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

From a Decision of the Court of Appeal,
Third Appellate District (No. C061110)
Reversing a Judgment of the Superior Court of Calaveras County,
Judge John E. Griffin, Jr.
(No. CV 33828)

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CALIFORNIA FIRE DISTRICTS ASSOCIATION, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES AND MOSQUITO & VECTOR CONTROL ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENTS

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TO THE HONORABLE CHIEF JUSTICE:

Pursuant to rule 8.520, subd. (f) of the California Rules of Court, the California Fire Districts Association, California Special Districts Association, California State Association of Counties, League of California Cities and the Mosquito & Vector Control Association of California (collectively, "Amici" or "Applicants") respectfully request permission to file an amicus curiae brief in this case.

Each applicant is an organization that represents public agencies that have a substantial interest in this case because they all are bound by the provisions of Proposition 218, Articles XIII C and XIII D of the California Constitution. Further, their member agencies rely on assessment revenues subject to that measure to fund essential services to their customers –all residents and property owners in our State. The Court of Appeal decision in this case would have interpreted Proposition 218, added to our Constitution by voters in 1996, to bar assessment funding of government services (as opposed to capital facilities). It would have thus undermined; without support in the text, context, or legislative history of Proposition 218; revenues important to Amici and the public they serve. Amici believe they can aid the Court's review of this case by providing a broader legal framework for consideration of this issue than do the parties' briefs.

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

Applicants' counsel has examined the briefs on file in this case and is familiar with the issues involved and the scope of the presentations. Applicants respectfully submit a need exists for additional briefing regarding the continuing validity of service assessments after Proposition 218, as well as its requirements that assessments be justified by special benefit to property and that assessment amounts be established in proportion to that special benefit.

Therefore, and as further amplified in the Introduction and Interest of Amici portion of the attached brief, Applicants respectfully request leave to file the amicus curiae brief that is combined with this application.

Pursuant to California Rules of Court, Rule 8.520, subd. (f), Amici hereby disclose that no person other than Amici and their counsel authored or made any monetary contribution to fund the preparation or submission of this brief.

DATED: February 7, 2012 Respectfully submitted,

COLANTUONO & LEVIN, PC

By:_____
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BRIEF OF AMICUS CURIAE

I. INTRODUCTION AND INTEREST OF AMICI

This case presents two issues of interest to Amici and the public they serve: (i) do the special benefit and other requirements of Article XIII D, § 4 of the California Constitution prevent the use of assessment financing to fund government services, as opposed to the cost to provide capital facilities? and, (ii) what must be shown to demonstrate compliance with the requirement of Article XIII D, § 4, subd. (a) that "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel"?

This brief argues, first, that Proposition 218 foresaw, protected, and permits assessment funding of government services that provide special benefit to property and, second, that the proportionality requirement of Article XIII D, § 4, subd. (a) must be given a practical construction that permits the use of assessment financing and does not make the administration of that financing needlessly costly.

The California Fire Districts Association (CFDA) is a non-profit organization established to provide its members districts with programs, services, and education to help them and their personnel and representatives be more successful and effective in service to their communities. CFDA represents and advocates for its members in the Legislature and the courts.

The California Special Districts Association (CSDA) is a non-profit corporation representing over 900 special districts in California which provide a wide variety of public services to both suburban and rural

communities including water distribution and treatment, fire suppression, park and recreation, sewage collection and treatment, security and police protection. CSDA has determined that this case involves significant issues affecting all of its member districts.

The California State Association of Counties (CSAC) is a non-profit corporation and its membership consists of all 58 California counties. CSAC sponsors a Litigation Coordination Program administered by the County Counsels' Association of California and overseen by that Association's Litigation Overview Committee, comprised of county counsels from throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case affects all counties.

The League of California Cities (LCC) is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or national significance. The Committee has identified this case as being of such significance.

The Mosquito & Vector Control Association of California 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.

Amici have a common interest in this case in that the continued availability of assessment financing of government services under the requirements of Proposition 218 vitally affects their members' ability to serve their residents, property owners, and business customers who collectively represent all Californians. Were this Court to adopt the reasoning of the Court of Appeal or establish too high or impractical a standard of substantial benefit and proportionality under Article XIII D, § 4, sub. (a), it would jeopardize the revenues of many of Amici's members and impair their ability to deliver to millions of Californians such vital public services as fire suppression, streets, public safety, utility, park and recreation, and vector control services.

II. ISSUES PRESENTED – FACTUAL AND PROCEDURAL HISTORY – STANDARD OF REVIEW

Amici adopt the Issues Presented, Statement of Factual and Procedural Background and Standard of Review set forth by the West Point Fire Protection District ("the District") in its Opening Brief.

