CASE NO. **S195152**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CONCERNED CITIZENS FOR RESPONSIBLE GOVERNMENT AND WILLIAM DOHERTY
Plaintiffs, Appellants and Cross-Respondents,

vs.

WEST POINT FIRE PROTECTION DISTRICT AND WEST POINT FIRE PROTECTION DISTRICT BOARD OF DIRECTORS,
Defendants, Respondents and Cross-Appellants

OPENING BRIEF ON THE MERITS

From a Decision of The Court of Appeal,
Third Appellate District (No. C061110)
Reversing a Judgment of the Superior Court of Calaveras County
(No. CV33828)

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I. ISSUES PRESENTED.

1. Under Proposition 218 (Cal. Const., art XIII D), may a fire district assessment be considered a special assessment?

2. Under Proposition 218, may the proportionality of special benefits to individual properties be measured by the costs of providing the benefits to those properties?

II. INTRODUCTION.

This involves a judgment in favor of West Point Fire Protection District and its Board of Directors (hereafter collectively "West Point") on all causes of action, and a subsequent reversal by the court of appeal. (West Point was Defendant in the Calaveras Superior Court and Respondent and Cross-Appellant in the Third District of the Court of Appeal.)

The West Point landowner voters in Calaveras County overwhelmingly approved a modest benefit assessment to fund part of their fire district's continued operation. (Ex. 11.)[1] William Doherty and "Concerned Citizens for Responsible Government," plaintiffs in the superior court and Appellants and Cross-Respondents in the court of appeal, brought a reverse validation action, seeking to overturn that assessment, on the grounds it was enacted in violation of Proposition 218 and other laws. After trial, the superior court determined that the benefit assessment was proper, and that the challengers had failed to introduce

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1 Abbreviated references in this Opening Brief are to trial exhibits ("Ex."); the court of appeal opinion ("Op."); the clerk's transcript ("CT"); and the reporter's transcript ("RT").

sufficient evidence to sustain any of their causes of action; indeed they even failed to request a statement of decision.

On appeal, the court of appeal reversed, in part holding that the levy was not a proper assessment under Proposition 218, because fire protection could not be deemed to be a "special" assessment, the benefits being only general. (Op., at pp. 21-26.) It also held that the levy did not comply with the proportionality requirements of Proposition 218. (Op., at pp. 26-29.)[2]

The decision of the court of appeal was in error in both respects. An assessment for fire protection, and specifically the one at issue here, may properly be characterized as a special assessment, rather than a general one. That is because it directly benefits the properties being assessed. As this Court has emphasized, under Proposition 218, a special benefit must be one that is "particular and distinct from its effect on other parcels and [one] that real property in general and the public at large do not share. (Art. XIII D, § 2, subd. (i).)" (*Silicon Valley Taxpayers Assn. v. Santa Clara Open Space* (2008) 44 Cal.4th 431, 452.) That an individual's home might burn down is a separate and distinct benefit from stopping a fire at a neighbor's house, and from a vehicle fire, and from such things as ambulance services that a fire department might also provide. The fact that, as here, a fire district might pay for other benefits that it provides through other revenue sources, does not mean that distinct benefits to individual real estate parcels within

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[2] The decision also determined that a failure timely to publish summons in the validation action under Code of Civil Procedure section 860 et seq. was excusable, and that retroactive application of this Court's decision in *Silicon Valley Taxpayers Assn. v. Santa Clara Open Space* (2008) 44 Cal.4th 431 was proper. These other two issues are not being raised here.

the district cannot be identified, measured and paid for by means of a special assessment. Nothing in Proposition 218 bars that approach; nor did any decision of this Court or the court of appeal until the erroneous decision below. That decision should be reversed so that West Point and other fire districts can utilize this reasonable and appropriate financing mechanism.

