

S 195152

**BARTKIEWICZ, KRONICK & SHANAHAN**

PAUL M. BARTKIEWICZ  
STEPHEN A. KRONICK  
RICHARD P. SHANAHAN  
ALAN B. LILLY  
RYAN S. BEZERRA  
JOSHUA M. HOROWITZ

A PROFESSIONAL CORPORATION  
1011 TWENTY-SECOND STREET  
SACRAMENTO, CALIFORNIA 95816-4907  
(916) 446-4254  
FAX (916) 446-4018  
E-MAIL bks@bkslawfirm.com

JAMES M. BOYD, JR., Of Counsel

July 27, 2011

SUPREME COURT  
FILED

JUL 28 2011

Frederick K. Ehrlich Glark  
Deputy

The Honorable Chief Justice Tani Cantil-Sakauye and  
Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

Re: *Concerned Citizens for Responsible Government v. West Point Fire Protection District*  
(Third Appellate District No. C061110) -- Request for Decertification from Publication

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I am general counsel of the Mosquito and Vector Control Association of California ("Association"). I write concerning the recent appellate opinion in *Concerned Citizens for Responsible Government v. West Point Fire Protection District* (Third Appellate District No. C061110; 2011 DJDAR 9715; 196 Cal.App.4th 1427), which was certified for publication.

In this opinion, a panel of the Third Appellate District found that an engineer's report commissioned by a rural fire protection district failed to adequately support a benefit assessment levied to fund fire suppression services. In reaching this conclusion, the panel made broad statements calling into question the appropriateness of benefit assessments as a funding source for property-related services. In the Association's opinion, these statements were unnecessary for resolving the case before the appellate panel; do not correctly reflect the constitutional provisions governing benefit assessments; and are irreconcilable with *Dahms v. Downtown Pomona Property & Business Improvement District* (2009) 174 Cal.App.4th 708, a decision that upheld an assessment for property-related services.

The Association and its member districts are concerned about this case as legal precedent and they have asked me to send this letter, pursuant to California Rules of Court, Rule 8.1125, to request an order that the opinion not be published. Note that we do not argue that the case was wrongly decided.<sup>1</sup> Rather, we are concerned that certain language in the opinion is overbroad and incorrect and, if published, would provide misguided precedent for future cases.

<sup>1</sup> We have not reviewed the assessment engineer's report that was at issue in *Concerned Citizens*. Frankly, from the Court of Appeal's analysis in Part V (Proportionality) of its opinion, it appears that the Court of Appeal may have

COPY

## **Mosquito and Vector Control Background**

The Association is a nonprofit corporation that represents the interests of 66 mosquito and vector control districts and agencies throughout the state. These member agencies provide vital services to respond to and prevent infestations of mosquitoes and other disease-carrying vectors.

Most mosquito and vector control districts are organized under the Mosquito Abatement and Vector Control District Law (Health & Saf. Code, § 2000 et seq.) (“Law”). The Law authorizes districts to levy special benefit assessments to finance vector control projects and programs. (Health & Saf. Code, §§ 2082-2085.) For decades, districts have been levying these benefit assessments to fund successful and vital programs. Districts typically use assessment revenues to fund the costs of responding to property owner requests for abatement services, the costs of surveying for vectors in order to prevent infestations on parcels, and the costs of providing services that help property-owners maintain their parcels in a healthful state that is free from the dangerous nuisance of infestation.

Any assessments imposed or extended since Article XIII D was added to the Constitution in 1996 by the adoption of Proposition 218 have been approved by affected property-owners in mail ballot proceedings. In developing assessments that comply with Proposition 218, vector control districts hire registered professional engineers to prepare detailed reports that among other things, (i) determine and identify the special benefits to property, (ii) determine the proportionate special benefit derived by each benefiting parcel, and (iii) identify and separate general benefits. (See Cal. Const., art. XIII D, § 4). To ensure that property owners are assessed only for the special benefits to their parcels from vector infestation response and protection, general benefits are not assessed and the costs of these general benefits are borne by the public.

