative hearing, the Town Council held two administrative hearings. On March 16, 2005, the Town Council held a public hearing and considered the Engineer's recommendations and the adoption of the Preliminary Engineer's report (setting district boundaries). (2 JA 536-37.) Then, on May 18, 2005, the Town Council held the public hearing required by the Municipal Improvement Act of 1913 and Proposition 218 to hear and consider public testimony, tally the property owner votes, and, if the property owners voted in favor of forming the district, to adopt a resolution approving the Final Engineer's Report and establishing the district.

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[3] Page 0715 of the Joint Appendix is an aerial photograph. The subject property addresses (56 and 66 Hacienda), their neighbors across the street (45 and 75 Hacienda), and district boundaries are superimposed upon the photograph.

[4] Regarding resolutions of intention, see Streets & Highway Code section 10200.

(Opinion, p. 8; see also 3 JA 671-76 (staff report discussing process); 3 JA 718-20 (meeting minutes); 3 JA 711 (Resolution No. 21-2005).) Appellants submitted both written and oral comments at both meetings objecting to the assessments.[5] (See, e.g., 3 JA 612-13, 629.)

After the close of the public hearing on May 18, 2005, the property owners' votes were tallied. The property owners in the proposed district voted overwhelmingly in favor of the formation of the assessment district--71% voting yes. (Opinion, p. 8; 3 JA 748 (transcript); see also 3 JA 725-29 (assessment ballot tabulation results).)[6] In the absence of a majority protest, the Town Council voted (4-0) to adopt Resolution No. 21-2005, which approved the Final Engineer's Report and created the Del Mar Valley Utility Undergrounding Assessment District. (Opinion, p. 8; see also 3 JA 711-14; see also 3 JA 749-50 (transcript).)

B. Appellants' Action to Challenge the Assessment District and Their Failure to Comply with the Validation Proceeding Statutes.

1. Appellants' Claims Sought to Invalidate the District.

On June 16, 2005, Appellants initiated this action by filing a combined petition and complaint, entitled: Petition for Writ of Administrative Mandamus (Code Civ. Proc., §1094.5) or Mandate (Code of Civ. Proc., §1085) and Complaint for Declaratory and Injunctive Relief ("Petition"). (Opinion, p. 8; 1 JA 001, 004.) Both the Summons and the Petition named only the Town of Tiburon, the Tiburon

[5] Appellants' property could not be excluded from the proposed district without excluding other property owners who wanted to be included in the District. (See, e.g., 2 JA 525 and 3 JA 715.)

[6] As required by the Municipal Improvement Act of 1913, the ballots were weighted in proportion to the proposed assessments (i.e., each property owner's vote equaled the dollar amount proposed to be assessed on his or her property). Property owners cast ballots for $4,113,890 of the assessments, and the favorable votes represented $2,914,256 of that amount. (3 JA 748 (transcript); see also 3 JA 725-29 (assessment ballot tabulation results).)

Town Council, and "Does 1 through 20" as Respondents and Defendants. (*Ibid.*) In sum, the Petition sought to invalidate the District by alleging:

- the amount of the assessments on Appellants' properties exceeded the reasonable cost of the proportional special benefit;
- the Resolution of Intention was inadequate due to alleged gerrymandering, illegally formed zones and tainting of the vote;
- No substantial evidence supported the determination that undergrounding the utilities provided a special benefit to Appellants' properties; and
- The Town abused its discretion in refusing to consider evidence that the District would be created in violation of the California Constitution, the Municipal Improvement Act of 1913 and the Town's own guidelines on undergrounding utilities.

(Opinion, p. 9.)

In the Prayer for Relief, Appellants sought to reverse the Town's approval of the District. Specifically, Appellants requested the following relief (Opinion, p. 9):

- "[A] peremptory writ of mandate ordering and requiring defendants to set aside Resolution No. 21-2005 …" (1 JA 062:1-2);
- "[A]n order restraining defendants and respondents from giving effect to Resolution No. 21-2005 …" (1 JA 062:4-5);
- "[A] preliminary and permanent injunction enjoining defendants and respondents … from enforcing Resolution No. 21-2005 …" (1 JA 062:8-9); and
- "[A] declaration that Resolution No. 21-2005 … including the assessment noticed May 27, 2005, is void and invalid and directing defendants to vacate the same and take no further action thereon" (1 JA 062:11-13).

On July 11, 2005, the trial court set a briefing schedule for the merits of Appellants' claims. (Opinion, p. 9.) In the interim, the trial court sought to protect

the status quo as to the parties actually before it, directing the Town not to enforce Resolution No. 21-2005 against Appellants. (*Ibid.*; 2 JA 348-49.) On July 17, 2005, Petitioners personally served the Petition and the Summons on the Town. (Opinion, p. 9.) On August 2, 2005, the Town filed its Answer to the Petition, and alleged as an affirmative defense that Petitioners "were required to, but failed to, comply with the statutory requirement for pursuing this action, including without limitation Code of Civil Procedure Section 860 et seq. [i.e., the validation statutes]." (Opinion, pp. 9-10 (quoting Town's Answer to the Petition).)

2. The Trial Court Dismissed the Action for Appellants' Failure Properly to Notify All Persons Interested.

In an apparent attempt to comply with Code of Civil Procedure section 860 et seq., on August 15, 2005, 60 days after the lawsuit was filed, Appellants mailed the Summons to other property owners in the District. (Opinion, p. 10; 3 JA 807-18.)[7]

Appellants assert that on August 15, 2005, the trial court "granted a two day extension to comply with Code Civ. Proc. § 860 *et seq.*" (Appellant's Opening Brief on the Merits ("AOB"), p. 17.) The record includes no order supporting this assertion. Rather, the record evidences that Appellants applied ex parte on August 17, 2005, the 62nd day after the action was filed, for an order amending the Summons. (Opinion, p. 10, 4, 11, 3 JA 819.) The Court ordered the issuance of an amended Summons. (Opinion, p. 11, JA 851-53.)

According to the Proof of Publication, Appellants first published the amended Summons in the *Marin Independent Journal* on August 19, 2005, more

[7] The Summons was internally inconsistent. Although the Summons states that "[y]ou have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response, " Appellants attached a page which stated, in contradiction with the foregoing: "[y]ou may contest the legality or validity of this matter by appearing and filing a written answer to the complaint not later than SEPTEMBER 20, 2005…." (3 JA 808-09.)

than 60 days after this action was commenced. (Opinion, p. 11; 4 JA 922.) On September 9, 2005, approximately 85 days after the commencement of this action, Proof of Publication of the amended Summons was filed. (Opinion, p. 11; 4 JA 922-23.)

On September 23, 2005, the Town filed a notice of motion and motion to dismiss for Appellants' failure to comply with sections 861, 861.1 and 863 of the Code of Civil Procedure. (Opinion, p. 11; 4 JA 924-25.) The Town provided points and authorities supportive thereof in conjunction with its opposition to the merits of Appellants' Petition. (Opinion, p. 11; 4 JA 924, 926, 938-40.)

Appellants did not file any motion for relief under Code of Civil Procedure section 473.[8] Instead, they offered a declaration that they were under the belief that Code of Civil Procedure section 860 et seq. did not apply (merely because they claimed Proposition 218 violations and the Validation Proceeding Statutes are "complex"), but that they belatedly sought to comply with the publication of summons provisions. The trial court granted the Town's motion, and on November 22, 2005, the trial court entered a judgment of dismissal. (Opinion, p. 11; 4 JA 1086-93, 1099-1100.) Appellants appealed to the First Appellate District Court of Appeal ("Appellate Court").

