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VIA FEDEX

The Honorable Chief Justice Tani Cantil-Sakauye and
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4712

Re: ***Concerned Citizens for Responsible Government v. West Point Fire Protection District*, Supreme Court Case No. S195152, Third District Court of Appeal Case No. C061110, 196 Cal.App.4th 1477 (decision filed June 29, 2011; request for depublication filed July 28, 2011)**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Introduction. I write on behalf of the California Special Districts Association (CSDA), the California State Association of Counties (CSAC), the Fire Districts Association of California (FDAC), and the League of California Cities (LCC) (collectively "Amici") to support the request for depublication of the Third District Court of Appeals' decision in the matter referenced above ("Decision"). Although the appellate court may have reached the correct result in this case, its reasoning is far more sweeping than the facts demand. If permitted to remain published, the Decision could undermine assessment funding of a broad range of vital public services such as police, fire, ambulance, transit, park, library, lighting, mosquito control, business improvement district services and the like. Moreover, the broad language of the Decision fails to account for the text of Articles XIII C and XIII D[1] (Proposition 218), the Proposition 218 Omnibus Implementation Act of 1997 (Government Code section 53750 et seq.), and case law, which demonstrate that this constitutional amendment **permits** assessment funding of services to property. Accordingly, Amici respectfully urge this Court to grant the Request for Depublication.

[1] All references to articles and sections in this letter are to articles and sections of the California Constitution as amended by 1996's Proposition 218.

Interests of Amici. 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.

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.

FDAC 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. FDAC represents and advocates for its members in the Legislature and the courts.

LCC is an association of 466 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 Decision Would Bar Assessment Financing of Government Services. The language of concern in the Decision has been identified in the Request for Depublication and we need not restate it here. Suffice it to say that the appellate court's reasoning suggests that the special benefit, defined in Article XIII D, section 2, subd. (i) and required to justify assessment financing, can **never** be shown for a government service, as opposed to the provision of infrastructure or other tangible facilities to serve property. Decision, part IV, Slip Op. at pp. 21-26; 2011 WL 2565258 at pp. *9 - *11. Moreover, the Decision suggests that a service having **some general benefit** necessarily has **no special benefit**. Decision, Slip. Op. at 22, 2011 WL 2565258 at p. *9:

> 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. … Such protection cannot be quantifiably

> pegged to a particular property, nor can one reasonably calculate the proportionate 'special benefits' accruing to any given parcel.

With all respect to the appellate court, this is simply wrong.

First, while all government facilities or services must provide public benefits (lest they be gifts of public funds in violation of Art. XVI, section 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 a professional 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, section 4, subd. (a) ("Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel.")

Second, that the engineer's report in issue failed to persuasively demonstrate special benefit to property from the West Point Fire Protection District's services does not mean that a sufficient engineer's report could not do so. To cite but one example, a fire provider might impose an assessment to fund acquisition of a ladder truck specially adapted to serve tall buildings and to fund operation of that truck. 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. Thus, Proposition 218 requires nuanced professional judgments as to the existence and extent of special benefit and the Decision's sweeping and general language reflecting the simple facts of this case disserves the body of law which must apply throughout our large and diverse state over the course of time.

In addition, the Decision errs in concluding that because certain services, like fire protection, are often funded by ad valorem property taxes; they must be funded only by such taxes. Slip. Op. at 24; 2011 WL 2565258 at p. *10. The Decision cites *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 Decision does not cite. The *Holodnak* court wrote:

> 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.

The Decision Could Invalidate Many Statutes Authorizing Service Assessments. The broad language of the Decision undermines many existing assessments and raises questions regarding the constitutionality of many statutes authorizing service assessments, such as:

- the Fire Suppression Assessments statute in issue (Gov't Code sections 50078 et seq.) (authorizing assessments "for fire suppression services"),

- the Benefit Assessment Act of 1982 (Gov't Code sections 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),

- the Business Improvement District Law of 1994 (Streets & Highways Code sections 36600 – 36671) (authorizing assessment funding of services to business districts, such as supplemental police and sanitation services),

- statutes authorizing assessment funding of the control of mosquitos and other vectors which transmit human disease (*e.g.*, Health & Safety Code section 2082), and

- statutes authorizing funding of services to control agricultural vectors (*e.g.*, Food & Ag. Code section 8605, authorizing special assessments on citrus groves to fund vector abatement services).