### **Association Concerns About *Concerned Citizens v. West Point Fire Protection District***

*Concerned Citizens* involves a challenge to an assessment adopted by a fire protection district. The fire district approved an engineer’s report that was attacked by plaintiffs under Proposition 218. The Court of Appeal concluded that the assessment, as described in the engineer’s report, was not in compliance with the special benefit and proportionality requirements of Proposition 218.

Section IV of the opinion is entitled “The Assessment Confers Only General Benefits.” It is this section of the opinion that concerns the Association and its members. In this section, the Court of Appeal included the following language:

Fire suppression, like bus transportation or police protection, is a classic example of a service that confers general benefits on the community as a whole. A fire

---

reached the right conclusion. However, in getting there, it made some unnecessarily broad and, we believe, incorrect statements concerning the use of assessments to fund operation, maintenance and services.

endangers everyone in the region. No one knows where or when a fire will break out or the extent of damage it may cause. Fire protection is a service supported by taxpayer dollars for the benefit of all those who reside in the entity's jurisdiction and those unlucky members of the public who may need it while temporarily within its borders. Such protection cannot be quantifiably pegged to a particular property, nor can one reasonably calculate the proportionate "special benefits" accruing to any given parcel. As the Legislative Analyst pointed out in the ballot materials that accompanied Proposition 218, "[t]ypical assessments that provide *general* benefits' [are] '*fire, park, ambulance, and mosquito control assessments.*'" Thus, the assessment generates only general benefits. (Slip Opinion, at p. 9, citations omitted.)

The court then gives examples of certain assessments that have been considered in past cases involving public improvement projects, such as utility under-grounding assessments and street widening assessments. Based on these examples, and on language from cases *that predate Proposition 218's creation of the concept of "general benefit,"* the court concludes:

These levies go toward paying for specific tangible benefits of which each parcel partakes, and which can be apportioned in relationship to the total cost of the improvement. By contrast, fire protection, as well as public park maintenance and library upkeep, are supported by ad valorem property taxes, which "are deemed to benefit all property owners within the taxing district, whether or not they make use of or enjoy any direct benefit from such expenditures and improvements."

By earmarking the proposed funds to pay only for additional fire suppression services, the District has, in effect, created a special tax. Special taxes are "taxes which are levied for a specific purpose rather than ... a levy placed in the general fund to be utilized for general governmental purposes." (Slip Opinion, at p. 10, citations omitted.)

The Association is concerned about the three above-quoted paragraphs because they strongly imply that property-related services are incapable of creating assessable special benefits and that fire suppression, vector control, or similar on-call services cannot be "quantifiably pegged" to a parcel unless that parcel has the misfortune to suffer a fire, infestation, or other calamity.

This interpretation flies in the face of real world experience. Structural fire suppression, mosquito abatement and vector control services are intimately related to real property. The threat of a fire is that it will destroy improvements to property. The threat of infestation is that it will render property unsafe, unhealthful, and unusable. These services protect parcels because they are available on-call, they are preventative, and they directly serve the landowner and its use of property. A parcel benefits when a fire or infestation is fought on the parcel. But the parcel also benefits when preventative efforts or responses to nearby parcels prevent the fire or infestation from ever reaching the assessed parcel.

The fact that fire suppression, mosquito abatement and vector control could be funded through property taxes does not necessarily mean that they cannot be funded by assessments against benefiting parcels. Similarly, the fact that fire suppression, mosquito abatement, and vector control usually generate some general benefits to the public-at-large or to property generally does not preclude that these services also can generate some quantity of assessable special benefits.