Also, there was nothing improper about the way West Point measured the value of the benefit provided. Proposition 218 requires that what is charged for a special assessment be proportional to the benefit received by the individual properties being assessed. In some circumstances, a reasonable way to measure the benefit received by the individual property may be the cost of providing that benefit. While other methods may also be appropriate in other circumstances, nothing in Proposition 218 dictates that cost of providing the benefit may not be the appropriate measure of the benefit in the right circumstances. Nor is there any precedent leading to that result. The prior opinion, upon which the court of appeal here incorrectly relied, *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1081, merely said that, under its particular fact pattern, cost was not a proper measure, but also stated that in another situation it might be. This is one of those other situations, and the court of appeal decision should be reversed.

III. FACTUAL AND PROCEDURAL BACKGROUND.

A. Procedural History.

In 2007, the landowner voters in West Point approved the benefit assessment to fund part of their fire district's continued operation. (Ex. 11.) Shortly thereafter, William Doherty and "Concerned Citizens for

Responsible Government," brought a reverse validation action, seeking to overturn that assessment, on the grounds it was enacted in violation of Proposition 218 and other laws.

The bench trial in the Calaveras County Superior Court was conducted before and judgment entered by the Honorable John Griffin, a visiting judge. Judge Griffin determined that the benefit assessment had been enacted properly under Proposition 218 and other laws. He concluded that the plaintiffs had failed to introduce sufficient evidence to sustain any of their causes of action. The plaintiffs failed to request a statement of decision in a timely manner.

On appeal, the court of appeal reversed, holding that the special assessment did not comply with Proposition 218. It filed its decision on June 29, 2011. On August 8, 2011, West Point timely petitioned this Court for review and, on October 19, 2011, the Petition for Review was granted.

B. Factual Background.

1) West Point Fire Protection District and the Need for Increased Revenue.

West Point is located in rural Calaveras County, California. (Ex. 4, p. 9.) It is in one of the most dangerous fire areas in the State. (RT 397.) A study found that for most of the District's existence, it had relied upon volunteer firefighters. (Ex. 4, 9-15.) However, within the preceding few years, there had been a marked increase in emergency and fire call volume; new and increased State training requirements for firefighters and emergency medical technicians had been put in place; and West Point had spent growing amounts of money trying to meet the firefighting and emergency medical services demands. (*Ibid.*) These factors and others caused West Point to study the problems it was beginning to see, prepare an

engineer's report and eventually conduct an election to determine if West Point should levy a benefit assessment to fund part of the fire protection services within its jurisdiction. (Ex.4; RT 321-325.)

2) The Engineer's Report.

An engineer's report is required by the California Constitution (Proposition 218) and it is a cornerstone of any assessment creation. (*See, generally*, Cal. Const., art. XIII D, § 4, subd. (b).) This particular engineer's report (hereinafter, "Engineer's Report" or "Report"), a copy of which is trial exhibit 4, was signed by an engineer licensed in the State of California, on February 26, 2007. (RT 325-326; Ex. 4, p. 24.)

According to the Report, "all parcels within the West Point Fire Protection District" were included within the boundary of the assessment district. (Ex. 4, p. 1.) Each parcel to be assessed was identified specifically in the Assessment Roll. (*Ibid.; see, also, p.* 24.) The duration of the proposed payments was defined as five years, with the first payment due on June 1, 2007 and the last on December 10, 2011. (*Ibid.*)

The reasons for the Assessment were set forth, as was the methodology upon which the Assessment was calculated. (Ex. 4 at pp. 1-3.) They included: (a) an 500 % increase in calls for fire and rescue services in the past decade; (b) a change in regulations, requiring that volunteers have 200 hours of training per year to participate in fire-fighting or rescues, and a change in what is known colloquially as the "2-in, 2 out" regulation;[3] a shortage of trained volunteers needed to respond to the

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[3] Since 2005, all fire departments in the State had been mandated to follow 29 C.FR. §1910.134 (g)(4). This regulation requires that in order for paid personnel or volunteers to enter a burning structure to save lives, four qualified personnel must be present: two who enter the structure and two

average amount of calls the District receives per week; the fact that the fiscal revenues from County taxes had not kept pace with the increase in calls for emergency services; the information that, if the Assessment did not pass, the District would exhaust all available reserve funds; and the fact that performance had suffered – that is, there were 18 emergency calls to which no one responded, and over 100 calls where only one person was able to respond. (*Ibid.*)