In its opinion, dated January 31, 2007, the Appellate Court affirmed the trial court's judgment. Specifically, the court held that Appellants' lawsuit "constitutes a validation action subject to the procedural requirements governing such actions contained in section 860 et seq. of the Code of Civil Procedure. (Opinion, p. 2.) In addition, the court held that the trial court did not abuse its

[8] Code of Civil Procedure section 473 provides that a party or his or her legal representative may amend a pleading or seek relief from an order, judgment or dismissal because of his or her "mistake, inadvertence, surprise, or excusable neglect."

discretion in finding that Appellants failed to show good cause for their failure to publish notice of their action within the time period required. (*Ibid.*)

III. ARGUMENT

Appellants assert that Code of Civil Procedure section 860 et seq. ("Validation Proceeding Statutes") do not apply to their lawsuit. Appellants' rationale is that Proposition 218's substantive guarantee regarding proportionality of benefits displaces the procedural requirements for challenging the imposition of assessments under the Municipal Improvement Act of 1913. As is shown in greater detail below, Appellants' claims are without merit.

Before undertaking this analysis, it is useful to consider the statutory context under which the Town formed the District and imposed the assessments.

A. The Process for the Implementation of Assessment Districts Under the Municipal Improvement Act of 1913.

"The use of the special or beneficial assessment district as a device for financing the cost of public improvements has a long pedigree in the history of public finance in the United States." (*Not About Water Committee v. Solano County* (2002) 95 Cal.App.4th 982, 991 ("*Not About Water*").) The Municipal Improvement Act of 1913 is the legislative authority invoked and followed by the Town to create the District. The Act establishes a three-step process for cities to create assessment districts for the undergrounding of utilities. (See, e.g., Sts. & Hy. Code, §§ 10008, 10100.) The first step is the decision to consider district formation; the legislative body must adopt "a resolution of intention." (Sts. & Hy. Code, § 10200.) This resolution shall describe the proposed improvements and specify the proposed exterior boundaries of the district, among other things. (*Ibid*.)

In the second step, the legislative body considers the particulars of the proposed district, including the precise boundaries of the district, any interior

zones, an estimate of the costs of the improvements, and the resulting amount of the proposed assessments. These details are articulated in an engineer's report that is presented to the legislative body. (Sts. & Hy. Code, §§ 10200, 10300.)

The third step is a vote of the residents of the proposed district regarding the proposed district formation, using a weighted voting method. If the district is approved, the map is recorded, the assessments are levied, and bonds are issued (upon the security of the assessments). The proceeds of the bonds pay the costs of the public improvements. (See, e.g., Sts. & Hy. Code, § 10401, et seq.; see also *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683, for a summary by the Supreme Court of the process for the establishment of an assessment district under the Municipal Improvement Act of 1913.)

B. Code of Civil Procedure Section 860 et seq. Applies to Any Challenge to the Formation of An Assessment District Under the Municipal Improvement Act of 1913.

1. Code of Civil Procedure Section 860 et seq. Prescribes the Procedures That Govern Validation Actions.

The statutory scheme governing the proceedings of validation actions is found at Code of Civil Procedure sections 860-870.5 ("Validation Proceeding Statutes"). A validation action, also known as a validation proceeding, is an action in which a public agency seeks a judicial determination as to the validity of some matter, such as an ordinance or resolution. (See e.g., *Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1028 ("*Katz*").) If the public agency does not bring any validation action, then any interested person may bring a validation action, which is usually referred to as a "reverse validation action." (Code Civ. Proc., § 863; *Katz, supra,* 144 Cal.App.4th at 1028.) The validation action is an action "in rem", and the plaintiff must notify all persons with an interest in the rest of the proceeding. (Code Civ. Proc., §§ 860, 861, 861.1; *Katz, supra*, 144 Cal.App.4th at 1028.) Code of Civil Procedure sections 861, 861.1 and

863 require that the plaintiff in either a validation action or reverse validation action publish the Summons and file proof thereof within 60 days of commencement of the action.[9]

The Validation Proceeding Statutes do not apply to every government action. Rather, Validation Proceeding Statutes apply when the statute(s) providing the authority for the government action subjects the action to validation proceedings. (Code Civ. Proc., § 860.) Appellants concede that they did not actually comply with the foregoing requirements. (AOB, pp. 17-18; 28-35.) Instead, they argue that the Validation Proceeding Statutes do not apply to their lawsuit. (*Ibid.*)

2. If Code of Civil Procedure Section 860 et seq. Does Not Apply, Then Appellants Have Failed to State a Cause of Action.

Here, there is no dispute that the Town formed the District under the Municipal Improvement Act of 1913. (AOB, p. 27.) The dispute arises over how to interpret Section 10601 of Streets and Highways Code, the provision of the Municipal Improvement Act of 1913 at issue. Section 10601 of Streets and Highways Code provides:

> 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. 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

[9] Code of Civil Procedure section 861 and 861.1 prescribes the form and contents of the Summons. Code of Civil Procedure section 863 further provides that the public agency defendant shall be served with the Summons in the form as published.

> contractor, nor except when permitted by Section 10400 shall the action be brought after the date fixed for the beginning of work.

In considering how to interpret a statute, courts first look towards the language of the statute itself. (*Copley Press Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284 ("*Copley*").) Nonetheless, the language of the statute is not dispositive of its interpretation. This Court has held that it "will not adopt a narrow or restricted meaning of statutory language if it would result in an evasion of the evident purpose of a statute, when a permissible, but broader meaning would prevent the evasion and carry out the purpose." (*Id.* at 1291 (quotations and citations omitted).) Moreover, "to the extent this examination of the statutory language leaves uncertainty, it is appropriate to consider the consequences that will flow from a particular interpretation." (*Ibid.* (quotations and citations omitted).) Thus, while obviously the Court considers the language of the statute, this Court also considers other factors in determining how to interpret a statute.

Appellants argue that the "black letter law" of Streets and Highways Code section 10601 prohibits application of the Validation Proceeding Statutes to their action. (AOB, pp. 30-31.) However, a "black letter law" analysis actually yields a result that is fatal to Appellants' action. Streets and Highways Code section 10601 authorizes that either the Town or the Contractor may bring an action to determine the validity of the District. It then provides: "the action authorized by this section shall not be brought by any person other than the legislative body or the contractor." (Sts. & Hy. Code, § 10601.) Given that Section 10601 authorizes a validation action only by the Town or the Contractor, under Appellants' "black letter law" analysis, Streets & Highway Code section 10601 actually would *preclude* Appellants from bringing *any* action to challenge the validity of the District because they are neither the legislative body nor the contractor.

Streets and Highways Code section 10400 also does not authorize Appellants to file a validation action.[10] Section 10400 is a relic from before the Validation Proceeding Statutes were enacted and prescribed the procedures to be followed in validation actions, regardless of who filed the action. The current version of section 10400 was derived from a section in a 1905 statute, which was later recodified as section 10400. (See Historical notes, 63c West's Ann. Sts & Hy Code, § 10400.) In other words, prior to their enactment of the Validation Proceeding Statutes, section 10400 would have governed the proceedings for an action brought by either the legislative body or contractor under section 10601 of Streets and Highways Code. It does not to create a cause of action for individuals nor contrary to Appellants' claim, govern only actions brought by individuals. (See AOB, p. 41.)