Proposition 218 itself contemplates and allows that it is possible to levy assessments to fund property-related services:

- Article XIII D, section 4(a) provides that special benefit to a parcel “shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, *or the cost of the property related service being provided.*” (Emphasis added.) “Property-related service” is defined as “a public service having a direct relationship to property ownership.” (Cal. Const., art. XIII D, § 1(h)).
- Proposition 218 contains a “grandfather” clause, Article XIII D, section 5, which refers to vector control. Section 5 authorizes the ongoing levy and collection of certain described pre-Proposition 218 assessments, including “Any assessment imposed exclusively to finance the capital costs *or maintenance and operation expenses* for sidewalks, streets, sewers, water, flood control, and drainage systems or *vector control*. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.” (Emphasis added.) Contrary to the views of the Third Appellate District in *Concerned Citizens*, the Constitution recognizes the propriety of assessments for vector control and even expressly allows for increases of such assessments. Certainly, new vector control assessments (in compliance with Article XIII D, section 4) likewise are permissible.

The Analysis by the Legislative Analyst in the Proposition 218 ballot pamphlet, which is cited in the *Concerned Citizens* opinion, also supports that assessments for property-related services are possible. We have attached the full Analysis from the ballot pamphlet. The provision cited in the opinion is under the heading of “Assessments, Current Practice.” If one continues reading the next part of the Analysis (“Assessments, Proposed Requirements for Assessments”), which is not mentioned by the Court of Appeal, the Legislative Analyst explains Proposition 218’s assessment requirements. The explanation includes the following from a list of conditions that would need to be satisfied for a new or increased assessment: “First, local governments must estimate the amount of ‘special benefit’ landowners receive – or would receive – from a project *or service*. ... Second, local governments must ensure that no property owner’s assessment is greater than the cost to provide the improvement *or service* to the owner’s property.” (Ballot Pamphlet pp. 73-74; emphasis added.) A full reading of the Legislative Analyst Analysis and the express references to services show that the Legislative Analyst concluded (and disclosed to the voters) that Proposition 218 would allow assessments for

services if the services provide special benefit to land and the assessing agency complies with the conditions of Proposition 218.

If *Concerned Citizens* is published, it also will conflict with the *Dahms v. Downtown Pomona Property & Business Improvement District* (2009) 174 Cal.App.4th 708. In that case, the appellate court upheld an assessment for security patrols, district marketing and similar services in a business improvement district. *Dahms* permitted the costs of these property-related services to be assessed to benefiting properties. The language of *Concerned Citizens* suggests that none of these costs should have been assessable. *Concerned Citizens* does not cite, let alone distinguish, the decision in *Dahms*.


The language in section IV of *Concerned Citizens* is inconsistent with these authorities. It calls into question the legality under Article XIII D of local government assessments to fund services such as fire protection and vector control. The opinion misreads the law and misleads the reader to conclude that assessments for local government services are impermissible. The opinion already is causing some vector control districts to question their authority to levy assessments for vector control programs. Opponents of vector control assessments likely will rely on this opinion to argue that they are unlawful. This erroneous statement of the law should not be allowed to stand.

### Conclusion

For these reasons, the Association respectfully urges the Supreme Court to decertify the Third Appellate District opinion from publication. Thank you for your consideration of our request.

Sincerely,

BARTKIEWICZ, KRONICK & SHANAHAN  
A Professional Corporation

By:   
RICHARD P. SHANAHAN  
General Counsel, Mosquito and Vector Control  
Association of California  
State Bar No. 109416



**Voter Approval for Local Government Taxes.  
Limitations on Fees, Assessments, and Charges.  
Initiative Constitutional Amendment.**

---

**Official Title and Summary Prepared by the Attorney General**

**VOTER APPROVAL FOR LOCAL GOVERNMENT TAXES.  
LIMITATIONS ON FEES, ASSESSMENTS, AND CHARGES.  
INITIATIVE CONSTITUTIONAL AMENDMENT.**

- Limits authority of local governments to impose taxes and property-related assessments, fees, and charges. Requires majority of voters approve increases in general taxes and reiterates that two-thirds must approve special tax.
- Assessments, fees, and charges must be submitted to property owners for approval or rejection, after notice and public hearing.
- Assessments are limited to the special benefit conferred.
- Fees and charges are limited to the cost of providing the service and may not be imposed for general governmental services available to the public.