The basis upon which the Assessment was calculated was how much it would cost the district to keep one senior fire fighter on duty around the clock, or $146,000 (actually over $159,000 but $146,000 was used as the balance could be paid from other resources). (*Id.* at pp. 3, 17; RT 331-332.) This translated into $87.58 for any developed parcel and $45.00 for any undeveloped parcel. (Ex. 4, p. 21.) That allocation was calculated and supported by a complex methodology that took into account population, state property values, and historical usage of the land at issues (*id.*, at p. 18), as well as the particular characteristics of West Point's call volumes, National Fire Protection Association (NFPA) figures assigning dollar values and benefits to developed and undeveloped parcels, and other factors (*id.* at pp. 13-21).

Finally, and importantly, the general and special benefits to each parcel assessed were separated and identified in the Engineer's Report. (Report at pp. 13-23.) In this regard it should be noted that the Report specifically acknowledges that "only special benefit-related costs may be assessed" under Proposition 218, and so the special benefits were

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outside who can provide rescue if needed.

identified. They included most significantly "[r]esponses to service calls for fire suppression or possible fires," *excluding* "calls for services that go unanswered or were handled by another fire district; . . ." (*Id.* at p. 15.)

3) The Assessment Passed.

The District followed the election procedure for enacting a benefit assessment. (See RT 350-359.) Ex. 11 reports the final majority vote in favor of the benefit assessment. (RT 359.)

On June 14, 2007, the Board approved Resolution No. 07-06. Resolution No. 07-06 explicitly acknowledged that the Assessment was imposed in the amount of $87.58 per improved parcel and $45 per unimproved parcel and that it passed by 61.8%; and it authorized Calaveras County to collect the Assessment on West Point's behalf. (Ex. 14.)

IV. STANDARD OF REVIEW.

Because Proposition 218 is involved, there was a twist in the usual allocation of burden at the trial court level. Under Proposition, 218, the burden was on Respondents to show compliance with certain sections of that law. (Cal. Const., art. 13D § 4, subd. (f).) The appellate courts exercise independent judgment in reviewing whether an assessment complies with Proposition 218. (*Silicon Valley Taxpayers Association v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 450 ("*Silicon Valley*").)

As will be developed, Respondents presented abundant evidence of the propriety of the assessment, primarily the Engineer's Report, trial exhibit 4. In contrast plaintiffs presented virtually no evidence at trial – most of the trial time was spent presenting argument –and then they did not request a statement of decision. Because of the failure to request a statement of decision, in the normal case, all necessary findings to support

the judgment will be implied and the only issue is whether there is substantial evidence to support those implied findings. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) Although this Court exercises independent judgment, there are instances where it is appropriate to deem the findings of fact in West Point's favor, as will be noted in the argument below.

V. DISCUSSION.

A. The West Point Assessment Supplies Special Benefits, Not General Benefits.

1) The Engineer's Report Reasonably Segregated the Benefits of the Special Assessment on Properties from Other Benefits.

The decision of the court of appeal should be reversed because it incorrectly determined that a fire suppression fee to a property was a general benefit, not a special benefit, within the meaning of Proposition 218.

The term "special benefit" is defined in Proposition 218: it is "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." (Cal. Const., art. XIII D, subd. (2).)