Obviously, justice would not be served if only either the legislative body or the contractor could file a validation action.[11] Therefore, the Legislature enacted Code of Civil Procedure section 863, allowing any individual to bring a validation action when the legislative body could have brought one but failed to do so. Without Code of Civil Procedure section 863, Appellants fail to state a cause of action since section 10601 of Streets and Highways Code provides that only the

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[10] Streets and Highways Code section 10400 provides: "The validity of an assessment or supplementary assessment levied under this division shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the assessment is levied. Any appeal from a final judgment in such an action or proceeding shall be perfected within 30 days after the entry of judgment."

[11] As Appellants note, generally, the public entity's action is validated after 30 days elapse if no one has challenged the action. (AOB, p. 45.) Although Appellants suggest that this result is absurd, if there is no dispute, i.e., no one contests the validity of the action, judicial intervention is unnecessary. Our judicial system would be unnecessarily overwhelmed if public entities had to file a validation action every time, even in the absence of any dispute.

legislative body or the contractor can bring a validation action. Appellants may bring an action to challenge the validity of the District only because of Code of Civil Procedure section 863. Hence, Appellants cannot derive the benefit of one of the provisions of the Validation Proceeding Statutes, without complying with the requirements of other applicable provisions. (See Code Civ. Proc., § 863.) The Validation Proceeding Statutes apply to Appellants' action.

3. The Legislature Intended All Validation Actions to be Subject to Simple, Uniform Procedures.

a. The Legislative History Behind the Validation Proceeding Statutes Requires Their Application to Appellants' Action.

In finding that section 10601 of Streets and Highways Code was subject to different interpretations, the Appellate Court turned to the policy behind the Validation Proceeding Statutes to guide its analysis. Turning to legislative history for guidance on the applicability of the Validation Proceeding Statutes is consistent with this Court's analysis in previous opinions. In *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335 ("*City of Ontario*"), the plaintiffs challenged the legality of bonds issued by a nonprofit company to fund an automobile racing stadium and sought to restrain the city for performing certain obligations under various agreements, from expending certain funds and restitution for funds that had been spent in connection with the agreements. (*City of Ontario*, *supra,* 2 Cal.3d at 343-44.) The plaintiffs alleged that the nonprofit was the City's alter ego. (*Id.* at 343.) The city moved to dismiss the complaint on the grounds that Government Code section 53511 applied, which required compliance with the Validation Proceeding Statutes, and plaintiffs had not complied. (*Id.* at 339.)

In determining whether the Validation Proceeding Statutes applied, the issue turned on the meaning of "contracts" in Government Code section 53511 – did it include *all* contracts or just contracts related to indebtedness concerning

bonds? (*Id.* at 341.) This Court questioned the applicability of the Validation Proceeding Statutes in light of the purpose behind them. (*Id.* at 342-44.) On the one hand, the Validation Proceeding Statutes were to promote a "uniform, simple procedure" for all validation actions, which would mean the Court should define contract broadly to encourage uniform procedures. (*Id.* at 340.) On the other hand, the application of the Validation Proceeding Statutes was not to extend beyond those matters that were not specified by the Legislature, which entailed defining contract narrowly. (*Ibid.*) Plaintiffs' lawsuit sought to invalidate the contracts, but it also went beyond invalidation to request other relief, such as restitution. Therefore, the Court noted that to the extent plaintiffs sought to invalidate the agreements, which related to indebtedness, the Validation Proceeding Statutes probably would apply. (*Id.* at 344 ("To the extent that plaintiffs in the present case prayed for a declaration invalidating the entire speedway scheme, including the bonds and accompanying agreements, the provisions of chapter 9 were arguably applicable.") Nonetheless, the Court ultimately held that plaintiffs were excused from complying with the Validation Proceeding Statutes because their action sought relief beyond invalidation, and given that the issue was one of first impression for the Court, it was complex and debatable. (*Id.* at 346-48.)

Appellants analogize to *City of Ontario*'s analysis of Government Code section 53511 to argue that the legislative history of Streets and Highways Code section 10601 supports Appellants being exempt from complying with Validation Proceeding Statutes. (AOB, pp. 33-35.) However, *City of Ontario's* precise analysis of Government Code section 53511 is irrelevant since that statute is not at issue here. Furthermore, *City of Ontario* acknowledged that to the extent that the plaintiffs sought to invalidate the agreements, the Validation Proceeding Statutes probably would apply. (*City of Ontario*, *supra*, 2 Cal.3d at 340, 346.) Appellants,

here, undoubtedly seek to invalidate the District and the assessments. (Opinion, p. 9; 1 JA 005:2; 1 JA 062:1-22.)

More importantly, Appellants blatantly ignore the subsequent cases that have followed *City of Ontario*. This Court's subsequent opinion in *Planning supra,* 17 Cal.4th at 264, in which this Court again looked toward the policy behind the Validation Proceeding Statutes, is more on point in this matter. In *Planning*, this Court considered whether the time period of 30 days for appealing judgments as set forth in Code of Civil Procedure section 870 also applied to appealable orders, even though section 870 makes no reference to appealable orders.[12] (*Id.* at 266-67.) If section 870 did not apply, then the normal 60-day time period to file a notice of appeal governed. (*Ibid.*) This Court held that section 870 applied to both judgments and appealable orders, and reasoned:

> The legislative history indicates the intent of the amendments to section 870 adding the shortened period, was simply to reduce the period of uncertainty before finality of a validation action, and not to create a new distinction between the appeal periods for appealable orders and judgments. Moreover, the provision of a longer period

[12] Code of Civil Procedure section 870 provides: The judgment, if no appeal is taken, or if taken and the
judgment is affirmed, shall, notwithstanding any other provision of law including, without limitation, Sections 473 and 473.5, thereupon become and thereafter be forever binding and conclusive, as to all
matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person
of any action or proceeding raising any issue as to which the judgment is binding and conclusive.
(b) Notwithstanding any other provision of law including, without limitation, Section 901 and any rule of court, no appeal shall be allowed from any judgment entered pursuant to this chapter unless a notice of appeal is filed within 30 days after the notice of entry of the judgment, or, within 30 days after the entry of the judgment if there is no answering party. If there is no answering party, only issues related to the jurisdiction of the court to enter a judgment in the action pursuant to this chapter may be raised on appeal.

> for appealing collateral orders would be inconsistent with the legislative purpose of ensuring prompt finality.

(*Id.* at 273-74.) Thus, in P*lanning*, this Court embraced a holding that was consistent with the policies behind the Validation Proceeding Statutes.

The crucial distinction between *City of Ontario* and *Planning* is that in *City of Ontario,* the Court considered whether the Validation Proceeding Statutes applied at all whereas in *Planning*, the Validation Proceeding Statutes applied, and the issue was whether there were any exceptions once they generally were applied to the lawsuit. Just as the Court held in *Planning* that the timing for bringing an appeal should not depend upon whether the pleading was a judgment or an order, the Court, here, should find that compliance with the Validation Proceeding Statutes should not depend upon who brings the action, and hold that the Appellants should have complied with the Validation Proceeding Statutes. In essence, Appellants contend that the Legislature created an exception to the application of the Validation Proceeding Statutes, dependent upon who brings the action. Appellants seek to invalidate the District, and Appellants concede that if the same action was brought by the Town or the contractor, the Validation Proceeding Statutes would apply. (See AOB, p. 35.)