**Summary of Legislative Analyst's  
Estimate of Net State and Local Government Fiscal Impact:**

- Short-term local government revenue losses of more than \$100 million annually.
  - Long-term local government revenue losses of potentially hundreds of millions of dollars annually.
  - Local government revenue losses generally would result in comparable reductions in spending for local public services.
-

## Analysis by the Legislative Analyst

### OVERVIEW

Local governments provide many services to people and businesses in their communities. To pay for these services, local governments raise revenues by imposing fees, assessments, and taxes. This constitutional measure would make it more difficult for local governments to raise these revenues. As a result, this measure would:

- Reduce the amount of fees, assessments, and taxes that individuals and businesses pay.
- Decrease spending for local public services.

### PROPOSAL

This measure would constrain local governments' ability to impose fees, assessments, and taxes. The measure would apply to all cities, counties, special districts, redevelopment agencies, and school districts in California.

#### Fees

**Current Practice.** Local governments charge fees to pay for many services to their residents. Some of these fees pay for services to property, such as garbage collection and sewer service. Fees are also called "charges."

Local governments often establish several fee amounts for a service, each based on the approximate cost of providing the service to different types of properties (such as commercial, industrial, or residential property). Local governments usually send monthly bills to property owners to collect these fees, although some fees are placed on the property tax bill. Local governments generally hold public hearings before creating or increasing such a fee, but do not hold elections on fees.

**Proposed Requirements for Property-Related Fees.** This measure would restrict local governments' ability to charge "property-related" fees. (Fees for water, sewer, and refuse collection service probably meet the measure's definition of a property-related fee. Gas and electric fees and fees charged to land developers are specifically exempted.)

Specifically, the measure states that *all* local property-related fees must comply by July 1, 1997, with the following restrictions:

- No property owner's fee may be more than the cost to provide service to that property owner's land.
- No fee may be charged for fire, police, ambulance, library service, or any other service widely available to the public.
- No fee revenue may be used for any purpose other than providing the property-related service:
- Fees may only be charged for services immediately available to property owners.

In addition, the measure specifies that before adopting a *new* property-related fee (or increasing an *existing* one), local governments must: mail information about the fee to every property owner, reject the fee if a majority of the property owners protest in writing, and hold an election on the fee (unless it is for water, sewer, or refuse collection service).

Taken together, these fee restrictions would require local governments to reduce or eliminate some existing fees. Unless local governments increased taxes to replace these lost fee revenues, spending for local public services likely would be decreased. The measure's requirements would also expand local governments' administrative workload. For example, local governments would have to adjust many property-related fees, potentially (1) setting them on a block-by-block or parcel-by-parcel basis and (2) ending programs that allow low-income people to pay reduced property-related fees. Local governments would also have to mail information to every property owner and hold elections.

#### Assessments

**Current Practice.** Local governments charge assessments to pay for projects and services that benefit specific properties. For example, home owners may pay assessments for sidewalks, streets, lighting, or recreation programs in their neighborhood. Assessments are also called "benefit assessments," "special assessments," "maintenance assessments," and similar terms. Local governments typically place assessment charges on the property tax bill.

To create an assessment, state laws require local governments to determine which properties would benefit from a project or service, notify the owners, and set assessment amounts based on the approximate benefit property owners would receive. Often, the rest of the community or region also receives some general benefit from the project or service, but does not pay a share of cost. Typical assessments that provide general benefits include fire, park, ambulance, and mosquito control assessments. State laws generally require local governments to reject a proposed assessment if more than 50 percent of the property owners protest in writing.