Here, the Engineer's Report did identify and separate what it determined to be the special benefits from others. (See, Ex. 4, pp. 13-14.) "Special benefits include those benefits that will be directly provided by the fire department to the parcel owners," including "fire suppression on the property of parcel owners." (*Id.* at p. 14.) As set forth in the Report, in 2006 there had been 67 responses to fire related calls within the district. (Ex. 4, p.15.) There also had been two outside the district, but they were

not counted in the statistics as a special benefit to the properties within the district. (*Ibid*.) There was a 10% projected increase in such calls for 2007, and so the number of fire related calls carried forward for the engineer's projections was 74 (that is, 67 times 110% equals 73.7, rounded to 74). (*Id*. at pp. 15-16.) The drafter of the Report also thought that some 50% of vehicle accidents might reasonably be allocated to the special benefit category, and he makes statements suggesting that some other calls could potentially be characterized as special. (*Id*. at pp. 14, 15.) However, conservatively, the statistic carried forward in the Report for special benefits for the final calculation was only the fire related calls, the 74 projected for the following year. (*Id. at p. 16*.) In other words, the Report allocated to the property owners as special benefit only fire suppression on their properties, whereas all other services were to be paid for by other funds. Special benefits only were allocated to those charged the special assessment; general benefits were funded by other sources.

The Report increased the number of projected responders to 6 for fire calls, as it was the intent to add more firefighters to comply with changed regulations. (Ex. 4, at pp. 15-16.) It projected a call volume increase of 10% for 2007, including the fact there would be no more missed calls. (*Ibid*.) The Report noted the fire department had been unable to respond to a number of calls in the prior year in this dangerous fire area. (*Id*. at p. 15.) The calculated percentage cost of the special benefit for 2007 out of the total budget would be 51.96 %, with the remainder being deemed general benefit. (*Id*. at p. 16.)

The Report then applied that 51.96% percentage to part of the costs, to firefighter salaries and benefits. (Report at p.17.) Other percentages of allocation were applied to other categories of expenses (for example, 90%

of workers compensation, as that was largely based on fire hazard, went to special benefit, while several categories of miscellaneous expenses went to general). The report concluded that $159,413 could be allocated to special benefit in the budget. However, as mentioned, the amount for the assessment was reduced to $146,000 as there were some other revenues to pay the difference. That erased the possibility of any minor quibble over the reasonableness of the percentages. Moreover, at trial there was no challenge to the reasonableness of the calculations, or the source of the numbers, and there was no request for a statement of decision.

2) Charging the Property Owners the Costs of Fire Protection Reasonably Allocated to the Properties, but Not the Costs of General Benefits to the Public, Complied with Proposition 218 as Analyzed by this Court in the *Silicon Valley* Case.

"Special Benefit" is "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." (Cal. Const., art. XIII D, §. (2), subd. (i).)

One finds it hard to imagine anything more beneficial to a house or commercial building than to keep it from being destroyed, to keep it from being burned down. Similarly, a property owner does not want his or her unimproved parcel to be burned; it is a benefit to that owner's property to protect it from fire.

The leading precedent on the subject is this Court's decision in *Silicon Valley, supra,* 44 Cal.4th 431. So long as a levying entity reasonably segregates special and general benefits, there is nothing in Proposition 218 that would bar it from levying a special assessment for the special benefit part and use some other financing mechanism to pay for the

general benefits. (*Id*. at p. 450 [citing Cal. Const., art. XIII D, § 4, subd. (a)].) There can be no doubt that the Engineer's Report in this case did make a reasonable allocation, as the trial court held in West Point's favor and no statement of decision was requested. The Engineer's Report provided that fire suppression for properties was reasonably charged to those properties, and other services were paid for by other means.

The court of appeal disagreed that fire suppression ever could be a special benefit, concluding that fire suppression, per se is a general benefit, not a special one. "Fire suppression…is a classic example of a service that confers general benefits on the community as a whole. A fire endangers everyone in the region. No one knows where or when a fire will break out or the extent of the damage it may cause. *** Thus the assessment generates *only general benefits*." (Op., at pp. 22-23; emphasis added.)

