

CONCERNED CITIZENS FOR RESPONSIBLE GOVERNMENT, AND WILLIAM
DOHERTY, Plaintiffs, vs. WEST POINT FIRE PROTECTION DISTRICT AND WEST
POINT FIRE PROTECTION DISTRICT BOARD OF DIRECTORS, Defendants,

S195152

SUPREME COURT OF CALIFORNIA

2011 CA S. Ct. Briefs 95152; 2011 CA S. Ct. Briefs LEXIS 1213

August 8, 2011

From a Published Opinion of The Court of Appeal, Third Appellate District (No.
C061110). Reversing a Judgment of the Superior Court of Calaveras County. (No.
CV33828).

Petition for Appeal

COUNSEL: [*1] NOSSAMAN LLP, STEPHEN N. ROBERTS (SBN 62538), San Francisco, California, Attorneys
for Petitioners (Defendants and Respondents below) West Point Fire Protection District and West Point Fire Protection
District Board of Directors.

TITLE: *Petition for Review From a Published Opinion of The Court of Appeal, Third Appellate District (No.
C061110) Reversing a Judgment of the Superior Court of Calaveras County (No. CV33828)*

TEXT: I. ISSUES PRESENTED

1. Under Proposition 218 (Cal. Const., art XIII D), may a fire district assessment be considered a special
assessment?

2. Under Proposition 218, may the proportionality of special benefits to individual properties be measured by the
costs of providing that benefit to those properties?

II. WHY REVIEW SHOULD BE GRANTED

In a time of extraordinary budget pressures on local government, the Court of Appeal decision in this case
mistakenly construes Proposition 218 in an impossibly narrow manner. By holding that fire districts may never levy a
special benefit assessment for fire protection, and by inference making that holding applicable to many other types of
government entities and other types of assessments, the Court of [*2] Appeal has dealt a crippling blow to local
government. No other decision has reached such a result. Because the potential applicability of the decision is so

widespread, it is an "important question of law" that merits review by the Supreme Court. (Cal. Rules of Court, Rule 8.500(b)(1).)

The author of the Court of Appeal opinion, Justice Butz, took the unusual step of writing a concurring opinion to his own majority opinion, lamenting the result even though he felt the result to be compelled. In that concurring opinion he pointed to the complexity of Proposition 218 as the reason a "small fire district, starving for the funds to furnish full-time fire protection, proposed a modest levy to meet that goal" but failed to follow the criteria correctly in his view. (Concurring Opinion, p. 1.) Unfortunately, the decision incorrectly increases that complexity beyond what Proposition 218 actually requires in refusing to permit the district to measure the benefit to each property by the cost of providing that benefit. Using a cost-based measure of proportionality is a reasonable approach under Proposition 218, especially for numerous small government entities as this one. Again, the widespread [*3] applicability makes this an important question of law. (Cal. Rules of Court, Rule 8.500(b)(1).)

As will be explained below, in both of the foregoing circumstances, the decision is inconsistent with other decisions of the Court of Appeal. Review is therefore appropriate "to secure uniformity of decision . . ." (Cal. Rules of Court, Rule 8.500(b)(1).)

Depublication of the opinion would not be sufficient to remedy the problem created by the decision. The existence of the decision, even though it could not be cited, would nevertheless have a chilling effect on local government, absent resolution of these important legal issues by the Supreme Court. Moreover, in view of the confusion at the Court of Appeal, it is an important area of the law that merits being clarified by the Supreme Court.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

This appeal involves the judgment after a bench trial in favor of Petitioners West Point Fire Protection District and its Board of Directors (hereafter "Petitioners" or "West Point," they were Respondents and Cross-Appellants in the Court of Appeal and Defendants in the Superior Court) on all causes of action. The bench [*4] trial in the Calaveras County Superior Court was conducted before and judgment entered by the Honorable John Griffin, a visiting judge. On June 29, 2011, the Court of Appeal reversed the Superior Court decision.

