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Supreme Court Strikes Down Open-Space Assessment Under Proposition 218

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On July 14, 2008, the California Supreme Court decided its first substantive case under the assessment provisions of 1996's Prop. 218, "The Taxpayers Right to Vote Act." In doing so, it struck down an open-space assessment on the ground it did not demonstrate special benefit to the assessed property either as required by Prop. 218 or Prop. 13 and because the amounts assessed were not proportional to the special benefits conferred. The unanimous decision, written by the Court's most conservative member, Justice Chin, sets out a new, more demanding standard of judicial review of local government assessment decisions and has significant implications for assessment financing in California.

The case is *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Auth*. The Authority imposed an assessment to fund future, regional, open-space acquisitions which applied throughout the District (which has a population of 1.2 million) and was $20 per year for all single-family residential parcels. Because the acquisitions were prospective and the Authority did not want to reveal to landowners exactly how much it might pay for a given site, the engineer had an unusual task in demonstrating special benefit to private property from unspecified, future acquisitions and calculating the proportionate benefit from such acquisitions attributed to each property. The San Jose Court of Appeal found, over a lengthy dissent by a well-respected, moderately conservative Justice, that open-space acquisitions sufficiently benefited property to justify assessment and that the spread of benefit was properly determined. The Supreme Court reversed.

This case was the California Supreme Court's first opportunity to consider the assessment provisions of Prop. 218 since glancing reference in the *Richmond* case in 2004 which held that water connection charges were not assessments and a 2001 decision that the Ventura harbor district could not impose assessments to pay off a judgment lien because doing so did not benefit property. Three aspects of the case are of most interest.

First, the deferential standard of review of assessment judgments established by pre-Prop. 218 decisions is no longer good law. The old standard was established in such cases as *Knox v. Orland*, a 1992 decision upholding a park assessment on parcels in- and outside of Orland to fund parks used by the whole community, and *Dawson v. Town of Los Altos Hill*s, a 1976 decision which upheld a sewer assessment. In those cases, the Supreme Court ruled that courts will not set aside an assessment unless it clearly appears on the face of the record before the local agency, or from facts which may be judicially noticed, that the assessment is not proportional to the benefits bestowed on assessed properties or that no benefit will accrue to those properties. In 2002, the San Francisco Court of Appeal ruled in *Not About Water Committee v. Board of Supervisors* that this older standard of review had survived Proposition 218, notwithstanding language in the measure shifting the burden of proof on these issues from challengers to local governments.

Under *Silicon Valley*, Prop. 218 establishes this more demanding standard of review:

> "Courts should exercise their independent judgment in reviewing local agency decisions that have determined whether benefits are special and whether assessments are proportionate to special benefits within the meaning of Proposition 218" because "courts use independent, de novo review for mixed questions of fact and law that implicate constitutional rights."

Thus, courts will do a more searching analysis of assessments and a meaningful amount of power over assessments has been transferred from local elected officials to the judiciary.

Second, the decision holds that Prop. 218 has tightened the definition of the "special benefit" which must be shown to justify the use of assessment financing:

> "A special benefit must affect the assessed property in a way that is particular and distinct from its effect on other parcels and that real property in general and the public at large do not share."

> "[T]he characterization of a benefit may depend on whether the parcel receives a direct advantage from the improvements (e.g., proximity to a park) or receives an indirect, derivative advantage resulting from the overall public benefits of the improvement (e.g., general enhancement of the district's property values)." "[T]o the extent that the value of property located in a desirable community is enhanced, this is a '[g]eneral enhancement of property values,' and is thus, by definition *not* a special benefit."

Citing the Ventura harbor district case, the Court noted, "[i]f everything is special, then nothing is special."

Thus, an assessment engineer's report must demonstrate that the program of improvements or services to be financed will benefit properties to be assessed in a manner that is different in kind from the benefit that society in general derives from a government service and cannot rest only on the general increase in property values that arises from a well-served community.

Third, the decision is the first to analyze Prop. 218's requirement that the assessment paid with respect to a parcel be "proportional" to the special benefit that parcel receives. This notion of proportionality is poorly defined in Prop. 218 and also has implications for water, sewer and other property-related fees because Prop. 218 also requires property-related fees to be "proportional" to the cost of serving the parcels on which the fee is imposed. The Supreme Court's analysis of this point is not especially detailed because it perceived the assessment engineer's report in issue to have made no effort to demonstrate proportionality:

> "The report's proportionality analysis fails to satisfy Proposition 218 largely because the special assessment is based on OSA's [*i.e.*, the Open Space Authority's] projected annual budget of $8 million for its open space program rather than on a calculation or estimation of the costs of the particular public improvement to be financed by the assessment." "Thus, the report fails to identify with sufficient specificity, the 'permanent public improvement' [required by Prop. 218] that the assessment will finance, fails to estimate or calculate the cost of any such improvement, and fails to directly connect any proportionate costs of and benefits received from the 'permanent public improvement' to the specific assessed properties. As the dissent below observed, 'an assessment calculation that works backward by starting with an amount taxpayer are likely to pay, and then determines an annual spending budget based thereon, does not comply with the law governing assessments, either before or after Proposition 218."

So, what does the case mean in practical terms? A full answer to that question will develop as lower courts apply the case, but we offer a few initial observations: First, open-space assessments, regional park assessments and other assessments that provide broad and diffuse benefit to a large area and that benefit all members of society – tenants, landowners and visitors alike – have always been difficult to justify as conferring special benefit sufficient to be assessments and not special taxes (for which ⅔-voter approval is required). This case makes that burden heavier still. Thus, great care will now be required in drafting engineers' reports for such assessments and legal review of those reports is essential. For some programs of this type, local governments may wish to consider special taxes, general taxes (which require majority voter approval), or non-property-related fees such as inspection and service fees (which do not require voter or property-owner approval but generally do not raise the substantial sums needed for capital improvements).

Second, the newly heighted standard of judicial review means that care must be taken to prepare a solid engineer's report and a good record to support the decision that a program confers special benefit and the assessment is apportioned among properties in proportion to that benefit. Some general benefit will exist with virtually every assessment regime and that general benefit must be accounted for and funded from non-assessment revenues.

Third, the proportionality requirement remains poorly defined. This case simply tells us that the engineer's report in issue did not attempt an analysis that is now required, but we are told little about what that analysis must be. Some level of judicial deference on proportionality judgments may be inevitable, notwithstanding the heightened standard stated in this case, because line-drawing exercises are, by their nature, arbitrary at the margin. Whether a given class of property should bear 20% of the benefit and cost of a program or 22% is not a question that lends itself to a black-and-white answer; a discretionary judgment is required. If local governments exercise that discretion responsibly and develop good records to support those judgments, courts will likely uphold them.

The Supreme Court can now be expected to remand a related case involving a business improvement district assessment imposed by the City of Pomona to the Los Angeles Court of Appeal for decision in light of *Silicon Valley*. Decision in that case, *Dahms v. City of Pomona*, is likely later this year and may provide more guidance on this subject.

As always, we will keep you posted!

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