

No. S136468

Sixth District Court of Appeal, Case No. H026759

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

SILICON VALLEY TAXPAYERS ASSN., INC., et al.,
Plaintiffs and Appellants,

vs.

SANTA CLARA COUNTY OPEN SPACE AUTHORITY,
Defendant and Respondent.

PETITION FOR REVIEW

On Appeal from the Superior Court of Santa Clara County
Superior Court Case Nos. 1-02-CV804474 and 1-03-CV000705
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INTRODUCTION

Some cases cry out for Supreme Court review because they turn on vitally important questions of public law that directly affect the day-to-day rights, responsibilities, and relationships of citizen-taxpayers and their local governments. This is one of those cases.

This case poses several questions – nearly all of first impression – arising under Proposition 218, an initiative measure added to the California Constitution in 1996 by voters who sought to plug what they perceived to be loopholes and devices of evasion that had undermined the property tax ceiling imposed by Proposition 13. (Cal. Const., arts. XIII C and D, Preamble, §2.)¹

¹ Proposition 218 consists of articles XIII C, dealing with taxes, and XIII D, dealing with assessments and fees. All section citations in this petition refer to article XIII D unless otherwise stated. There are also important provisions governing interpretation of Proposition 218 included at the beginning and end of the text with different section numbering. Regrettably, the Majority of the Court of Appeal chose to leave these sections out of its Appendix and did not refer to them in its opinion. For consistency, the Title and Findings and Declarations sections at the beginning of Proposition 218 will be referred to as the “Preamble,” followed by the section number. The Liberal Construction and Severability sections at the end will be designated “Postamble,” followed by the section number. For ease of reference, the complete text is located at the end of the Ballot Pamphlet attached to the petition as Exhibit B, Joint Appendix 2354-2355.)

In this lawsuit, two taxpayer organizations and eight individual property owners have challenged as in violation of Proposition 218 the largest and broadest real estate assessment ever imposed by a California local government agency – an \$8 million perpetual annual levy exacted on a flat rate \$20 per home basis from over 300,000 parcels of real estate in Santa Clara County. The assessing agency is Respondent Santa Clara County Open Space Authority (OSA). The assessment funds most of OSA’s discretionary spending budget for “open space” projects. (JA 538-588.)

Appellants’ challenge to OSA’s assessment was rejected in a 2-1 Majority Opinion of the Sixth District Court of Appeal, written by Justice Eugene Premo and signed by pro tempore Justice Brian Walsh.² Justice Patricia Bamattre-Manoukian wrote a 44-page Dissenting Opinion, pointing out how the Majority disregarded both the plain meaning and the legislative history of sections 4(a), (c), and (f).³

² The court’s website shows that Judge Walsh, appointed to the Santa Clara County Superior Court by Governor Davis in 2003, hears criminal cases in the Santa Clara Hall of Justice.

³ According to Justice Bamattre-Manoukian’s biography, she holds a Ph.D. in public administration from USC in addition to her law degree from Loyola Law School. (*California Courts and Judges* (James 2003), p. 92.

The Dissent’s analysis of the substantive legal issues demonstrates as eloquently as any petition for review why it is imperative that this Court intervene to stop what is effectively a wholesale judicial repeal of a voter-enacted part of the California constitution. It is no exaggeration to say that the outcome of this lawsuit will affect every real property taxpayer, every voter, and every local government agency having the power to assess real estate in the State of California. OSA’s own amici curiae, which included the California Association of Counties, the League of California Cities, and the California Special Districts Association, have declared that “this case is matter affecting all counties” and “raises issues of great concern to local public entities.” (Application to file Amicus Brief filed 6/14/04, 1-3 and Brief, 1-2.)

Likewise, California’s property taxpayers, having lost in the Court of Appeal in a decision that has cut a wide swath through Proposition 218, face destruction of their state constitutional rights without this Court’s intervention. For the settlement of important questions of public law and the protection of vitally important public rights, review should be granted.

ISSUES PRESENTED FOR REVIEW

Nearly all of the questions presented are matters of first impression in this Court, which has not spoken about any of the specific assessment

provisions of Proposition 218 at issue here, except in a limited context involving a flat parcel assessment to pay a judgment against a port district. (*Ventura Group Ventures, Inc. v. Ventura Port Authority* (2001) 24 Cal.4th 1089 [holding flat parcel assessment invalid for lack of special benefit to assessed properties].)⁴

Because Proposition 218's assessment provisions have received scant appellate attention, this petition presents an usually large number of questions for review – three principal issues, including one with four sub-issues.

