HOWARD JARVIS TAXPAYERS ASSOCIATION

HOWARD JARVIS, Founder (1903-1986)
ESTELLE JARVIS, Honorary Chairwoman
JON COUPAL, President
TREVOR GRIMM, General Counsel
TIMOTHY BITTLE, Director of Legal Affairs

August 30, 2011

Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: **OPPOSITION to the Petition for Review**
Concerned Citizens v. West Point Fire District, No. C061110

Your Honors,

The Howard Jarvis Taxpayers Association ("HJTA") opposes the petition seeking review of the decision by the Third District Court of Appeal in *Concerned Citizens v. West Point Fire District*, No. C061110 (*West Point*).

HJTA, the author of Proposition 218, fully concurs with the interpretation of Proposition 218 by the Court of Appeal.

West Point challenged a tax-like "assessment" imposed on owners of real property within the West Point Fire District to increase the number of emergency medical technician (EMT) firefighters employed by the District. The Court of Appeal, following this Court's guidance in *Silicon Valley Taxpayers Assn. v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 431, held that the District had the burden to prove compliance with Proposition 218, specifically that the assessment was for special benefits received only by the billed property owners, and that the amounts assessed were proportional to each parcel's relative benefit. The Court correctly ruled in favor of the property owner plaintiffs.

The Court of Appeal's decision is divided into two parts. The first part holds that fire protection is a general governmental service that benefits *all* property owners in the district–indeed the public at large–not just a select group of property owners, and therefore cannot be funded by an assessment, since the theory of an assessment is that a permanent public improvement is being built for the special benefit of a select group of private property owners. *West Point Fire*, Slip Opinion (Op.) at 22-24.

The second part holds that, even if fire protection is a proper subject of assessment financing, this particular assessment does not comply with Proposition 218 because (1) the engineer hired to design the assessment, while paying lip service to the requirement that he separate general benefits from special benefits and not charge property owners for general benefits, nonetheless imposed the entire cost of the District's proposal on the property owners, and (2) because he applied an unjustifiably simplistic method for apportioning those costs among the property owners. Op. at 26 *et seq.*

The Court of Appeal got it right on all accounts. It was our intention in drafting Proposition 218, and the voters' intention in passing it, that assessments–which can be passed by a simple majority of the affected property owners–be limited to funding things that are for the special benefit of the affected property owners.

The Voter Guide analysis of Proposition 218 by the Legislative Analyst gave voters examples of things that generally benefit the public at large and would no longer be eligible for special assessment financing under Proposition 218: "[t]ypical assessments that provide *general* benefits [are] *fire*, park, *ambulance*, and mosquito control assessments." Ballot Pamp., Gen. Elec. (Nov. 1996), analysis of Prop. 218 by Leg. Analyst (*Current Practice*) p. 73.

The plain text of Proposition 218 itself states that fire and ambulance services are "general governmental services ... available to the public at large." Cal. Const., art. 13D, § 6(b)(5). Specific to assessments, Proposition 218 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." *Id.*, § 2(i).

As the Court of Appeal explained, the EMT firefighters that would be added to West Point's crew by this assessment would not be limited in their duties to serving a select group of privately owned lots. They would be on-call for, and respond to, fires on *all real property located in the district* (including public property and those private lots exempted by the engineer from the assessment). They would also be on-call for, and respond to, emergencies not related to real property ownership, such as vehicle accidents and medical transportation for tenants, employees, out-of-town shoppers, tourists and motorists, etc.

Property owners are already singled out to fund the lion's share of the cost of community fire and ambulance services through the property taxes they alone pay. If additional funding is requested from property owners, it was the intent of Proposition 218 that such a request be in the form of a special tax subject to a two-thirds vote requirement.

Contrary to the District's claim, this aspect of the Court of Appeal's decision was neither novel nor unexpected. A month after the November 1996 election at which Proposition 218 was adopted, the Legislative Analyst published a guide called "Understanding Proposition 218" to assist local agencies in complying with the new law. *See* http://www.lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.pdf. The guide explained that certain existing assessments, depending on their purpose, would either be exempt from Proposition 218 or would need to be eliminated or replaced with a special tax. "Our review indicates that the types of assessments that are not likely to satisfy any of the conditions for exemption are: *fire,* lighting and landscaping, and park and recreation assessments." *Id.*

The County of Los Angeles lost no time in challenging this assumption. In *Consolidated Fire Protection District v. Howard Jarvis Taxpayers Association,* (1998) 63 Cal.App.4th 211, the County sought protection for its fire assessment. The County argued that (1) voter approval of the assessment created a contract for the delivery of services which, under the Contracts Clause of the federal Constitution, could not be impaired by Proposition 218, and (2) Proposition 218 constituted an unlawful referendum on an assessment. The trial court ruled against the County. The County suspended implementation of the assessment (but did not rescind it), and appealed. While the appeal was pending, the County obtained 2/3 voter approval of a special tax to replace the assessment. The Court of Appeal concluded the matter was not moot and affirmed the trial court's ruling against the County, ruling that no "contract" within the meaning of the Contracts Clause was in issue and that the referendum argument was precluded by *Santa Clara Co. Transportation Auth. v. Guardino* (1995) 11 Cal.4th 220.