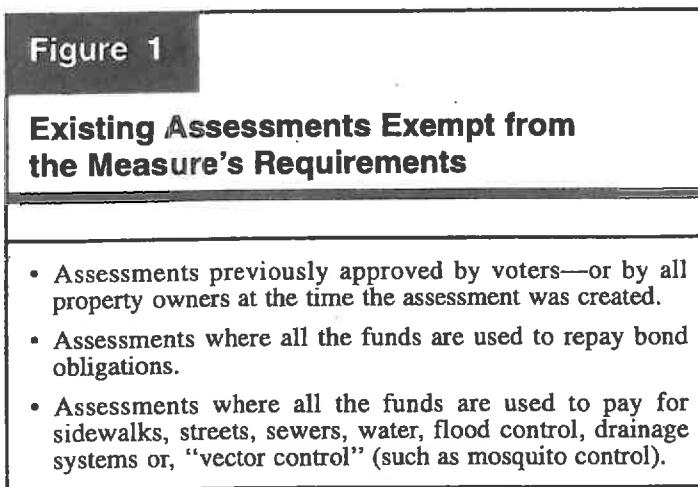
Some local governments also levy "standby charges," which are similar to assessments. Standby charges commonly finance water and sewer service expansions to new households and businesses. (The measure treats standby charges as assessments.)

**Proposed Requirements for Assessments.** This measure would place extensive requirements on local governments charging assessments. Specifically, the measure requires all *new* or *increased* assessments—and some *existing* assessments—to meet four conditions.

- First, local governments must estimate the amount of "special benefit" landowners receive—or would receive—from a project or service. Special benefit is defined as a particular benefit to land and buildings, not a general benefit to the public at large or a general increase in property values. If a project provides both special benefits *and* general benefits, a local government may charge landowners only for the cost of providing the special benefit. Local government must use general revenues (such as taxes) to pay the remaining portion of the project or service's cost. In some cases, local government may not have sufficient revenues to pay this cost, or may choose not to pay it. In these cases, a project or service would not be provided.

- Second, local governments must ensure that no property owner's assessment is greater than the cost to provide the improvement or service to the owner's property. This provision would require local governments to examine assessment amounts in detail, potentially setting them on a parcel-by-parcel or block-by-block basis.
- Third, local governments must charge schools and other public agencies their share of assessments. Currently, public agencies generally do not pay assessments.
- Finally, local governments must hold a mail-in election for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to vote. Ballots cast in these elections would be weighted based on the amount of the assessment the property owner or renter would pay. For example, if a business owner would pay twice as much assessment as a homeowner, the business owner's vote would "count" twice as much as the homeowner's vote.

Figure 1 summarizes the existing assessments that would be exempt from the measure's requirements. We estimate that more than half of all existing assessments would qualify for an exemption. All other existing assessments must meet the measure's requirements—including the voter approval requirement—by July 1, 1997.



### Taxes

**Current Practice.** Local governments typically use taxes to pay for general government programs, such as police and fire services. Taxes are "general" if their revenues can be used to pay for many government programs, rather than being reserved for specific programs. Proposition 62—a statutory measure approved by the voters in 1986—requires new local general taxes to be approved by a majority vote of the people. Currently, there are lawsuits pending as to whether this provision applies to cities that have adopted a local charter, such as Los Angeles, Long Beach, Sacramento, San Jose, and many others.

**Proposed Requirements for Taxes.** The measure states that all *future* local general taxes, including those in cities with charters, must be approved by a majority vote of the people. The measure also requires *existing* local general taxes established after December 31, 1994, without a vote of the people to be placed before the voters within two years.

### Other Provisions

**Burden of Proof.** Currently, the courts allow local governments significant flexibility in determining fee and assessment amounts. In lawsuits challenging property fees and assessments, the taxpayer generally has the "burden of proof" to show that they are not legal. This measure shifts the burden of proof in these lawsuits to local government. As a result, it would be easier for taxpayers to win lawsuits, resulting in reduced or repealed fees and assessments.