The landowner voters in West Point overwhelmingly approved a modest benefit assessment to fund part of their fire district's continued operation. (Ex. 11.) n1 Respondents here, William Doherty and "Concerned Citizens for Responsible Government," brought a reverse validation action, seeking to overturn that assessment, on the grounds it was enacted in violation of Proposition 218 and other laws. After trial, Judge Griffin determined that the benefit assessment had been enacted properly under Proposition 218 and other laws. He concluded that Respondents had failed to introduce sufficient evidence to sustain any of his causes of action; Respondents failed to request a statement of decision.

n1 Abbreviated references in this Petition are to exhibits ("Ex."); the Court of Appeal Opinion, a copy of which is an appendix to this Petition ("Op."); the Clerk's Transcript ("CT"); and the Reporter's Transcript ("RT").

[*5]

On appeal, the Court of Appeal reversed, holding that the special assessment did not comply with Proposition 218, in that an assessment for fire protections did not fall within the meaning of "special" assessment, the benefits being only general (Op., at pp. 21-26); and that the assessment did not comply with the proportionality requirements of Proposition 218 (Op., at pp. 26-29). The decision also determined that the failure timely to publish summons in the validation action

was excusable, and that retroactive application of this Court's decision in *Silicon Valley Taxpayers Assn. v. Santa Clara Open Space* (2008) 44 Cal.4th 431 was proper. The latter two issues are not being raised in this petition.

The Court of Appeal decision was certified for publication in part; those parts are the subject of this Petition.

B. Factual Background

West Point is a special district located in rural Calaveras County, California. (Ex. 4, p. 9.) It is in one of the most dangerous fire areas in the State. (RT 397.) In addition to responding to fires, as the Court of Appeal noted it responds to vehicle accidents and medical emergencies. (Op., at p. 3.) Within the few years preceding [*6] the special assessment, there had been a marked increase in volume. (*Ibid.*) This factor and others caused West Point to study the problems it was beginning to see, prepare an engineer's report under Proposition 218 and eventually conduct an election to determine if West Point should levy a benefit assessment to fund fire protection services within its jurisdiction. (*Id.* at 3-4; Ex.4; RT 321-325.)

An engineer's report is required by the California Constitution, Proposition 218, and it is a cornerstone of any assessment creation. (*See, generally*, Cal. Const., art. XIII D, § 4, subd. (b).) According to the Report, "all parcels within the West Point Fire Protection District" are included within the boundary of the assessment district. (Ex. 4.) Each parcel to be assessed is identified specifically in the Assessment Roll, and the duration of the proposed payments is defined as five years, with the first payment due on June 1, 2007 and the last on December 10, 2011. (*Ibid.*)

The basis for the Assessment was defined, as is the methodology upon which the Assessment was calculated. (Report at pp. 2-3.) It includes: (a) an increase in calls for fire and rescue services, from [*7] 20 calls in 1990 to 692 calls for 2005 and 2006 combined; (b) a change in regulations, requiring that volunteers have 200 hours of training per year to participate in fire-fighting or rescues, and a change in state regulation; a shortage of trained volunteers needed to respond to the average amount of calls the District receives per week; the fact that the fiscal revenues from County taxes had not kept pace with the increase in calls for emergency services; the information that, if the Assessment did not pass, the District would exhaust all available reserve funds; and the fact that performance had suffered - that is, there were 18 emergency calls to which no one responded, and over 100 calls where only one person was able to respond. (*Id.*, pp. 1-2.)

The basis upon which the Assessment was calculated was how much it would cost the district to keep one senior fire fighter on duty around the clock, or \$ 146,000 (actually over \$ 159,000 but \$ 146,000 was used as the balance could be paid from other resources). (*Id.* at pp. 3, 17; RT 331-332.) This translated into \$ 87.58 for any developed parcel and \$ 45.00 for any undeveloped parcel. (Ex. 4, p. 21.)

Critical to the issues in [*8] this Petition, the general and special benefits to each parcel assessed were separated and identified in the Engineer's Report. (Ex. 4, pp. 13-23.) The Engineer's Report specifically states that "only special benefit-related costs may be assessed" under Proposition 218, and so the special benefits were identified. They included most significantly "[r]esponses to service calls for fire suppression or possible fires," *excluding* "calls for services that go unanswered or were handled by another fire district; . . . (*Id.* at p. 15.) That is, costs for services provided by the fire district other than property fires were segregated out and not made part of the special assessment.