The court of appeal's reasoning is in error because it confuses general benefits with shared special benefits. This Court made the distinction clear in *Silicon Valley*:

> [Santa Clara Open Space Authority] observes that Proposition 218's definition of "special benefit" presents a paradox when considered with its definition of "district." Section 2, subdivision (i) defines a "special benefit" as "a particular and distinct benefit *over and above general benefits conferred on real property located in the district* or to the public at large." (Art. XIII D, § 2, subd. (i), italics added.) Section 2, subdivision (d) defines "district" as "an area determined by an agency to contain *all parcels which will receive a special benefit* from a proposed public improvement or property-related service." (Art. XIII D, § 2, subd. (d), italics added.) In a well-drawn district - limited to only parcels receiving special benefits from the improvement - every parcel within that district receives a shared special benefit. Under section 2, subdivision (i), these benefits can be construed as being general benefits since they are not "particular and distinct" and are not "over and above" the

> benefits received by other properties "located in the district."
>
> We do not believe that the voters intended to invalidate an assessment district that is narrowly drawn to include only properties directly benefitting from an improvement. Indeed, the ballot materials reflect otherwise. Thus, if an assessment district is narrowly drawn, the fact that a benefit is conferred throughout the district does not make it general rather than special. In that circumstance, the characterization of a benefit may depend on whether the parcel receives a direct advantage from the improvement (e.g., proximity to a park) or receives an indirect, derivative advantage resulting from the overall public benefits of the improvement (e.g., general enhancement of the district's property values).

(*Silicon Valley, supra*, at p. 452, n. 8; emphasis in original.)

The special benefit of fire suppression on one's property is a special benefit under that very reasoning. A fire district by definition naturally includes all parcels; in any event, the Engineer's Report here did include all parcels. (Ex. 4, p. 1.) All receive a direct benefit—the ability to have the fire department put out a fire on their property. The fact that all properties within the district receive the same benefit does not make the benefit general. Rather, they simply all share the same special benefit within the reasoning of this Court.

In *Silicon Valley* the types of benefits that the government had argued were special—the enjoyment of open space—really consisted of benefits that would be enjoyed generally by all who lived within the district, property owners or not, and by many who lived outside the district. (*Id.* at pp. 452-456.) Consequently the Court concluded they were only general benefits, not special ones.

Fire suppression services are different. In the first instance, they specifically benefit individual property owners. Very simply, they keep one's house from burning down or they keep one's undeveloped property from burning up. That an individual's home might burn down is separate and distinct from a vehicle fire, or an auto accident, or the subjects of other services that a fire department might deliver. It is a precise benefit supplied to an individual's property. If the fire district has segregated that from the more general benefits to all property owners, or those who are not property owners in the district, the plan is not invalid if the other elements are not included as part of the special assessment.

Perhaps the court of appeal was concerned that a fire might spread from the property where it started to the adjacent property. But that hardly makes it a general benefit as opposed to a special one. Barring a fire from spreading to a neighboring property is a benefit to the property where it started. It protects that property owner from liability. Moreover, the neighboring property owner as well has equally paid the special assessment because of the special benefit to his or her own property. As the Engineer's Report noted (Ex. 4, p. 14), stopping the spread of a fire to other properties is also a special benefit. That is, it is a special benefit to property A to have fire protection to keep a fire from spreading from property B to property A.

In sum, fire protection for property owners is a classic example of what this Court termed in *Silicon Valley* as a shared special benefit, as opposed to a general benefit. (*Silicon Valley, supra*, at p. 452, n. 8.) Nothing could be a more "direct" (*ibid.*) benefit to a property than a service to keep it from burning down.

In *Silicon Valley* the plan that this Court struck down simply lumped all benefits from parklands as special benefits, whereas the Court observed that many were open to the public at large, not just the property owners in the assessment district. (*Id*. at p. 454.) But that leaves open the situation here where the Engineer's Report carefully segregated what is special and what is general. Yes a fire department's services are available to persons other than property owners. But in this case the district specifically segregated those expenses—fires outside the district, medical calls, etc.—and caused them to be paid for through other means.

3) Decisions of the Courts of Appeal and Statutes Support West Point.

Decisions of other districts of the courts of appeal and fire district assessment statutes are consistent with West Point's position and inconsistent with the decision of the court of appeal below.

a) Pre Proposition 218.

Before Proposition 218 was passed, it was clear that fire suppression could be deemed a special benefit.