**Initiative Powers.** The measure states that Californians have the power to repeal or reduce any local tax, assessment, or fee through the initiative process. This provision broadens the existing initiative powers available under the State Constitution and local charters.

### FISCAL IMPACT

#### Revenue Reductions

**Existing Revenues.** By July 1, 1997, local governments would be required to reduce or repeal existing property-related fees and assessments that do not meet the measure's restrictions on (1) fee and assessment amounts or (2) the use of these revenues. The most likely fees and assessments affected by these provisions would be those for: park and recreation programs, fire protection, lighting, ambulance, business improvement programs, library, and water service. Statewide, local government revenue reductions probably would exceed \$100 million annually. The actual level of revenue reduction would depend in large part on how the courts interpret various provisions of the measure. In addition, because local governments vary significantly in their reliance upon fees and assessments, the measure's impact on individual communities would differ greatly.

Within two years, local governments also would be required to hold elections on some recently imposed taxes and existing assessments. The total amount of these taxes and assessments is unknown, but probably exceeds \$100 million statewide. If voters do not approve these existing taxes and assessments, local governments would lose *additional* existing revenues.

**New Revenues.** The measure's restrictions and voter-approval requirements would constrain new and increased fees, assessments, and taxes. As a result, local government revenues in the future would be lower than they would be otherwise. The extent of these revenue reductions would depend on court interpretation of the measure's provisions and local government actions to replace lost revenues.



**Summary of Revenue Reductions.** In the short term, local government revenues probably would be reduced by more than \$100 million annually. Over time, local government revenues would be significantly lower than they would otherwise be, potentially by hundreds of millions of dollars annually. Individual and business payments to local government would decline by the same amount. In general, these local government revenue losses would result in comparable reductions in spending for local public services.

**Cost Increases**

Local governments would have significantly increased costs to hold elections, calculate fees and assessments,

notify the public, and defend their fees and assessments in court. These local increased costs are unknown, but could exceed \$10 million initially, and lesser amounts annually after that.

School and community college districts, state agencies, cities, counties, and other public agencies would have increased costs to pay their share of assessments. The amount of this cost is not known, but could total over \$10 million initially, and increasing amounts in the future.

---

**For text of Proposition 218 see page 108**

---

1 **PROOF OF SERVICE BY FIRST CLASS U.S. MAIL**

2 I, Terry M. Olson, declare:

3 I am over the age of eighteen and not a party to this action and work in Sacramento County  
4 at 1011 Twenty-Second Street, Sacramento, California 95816. On July 27, 2011, following  
5 ordinary business practices, I placed for collection and mailing via First Class U.S. Mail with the  
6 United States Postal Service, Sacramento, California 95816, **Request for Decertification from**  
7 **Publication Concerning *Concerned Citizens for Responsible Government v. West Point Fire***  
8 **Protection District (Third Appellate District No. C061110)** in a sealed envelope, with postage  
fully prepaid, addressed to:

9 Clerk of the Court  
10 California Third District Court of Appeal  
11 621 Capitol Mall, 10<sup>th</sup> Floor  
Sacramento, CA 95814

Robert K. Reeve  
Attorney at Law  
1919 Vista Del Lago Drive, #2  
Valley Springs, CA 95252

12 Stephanie J. Finelli  
13 Attorney at Law  
14 1007 Seventh Street, Suite 500  
Sacramento, CA 95814

15 Stephen Norvell Roberts  
16 Nossaman LLP  
17 50 California Street, 34<sup>th</sup> Fl.  
San Francisco, CA 94111-4799

18 I am readily familiar with the business' practice for collection and processing of  
19 correspondence for mailing with the United States Postal Service and, in the ordinary course of  
20 business, the correspondence would be deposited with the United States Postal Service on the day  
21 on which it is collected at the business.

22 I declare under penalty of perjury that the foregoing is true and correct.

23 Dated: July 27, 2011



24 Terry M. Olson

25

26