III. ARGUMENT

A. Government Services Frequently Provide Special Benefit Sufficient to Justify Assessment Funding

California law authorizes the use of assessment financing in a wide variety of contexts, by a range of government entities, and for many purposes. Thus the continued availability after Proposition 218 of assessment funding of services controls the constitutionality of many statutes authorizing service assessments, such as:

- the Fire Suppression Assessments statute in issue (Gov't Code §§ 50078 et seq.) (authorizing assessments "for fire suppression services"),
- the Benefit Assessment Act of 1982 (Gov't Code §§ 54703 – 54720) (authorizing assessments for drainage, flood control, street lighting and street maintenance services),
- the Landscaping and Lighting Act of 1972 (Streets & Highways Code sections 22500 – 22679) (authorizing assessments for street lighting and landscape maintenance services, including such services in parks and other recreation facilities),
- the Business Improvement District Law of 1994 (Streets & Highways Code §§ 36600 – 36671) (authorizing assessment funding of services to business districts, such as supplemental police and sanitation services),

- statutes authorizing assessment funding of services to control mosquitos and other vectors which transmit human disease (e.g., Health & Safety Code §§ 2082-2083), and
- statutes authorizing funding of services to control agricultural vectors (e.g., Food & Ag. Code § 8605, authorizing special assessments on citrus groves to fund vector abatement services).

Many other statutes authorizing assessment funding of a variety of services could be cited, but this list is sufficient to make the point. This case controls the vitality of many statutes not in issue here and, should this Court determine that the assessment in question does not meet the demands of Proposition 218, a narrow decision is needed to avoid creating unnecessary uncertainty as to the impact of Proposition 218 on local governments large and small, general and special, urban and rural. Rather than cut a swath through the law of government finance on the facts of one – perhaps outlying – case, this Court ought to allow case-by-case development of these issues so a very substantial loss of revenue authority occurs, if at all, only after well-considered judicial decision-making informed by fuller participation than by merely the parties to this dispute.

B. Proposition 218 Specifically Authorizes Assessments to Fund Services that Specially Benefit Property

i. Proposition 218's Text Allows Assessment Funding of Services

The text of Proposition 218 makes clear that the voters who approved it did not intend to disallow assessment funding of government services, provided that the assessing agency demonstrates special benefit to property and proportionality of assessment amounts to the special benefit conferred on each property (Article XIII D, § 4, subd. (a)). These provisions of the measure are in point:

- Article XIII D, section 2, subd. (d):

> "District" means 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**. (Emphasis added.)

- Article XIII D, section 2, subd. (h):

> "Property-related service" means a public **service** having a direct relationship to property ownership. (Emphasis added.)

- Article XIII D, section 4, subd. (a):

> [P]roportionate special benefit ... shall be determined in relationship to ... the maintenance and operation expenses of a public improvement **or the cost of the property related service** being provided. (Emphasis added.)

In addition, Proposition 218 "grandfathers" many existing assessments, including services assessments. Article XIII D, § 5. This is in studied contrast to the requirement of Article XIII D, § 6, subd. (d) that property related fees governed by Proposition 218 be brought into compliance with the measure's requirements by the beginning of the fiscal year following its adoption: "Beginning July 1, 1997, all fees or charges shall comply with this section."

As to assessments, Proposition 218 states (in § 5):

> Beginning July 1, 1997, all existing, new or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4: … .

Among these exceptions are several classes of what are plainly service assessments, rather than assessments for capital facilities:

> Any assessment imposed exclusively to finance the capital costs **or maintenance and operation expenses** for

sidewalks, streets, sewers, water, flood control, drainage systems or vector control. (Emphasis added.)

In addition to the express reference to maintenance and operation costs (characteristic of services), it is noteworthy that many of these services, such as vector (*e.g.*, mosquito) control, are provided without provision of much by way of capital facilities and are necessarily service assessments. It would make little sense for the voters who approved Proposition 218 to have protected pre-existing service assessments if new service assessments were categorically prohibited. Accordingly, this Court can conclude that the text of Proposition 218 protects rather than bars service assessments.

Further, Article XIII D, § 6, subd. (b)(5) governing property related fees, forbids fee funding of police, fire, ambulance or library services; but sections 4 and 5 of that article impose no similar restriction on assessment funding. Indeed, the prohibition on property related fees for these services is limited to circumstances "where the service is available to the public at large in substantially the same manner as to property owners." Thus, if a property related fee governed by Article XIII D, § 6 funds a different service or an enhanced level of service to property owners than to the general public, it is not prohibited by subd. (b)(5). Accordingly, fire districts commonly charge fees for services not provided to the general public, such as fees on developers to fund the cost to review their development plans for compliance with the California Fire Code. See Health & Safety Code § 17951, subd. (b) (authorizing such fees).

Two conclusions can be drawn from Article XIII D, § 6, subd. (b)(5). First, had the framers of Proposition 218 (and the voters who adopted their work) intended to prohibit service assessments, they could easily have provided an express prohibition, just as they did for fee funding of some services. Second, the special benefit requirement of Article XIII D, § 4 as to assessments can be read as paralleling the prohibition of fee funding of services **only** if those services are "available to the public at large in substantially the same manner as to property owners" – i.e., where there is no special benefit to property owners. Either reading suggests a conclusion barring all assessment funding of government services misreads our Constitution.

ii. The Legislative History of Proposition 218 Also Demonstrates the Voters Intended to Allow Assessment Funding of Services

The legislative history of Proposition 218 also demonstrates that the voters who adopted it understood that it would permit continued assessment funding of government services. The Legislative Analyst's Impartial Analysis of Proposition 218 demonstrates the point:

> First, local governments must estimate the amount of "special benefit" landowners receive – or would receive – from a project **or service**. … 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. Impartial Analysis of Proposition 218 at p. 73. (Bold emphases added.)
>
> Second, local governments must ensure that no property owner's assessment is great than the cost to provide the improvements **or service** to the owner's property. Id. at 74 (emphasis added).