As observed by the Court of Appeal Opinion, the cost of a special benefit must be distributed proportionally among the assessed properties, in proportion to the special benefits received by them. (Op., at pp. 26-27, citing *Silicon Valley, supra*, 44 Cal.4th at p. 456.) The Court of Appeal criticized the methodology of the Engineer's Report here (Ex. 4) because it allocated the total cost according to the cost of delivery to the category of properties being assessed, here two categories, [*9] imported and unimproved parcels. (Op., at pp. 27-28.) The criticism was that this was "cost-driven, rather than benefit-driven," in violation of Proposition 218. (Op., at pp. 27-28.) As will be discussed below, the Opinion fails to recognize that the cost of delivering a service to a property is, under circumstances such as here, a reasonable method of measuring the benefit.

IV. LEGAL DISCUSSION

A. The Assessment Here Supplies Special Benefits, Not General Benefits; The Court of Appeal Decision is Not Compelled by Proposition 218 and Is In Conflict With Other Decisions of the Court of Appeal.

The primary decision of the Court of Appeal is that fire protection to properties is necessarily a general benefit, and cannot be a special one.

The term "special benefit" is defined in Proposition 218: it is "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." (Cal. Const., art. XIII D, subd. (2).)

Here, the Engineer's Report did identify and separate what it understood to be special benefits from general ones. (See, Ex. 4, pp. 13-14.) "Special benefits include those benefits that [*10] will be directly provided by the fire department to the parcel owners," including "fire suppression on the property of parcel owners. (*Id.* at p. 14.) As set forth in the Report, in 2006 there had been 67 responses to fire related calls within the district. (Ex. 4, p.15.) There also had been two outside the district, but they were not counted in the statistics as a special benefit to the properties within the district. While the drafters of the Report also thought that some vehicle accidents might reasonably be allocated to the special benefit category, the statistic carried forward in the Report was only the 67 fire related calls. (*Ibid.*) In other words, the Report sought to limit the charges allocated to the property owners to the benefits being received by them, whereas benefits to the general public were to be paid for by other funds.

The Report increased the number of responders to 6, as it was the intent to add more firefighters to comply with changed regulations. (Report at pp. 15-16.) It projected a call volume increase of 10% for 2007, including the fact there would be no more missed calls. (*Ibid.*) The calculated percentage cost of the special benefit for 2007 [*11] out of the total budget would be 51.96 %, with the remainder being general benefit. (*Id.* at p. 16.)

The Report then applied that 51.96% percentage to the firefighter salaries and benefits. (Report at p. 17.) Other percentages of allocation were applied to other categories of expenses (for example, 90% of workers compensation, as that was largely based on fire hazard went to special benefit, while several categories of miscellaneous expenses went to general). The report concluded that \$ 159,413 could be allocated to special benefit in the budget. However, as mentioned, the amount for the assessment was reduced to \$ 146,000 as there were some other revenues to pay the difference.

The Court of Appeal rejected this approach, on the grounds that fire suppression, per se is a general benefit, not a special one. "Fire suppression . . . 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 the damage it may cause. *** Thus the assessment generates only general benefits." (Op., at pp. 22-23.)

There is no doubt that society as a whole benefits [*12] if individuals' properties do not burn down, or if a fire does not spread to other properties, but that does not mean that part of the costs of fire protection cannot reasonably allocated to protection of individual properties, and hence a special benefit. n2 There is nothing contrary in this Court's leading case of *Silicon Valley Taxpayers Assn. v. Santa Clara Open Space* (2008) 44 Cal.4th 431. The special benefit of fire suppression on one's property is a special benefit under *Silicon Valley's* reasoning. In *Silicon Valley* the types of benefits that the government had argued were special-the enjoyment of open space-really consisted of benefits that would be enjoyed generally by all who lived within the district, property owners or not, and by many who lived outside the district. (*Id.* at pp. 452-456.) Consequently the Court concluded they were only general benefits, not special ones.

n2 Indeed, even the problem of fire expanding to other properties can be argued to be a problem for the assessed

property owner as well, as he, she or it faces possible liability if the property owner's negligence was the cause of the fire.