Petitioners do recognize that, as this Court has cautioned, pre Proposition 218 cases may not be instructive in some ways because they allowed the entire cost of a project to be paid by a special assessment, even if it also offered general benefits, not a situation that can occur under Proposition 218. (*Silicon Valley*, *supra*, 44 Cal.4th at p. 451-452.) However, such cases may nevertheless be valuable in analyzing the different issue here of whether fire suppression has special benefit attributes at all. *City of San Diego v. Holodnak* (1984) 157 Cal.App.3d 759, 763, addressed that issue. It held that the fire stations involved could be financed entirely through a special assessment, even though both special

benefits and general ones were gained, a decision, as already noted, inconsistent with Proposition 218 and *Silicon Valley's* reasoning discussed above. But what is important is that *Holodnak* found that "fire stations do specially benefit the properties within their area of service..." (*Id*. at p. 763.) Indeed, this Court seems to have agreed with that. In discussing *Holodnak* and other pre Proposition 218 cases, the Court stated : "Unlike the assessment here, the assessments in the pre-Proposition 218 cases involved specific, identified improvements that directly benefited each assessed property…." (*Silicon Valley*, *supra*, 44 Cal.4th at p. 455.)

Indeed, that is consistent with the statutory scheme in California, Government Code section 50078 et seq., which both before Proposition 218 and currently has provided that financing for fire suppression may be raised by assessment.

> Any local agency which provides fire suppression services directly or by contract with the state or a local agency may, by ordinance or by resolution adopted after notice and hearing, determine and levy an assessment for fire suppression services pursuant to this article. The assessment may be made for the purpose of obtaining, furnishing, operating, and maintaining fire suppression equipment or apparatus or for the purpose of paying the salaries and benefits of firefighting personnel, or both, whether or not fire suppression services are actually used by or upon a parcel, improvement, or property.

(Gov. Code, § 50078.)

b) Post Proposition 218.

Although to West Point's understanding the precise issue of whether fire suppression for a parcel is a special benefit has not been addressed

since the passage of Proposition 218, decisions involving other types of assessments support the characterization of fire suppression as a special benefit. One case finding an assessment proper and three finding the particular assessments there improper, all support the proposition that fire suppression can properly be deemed a special benefit for property.

Town of Tiburon v. Bonander (2009) 180 Cal.App.4th 1057 involved an undergrounding project for utility lines. Citing *Silicon Valley*, the court in Tiburon noted that a special benefit occurred when a property receives a "direct advantage from the improvement funded by the assessment." (*Id.* at p. 1077.) Noting that the engineer had identified three such benefits to parcels, improved aesthetics, increased safety and improved service reliability, the court concluded that there were special benefits to the undergrounding. (*Id.* at pp. 1078-1079.) Certainly these benefits are more tangential than fire suppression to a parcel. Stopping a house from burning down is a very direct benefit to a property. Ultimately Tiburon lost the case for other reasons, but the decision is precedent for fire suppression being a special benefit..

Dahms v. Downtown Pomona Property and Business Improvement District (2009) 174 Cal.App.4th 708, allowed several types of costs in a business district—marketing, security and streetscape maintenance—to be assessed as a special benefit. The court concluded that these were special benefits to the business properties, and not general benefits. If anything, the benefits discussed in *Dahm*s are, in *Silicon Valley's* word (*Silicon Valley*, *supra*, at p. 452, n. 8), less "direct" than fire suppression for a parcel. General security for an area, or marketing for area businesses, and even street lighting, arguably afford benefit to a property less directly than paying for a fire department to put out the fire on the property. *A fortiori*, if

the benefits in *Dahms* are special benefits, then fire suppression levies for properties are as well.

In *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, 1534, the county had created an assessment for homes in an unincorporated residential area that would support local parks. Ultimately the court of appeal reversed the trial court's decision in favor of the county for the reason that it had not met its burden in demonstrating the proper calculation of separation of special and general benefit. But implicit in the decision is the notion that making parks available to local residents, if properly analyzed, could provide a measure of special benefits to the properties within the assessment. Again, the use of a nearby park is a less direct benefit that fire protection for a specific parcel; if the parks in *Beutz* could be the subject of a special assessment, then even more clearly so can fire suppression services.