The "yes" and "no" arguments are to similar effect:

> Proposition 218 does NOT prevent government from raising and spending money for vital **services like police, fire and education**. Argument in Favor of Proposition 218 at 76 (bold emphasis added).
>
> Every citizen should have the right to vote if a community is voting on **local assessments for police, fire, emergency medial and library programs**. It's unfair to give voting

> power to non-citizens, big landowners and developers, yet deny it to millions of Californians. Argument Against Proposition 218 at p. 77 (emphasis added).

Thus, the voters who approved Proposition 218 understood that it would continue to allow assessment funding of both services and capital facilities.

iii. The Proposition 218 Omnibus Implementation Act of 1997 Also Demonstrates the Continued Vitality of Service Assessments

This Court recently concluded in *Greene v. Marin County Flood Control & Water Cons. Dist.* (2010) 49 Cal.4th 277 that the Proposition 218 Omnibus Implementation Act of 1997, adopted without a dissenting vote in any committee or on the floor of either chamber of the Legislature and signed into law by then-Governor Pete Wilson with the support of both local government and taxpayer advocates, is good authority for the construction of Proposition 218. Accordingly, it is notable that this statute, too, demonstrates that assessment funding of government services – as opposed to capital facilities – is permitted.

Government Code § 53750, subd. (b) defines an "assessment" permitted by Proposition 218 as:

> "Assessment" means any levy or charge by an agency upon real property that is based upon the special benefit conferred

> upon the real property by a public improvement **or service**, that is imposed to pay the capital cost of the public improvement, the **maintenance and operation expenses** of the public improvement, **or the cost of the service being provided**. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "**maintenance** assessment," and "special assessment tax." (Emphasis added.)

Similarly, Government Code § 53750, subd. (c) provides:

> "District" means an area that is determined by an agency to contain all of the parcels that will receive a special benefit from a proposed public improvement **or service**." (Emphasis added.)

Finally, subdivision (*l*) of this same section defines "vector" for purposes of Article XIII D, § 5(a)'s language grandfathering such assessments. It makes clear that Proposition 218 permits such assessments – for services provided without much by way of capital facilities to protect the health of both people and crops:

> "Vector control" means any system of public improvements **or services** that is intended to provide for the surveillance, prevention, abatement, and control of vectors as defined in subdivision (k) of Section 2002 of the Health and Safety

Code and a pest as defined in Section 5006 of the Food and Agricultural Code. (Emphasis added.)

iv. Case Law Also Demonstrates that Proposition 218 Permits Service Assessments

Five recent cases construing the assessment provisions of Proposition 218 also demonstrate that service assessments may satisfy Proposition 218's special benefit and proportionality requirements. First is this Court's own decision in *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, which invalidated a regional open space assessment for failure to show special benefit and proportionality, but pursuant to reasoning that does not categorically bar assessments for similar services not requiring capital improvements:

> Here, with a district of 314,000 parcels, OSA [the Open Space Authority] shows no distinct benefits to particular properties above those which the general public using and enjoying the open space receives. The special benefits, if any, that may arise would likely result from factors such as proximity, expanded or improved access to the open space, or views of the open space. (See *Ensign, supra*, 59 Cal. App. at p. 217, 210 P. 536 [property which is specially benefited is "'real property adjoining, or near the locality of the

> improvement'"].) But, because OSA has not identified any specific open space acquisition or planned acquisition, it cannot show any specific benefits to assessed parcels through their direct relationship to the "locality of the improvement." The improvement is only to OSA's budget for open space acquisitions.

Id. at 455-56.

To similar effect is the Court of Appeal's 2009 decision upholding a business improvement district assessment to fund supplemental municipal services. *Dahms v. Downtown Pomona Property & Business Improvement District* (2009) 174 Cal.App.4th 708, *review denied*. There, referring to the respondent agency as "the PBID," the Court of Appeal upheld the assessment against challenges identical to those in the case at bar, and concluded:

> As we have already explained, the services provided by the PBID (security services, streetscape maintenance, and marketing, promotion, and special events) are all special benefits conferred on the parcels within the PBID—they "affect the assessed property in a way that is particular and distinct from [their] effect on other parcels and that real property in general and the public at large do not share." (*SVTA, supra*, 44 Cal.4th at p. 452, 79 Cal.Rptr.3d 312, 187 P.3d 37.) Under article XIII D, therefore, the cap on the assessment for each parcel is the reasonable cost of the

> proportional special benefit conferred on that parcel. If the special benefits themselves produce certain general benefits, the value of those general benefits need not be deducted before the (caps on the) assessments are calculated.

Id. at 723 (parentheticals by *Dahms* court). These conclusions – that supplemental security, streetscape maintenance, marketing, promotion and special event services specially benefit property in a business district and assessments may be apportioned according to the cost of providing these services, without respect to the cost of generating general benefits are further demonstration of Amici's point. Proposition 218 has not been understood to bar any and all service assessments, but to permit them provided they confer special benefit on property and assessment amounts are proportionate to that benefit.