Determining the applicability of the Validation Proceeding Statutes based upon who brought the action runs afoul of the Legislature's intent to create simple, uniform procedures for *all* validation actions. The Appellate Court recognized that the procedures governing the action should not turn on who brings the action. The Appellate Court reasoned:

> The interpretation urged by appellants would lead to the odd result that the procedures in litigation to determine the validity of government acts would vary depending upon who filed the action. Whereas a public agency and a contractor would have to publish the summons in such an action, any other interested person could simply serve the summons on the public agency and any other named

> parties without having to comply with the publication requirements of the validation statutes. The consequence of this differential treatment would be that a lawsuit filed by a public agency or contractor would be an in rem action, the outcome of which would be conclusive and binding on everyone, where as an action filed by any other interested person would be an in personam action that would yield a result binding only upon the parties to the litigation. Such a result is at odds with the purpose of the validation statutes, and it further suggests that challenges to an action of a public agency could be decided on a piecemeal basis through individual, in personam actions. 'But the validity of a matter is not decided piecemeal. That is the reason validation actions are designated as actions in rem. When any person files a validation action, the validity of the matter is decided once and for all in that action.'"

(Opinion, p. 19 (citation omitted).) Thus, the policy behind the Validation Proceeding Statutes warrants the Court holding that the Appellants should not be excused for their failure to comply with the Validation Proceeding Statutes.

b. The Legislative History of Streets and Highways Code section 10601 is Not Controlling.

Although Appellants offer a detailed analysis of the legislative history of Streets and Highways Code section 10601, the parsing of words and phrases of section 10601 in this matter is inconsistent with how this Court approaches statutory construction. In considering the interplay of the two different statutory schemes, the Court should interpret the statutory schemes in a manner that reaches a reasonable result and a result that is consistent with the Legislature's intent. (See e.g., *Copley Press, supra*, 39 Cal.4th at 1288, 1291.) Even though Appellants concede "that the overall goal of adding AB 1462 was to aid in the goal to 'make uniform' the specified suits per Code Civ. Proc. § 860 et seq." (AOB, p. 32), their piecemeal analysis of Streets and Highways Code section 10601 renders a result, as explained *infra*, that is inconsistent with the Validation Proceeding Statutes' policies of simplicity and uniformity. Furthermore, Appellants' legislative history analysis is void of any reasoning to explain why the Legislature would intend to

exempt individual validation actions and subject them to different procedures when the Legislature intended validation actions to be governed by "uniform, simple procedures." (See AOB, pp. 31-33.) Thus, the legislative analysis of Streets and Highways Code section 10601 is irrelevant.

In sum, Appellants' argument that the Legislature intended to exempt an individual action from compliance with the Validation Proceeding Statutes lacks any legal support and runs afoul of well-established legislative intent. Rather, statutory provisions and their accompanying policies as well as case law dictate that Appellants were required to comply with the Validation Proceeding Statutes.

C. The Validation Proceeding Statutes Provide a Constitutional, Adequate Remedy By Which Appellants Could Challenge Their Assessments.

One of Appellants' main contentions is that the Appellate Court created a "drastic new rule: A property owner who seeks to challenge her assessment under the principles of Proposition 218 may seek to invalidate a special assessment on the ground the procedures leading to the assessment's adoption violate Proposition 218." (AOB, p. 36; see also p. 39.) As shown in further detail below, Appellants' arguments and conclusions are based on overstatements of fact and law. Appellants contend that forcing them to comply with the Validation Proceeding Statutes undermines their individual rights under Sections 4(a) and 4(f) of Article XIIID of the California Constitution. (*Ibid.*) This contention is unsupported by both the text and the policy behind Proposition 218. In fact, a validation action is consistent with and promotes the policy behind Proposition 218 – to have the majority of the electorate determine how and when government raises revenue and where that revenue is spent.

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1. The Appellate Court's Opinion Was Based on Established Precedent.

As an initial matter, Appellants overstate the holding of the Appellate Court. The Appellate Court did not create any "drastic new rule", but rather, it actually held: "[W]e conclude the validation statutes apply to a legal challenge to an assessment levied *under the 1913 [Municipal Improvement] act*." (Appellate Opinion, p. 20 (emphasis added).) In reaching its holding, the Appellate Court reasoned that the section 10601 of Streets and Highways Code was not a model of clarity, but that it could be read in a manner consistent with the Validation Proceeding Statutes. (Opinion, pp. 17-18.) An individual may challenge an assessment levied under the Municipal Improvement Act of 1913 based on Proposition 218 violations and comply with the Validation Proceeding Statutes.

Similarly, the Appellate Court's holding was aligned with prior court decisions. For example, in *Millbrae School District v. Superior Court* (1989) 209 Cal.App.3d 1494, 1496, the court considered whether a public agency contesting the validity of another public agency's action had to comply with the requirements for filing a reverse validation action or it was exempt. The court held that the Validation Proceeding Statutes applied to all third party challenges, even those brought by third-party public agencies. (*Id.* at 1499 ("We reject petitioners' suggestion that the amendment exempts third party public agencies…Such a reading would eviscerate the validating statutes…").)

More recently, a First District Court of Appeal opinion, published after the adoption of Proposition 218, was directly on point. In *Not About Water*, the Appellate Court considered a petition for writ of mandamus brought by property owners who challenged assessments imposed under the Municipal Improvement Act of 1913. (*Not About Water*, *supra,* 95 Cal.App.4th at 986.) The petitioners alleged, inter alia, that their properties were not specially benefited from the formation of the assessment district and that the defendant county proceeded in a

manner contrary to law (e.g., by gerrymandering). (*Id*. at 986 and 990.) The appellate court explained that its review of the county's legislative decision was circumscribed by the Validation Proceeding Statutes: "judicial review of challenges to public improvement determinations made by a local government agency is circumscribed both by the legislative character of such municipal proceedings and the exclusive statutory proceeding codified as Code of Civil Procedure sections 860 et seq." (*Id.* at 992-93 (emphasis added).) Thus, the Validation Proceeding Statutes provide "the sole procedure available to determine [the] validity" of the assessment district. (*Ibid*. (citing Code Civ. Proc., § 863; internal quotation marks omitted).) Hence, the Appellate Court's opinion was based on well-established precedent.

2. Proposition 218 Supplements the Formation District Process; It Does Not Modify the Validating Proceeding Requirements.

Appellants contend that the Appellate Court's opinion discounts an individual's rights under Proposition 218 (Cal. Const., art. XIIID, § 4) to challenge an assessment. (AOB, pp. 35-39.) Contrary to Appellants' assertion, the text of Proposition 218 is silent as to how an individual should challenge a majority-approved assessment. In addition, Appellants' claim misconstrues Article XIIID section 4 – it can be and should be interpreted in a manner that renders application of the Validation Proceeding Statutes to Appellants' action constitutional. (See *Copley Press, Inc. v. Superior Court*, *supra,* 39 Cal.4th at 1288.)