Recently the Fourth District filed its opinion in *Golden Hill Neighborhood Association, Inc. v. City of San Diego* (2011) No. D057004, __ Cal.4th __. This case involved an assessment to provide debris and litter removal, sidewalk sweeping, landscaping, trail beautification and other services. As in *Beutz*, the court struck down the assessment because the City had not met is burden of showing its calculation was proper, because it had not separated and quantified special and general benefits. But implicit in the decision is that such benefits might include special benefits, not just general ones. Unlike *Beutz* and *Golden Hill*, the engineer for West Point did precisely separate and quantify special versus general benefits. If the types of benefits considered in *Golden Hill* could be special, then so can fire suppression in this case.

These four recent decisions of the Court of Appeal are all consistent with deeming fire suppression for a parcel to be deemed a special benefit. Ultimately three of the assessment faltered for other reasons, but the cases are still strong precedent for West Point.

B. The Special Assessment Complied with Proposition 218's Proportionality Requirement.

The assessment here complies with Proposition 218's proportionality requirements as analyzed in *Silicon Valley*. Proposition 218 says: "The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the … property related service being provided." (Cal. Const., art. XIII D, § 4, subd. (a).) The court of appeal determined that the proportionality requirement was not followed because the Engineer's Report used cost of providing the benefit as the method of calculating the proportionality. But nothing in Proposition 218 forbids using cost as the measure, so long as cost is a reasonable measure of the value of the benefit.

With respect to proportionality, the Report divided the district into improved and unimproved parcels. (Ex. 4, p. 18.) From historical records it calculated the number of responses to fire calls from improved versus unimproved parcels, concluding that each received a different proportional benefit. (*Id*. p. 19.) Using a model developed at the University of Michigan, several years of historical data from West Point, and information from the National Fire Protection Association, it calculated proportionality based upon cost of providing services and the potential losses suffered by the property owners, improved and unimproved. (*Id*. pp. 18-21.) This is exactly the type of analysis called for by Proposition 218, and totally contrary to what the agency in *Silicon Valley* had done.

Citing *Town of Tiburon, supra,* 180 Cal.App.4th 1057, 1081, the court of appeal here said that West Point's methodology was improper because it measured the benefit not by valuing the benefit, but by analyzing the cost of providing the service. However, *Tiburon* did not hold that a cost-based measurement system is always improper as a way to measure proportionality of benefit. It merely held that, in that particular case, the elaborate system used did not truly reflect the relevant benefits received. And then the court of appeal in *Tiburon* stated: "There may be cases in which the relative cost of an improvement is a reliable measure of relative benefit conferred." (*Id.* at p. 1083.) Thus in holding that a cost based proportionality measurement is *always* invalid, the opinion below opinion did not correctly follow *Tiburon*.

The court in *Beutz, supra,* 184 Cal.App.4th 1516, made a similar point. "Just as the Town of Tiburon *may* have been able to properly support its undergrounding assessment based on the costs of the undergrounding project to various properties, the County may have been able to support the assessment … based on the costs of maintaining the parks' landscaping provided those costs were proportional to, and did not exceed, the special benefits to the assessed parcels. (*Id*. at p. 1536; emphasis in original.)

Here a cost based system for fire suppression to properties is a reliable measure. *Indeed, it is the only practical one.* Careful calculations concluded that the costs of responding to all structure fires were essentially the same and the costs of responding to all fires on unimproved parcels were essentially the same. The cost of responding to a particular homeowner's fire may be reasonably construed as a measure the benefit he or she receives. Under the circumstances, using costs is a reasonable and

practical methodology. For many types of services, cost is a reliable measure of value. The market cost of a commodity is a proper reflection of its value. The cost of a service to a property similarly can reflect the value of the service.