1. Standard of Review and Burden of Proof In Taxpayer Lawsuits Challenging Assessments.

As the Majority itself admits, its opinion has changed the standard of review and burden of proof in taxpayer lawsuits challenging assessments, superseding two decisions of this Court – *Knox v. City of Orland* (1992) 4

⁴ This Court has twice examined provisions of Proposition 218 that are not directly at issue in this case. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 [capacity water charge not an assessment and fire suppression charge not a property-related fee or charge]; *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 [inspection fee imposed on private landlords not assessment or property-related fee subject to Proposition 218]. The Court has also granted review in *Bighorn-Desert View Water Agency v. Beringson*, S122883 [posing question whether water rates can be reduced by initiative].

Cal.4th 132, 147, and *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685. (Maj. Opn. 10-11.)

The Majority similarly acknowledges that its new standard alters, and conflicts in part with, another set of rules announced by the First District Court of Appeal in *Not About Water Com. v. Board of Supervisors* (2002) 95 Cal.App.4th 982, 994, which is the only other appellate court to consider the impact of Proposition 218 on standard of review and burden of proof. (Maj. Opn. at 14, fn.5.)

The Majority's new rules raise the following threshold issue:

Did Proposition 218 necessarily alter the level of judicial scrutiny to be given assessments so as to: (a) remove traditional deference to the judgment of assessing government agencies; (b) require assessing agencies to affirmatively demonstrate in trials on the merits that new assessments comply in all respects with Proposition 218; and (c) allow taxpayers additional opportunities to challenge assessments at trial by arguing contrary inferences from government-commissioned engineers' reports and introducing evidence to rebut self-serving factual claims and unfounded assumptions made by government agencies?

The Dissent answers this question in part in the affirmative, contending that the Majority's standard pays undue deference to local

government decisions at the expense of the will of the voters expressed in Proposition 218. (13-21.)

2. Violations of Substantive Restrictions on Assessments Imposed by Section 4(a) of Article XIII D.

Section 4(a) of article XIII D enacts several new substantive hurdles that government agencies must clear before imposing new assessments on property. This case involves what taxpayers contend to be violations of several of those provisions, including each of the following:

a. Exclusion of General Benefit.

In one of its most radical departures from prior law, Proposition 218 requires the complete and utter exclusion of any general benefits from assessments. (§4(a).) Appellants contend that OSA violated this mandate by including manifestly general benefits in its assessment. Appellants' petition raises the following issue:

An agency concedes that its assessment includes vast “quality of life” benefits to members of the public who live, work, and shop within its district and to all property located there. Yet it declines to exclude those general benefits from the assessment, choosing to remove only the minuscule advantages enjoyed by people who live, work, and shop entirely

outside the district. Has the agency violated the general benefit exclusion provisions of section 4(a) of article XIII D?

The Dissent would hold in the affirmative because OSA has assessed parcels of property for general benefits in direct violation of Proposition 218. (21-30.)

b. Proportionality of Assessments.

Proposition 218 demands that each parcel be assessed on a scale that determines the reasonable cost of the proportionate special benefit received by that parcel. (§4(a).) Appellants contend the Majority has allowed OSA to impose a flat-rate and inevitably disproportionate assessment that has nothing to do with any actual special benefit received by any assessed property. They seek review of the following issue:

Did OSA's flat assessment formula based on \$20 per single family unit carry its burden of showing that each property in the OSA was assessed in an amount that was proportional to the special benefit it received?

The Dissent gives a “no” answer, and would find OSA’s method of assessing property without reference to a public improvement of known cost and location to be inherently incapable of yielding the proportionality Proposition 218 requires. (30-35.)

c. Actual Cost of Definite Public Improvement

Proposition 218 requires that special benefit be determined in relation 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.” (§4(a).)

OSA’s assessment raises the following issue:

Does an assessment that is based only on a government agency’s spending “wish list,” but without any relation to the actual cost of a definite public improvement of determinable character, scope, and location, comport with the requirements of section 4(a) of article XIII D?

The Dissent says “no.” (31-33.)

d. No Exemption from Assessment.

Section 4(a) of article XIII D commands that all specially-benefitted property, even government-owned property, be assessed unless the assessing agency can prove by “clear and convincing evidence” that no special benefits accrue to a particular parcel that is exempted from assessment. Appellants challenge the Majority’s decision to permit exemption of public and private schools and other property in the following issue:

Does a government agency have discretion to disregard section 4(a)'s no-exemption mandate and exempt all school, church, and other classes of properties as it sees fit based on an invented concept of "net benefit" that appears nowhere in the California constitution?

The Dissent also supports Appellants on this issue, giving an emphatic "no" answer to the question posed. (35-36.)