Section 4 of Article XIIID of the California Constitution obligates government to follow certain procedures to assist the property owners' consideration of proposals to impose new or increased taxes or assessments. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838-40 ("*Apartment Assn*."); see also *Barratt American, Inc. v. City*

of San Diego (2004) 117 Cal.App.4th 809, 817-18.) This Court has summarized the procedures of Section 4 as follows:

> (1) the agency identifies "all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed" [citation]; (2) the agency obtains an engineer's report that supports the assessment [citation]; (3) the assessment does not exceed the reasonable cost of the proportional special benefit conferred on the affected parcel [citation]; and (4) after giving notice to affected property owners and holding a public hearing, the agency does not receive a majority protest based on ballots "weighted according to the proportional financial obligation of the affected property" [citation].

(*Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 418 (quoting Cal. Const., art. XIIID, § 4).)[13] In addition, the standard of review is slightly modified. (Cal. Const., art. XIIID, § 4(f) ("In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question"); see also *Not About Water, supra,* 95 Cal.App.4th at 994.) [14]

In sum, Proposition 218 supplements the assessment district formation process provided by various statutes, including the Municipal Improvement Act of 1913, by modifying the district formation procedures and the substantive analysis regarding the proportionality of the assessments. It does not modify the procedural requirements related to the courts' review of assessment districts.

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[13] The Legislature adopted the Proposition 218 Omnibus Implementation Act (Gov. Code, § 53750, et seq.) to assist with the implementation of the proposition. Government Code section 53753 more specifically articulates the notice, hearing and voting procedures applicable to proposed implementation of assessments.

[14] However, the agency discharges that burden by providing evidence during the administrative process regarding the special benefits. (*Not About Water*, 95 Cal.App.4th at 994.)

(*Barratt American, Inc. v. City of San Diego*, *supra*, 117 Cal.App.4th at 818 ("It [Prop 218] does not conflict with process or procedures relating to the timing of legal challenges to such an assessment." (*citing Apartment Assn., supra,* 24 Cal.4th at 839).) It does not create any additional individual remedies. Therefore, to determine how an individual challenges the assessment, the Court should look towards the statutory scheme that provided the authority to levy the assessment. As is undisputed by the Parties, the Town levied the assessments under the authority of Municipal Improvement Act of 1913, and hence, the Court should look towards Streets and Highways Code section 10600, which references the Validation Proceeding Statutes, to determine the procedures that govern Appellants' action. As discussed *infra*, section 10601 of Streets and Highways Code requires Appellants to comply with the Validation Proceeding Statutes.

3. The Validation Proceeding Statues complement the Electorate's Intent in Enacting Proposition 218.

As this Court has observed, Proposition 218 is best understood as a progeny of Proposition 13. (See *Apartment Assn.*, *supra*, 24 Cal.4th at 836-37 ("*Apartment Assn*.").) Proposition 13 was a voter initiative whose purpose was to cut local property taxes and which prevented local governments from enacting any special tax without a two-thirds vote of the electorate. (*Ibid.*) Subsequently, however, *Knox v. City of Orland* (1992) 4 Cal.4th 132, 142 held that a special assessment did not fall into the category of special tax, which meant that a special assessment could be imposed without two-thirds vote by the people. Therefore, in part to change this rule, Proposition 218's purpose was to allow property owners collectively to decide whether government could levy special assessments to pay for certain services or improvements. (*Apartment Assn.*, *supra*, 24 Cal.4th 836-37.) In addition, Proposition 218 modified the standard of review slightly by

requiring the government to bear the burden of proof in a legal challenge. (Cal. Const., art. XIIID, § 4(f).)

Therefore, with respect to the electorate intent, the overarching policy behind Proposition 218 was to give the electorate as a whole a greater voice in determining how and when local governments raised revenue. Appellants' contention that Proposition 218 provided greater individual remedial rights misconstrues the initiative. California Constitution, article XIIID, section 4(f) slightly modified the standard of review in legal challenge, placing the burden of proof on the government. One potential effect of this modification is that individuals challenging a government's assessment may be more likely to prevail given the switch of the burden of proof. However, contrary to Appellants' argument, this provision alone did not create any additional individual remedies.

Furthermore, legal challenges that comply with the Validation Proceeding Statutes advance the electorate's objective in enacting Proposition 218 by providing the electorate an opportunity to weigh in on how and when revenues are raised. Just as Proposition 218 has enhanced notice procedures designed to inform the public above a proposed assessment, the Validation Proceeding Statutes enhanced summons requirement ensures that the public is informed about the implementation of or lack thereof the assessment. The notice required by Code of Civil Procedure sections 860 and 861.1 is essential if other interested property owners would like to participate in the lawsuit to ensure that their concerns or interests are represented. Indeed, a reduction of one property owner's assessment is likely to yield a reconfiguring of the district, which could exclude property owners who were in favor of the district, or result in a reapportionment of costs, increasing the assessments for others. (See e.g. *Costello v. City of Los Angeles* (1975) 54 Cal.App.3d 28, 31-33 (district was to be reformed because a few assessments were invalid).)

Appellants counter that the dispute they have over their assessment is essentially a private dispute with the Town because the Town should pay for a reduction of an individual property owner's assessment. (AOB, p. 42.) However, the Town has no obligation to pay for the reduction of Appellants' assessments and Appellants cite no authority to support this contention. To require the Town to do so, would be inconsistent with the purpose behind assessment districts. The purpose of assessment districts is to defray the ever growing cost of public improvements by having the property owners who are specially benefited by the improvements pay for them. (*Not About Water*, *supra*, 95 Cal.App.4th at 991-92.) Requiring the public entity to bear the burden of a reduction in an assessment essentially defeats the purpose – to avoid using general funds to pay for improvements that specially benefit some property owners. Rather, the assessments should be reapportioned or the assessment district reformed if a court finds that a few individual assessments were not in proportion to the special benefit conferred to the property. (See e.g., *Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852 (discussed *infra*, § III.C.4).)

In essence, Appellants advance a position where the individual rights of a few property owners should come at the cost of the rights of the other homeowners in the District. Proposition 13 and 218 were designed to give *all* property owners an opportunity to voice their opinion as to how and when revenue was raised. The opportunity to be heard at the administrative level should continue at the judicial level. By circumventing the summons requirements of the Validation Proceeding Statutes, Appellants deprive the affected property owners of their notice, which is crucial if they are to exercise their right to be heard at the judicial level. (See also *Barratt American, Inc. v. City of San Diego, supra,* 117 Cal.App.4th at 818 (finding that Proposition 218's "main concern was guaranteeing property owners the right to vote on proposed local tax increases even when they were labeled as

assessments or fees").) Hence, Appellants should have to comply with the Validation Proceeding Statutes.

4. All Validation Actions Brought to Challenge an Assessment Levied Under Municipal Improvement Act of 1913 Should Be In Rem.

Appellants argue that while the Town's action is governed by the Validation Proceeding Statues, their action is governed only by Streets and Highways Code section 10400. (AOB, pp. 40-41.) Streets and Highways Code section 10400 provides:

> The validity of an assessment or supplementary assessment levied under this division shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the assessment is levied. Any appeal from a final judgment in such an action or proceeding shall be perfected within 30 days after the entry of judgment.