Could a different approach have been taken, as the court of appeal suggests? Not reasonably. Presumably every house in the area has a different value. One might be worth $100,000 and another $200,000. The court of appeal implies each house should have been valued and therefore the benefit would have been the value of the house saved by the fire. But as a practical matter, in a small fire district, that would have been cost prohibitive—valuing each house, and the contents in it. Moreover, it would have been inaccurate. A homeowner would receive one value of benefit if the house did not burn down, another if it did burn down (no value to the services) and another if it partly burned down. The value of a house changes over time. The value of contents changes as new items are acquired and some disposed of. One house might have more insurance than another. With that perspective, the court of appeal's methodology would not have been a reasonable measure.

It is more rational to look at the costs of the services. As an analogy, if a house is to purchase cable television, the amount for the same service to a $200,000 home is the same as that to a $100,000 home. But that cost is a true measure of the benefit received. If fire services were offered only to those who paid for them, that would certainly be the measure of the benefit—what they were charged. It should be no different here. Combined with the practical issues of a small district finding a cost effective way to proceed, the bottom line is that, as the courts of appeal said

in *Tiburon and Beutz*, the cost of a service may well be a reasonable measure of the proportional value of a benefit. It was here.

In this respect, in complaining that properties under $5000 were excluded, the Opinion (at p. 28) ignores a separate part of Proposition 218. "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (Cal. Const., art. XIII D, §4, subd. (a).) West Point had to exclude parcels where the charge would be higher than the benefit. To arrive at a cutoff, the engineer did an historical analysis of fires in the district. (RT 337-340.) The result was the $5000 cutoff. There was no counter evidence at trial. Even if that were not the reason, as the court in *Dahms* said, so long as the benefit to those charged is proportional, it does not mean a district could not offer a discount to some properties within it. (*Dahms, supra,* 174 Cal.App.4th at pp. 716-720.)

The Opinion also argues (at p. 28) that using costs is an inequitable approach, citing different property values. But there is nothing unfair about charging each property the same $87.58, if that is the cost to the fire district. If this were, for example, water service, each property would be charged the same rate for water, and there is nothing unfair in that. The test is not a matter of equity, it is whether cost is a reasonable measure of benefit received. Proposition 218 does not legislate equity, it imposes a system of measurement, and that is what West Point followed.

In sum, cost is a fair measurement of benefit received in this circumstances. Other potential measurements would not be appropriate under Proposition 218.

VI. CONCLUSION

The proper application of Proposition 218 is an important issue of law, as local government agencies need to be able to understand the rules of financing their critical services. In two significant ways, the court of Appeal has it wrong in its opinion. Petitioners respectfully request that the Court reverse.

Dated: November 18, 2011 NOSSAMAN LLP

By:_____
Stephen N. Roberts
Attorneys for Petitioners West Point Fire Protection District and West Point Fire Protection District Board of Directors

RULE 14(c)(1) CERTIFICATION

As required by Rule 14(c)(1) of the California Rules of Court, I certify that this brief is at 13 point font and contains **6,139** words. In making this certification, I have relied upon the word count function of Microsoft Word, the computer program used to prepare the brief.

November 18, 2011 NOSSAMAN LLP

By: _____

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PROOF OF SERVICE

The undersigned declares:

I am employed in the County of San Francisco, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Nossaman LLP, 50 California Street, 34th Floor San Francisco, California 94111.

On **November 18, 2011** I served the foregoing **Petitions' Certification of Interested Entities or Persons** on the parties to the within action by placing ( ) the original (x) a true copy thereof, enclosed in a sealed envelope, addressed as shown on the attached service list.

(X) (By U.S. Mail) On the same date, at my place of business, said correspondence was sealed and placed for collection and mailing following the usual business practice of my employer. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the U.S. Postal Service, with postage thereon fully prepaid,

() (By Overnight Service) I served a true and correct copy by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Sacramento, California.

_____ _____

(Dated) Nancy Torpey

Calaveras Superior Court Case No. CV 33828

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