Also helpful is *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, *review denied*, which invalidated an assessment under the Landscaping & Lighting Act of 1972 for failure to demonstrate special benefit and proportionality, but upon reasoning which permits park and recreation service assessments when supported by an adequate engineer's report. Thus, *Beutz* concluded that the challenged program of park improvements, maintenance and park and recreation services **did** confer special benefit on property as demonstrated by the engineer's report there in issue:

> Notably, had the Report separated and quantified the general and special benefits of the [Park and Recreation] Master Plan

> based on solid, credible evidence and purported to base the assessment solely on the special benefits, the substantial evidence standard of review may have applied to the Report's implicit conclusions that all Wildomar properties would specially benefit from the parks in equal measure, and that the assessment on each parcel was proportional to and no greater than those special benefits. (See, e.g., *City and County of San Francisco v. Sainez, supra*, 77 Cal.App.4th at p. 1313, 92 Cal.Rptr.2d 418 [substantial evidence standard of review applies to factual findings underlying constitutional determinations].) The Report, however, fails to explain the nature and extent of the general and special benefits of the parks or quantify both in relation to each other based on credible, solid evidence.

Id. at 1534 (last parenthetical by *Beutz* court).

Even the early decision of *Howard Jarvis Taxpayers Ass'n v. City of Riverside* (1999) 73 Cal.App.4th 679 concluded that the cost to the City of electricity for street lighting (a service) was properly excluded from the requirement of Proposition 218 that assessments be submitted to property-owner balloting. The court relied on the grandfathering exception of Article XIII D, § 5, subd. (a) for "[a]ny assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for … streets …." Were services of this type necessarily excluded from assessment financing due to the special benefit requirement of Proposition

218, neither the grandfathering exception of Article XIII D, § 5, subd. (a) nor the *Riverside* decision would have been necessary.

The Court of Appeal's most recent assessment decision is helpful here, too. In *Golden Hill Neighborhood Ass'n v. City of San Diego* (2011) 199 Cal.App.4th 416, the court invalidated a maintenance assessment district formed under Lighting & Landscaping Act of 1972 to provide trash removal, sidewalk sweeping and washing, landscaping, graffiti abatement and trail and canyon beautification. The court did not do so because such services can never be funded by a Proposition 218-compliant assessment. Rather, it found the engineer's report had failed to disclose the basis on which it assigned special benefit from these services to the City's own properties, including almost 90 vacant parcels, a fire station, and transportation facilities. Thus, the basis for the assessments paid by the City – and the votes the City cast for the assessment on account of those payments pursuant to Article XIII D, § 4, subd. (e) – was not clearly stated in the record as required by Proposition 218 and the Proposition 218 Omnibus Implementation Act.

In addition, the court found the engineer's report failed to adequately distinguish general and special benefits. Specifically, the report argued that because the district's services would not be provided without the assessment and the services were provided only in the district, the services necessarily provided special benefit to property in the district. The court noted this begs the question – street lighting lights the way for the general public as well as property owners, passers-through as well as residents. Proposition 218 demands analysis of how much of the benefit of a public facility or service accrues to assessed properties and how much accrues to

others. In addition, the engineer's report noted that there were only "minimal" general benefits and these were outweighed by the City's contributions. The court found no exception to the duty to identify and quantify both general and special benefits for "minimal" benefits – all benefits must be identified and quantified.

Even so, the court refused to categorically find that service assessments fail to show special benefit, even though it cited the Third District's (now unpublished) decision in this case. Id. at 432 n. 14. *Golden Hill*'s reasoning undermines the Third District's rationale in this case and states a basis to sustain service assessments going forward. The court even provides "[a] hypothetical example of such apportionment" which apportions benefit for street lighting based on vehicle trips generated by assessed properties as a fraction of total vehicle trips. *Id*. at 438 n. 18. Thus, the *Golden Hill* decision demonstrates that street lighting – a service – can be funded by an assessment provided that the general and special benefits of that service are properly separated and quantified.

In short, all published cases involving assessments under Proposition 218 countenance the continued availability of assessment funding for municipal services, as well as for capital facilities to support the provision of those services.

C. The Presence of Some General Benefit Does Not Preclude the Presence of Special Benefit

The fact that the fire suppression services in issue here have some benefit to society at large – including non-property-owners such as tenants and visitors – does not mean that they have no special benefit.

First, while **all** government facilities or services must provide public benefits (lest they be gifts of public funds in violation of Article XVI, § 6), when special benefits can be identified, they may be separated from general public benefits and their costs imposed as assessments on the properties to which those special benefits accrue. That is why Proposition 218 requires an engineer to identify the special and general benefits accruing from a facility or service to be funded and to distinguish the two. See Article XIII D, § 4, subd. (a) ("Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel.") "As the *Beutz* court noted, "the courts of this state have long recognized[] that virtually all public improvement projects provide general benefits." (*Beutz, supra*, 184 Cal.App.4th at p. 1531, 109 Cal.Rptr.3d 851.)" *Golden Hill*, *supra*, 199 Cal.App.4th 439.