The problem that arises under Appellants' interpretation, which the Validation Proceeding Statutes are supposed to eliminate, is that there are different procedures to be followed depending on who filed the action, and the difference in procedures may lead to inconsistent results. (Opinion, p. 19; *infra*, § III.B.1.a.) Nothing in section 10400 precludes the application of the Validation Proceeding Statutes via Code of Civil Procedure section 863.[15] As stated above, the Court should interpret the two statutory schemes in a manner that reaches a reasonable result and a result that is consistent with the Legislature's intent. (See e.g., *Copley, supra,* 39 Cal.4th at 1288, 1291.) Here, the Validation Proceeding Statutes were intended to create a uniform procedure for *all* validation actions. Although Section 10400 encompasses some of the same policies, i.e., prompt

[15] As discussed above, Streets and Highways Code section 10601 also does not preclude application of the Validation Proceeding Statutes to Appellants' action. (See *infra*, § III.B.2.)

commencement of litigation and appeals, a major inconsistency still exists between the two, one is an action in rem, and the other is an action in personam.

In addition, Appellants rely on *Harrison v. Board of Supervisors, supra*, 44 Cal.App.3d 852 ("*Harrison*") to justify why their action should be in personam yet *Harrison* is inapposite. (AOB, pp. 44-45.) In *Harrison,* a property owner brought an action, on behalf of himself and a putative class consisting of property owners who had protested, seeking to invalidate assessments levied under the Municipal Improvement Act of 1913. (*Id.* at 855-56.) The trial court entered judgment that all assessments were invalid, even the assessments for property owners that were not a party to the action. (*Ibid.*) The court of appeal considered whether the judgment was binding on the property owners who were not parties to the action, and held that it was. (*Id.* at 863-64.) Appellants rely on *Harrison* to support their premise that they do not have to bring the current action as a reverse validation action. The Appellate Court dismissed *Harrison* as unpersuasive because *Harrison* never considered whether the Validation Proceeding Statutes were applicable. (Opinion, p. 21, fn. 8.)

More importantly, *Harrison* provides evidence as to why Appellants should have to comply with the Validation Proceeding Statutes. The *Harrison* plaintiffs' *in personam* action resulted in a judgment that operated as a judgment *in rem*. Likewise, Appellants in personam action also would operate as an in rem judgment. As explained above, contrary to Appellants' assertion, if Appellants' assessments are reduced, then the assessments for other property owners in the District must increase to account for the reduction or the district must be reformed. (AOB, p. 45; *infra*, § III.C.3.) Similarly, any lawsuit, whether in personam or in rem, serves to stop the sale of the bonds, which means the improvement work cannot be performed. (AOB, p. 40.) Other property owners who will be affected by the filing of a lawsuit, or the judgment of a lawsuit, should have notice and be

given the opportunity to participate in a lawsuit that operates to circumvent the will of the majority of the electorate. By bringing a lawsuit in personam, a few individuals are able to thwart the will of the supermajority without notice to the electorate. Appellants' position subverts the purpose of Proposition 218 – to expand the *electorate's* voice for when assessments are levied. Therefore, Appellants' argument that they seek only to invalidate their assessments is unpersuasive as to why they should be allowed to bring an in personam action.

Appellants' argument is also disingenuous in light of the Petition's allegations. Each cause of action challenges the validity of the assessments. For example, the first cause of action in the Petition alleged 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 as well as "similarly situated properties." (1 JA 055-57.) In the second and third causes of action, Appellants allege the Town illegally refused to consider "evidence whether the District as it exists, today, is in violation of the state Constitution, Municipal Improvement Act of 1913 and the published undergrounding policies of the Town of Tiburon." (1 JA 059:14-16, 20-22, and 1 JA 060:15-17, 21-23.) In the fourth and final cause of action, Appellants requested a declaration as to whether Resolution No. 21-2005, including the assessment noticed May 27, 2005 is valid or invalid. (1 JA 061:14-16.) Thus, Appellants' assertion that they did not seek to impact the validity of the District except as to its application to their property is patently untrue. (See also 1 JA 062:1-13 (Prayer for Relief, in which Appellants' sought to invalidate the Town's action to form the District, among other things); Opinion, p. 9.)

In sum, Proposition 218 supplemented the procedures for forming the assessment district, but is silent as to the procedures an individual must follow in filing a lawsuit seeking review of the assessment levied. Nothing in Proposition

218 precludes individuals from complying with the Validation Proceeding Statutes, and to do so, would be inconsistent with the policies advanced by Proposition 218.

D. The Administrative Remedy Provided by Government Code Section 53753(d) for Challenging the Special Assessment Afforded Appellants Due Process.

For the first time in the course of this lawsuit, Appellants argue that their federal due process rights were violated because the hearing held under Government Code section 53753(d) lacked particular technical requirements. (AOB, pp. 46-52.) Their argument is two-fold. First, Appellants argue that as a matter of law, the hearing procedures prescribed in Government Code section 53753(d) violate Appellants' rights under the Fifth and Fourteenth Amendments of the United States Constitution. Second, Appellants argue that the hearing actually received was inadequate.

As an initial matter, the administrative remedy provided is irrelevant in considering the procedures that litigants must follow in a judicial action. Additionally, Appellants never alleged either in front of the Town Council or in their Petition that the Town violated their federal due process rights. The Court should not consider a claim that was raised for the first time in this Court. (See *People v. Cookson* (1991) 54 Cal.3d 1091, 1100.) In any event, as shown in greater detail below, Appellants fail to provide any controlling legal authority to support their claim.

1. The Process That Is Due Depends Upon the Circumstances.

Procedural due process requires that a government entity provide reasonable notice and opportunity to be heard to an individual before taking action that would adversely affect the individual's life, liberty or property. (See, e.g., *Mathews v. Eldridge* (1976) 424 U.S. 319, 332-35.) There are no steadfast rules to

satisfy procedural due process. Rather, as noted in *Mathews v. Eldridge*, "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances…Due process is flexible and calls for such procedural due process protections as the particular situation demands." (*Supra*, 424 U.S. at 334 (citations and quotations omitted).)

2. Government Code section 53753(d) Provides for a Hearing that Affords Appellants' Their Federal Due Process Rights.

In the instant case, the Proposition 218 Omnibus Implementation Act (Government Code, § 53750, et seq.) prescribes how the Town affords affected property owners' their due process. Specifically, Government Code section 53753(d) provides:

> At the time, date, and place stated in the notice mailed pursuant to subdivision (b), the agency shall conduct a public hearing upon the proposed assessment. At the public hearing, the agency shall consider all objections or protests, if any, to the proposed assessment. At the public hearing, any interested person shall be permitted to present written or oral testimony.

While Proposition 218 and Government Code section 53753 have specific requirements for the type of notice that property owners shall receive, the requirements set forth for the type of hearing are comparatively lax to the type of requirements set forth for the type of notice that the property owners shall receive.

Appellants only contest the hearing procedure set forth in Government Code section 53753(d), arguing that it is inadequate and, that instead, they should be entitled to a hearing akin to a hearing before a board of equalization. (AOB, p. 50.) Their argument is meritless. In the Appellate Court, for the first time, Appellants argued that they were entitled to a hearing under Revenue and Taxation Code sections 1603 et seq., 1615 and 5140 et seq. (Opinion, p. 25.) The Appellate Court held that these provisions of Revenue and Taxation Code were inapplicable

because they related to property taxes, which are not at issue in this case. (*Ibid.*) Special assessments are *not* property taxes, and are not to be treated as such. (*Ibid.*; see also *Knox v. City of Orland, supra,* 4 Cal.4th at 32, 142 (held that a special assessment did not fall into the category of special tax).) Here, however, Appellants do not challenge the Appellate Court's analysis in holding that Revenue and Taxation Code sections 1603 et seq., 1615 and 5140 et seq. do not apply. Rather, for the first time in the course of this lawsuit, Appellants now argue that they are entitled to an administrative hearing that is akin to the hearing afforded by the Revenue and Taxation Code provisions because an assessment that exceeds the costs of providing the services amounts to a special tax. Without a hearing similar to a hearing in front of a board of equalization, Appellants allege that the assessment constitutes a taking, in violation of the Fifth and Fourteenth Amendments of the United States Constitution.[16] (AOB, p. 51-52.)