[*13]

Fire suppression services are different. In the first instance, they specifically benefit individual property owners. Very simply, they keep one's house from burning down or they keep one's undeveloped property from burning up. As the Court said in *Silicon Valley*, under Proposition 218 the special benefit must be "particular and distinct from its effect on other parcels and that real property in general and the public at large do not share." (*Silicon Valley, supra, 44 Cal.4th at p. 452.*) That an individual's home might burn down is separate and distinct from a vehicle fire, or an auto accident, or even the fact that in general a fire might spread to adjoining properties. It is a precise benefit supplied to an individual's property. If the fire district has segregated that from the more general benefits to all property owners, or those who are not property owners in the district, the plan is not invalid if the other elements are not included as part of the special assessment.

In *Silicon Valley* the plan that this Court struck down simply lumped all benefits a special benefits, when the Court observed that many were open to the public at large, not just the [*14] property owners in the assessment district. (*Id. at p. 454.*) But that leaves open the situation-that here-where the engineer's report carefully segregates what is special and what is general. n3 Yes a fire department's services are available on persons other than property owners. But in this case the district specifically segregated those expenses-fires outside the district, vehicle accidents-and caused them to be paid for through other means.

n3 Following *Silicon Valley*, that type of distinction was recognized by the Court of Appeal in *Beutz v. County of Riverside (2010) 184 Cal.App.4th 1516, 1534*, which said the substantial evidence test would have then applied to that factual determination. Here, all fact findings by the trial court were in Petitioners' favor; indeed, Respondents did not even request a statement of decision.

It is not a valid argument to say that, because fire suppression benefits all property owners in the district, that makes it general. In [*15] *Silicon Valley* this Court expressly stated that every parcel in a correctly drawn district can be said to enjoy a special benefit. (*Id. at p. 452, n. 8.*)

The foregoing is an important question of law. the Opinion directly undermines how small fire districts can fund critical services. Further, the logic of the decision, affects other types of districts. See, for example, letter requesting depublication of this decision, from the General Counsel of the Mosquito and Vector Control Association of California, dated, July 27, 2011 (No. S195152).

The Court of Appeal's decision also is in conflict with others. As mentioned in note 3, *supra*, it is in conflict with *Beutz, supra, 184 Cal.App.4th 1516*. Also *City of San Diego v. Holodnak (1984) 157 Cal.App.3d 759, 763*, held that an entire fire station could be financed through a special assessment. Petitioners recognize that, as this Court cautioned in *Silicon Valley*, pre Proposition 218 cases may not be instructive because they allowed the entire cost of a project to be paid by a special assessment, even if it also offered general benefits. (*Silicon Valley, supra, 44 Cal.4th at p. 452.*) [*16] However, that does not mean those cases are not helpful in determining whether at least part of a benefit is special. As *Holodnak* found that at least part of a fire station included a special benefit, it is in conflict with this decision that has concluded no part of fire suppression could be a special benefit.

The Court's decision is also in conflict with an entire statutory scheme of the legislature. Government Code sections 50078 et seq. provide for fire district assessments. If the Court of Appeal opinion is correct, that no fire district assessment can be a special benefit, the entire statutory section is invalid, an issue not confronted by the Court of

Appeal.

Finally the Court of Appeal's opinion is in conflict with *Dahms v. Downtown Pomona Property and Business Improvement District (2009) 174 Cal.App.4th 708*, which allowed several types of costs in a business district-marketing, security-to be assessed through a special benefit. If this Opinion's logic is to be followed, *Dahms* was not decided correctly.

B. The Special Assessment Complied with Proposition 218's Proportionality Requirement; The Opinion is in Conflict With Another Decision of the [*17] Court of Appeal.

Further, the Assessment complies with Proposition 218's proportionality requirements as analyzed in *Silicon Valley*. Proposition 218 says: "The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the . . . property related service being provided." (Cal. Const., art. XIII D, § 4, subd. (a).)

With respect to proportionality, the Report divided the district into improved and unimproved parcels. (*Id.* p. 18.) From historical records it calculated the number of responses to fire calls from improved versus unimproved parcels, concluding that each received a different proportional benefit. (*Id.*, p. 19.) Using a model developed at the University of Michigan, several years of historical data from West Point, and information from the National Fire Protection Association, it calculated proportionality based upon cost of providing services and the potential losses suffered by the property owners, improved and unimproved. (*Id.*, pp. 18-21.) This is exactly the type of analysis called for by Proposition 218, and totally contrary to what the agency in *Silicon Valley* had done.