Whether or not the engineer's report in issue here persuasively demonstrates special benefit to property from the West Point Fire Protection District's services, it is plain that a sufficient engineer's report can do so. To cite but one example, a fire provider might impose an assessment to fund the purchase and operation of a ladder truck specially adapted to serve tall buildings. Such a ladder truck is of little benefit to owners of unimproved property and of property improved with low-rise structures. Yet, the benefit to high-rise property owners is substantial – without it, their land might be unsafe or uninsurable. Special benefit to these properties may be persuasively shown. Yet the tenants and visitors of such a high-rise property will benefit, too, so some general benefit must be accounted for even though the presence of special benefit is persuasively demonstrated.

Second, were the presence of general benefit sufficient to prevent assessment financing, there would be no point in requiring the separation of general from special benefit, as Article XIII D, § 4, sub. (a) expressly requires: "Only special benefits are assessable, and an agency shall separation the general benefits from the specific benefits conferred on a parcel." Indeed, much of the appellate courts' exegesis of this section discusses this very issue. E.g., *Beutz, supra*, 184 Cal.App.4th at 1531; *Golden Hill, supra*, 199 Cal.App.4th at 439.

Third, research reveals only two cases in which California courts have upheld an engineer's conclusion that a particular facility or service provides **no** general benefit. Each involved unusual and outlying facts. In *Saratoga v. Hinz* (2004) 115 Cal.App.4th1202 the court upheld a conclusion that no general benefit arose from improving a private "dead-end," cul-de-sac so it might be accepted in City's public street system. Obviously, any visitor or tenant would have no more access on a public street than a private street held open to the public. The benefit of the improvement is solely to property owners who shift their maintenance burden to the public fisc.[1] In

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[1] The court's discussion of general benefit is largely in the context of a challenge to the right to take in an eminent domain proceeding, since the court found that challenge to the assessment district was barred by the statue of limitations. Rejecting the argument that a finding of no general benefit precluded the finding of the requisite public necessity to take, the court said: "The fact that the municipality is required to distinguish between the special and general benefits to be derived from the project

Town of Tiburon v. Bonander (2009) 180 Cal.App.4th 1057, the Court of Appeal upheld a conclusion that no public benefit arose from undergrounding overhead utility lines to allow the benefitted properties better views of the San Francisco Bay and safer, more reliable service.

D. The Fire Suppression Benefit Assessment Act Complies with Proposition 218 by Limiting Assessment Funding to Services Which Specially Benefit Property

The statute which authorizes the assessment in issue here reflects Proposition 218's requirement that assessment funding be limited to services for which special benefit can be demonstrated. First, the statute authorizes assessment funding of fire suppression services alone. Other services commonly provided by fire departments, such as emergency medical services, cannot be funded by such an assessment. Government Code § 50078 authorizes "assessment for fire suppression services." Government Code § 50078.1, subd. (c) defines those services as follows:

> 'Fire suppression' includes firefighting and fire prevention including, but not limited to, vegetation removal or

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during the assessment process does not detract from the inherently public nature of the project. The fact that a particular improvement project does not confer any general benefit on the community at large does not make the project any less public." *Saratoga v. Hinz, supra,* 115 Cal. App. 4th at 1224.

management undertaken, in whole or in part for the reduction of a fire hazard.

The statute, adopted in 1981, predicts Proposition 218's requirement that assessments reflect and be proportionate to special benefits to property from the fire suppression services: "The assessment shall be related to the benefits to the property assessed." Gov't Code § 50078.2, subd. (a). Detailed rules are provided for the assessment of "land devoted primarily to … and being used for the commercial production of agricultural, timber or live stock products." *Id*., subd. (b). It also prohibits assessment "for wildland or watershed fire suppression on land located in a state responsibility area." *Id*.

The West Point Fire Protection District complied with these requirements of the statute and Proposition 218 by excluding from the fire suppression services funded by this assessment:

- services outside the District,
- emergency medical services,
- vehicle fires that involve no threat to real property.

Moreover, the bulk of the District's budget comes from property taxes and other non-assessment revenue sources – the assessment in issue here provides supplemental funding restricted to fire suppression services of benefit to assessed property.

E. That a Service Can Be Funded by Taxes does not Mean It Must Be

The Court of Appeal erred in this case by concluding that because services like fire protection are often funded by ad valorem property taxes, they must be funded only by such taxes. The Third District cited *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 554 for this proposition, but the cited language was rejected as erroneous dicta in *City of San Diego v. Holodnak* (1984) 157 Cal. App.3d 759, 763, which the Court of Appeal did not cite. The *Holodnak* court upheld an assessment to fund a fire station to serve the assessed properties:

> Similarly, the fire station will primarily benefit North City West properties. Notwithstanding dicta in *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 557, intimating fire stations cannot properly be financed by special assessment to avoid the requirements of article XIII A, section 4 [*i.e.*, Proposition 13's 1% limitation on ad valorem property taxes], fire stations do specially benefit the properties within their area of service and such special benefit exceeds the benefit the city at large gains by having additional fire stations within its limits. Therefore, fire stations can be financed by special assessment. (See Gov. Code, § 50078 et seq., specifically authorizing financing fire suppression services by special assessment.)