The cases that Appellants rely upon to support their argument, however, are unpersuasive because none of them addressed the nature of the process that was due. Rather, the cases cited by Appellants address whether *any* process was due. For example, *Norwood v. Baker* (1898) 172 U.S. 269 held that the village's ordinance, which made a special assessment on a land owner's property to pay for a highway, was invalid because the special assessment did not take into account the proportion of special benefits that the land owner's property would receive compared to the general public. *Norwood v. Baker* never discussed the type of procedural due process that was due to the land owner. Likewise, *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24 (holding that the City's Council

[16] Although the Court should not address the merits of this argument because it is raised for the first time in Appellants' Opening Brief on the Merits (see *People v. Cookson, supra,* 54 Cal.3d at 1100), nonetheless, the City addresses the merits of Appellants' argument.

decision to implement an assessment district was subject to attack, and that the record showed the amount of the assessments were arbitrary in relation to the benefits that the properties received), *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400 (holding that a particular utilities fee/tax was not subject to the referendum process), *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495 (upholding the constitutionality of the Alabama Unemployment Compensation Act), and *County of Fresno v. Malstrom* (1979) 94 Cal.App.3d 974 (holding that special assessments levied under Sts & Hy. Code, § 10000, et seq., were not an ad valorem tax and were not subject to Proposition 13) are all immaterial. None of these cases support Appellants' contention that they are entitled to a different process because none of the cases discuss the nature of the process due.

Moreover, Appellants' federal due process argument ignores *Allis-Chalmers v. City of Oxnard* (1980) 105 Cal.App.3d 876 ("*Allis-Chalmers*"). In *Allis-Chalmers*, the plaintiffs filed a lawsuit alleging that the special assessments levied on their property under the Municipal Improvement Act of 1913 exceeded the benefit to their properties. (*Id.* at 879.) Plaintiff argued that levying such an excessive assessment violated their due process rights as protected by the federal constitution. (*Ibid.*) The court rejected the plaintiffs' argument, and held that a federal cause of action did not exist. (*Id.* at 880-81.) Specifically, the court reasoned: "[P]laintiffs' allegations of lack of benefit do not raise a question of deprivation of a fundamental constitutional right…Plaintiffs have not alleged that they were not given proper notice of assessment proceedings and they positively alleged that they made written and oral protests at the hearing…when the assessment was levied." (*Id.* at 882.) Thus, under *Allis-Chalmers*, as long as Appellants received notice and an opportunity to present their concerns to the decision making body, no federal due process cause of action is present. As

discussed in further detail below, Appellants had notice and an opportunity to be heard.

3. The Requirements Set Forth in Government Code section 53753(d) as Applied Resulted in a Hearing That Afforded Appellants Their Federal Due Process Rights.

Appellants claim that they did not receive an adequate hearing because they had "no right to present evidence, present and cross examine witnesses, or to appear before an impartial board to argue." (AOB, p. 48.) Appellants' claim is patently false.

Appellants' had the right to present evidence to the Town in protest of the assessment. Indeed, Appellants concede that the "Town held a public hearing required by the 1913 Act and Government Code § 53753, to hear public comments." (AOB, p. 14.) The fact that Appellants were limited to a three-minute comment period did not deprive Appellants of their due process. The Town is entitled to regulate the amount of time for each public commenter. (See Gov't Code, § 54954.3(b).) Moreover, Appellants had the opportunity to provide written comments to the Town to advocate their position, which they did. (Opinion, p. 3 JA 640, 645, 663-65.) With respect to cross-examining witnesses, Appellants have cited no authority as to why they should be able to cross-examine the witnesses, and it is well-established that a hearing, even in the absence of cross-examination of witnesses, can satisfy due process requirements. (See e.g., *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565-66 ("A formal hearing, with full rights of confrontation and cross-examination is not necessarily required…What must be afforded is a "reasonable' opportunity to be heard.") (citations omitted).)

Finally, Appellants' contention that the Town Council somehow acted in an unethical matter lacks any foundation. The facts related to bond counsel that Appellants allege through judicial notice should not be considered as they were not alleged in the Petition, and were never brought to the attention of either the

trial court or the Appellate Court. (See Rule of Court, § 8.500(c)(2).) Furthermore, assuming *arguendo* that the Court was to consider the facts, Appellants have failed to show how an alleged violation of the Professional Rules of Conduct by bond counsel is somehow attributed to the Town Council, which would result in invalidating the District. Finally, even if there was a legal conflict of interest for a Town Council Member, the remedy is not to create an additional administrative remedy, but rather, is to invalidate the action taken, and provide a fair hearing. (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1174 ("The trial court should have ordered the Council to rehear the matter and to provide the Clarks with a fair hearing.").)

In sum, Appellants received an adequate administrative hearing in which they could protest the formation of the District and the assessments that were to be levied.

E. The Trial Acted Within Its Discretion in Not-Excusing Appellants' Non-Compliance With the Validation Proceeding Statutes.

Finally, Appellants contend that even if the Validation Proceeding Statutes apply to their action, the trial court abused its discretion in refusing to excuse Appellants' failure to comply with the Validation Proceeding Statutes. Appellants bear a significant burden here.[17] They must establish a "clear case of abuse" and a "miscarriage of justice." (*Blank v. Kiwan* (1985) 39 Cal.3d 311, 331.) The Court of Appeal must defer to the trial court's reasonable evaluation of the situation presented. (See *Department of Parks & Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 830-31.)

[17] In their Petition, Appellants did not request review of the Appellate Court's holding that Appellants were excused from compliance with the statutes due to excusable neglect, and thus, the Court should not consider this issue. (See *People v. Cookson, supra*, 54 Cal.3d at 1100.) Nonetheless, the City addresses the merits of Appellants' arguments.

Appellants mistakenly rely upon *City of Ontario* to support their claim that good cause exists. In *City of Ontario*, this Court held that to the extent that the Validation Proceeding Statutes were applicable to plaintiffs' action, there was good cause under Code of Civil Procedure section 863 to excuse them from complying with the summons requirements. Although plaintiffs' counsel was familiar with the statutes, given the wording of Government Code section 53511, and the relief sought, the issue presented was one that was complex and debatable as to whether the statutes applied. (*City of Ontario, supra,* 2 Cal.3d at 345-48.) This Court wrote: "It is settled that an honest and reasonable mistake of law on such an [complex and debatable] issue is excusable and constitutes good cause for relief…The issue of which mistakes of law constitute excusable neglect presents a fact question; the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. Although an honest mistake of law is a valid ground for relief where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief." (*City of Ontario, supra,* 2 Cal.3d at 345-48.) As shown below, the cases in the wake of *City of Ontario* warrant a finding that no good cause existed.

