Colantuono & Levin, PC
11364 Pleasant Valley Road
Penn Valley, CA 95946-9000
Main: (530) 432-7357
FAX: (530) 432-7356
WWW.CLLAW.US

Michael G. Colantuono
MColantuono@CLLAW.US
(530) 432-7359

Court of Appeal Questions Service Assessments

by
Michael G. Colantuono, Esq.

August 6, 2011

On June 29, 2011 the California District Court of Appeal in Sacramento decided *Concerned Citizens for Responsible Government v. West Point Fire Protection District,* questioning whether Prop. 218, the "Right to Vote on Taxes Act," allows assessment financing of government services, as opposed to capital facilities. The decision is sufficiently problematic that several local government associations have asked the California Supreme Court depublish it so it cannot be cited as precedent in future cases.

The dispute. The District serves approximately 2,400 parcels in an unincorporated area of northern Calaveras County. The District imposed a benefit assessment in 2007 under the Fire Suppression Benefit Assessment Act to (i) fund staffing of at least one EMT / senior firefighter at all times, (ii) fund additional volunteer firefighters support and (iii) require periodic town hall meetings and board review of the assessment every five years. The assessment distinguished among improved and unimproved parcels and exempted properties which had assessed valuations (of land and structures) of less than $5,000. The assessment rate structure was very simple: improved properties were assessed $87.58 per year and unimproved parcels were assessed $45 per year. No distinctions were made with respect to the size or value of structures or land use (i.e., single-family, multi-family, commercial). The assessment was approved by a vote of 61.8% to 38.1% of the property owners in a Proposition 218 assessment protest proceeding, in which ballots are weighted by the amount each property owner is to pay.

The plaintiff association filed a reverse validation action to invalidate the assessment, arguing it failed to comply with Proposition 218's requirements that it be assessed only for special benefit to property and that assessment amounts be proportionate to the special benefit received by each parcel. The trial court upheld the assessment and awarded the District $104,153 in attorneys' fees, finding the plaintiffs had unreasonably denied the District's discovery requests for admissions. An award of attorneys fees to a government agency against an activist group is rare and, in this case, not destined to last.

The appellate decision. The Court of Appeal found that the assessment engineer's report failed to demonstrate that the District's services specially benefited property in a way

meaningfully different from the benefit provided to the general public. The Court also found the very simple, two-rate, assessment formula inadequate to make assessments proportionate to the special benefit conferred on each property. Although we only know what the Court of Appeals decision tells us about the engineer's report, these conclusions are not surprising. Ever since the California Supreme Court announced in its 2008 decision in *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* that courts will use their independent judgment in evaluating assessments – abandoning the pre-Proposition 218 standard which gave some deference to the determinations of local legislative bodies – it has been much harder to defend assessments. Recent appellate decisions involving Riverside County and the Town of Tiburon have continued that trend.

What is notable about the *West Point* decision, however, is the breadth of its 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 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.

The Court also suggested that valid assessments must involve:

> a local public improvement of direct benefit to that property, as for example a street improvement, lighting improvement, irrigation improvement, sewer connection, drainage improvement or flood control improvement.
>
> 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."

This last comment was a quote from a 1980 decision involving Proposition 13's application to fire assessments that was rejected by later courts.

The reaction. On June 28th, the Mosquito and Vector Control Association of California filed a 5-page letter with the California Supreme Court requesting it "depublish" the case – *i.e.*, remove it from the books as precedent for future cases without disturbing the result of the case. On August 4th, the Howard Jarvis Taxpayers Association filed a cursory and polemical two-page opposition to that request. On August 5th, the author of this article filed a 9-page letter supporting the MVCAC request, explaining that the Court of Appeals' conclusion that Prop. 218 allows assessments for physical improvements, but not for services, does not reflect the language of the Constitution or the Proposition 218 Omnibus Implementation Act and overlooks important cases, including a recent decision upholding a business improvement assessment in Pomona. That request was filed on behalf of the California Special Districts Association, the California State Association of Counties, the Fire Districts Association of California and the League of California Cities. In addition, the West Point Fire Protection District has until August 28, 2011 to ask the California Supreme Court to grant review of the case. If the Supreme Court were to grant review, the Court of Appeal decision will automatically be removed from the books. The requests for depublication remain pending as this article is written.

What should local governments do in the meantime? First, it is very important that assessments be supported by a well drafted engineer's report. It is not enough to simply put a fresh date on an old report, written before the *Silicon Valley* decision. New reasoning is needed, especially for assessments to fund services that broadly benefit society, like fire protection, park services, and landscaping and lighting services. Second, given the unstable and uncertain state of the law on these issues, it is important that a lawyer review the engineer's report before it is final and that enough time be allowed for meaningful review. Lastly, of course, agencies with an interest in service assessments should follow the status of the requests to depublish the *West Point* case.

In short, be careful and stay tuned. As always, we will keep you posted!