157 Cal. App. 3d at 763-64.

Moreover, what text or goal of Proposition 218 suggests that property owners may not choose to assess themselves to fund services of special benefit to them in a process they control rather than resort to taxes controlled by registered voters? Why ought they to be barred from requesting – and agreeing to pay for – a higher level of services that their local government could otherwise fund as was the case in *Dahms*?

Rather, whether and how to fund local government services are legislative decisions entrusted to local elected officials, subject to property owner or registered voter approval as required by our Constitution. Courts need not to evaluate these policy judgments, but must rather ensure compliance with the procedural requirements of our Constitution and statutes for the protection of those, as the plaintiffs here, who hold minority views.

F. Proposition 218's Proportionality Requirement Must Be Applied Reasonably

i. Use Of Assessed Valuation Alone to Apportion an Assessment Is Forbidden

Among the tools that a local government may not use in estimating a property's relative share of benefit from – and therefore the duty to fund –

an assessment is the assessed valuation of the property as determined by the County Assessor for purposes of the property tax. This follows because Proposition 13, Article XIII A, § 1, subd. (a) of our Constitution, limits the use of assessment valuation to the collection of the one percent property tax:

> The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

Article XIII A, § 1, subd. (b) states exceptions to this rule for certain additional property taxes, but none of them includes assessments of the type in issue here.

Article XIII A, § 4, another provision of Proposition 13, also prohibits local governments from imposing assessed valuation property taxes or sales or transactions taxes on real property:

> Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, **except ad valorem taxes on real property** or a transaction tax or sales tax on the sale of real property within such City, County or special district. (Emphasis added.)

Moreover, use of assessed valuation to determine a property's proportionate special benefit from a government facility or service might be irrational and will rarely relate to special benefit given the historic purchase assessment system required by Proposition 13. Under that system, two identical houses can have vastly different assessed valuations depending on the state of the housing market when each was purchased. *Compare Nordlinger v. Hahn* (1992) 505 U.S. 1 ("welcome, stranger" assessment formula of Proposition 13 does not lack the minimum rationality required by Equal Protection) *with Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.* (1989) 488 U.S. 336 ("welcome, stranger" assessment formula applied by West Virginia county to out-of-state landowner offended equal protection because formula not consistently applied).

ii. Assessments Collected Via the Tax Roll Are Limited by the Administrative Characteristics of that Roll

Assessments on property are collected on the property tax assessment roll along with property taxes. For example, the statute in issue here provides:

> The legislative body may provide for the collection of the assessment in the same manner, and subject to the same penalties as, other fees, charges, and taxes fixed and collected by, or on behalf of the local agency.

Gov't Code § 50078.16. Moreover, using information available developed by the county assessor and included on the tax rolls is an administratively convenient method to apportion special benefit. The factors used here to determine assessed properties' proportionate share of the cost of an assessment program are all factors for which the assessment roll provides reliable data. Other factors argued by appellants necessarily involve intrusive evaluations of such personal information as insurance and property maintenance decisions.

The reasons for this are plain. First, a rural fire district seeking to raise just $145,000 per year can hardly afford to create a whole new assessment collection system in lieu of the property tax roll. Second, the goal of Proposition 218 to protect property owners from bearing excessive financial burdens for government services would not be advanced by requiring it to do so. Third, even if such a system were both required and affordable, it could hardly be expected to be more sophisticated than that maintained by the County Assessor and Tax Collector.

Since the Domesday Book, it has been clear that the heart of any government revenue system is data about taxpayers and their economic activity. Collecting such data and updating it to reflect constant economic change is an arduous task and fraught with opportunities for disagreement and error. Hence, our sophisticated and often litigious system for assessing, levying, collecting and enforcing property and other taxes. The assessor's roll on which the West Point Fire Protection District and – indeed, all local governments which rely on tax rolls – must depend provides only limited data about property. These data typically include size, assessed value of

land, assessed value of improvements, zoning district, number of dwelling units, and square footage of non-residential improvements. Other, limited data can be obtained from public works providers and land use regulators, such as frontage lengths, access to maintained roads, and the like.

Accordingly, this District distinguished among assessed properties using a limited number of criteria:

- whether or not the property was developed (i.e., did the assessor's roll assign value to "improvements");
- whether or not the property had sufficient value to receive benefit from fire suppression services commensurate to the benefit derived from those services (i.e., whether the assessed value of property exceeded $5,000).
- Whether the property had a use such that fire suppression would be of limited benefit (i.e., excluding the cemetery based on its land use).

The assessment regimes in other reported cases are comparably simple, reflecting the data available on assessors' rolls:

- *City of San Diego v. Holodnak* (1984) 157 Cal.App.3d 759 (facilities benefit assessment based on number of dwelling units or "equivalent dwelling units" for non-residential uses);

- *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057 (utility underground assessment based on length of utilities to be undergrounded along property line);
- *Dahms v. Downtown Pomona Property & Business Improvement District* (2009) 174 Cal.App.4th 708 (assessment for supplemental municipal services based on street frontage, lot size, building size and land use);
- *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516 (park and recreation assessment based on number of dwelling units or "equivalent dwelling units" for non-residential uses)
- *Golden Hill Neighborhood Ass'n v. City of San Diego* (2011) 199 Cal.App.4th 416 (assessment for supplemental municipal services based on number of dwelling units or "equivalent dwelling units" for non-residential uses)

Other criteria rationally relate to the relative benefit various property owners might derive from fire suppression services. These include the value of a home's contents, the availability of private fire insurance, on-site fire suppression resources (like fire extinguishers, sprinklers, swimming pools, ponds, etc.), landscaping materials that promote or retard fires, etc. However, no affordable, reliable data are available to incorporate such criteria into an assessment formula. Thus, given that Proposition 218 is intended to permit assessment financing to continue, the task is not to conceive a perfect system for determining proportionality, but to require a

reasonable system which comes at a cost proportionate to the benefit to be obtained from using it.