Citing *Town of Tiburon v. Bonander (2009) 180 Cal.App.4th 1057, 1081*, [*18] the Court of Appeal here said that West Point's methodology was improper because it measured the benefit not by valuing the benefit, but by analyzing the cost of providing the service. However, *Tiburon* did not hold that a cost-based measurement system is always improper. It merely held that in that particular case the elaborate system did not truly reflect the relevant benefits received. And then the Court of Appeal in *Tiburon* stated: "There may be cases in which the relative cost of an improvement is a reliable measure of relative benefit conferred." (*Id.* at p. 1083.) Thus in holding that a cost based proportionality measurement is always invalid, this Opinion is contrary to *Tiburon*.

Here a cost based system is a reliable measure. Careful calculations concluded that the costs of responding to all structure fires were essentially the same and the costs of responding to all fires on unimproved parcels were essentially the same. The cost of responding to a particular homeowner's fire may be reasonably construed as a measure the benefit he or she receives. Under the circumstances that is a reasonable methodology.

Could a different approach have been taken, [*19] as the Court of Appeal suggests? Certainly. Presumably every house in the area has a different value. One might be worth \$ 100,000 and another \$ 200,000. The Court of Appeal implies each house should have been valued and therefore the benefit would have been the value of the house saved by the fire. But as a practical matter, in a small fire district, that would have been cost prohibitive-valuing each house, and the contents in it. Moreover, it would have been inaccurate. A homeowner would receive one value of benefit if the house did not burn down, another if it did burn down (no value to the services) and another if it partly burned down. In that perspective, the Court of Appeal's methodology would not have been reasonable.

It is more rational to look at the costs of the services. For example, if a house is to purchase cable television, the amount for the same service to a \$ 200,000 home is the same as that to a \$ 100,000 home. But that cost is a true measure of the benefit received. If fire services were offered only to those who paid for them, that would certainly be the measure of the benefit. It should be no different here. Combined with the practical issues of a small district [*20] finding a cost effective way to proceed, the bottom line is that, as the First District said in *Tiburon*, the cost of a service may well be by a reasonable measure of the proportional value of a benefit.

In this respect, in complaining that properties under \$ 5000 were excluded, the Opinion ignores a separate part of Proposition 218. "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional

special benefit conferred on that parcel." (Cal. Const., art. XIID, § 4, subd. (a).) West Point had to exclude parcels where the charge would be higher than the benefit. To arrive at a cutoff, they did an historical analysis of fires in the district. (RT 337-340.) The result was the \$ 5000 cutoff. There was no counter evidence at trial.

V. CONCLUSION

The proper application of Proposition 218 is an important issue of law, as local government agencies need to be able to understand the rules of financing their critical services. In two significant ways, the Court of Appeal has it wrong in its Opinion, and it is important for the Supreme Court to clarify. Moreover, the Opinion is in conflict in both respects with other opinions of the Court of [*21] Appeal. Petitioners respectfully request that the Court grant the Petition to Review.

Dated: August 8, 2011

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By: /s/ [Signature]
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RULE 14(c)(1) CERTIFICATION

As required by Rule 14(c)(1) of the California Rules of Court, I certify that this brief is at 13 point font and contains 3794 words. In making this certification, I have relied upon the word count function of Microsoft Word, the computer program used to prepare the brief.

August 8, 2011

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PROOF OF SERVICE

The undersigned declares:

I am employed in the County of San Francisco, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Nossaman LLP, 50 California Street, 34th Floor San Francisco, California 94111.

On **August 8, 2011** I [*22] served the foregoing **Petition for Review** on the parties to the within action by placing () the original (x) a true copy thereof, enclosed in a sealed envelope, addressed as shown on the attached service list.

(X) (By U.S. Mail) On the same date, at my place of business, said correspondence was sealed and placed for collection and mailing following the usual business practice of my employer. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the U.S. Postal Service, with postage thereon fully prepaid,

() (By Overnight Service) I served a true and correct copy by Overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

(X) (STATE) I [*23] declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Sacramento, California.

8/8/11
(Dated)

/s/ [Signature]
Nancy Torpey

SERVICE LIST

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