1. There Was No Complex and Debatable Issue to Excuse Appellants From Complying with the Validation Proceeding Statutes.

Appellants claim that the issue of whether they were required to comply with the Validating Proceeding Statues presented a "complex and debatable issue," similar to the one in *City of Ontario*. The Appellate Court acknowledged that the interpretation of Streets and Highways Code section 10601 is "hardly straightforward." (Opinion, p. 30.) Nonetheless, what Appellants' fail to realize is that the Appellate Court found that their failure to comply with the Validation

Proceeding Statues was more akin to "ignorance of the law coupled with negligence" rather than an "honest mistake."

When *City of Ontario* was decided in 1970, the Validation Proceeding Statutes were fairly new, being enacted in 1961. In *City of Ontario*, although plaintiffs' counsel was aware of the Validation Proceeding Statutes, the legal authority directly on point to the issue presented was sparse. However, in the thirty years following *City of Ontario*, there have been subsequent published opinions to suggest that Appellants would be required to comply with the Validation Proceeding Statutes. For example, the First District Court of Appeal, i.e., the Appellate Court, held that the Validation Proceeding Statutes provide "the sole procedure available to determine [the] validity" of the assessment district." (*Not About Water*, *supra*, 95 Cal.App.4th at 993.) Even if as Appellants suggest that the Appellate Court overstated the holding of *Not About Water*, the language of the case, nonetheless, puts Appellants on notice that the Appellate Court who will have jurisdiction over Appellants' action is likely to hold that the Validation Proceeding Statutes will apply to their action. (See also *Millbrae School District v. Superior Court, supra,* 209 Cal.App.3d at 1499.)

Furthermore, the record shows that Appellants did not engage in a debate as to whether the Validation Proceeding Statutes applied. In filing its answer, the Town first alerted Appellants to the possibility that the Validation Proceeding Statutes applied by raising the issue as an affirmative defense. (Opinion, pp. 9-10; 3 JA 804.) Appellants' reaction was not to contest the applicability of the Validation Proceeding Statutes. Rather, Appellants attempted to comply with the Validation Proceeding Statutes. They sought an ex parte order to seek more time to comply, albeit their efforts at compliance were unsuccessful. (Opinion, p. 3 JA 819.) As the Appellate Court noted, Appellants did not even raise the issue of whether Streets and Highways Code section 10601 was applicable until the

Appellate Court requested that the parties be prepared to discuss its applicability at oral argument. (Opinion, p. 30.) The record is deplete of evidence to suggest that Appellants wrestled with a complex and debatable issue. Rather, it appears Appellants' failure to comply was due to an ignorance of the law.

2. Appellants' Alternative Means of Notification Were Not Sufficient.

Appellants also contend that the trial court should have excused them from complying with the service of summons requirements because they made good faith efforts to comply (e.g., by mailing the summons and by tardy publication). This argument also fails.

In an in rem action--including a validation action--due process requires constructive notice to be made to all persons interested. (*Community Redevelopment Agency v. Superior Court* (1967) 248 Cal.App.2d 164, 175 ("*Community Redevelopment Agency*").) However, the State "may make its own choice among such forms of constructive service as mail, publication or posting." (*Id.* at 176 (citation omitted).) Here, the Legislature selected publication as the means by which plaintiffs shall notify interested persons pursuant to the Validation Proceeding Statutes. (*Ibid.*; see also Code Civ. Proc., §§ 861, 861.1, 863.) Therefore, constructive notice by mailing is inadequate as a matter of law.

Generally, requirements for service of summons "must be *strictly* complied with." (*County of Riverside v. Superior Court* (1967), 54 Cal.App.4th 443, 450 ("*County of Riverside*") (italics in original).) Specifically, "[i]f there is any situation in which strict compliance can reasonably be required, it is that of service by publication." (*Ibid.*) This is particularly true in a validation action, where "published notice to members of the public is the *primary* means of notice." (*Ibid.* (italics in original).) Thus, the *County of Riverside* court held a published summons which did not properly identify the specific due date for an answer by an

interested person failed strictly to comply with the Validation Proceeding Statutes, which compelled dismissal. (*Id.* at 451; see also *Arnold v. Newhall County Water Dist.* (1970) 11 Cal.App.3d 794, 801 (where the published summons set forth an incorrect due date for answers by interested persons, "the superior court never acquired jurisdiction in rem with respect to the issue which the plaintiff sought to have adjudicated").) The *Community Redevelopment Agency* reached a similar result and held a belatedly corrected and published summons did not provide the requisite jurisdiction. (*Id.* at 178-79.)

The result of failure to comply with the summons requirements is harsh – dismissal of the lawsuit. *Community Redevelopment Agency* explained why the law requires this draconian result: "Any judgment which might be rendered either for or against any interested person who is not before the court as a party would be beyond the authority of the court and void." (*Community Redevelopment Agency*, *supra,* 248 Cal.App.2d at 176.[18]) Accordingly, irrespective of Appellants' efforts to provide constructive notice of the litigation--whether by publication or mailing--their failure to comply with the law resulted in an absence of jurisdiction in the trial court. Because the interested persons were not provided the notification mandated by the State regarding their rights to participate in this action, they would necessarily have been prejudiced by any judgment affecting their property interests. Thus, Appellants' are mistaken in contending that the trial court and the Appellate Court should have found the Town was prejudiced before finding the absence of good cause. (AOB, p. 57.) Rather, the purpose of the strict compliance

[18] In addition, under *Community Redevelopment Agency*, Appellants' failure timely to publish the amended Summons denied the trial court the requisite jurisdiction. (*Supra*, 248 Cal.App.2d at 177 (explaining that any ruling on the merits would be a futile attempt to adjudicate the rights of property owners not properly notified of the proceeding pursuant to the specific, mandatory procedures).)

with the summons requirements is to protect those interested parties, which should be parties to the action.

IV. CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Court affirm the Appellate Court's opinion and ruling and find that Appellants failure to comply with the Validation Proceeding Statutes warrants dismissal of their action.

Dated: September ____, 2007

Respectfully submitted,

McDONOUGH HOLLAND & ALLEN PC
Attorneys at Law

By: _____
THOMAS R. CURRY
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Attorneys for Defendants/Respondents Town of Tiburon and Tiburon Town Council

CERTIFICATE OF COMPLIANCE

In accordance with the California Rules of Court, rule 14(c)(1), I, Andrea Visveshwara, hereby certify that the foregoing was produced on a computer, is proportionately spaced, has a typeface 13 points or more and, according to the word count function on the word processing program used, this brief contains 12,717 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this certificate is dated September 14, 2007.

_____
ANDREA S. VISVESHWARA

PROOF OF SERVICE

I am employed in the County of Alameda; my business address is 1901 Harrison Street, 9th Floor, Oakland, California 94612. I am over the age of eighteen years and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On **September 17, 2007**, I served the within:

1. **ANSWER BRIEF ON THE MERITS**

X **by mail** on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At McDonough Holland & Allen PC, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Oakland, California.

X **by overnight delivery** on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013(c), by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, and delivering that envelope to an overnight express service carrier as defined in Code of Civil Procedure § 1013(c).

X **by overnight delivery** on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013(c), by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, and delivering that envelope to an overnight express service carrier as defined in Code of Civil Procedure § 1013(c).

Clerk of the Court
California Court of Appeal
First Appellate District Court – Div. 3
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San Francisco, CA 94102

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San Rafael, CA 94903

[1 Copy by U.S. Mail]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on **September 17, 2007**.

_____
DIANA NORTON

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