Following the decision in *Consolidated Fire*, most cities, counties, and special districts seeking to supplement their fire protection budgets proposed special taxes to their voters, rather than new or increased assessments. And most of those proposals passed with a two-thirds vote. That remains true today. Thus, the Court of Appeal's decision should not be viewed as depriving West Point Fire of additional funding from property owners. Its assessment was popular, receiving 62% approval in an election limited to only those property owners obligated to pay it. Op. at 2. It is highly likely therefore that a special tax would be approved in an election opened up to all voters, including those exempt from the tax.

The Court of Appeal's fall-back position (that the engineer's work did not comply with Proposition 218), while unnecessary, was also correct.

Although the District tries to finesse the point in its Petition for Review by quoting the engineer's hollow acknowledgment of the requirement to separate general benefits from special benefits, the Court of Appeal correctly found that the engineer circumvented that very requirement. The engineer started with the dollar amount desired by the District, "then *worked backwards* from that figure" to arrive at an assessment that, after ostensibly separating general benefits, would yield the desired amount. Op. at 27 (emphasis in original).

The Court of Appeal also found that the engineer "divides properties into three general, unrefined categories for purposes of assessment: improved, unimproved, and exempt ... [which] result in gross inequities." Op. at 28. The Court gave as an example that "a 200-acre parcel with an $800,000 luxury home built on it would be taxed the same as a five-acre parcel with a barn worth $5,500." *Id.* A better example, however, might be that a single family home worth the District average of $191,000 is billed $87.58 while a company owning a large stand of commercial timber worth millions pays only $45. Op. at 5. A special tax need not be tied to benefit, but an assessment must.

Proposition 218 requires the engineer to determine "[t]he proportionate special benefit derived by each identified parcel." Cal. Const., art. 13D, § 4(a). The reason Proposition 218 requires that "[a]ll assessments must be supported by a *detailed* engineer's report prepared by a registered engineer certified by the State of California" (Cal. Const., art. 13D, § 4(b)) is so that the assessment report will not be a simplistic creative writing paper, but will contain an apportionment of special benefits calculated with an engineer's precision. That was not done here.

The *West Point Fire* decision is an honest and accurate application of the voters' amendment of their constitution through Proposition 218. This Court should ignore Petitioner's subtle suggestion that it give extra deference to the government in the interpretation of the people's initiative because this is "a time of extraordinary budget pressures on local government." Pet. at 1. To do so would violate the judicial oath of office. Besides, this is also a time of extraordinary budget pressure on taxpayers.

It would be equally improper for the Court to consider Petitioner's frequent reminder that this assessment was "modest" in its amount. That doesn't make it legal.

Finally, it is irrelevant that the assessment was "overwhelmingly approved" (Pet. at 2), except that it shows a strong likelihood that if a special tax were proposed, it would pass.

For these reasons, the petition for review should be denied.

Sincerely,

Timothy A. Bittle
Director of Legal Affairs

PROOF OF SERVICE

CALIFORNIA SUPREME COURT

CASE NAME: *Concerned Citizens v. West Point Fire District*

CASE NUMBER: C061110

I, Cindy Perez, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is 921 11th Street, Suite 1201, Sacramento, California 95814. I am readily familiar with my employer's business practice for collection and processing of correspondence for FedEx, UPS, U.S. Mail, Fax Transmission and/or Personal Service.

On August 31, 2011 I caused the following documents to be served:

OPPOSITION TO THE PETITION FOR REVIEW

on the parties listed as follows:

__x___ by placing a true copy thereof enclosed in a prepaid envelope and depositing in the US Postal Service mailbox for delivery..

Robert K Reeve
1919 Vista Del Lago Drive, #2
Valley Springs, CA 95252

Stephanie J. Finelli
1007 Seventh Street, Suite 500
Sacramento, CA 95814

Stephen Norvell Roberts
Nossaman LLP
50 California Street, 34th Fl
San Francisco, CA 94111-4799

Richard P. Shanahan
Bartkiewicz Kronick & Shanahan
1011 22nd Street, #100
Sacramento, CA 95816

Jack D. Cohen
P.O. Box 6273
Beverly Hills, CA 90212

John A. Lambeth
Civitas Advisors, Inc
7700 College Town Drive, Suite 111
Sacramento, CA 95826

Michael G. Colantuono
Colantuono & Levine, PC
11364 Pleasant Valley Road
Penn Valley, CA 95946

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

Executed on August 31, 2011 at Sacramento, California.

Cindy C. Perez