An older assessment case provides another basis for use of relatively few, objective and stable criteria for apportioning assessments. *Howard Park Co. v. Los Angeles* (1953) 119 Cal.App.2d 515 upheld a sewer assessment, apportioned under the applicable statute according to the length of each property's frontage along which the sewer was to run. The owner of land in oil production argued it received no benefit from the sewer. The Court of Appeal noted that land use could easily change and upheld the assessment:

> We are constrained to hold that a special use to which property is put cannot be considered as affecting the amount of benefits, but that such amount is to be measured by the benefit which would be received by the property if devoted to any use which might reasonably be made of it. It would be inequitable and unfair to exempt particular property from an assessment when a special use is voluntarily made of it by the owner, and which he may change at any time so as to reap the benefits of an improvement that does not, at the time an assessment is made, benefit him because of a special use to which he has voluntarily put his property

Id. at 519 (1953).

Thus, assessments are apportioned in light of the benefit property is **able** to derive, and not the subjective value a given land owner might

believe he or she will derive. If a discount were given for properties with fire sprinklers, those sprinklers might not be maintained. If a discount were given for private insurance, it might be permitted to lapse. To ensure fairness to all, and to prevent free-rider problems which are at the heart of the special benefit and proportionality requirements of Proposition 218, assessment formulae must turn on criteria which are simple, stable, and objectively determinable. A legislative choice to use the data about properties available from county assessors and, to a limited extent, from land use and public works agencies, is both administratively practical and legally sound.

iii. Exclusion of Low-Value Properties from an Assessment is Permissible

The District's decision to exclude from assessment properties with assessed valuations of $5,000 or less is permissible. First, as the District notes, Proposition 218 itself requires that "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportionate specific benefit conferred on that parcel." Article XIII D, § 4, subd. (a). Thus, owners of small parcels of little value which derive little benefit from fire protection may be asked to pay only minor sums – sums which may be less than the cost to collect them. Similar concerns arise in the property tax setting, as our Constitution recognizes:

> The Legislature, two-thirds of the membership of each house concurring, may authorize county boards of supervisors to exempt real property having a full value so low that, if not exempt, the total taxes and applicable subventions on the property would amount to less than the cost of assessing and collecting them.

Article XIII, § 7.

iv. Cost Can Be, But is not Always, an Appropriate Tool in Apportioning an Assessment

As demonstrated above, Proposition 218 was not intended to end assessment funding of government services, as opposed to capital facilities. Accordingly, its proportionality requirement ought not to be given an impractical construction that has that same effect.

As always in a case of constitutional construction, it is best to start with the text of our Constitution. The relevant language is this:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified

> 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. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel.

Article XIII D, § 4, subd. (a).

> 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.

Article XIII D, § 4, subd. (f)

What can we glean from this text alone? First § 4, subd. (a) directs that that special benefit and general benefit from an improvement or property related service be identified, that the parcels receiving the

identified special benefit be identified, that special benefit be apportioned among the benefitted properties, and that the amount of the assessment be set so the "proportionate special benefit" is 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." Stated more simply, proportionate special benefit must relate to the whole cost of the facility or service to be funded. This is an exercise in apportioning the cost of a facility or service among its beneficiaries in proportion to their benefit. Accordingly, what things costs is an essential element of the analysis.

Second, §4, subd. (f) states "that the amount of any contested assessment [must be] proportional to, and no greater than, the benefits conferred on the property or properties in question." Thus, the cost to a property owner or all property owners (i.e., "the amount of any contested assessment") must be "proportionate to, and no great than, the benefits conferred on the property or properties in question." This compares a dollar amount – what an assessed property owner must pay – to something more subjective and not readily stated in dollar terms – the benefits conferred upon that property owner. To equate a number of dollars with a qualitative determination of benefit requires that determination of benefit to be monetized – i.e., to be converted from a qualitative to a quantitative determination. Thus, decisions, such as *Tiburon* and *Golden Hill*, which question the use of the cost to provide a service in determining the extent to

which properties are relatively benefited by it, overlook an analysis our Constitution demands.