Other statutes authorizing assessment funding of a variety services could be cited, but this list is sufficient to make the point. The Decision undermines many statutes not in issue in the case and accordingly reaches far more broadly than required. Rather than cut so wide a swath through the law of government finance on the facts of one outlying case, the courts ought to allow case-by-case development of these issues so the very substantial loss of revenue authority effected by the

Decision occurs, if at all, only after well-considered judicial decision-making informed by fuller participation than by merely the parties to this dispute.[2]

The Text of Proposition 218 Allows Assessment Funding of Services. The text of Proposition 218 makes clear that its framers 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 (Art. XIII D, section 4, subd. (a)). These provisions of the measure are in point:

Art. 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.)

Art. XIII D, section 2, subd. (h):

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

Art. 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.)

Art. XIII D, section 5, subd. (a), grandfathers certain pre-Proposition 218 assessments including:

> Any assessment imposed exclusively to finance the capital costs or **maintenance and operation expenses** for sidewalk, streets, sewers, water, flood control, drainage systems or vector control. (Emphasis added.)

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[2] The absence of amicus participation below may have contributed to the apparent failure of the briefing to alert the appellate court to the consequences of its decision. Amici became aware of the dispute only upon publication of the Decision.

Many of these services, such as vector (*e.g.*, mosquito) control, are provided without provision of much by way of capital facilities and are therefore 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, as the Decision concludes.

Further, Art. XIII D, section 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 Art. XIII D, section 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).

Two conclusions can be drawn from Art. XIII D, section 6, subd. (b)(5). First, had the framers of Proposition 218 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 Art. XIII D, section 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 the sweeping language of the Decision barring all assessment funding of government services misreads our Constitution.

The Proposition 218 Omnibus Implementation Act of 1997 Also Demonstrates the Viability 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 local government and taxpayer advocates, is good authority for the construction of Proposition 218. Accordingly, it is notable that the Decision does not cite this statute and that the statute, like the text of Proposition 218 itself, demonstrates that assessment funding of government services – as opposed to capital facilities – is permitted.

Government Code section 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 section 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 Art. XIII D, § 5(a)'s language grandfathering assessments to fund vector control and makes clear that such assessments – for services provided without much by way of capital facilities – are permitted by Proposition 218:

> "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.)

Case Law Also Demonstrates that Proposition 218 Permits Service Assessments.

Four cases construing the assessment provisions of Proposition 218 also demonstrate the Decision's error in concluding that service assessments necessarily violate 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 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. Similarly, as the Request for Depublication notes, the Decision does not discuss (likely because the parties' briefing did not), 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, 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 fundamentally at variance with the Decision here. Because the Decision conflicts with published authority, but fails to distinguish or even discuss that authority, it ought to be depublished.

Even the cases the Decision **does** discuss undermine its broad prohibition on service Assessments. *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, *review denied*, invalidated an assessment under the Landscaping and Lighting Act of 1972 for failure to demonstrate special benefit and proportionality, but did not adopt the sweeping conclusion of the Decision that service assessments necessarily lack the special benefit required by Proposition 218. Indeed, *Beutz* concluded that a program of park improvements, maintenance and park and recreation services **did** confer special benefit on property:

> Notably, had the [Assessment Engineer's] 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).

Finally, 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 under the grandfathering exception of Art. XIII D, section 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 Art. XIII D, section 5, subd. (a) nor the *Riverside* decision would have been necessary.

Conclusion. On behalf of the thousands of local governments they represent and the millions of Californians those governments serve, Amici support the Request for Depublication for all the foregoing reasons and respectfully ask this Court to depublish the Decision.

Very truly yours,

Michael G. Colantuono

MGC:mgc
Attachment (proof of service)