Ours is, of course, a market economy. Markets monetize the utility of goods and services by establishing prices that reflect what it costs to produce a good or service and what buyers are willing to pay for it. Thus, for many government services, the special benefit to property of that service is the cost the property owner avoids by obtaining that service from government rather than privately, especially where if the service were provided solely at general governmental expense it would not be provided at all or provided at a far lower level of service, or where the cost of service varies greatly among benefited properties. And in some instances, given the diseconomies of small scale that characterize many services (a fire truck in each back yard would be hugely expensive and wasteful), that cost may be so high as to be meaningless. Why not look to the cost to government to provide that service, provided that cost is used as a measure of benefit and not as an end in itself? This Court properly observed in *Silicon Valley Taxpayers Association v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, that an assessing agency may not simply divide its desired budget across the parcels to be benefited and claim to have measured special benefit and apportioned an assessment to that benefit:

> However, the purpose of an assessment is to require the properties which have received a special benefit from a

> "public improvement" "to pay the cost of that improvement," and not to fund an agency's ongoing budget.

Id. at 457.

However, lower courts have misunderstood this observation. They have interpreted it to reflect a hard-and-fast rule that the cost to government to provide a service can never be relevant to the determination of the proportionate special benefit that an assessment-funded program confers on property.

In *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1080-81, the court wrote:

> As we explain, the assessment scheme suffers from two infirmities that result in assessments that are disproportionate to special benefits. **First, the Town's apportionment method is largely based on cost considerations rather than proportional special benefits.** Second, properties within the Supplemental District are required to pay for special benefits conferred upon parcels that were excluded from the Supplemental District. (Emphasis added.)

The second point was alone sufficient to invalidate the assessment there – assessments can hardly be proportionate to the special benefit conferred on property if some special benefit accrues to properties not charged. The first

point misleads – cost can and should be taken into account when evaluating the extent to which a service or facility benefits property.[2]

Similarly, *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, 1536 generally follows *Silicon Valley* in criticizing an engineer's report that seems motivated more by a desire to fund a budget than to analyze special benefit. However, it, too, includes language which led the Third District astray in this case:

> Like the undergrounding assessment in *Tiburon*, the assessment here at least appears to be based on the ongoing annual costs of refurbishing and maintaining the parks' landscaping, rather than on the special benefits the entire Master Plan will confer on Wildomar residential properties.

This Court's decision here can create context for lower courts in evaluating *Silicon Valley*, *Tiburon* and *Beutz* and make clear that while Proposition 218 forbids an agency to simply spread its budget among assessees, the cost of providing a service can be – and frequently is – relevant to determining

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[2] The cost of improvements to each property owner going it alone may be an appropriate factor, among others in the apportionment of special benefit. What the Constitution requires is that the entire cost of a project or service (appropriately adjusted to account for general benefit) be spread according to the special benefit accruing to each parcel. To the extent that *Tiburon* suggests that only the entire project cost may be used to determine the special benefit for each parcel, it is overbroad.

the benefit it provides and how the burden of funding the means to obtain that benefit ought to be apportioned.

Allowing some reliance on costs makes sense given the realities of a market economy. The undergrounding services at issue in *Tiburon*, with its highly valued location overlooking San Francisco Bay, created real estate values that did not necessarily bear a proportionate relationship to the cost of undergrounding. A few thousand dollars in undergrounding could generate tens of thousands of dollars of real estate value. Most other government services, however, do not so directly and measurably affect real estate values. Instead they provide benefits to property owners comparable to those from services provided by private service providers – pool service firms, telephone providers, etc. all price their services based on their cost to provide service and a reasonable profit, as limited by what the market will bear. As local government can make no profit and as property owners must decide whether to approve an assessment under Article XIII D, § 4, subd. (e), cost is all that is left to determine proportionate share of benefit for many service assessments. Surely the cost to provide a service is comparable to the cost the benefited property owner would pay to provide that service by other means and is therefore, in many cases, a good measure of his or her benefit from the availability of that government service, with its attendant economies of scale and elimination of free riders.

Thus, while it is helpful to clarify that the apportionment of the cost of a service (the ultimate goal of the Proposition 218 assessment apportionment process) must be proportionate to special benefit received, which might or might not relate to the cost of serving each parcel, it is not

helpful to state that costs are never proportionate to benefit. Experience and common sense demonstrate that they frequently are.

IV. CONCLUSION

Proposition 218's text, context, statutory gloss and case law all demonstrate that the voters who approved Proposition 218 did not intend to bar continued assessment funding of local government services, as distinct from capital facilities. For that intent to have meaning, the proportionality requirement of Proposition 218 must be construed to allow local governments to satisfy it without undue expense and in light of the practical limitations of our most efficient system for collecting revenues from property owners – the property tax roll. Further, this Court can cure the misapprehension of its *Silicon Valley* decision's discussion of the relationship between the cost to provide an assessment program and the special benefit arising from that program by clarifying that, while the cost of such a program does not justify it, that cost is not a forbidden consideration when measuring and monetizing special benefits.

For all these reasons, Amici respectfully urge this Court to affirm the Superior Court or, if it is not persuaded to do so, to frame the standards under which special benefit and proportionality must be shown to give

practical guidance to local governments so the voters' intent to allow continued assessment financing of services can be given practical effect.

DATED: February 7, 2012

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 8,887 words, as counted by the Word version 2007 word-processing software program used to generate the brief.

DATED: February 7, 2012

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PROOF OF SERVICE
Supreme Court of the State of California
Case No. S195152

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 95946. On _____, I served the document(s) described as **APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

See Attached Service List

_____ **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Penn Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on _____, at Penn Valley, California.

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