3. Government Agency Disclosure Requirements

Proposition 218 demands that assessing government agencies comply with detailed ballot disclosure requirements to insure that assessments receive fully informed consent from the owners of a weighted majority of the assessed properties. In particular, the assessing agency must disclose "the total amount chargeable to the entire [assessment] district, the amount chargeable to the owner's particular parcel," and "the duration of the payments." (§4(c).)

The Dissent joins Appellants in contending that OSA's written disclosures transgressed these requirements (see Dis. Opn. 43-44), and poses the following question for this Court:

Does a written ballot disclosure that fails to include a total cost of a specific improvement project being funded by the assessment or to specify a

fixed or determinable duration of payments deprive property owners of their right to give informed consent in violation of Proposition 218?

OVERVIEW OF PROPOSITION 218'S REAL ESTATE

ASSESSMENT PROVISIONS

Local governments in California traditionally raise revenue in three legally distinct ways – taxes, assessments on real estate, and fees for services. Taxes (general or special) are levied to generate funds for general or specially identified government purposes. Assessments are imposed on particular parcels to pay the actual costs of identified public improvements that supply special benefits to those parcels. Fees are charged to defray the cost of regulation or government services made available to the fee payer. (*Isaac v. County of Los Angeles* (1998) 66 Cal.App.4th 586, 595-597.)

Proposition 13 limited ad valorem property taxes to 1 percent of assessed value, and increases in assessment to 2 percent a year, unless and until the property changed hands, when a reassessment was triggered. (Cal. Const., art. XIII A, §§ 1, 2.) To prevent local government agencies from subverting Proposition 13's ceiling on property taxes, the measure included a provision prohibiting any special tax without a 2/3 vote of the local electorate. (Id., §4; *Apartment Association of Los Angeles County v. City of Los Angeles* (1992) 24 Cal.4th 830, 836-838.) Assessments on real estate,

however, were not special taxes and did not require voter approval, and could be imposed under common law by “legislative decisions” of local governments that were accorded great deference and given limited judicial review. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141.)

Proposition 218 was enacted because voters were concerned that local government agencies had imposed “excessive tax, assessment, fee, and charge increases that not only frustrate voter approval of tax increases, but also threaten the economic security of all Californians and the California economy itself.” (Preamble, § 2.) Proposition 218's history is included in an Analysis of the Legislative Analyst and the Proponent’s and Opponent’s Ballot Arguments, both of which were included in the Ballot Pamphlet sent to voters. This Court has relied on these items in construing the terms of the initiative. (*Apartment Association of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 838-839.)

Proponents argued that California law giving local government “significant flexibility” in determining assessments had produced abusive levies that were constrained ““only by the limits of human imagination.”” (JA 2350, 2352.) Assessments were so broad and “imaginative” that they had become no more than disguised property taxes, forcing property owners to pay for existing ocean views, a sports scoreboard and equestrian center, a

park 27 miles from home, and a college football field. (JA 2352 [Proponent’s Ballot Argument].) “Creative” special district assessments had grown by 2400% and city assessments by 976% in just 15 years. (Id.)

Proposition 218's response to assessment abuse by local government was tripartite:

Substantive Restrictions. As its proponents told the voters:

“Proposition 218 will significantly tighten the kind of benefit assessments that can be levied.” (JA 2352.) This “tightening” included significant three new substantive restrictions on assessments in sections 2(i) and 4(a): (1) a narrow definition of “special benefits” and a broad definition of “general benefits;” (2) mandatory exclusion of all general benefits from assessment; and (3) strict proportionality of assessments on parcels based on relative special benefit provided to each parcel, resulting in setting assessment amounts “on a parcel-by-parcel or block-by-block basis.” (JA 2349-2350.)

Proposition 218 also prohibited exemptions from assessment. Even government parcels were to be assessed, unless the agency could prove by clear and convincing evidence that absolutely no benefit accrued to an exempt government parcel. (§ 4(a).) This meant that school property, along with all other government property, had to be assessed. (JA 2350.)

Reversed Burden of Proof. Not content with a single approach to assessment reform, the authors of Proposition 218 were also concerned that taxpayers faced powerful procedural disadvantages when they sued to challenge assessments. What the Legislative Analyst called local government’s “significant flexibility in determining fee and assessment amounts” was enforced by a “burden of proof” on the taxpayer to demonstrate illegality. (JA 2350.) Proposition 218 reversed that burden, requiring the government agency to demonstrate special benefit and proportionality or lose the assessment. (§ 4(f).)

Property Owner Approval. Those assessments that government agencies could prove met substantive hurdles faced one more obstacle under Proposition 218: approval by a weighted majority of assessed parcels in a mailed written ballot. (§ 4(c), (d), (e).) As a part of the balloting process, the agency had to make a full written disclosure of numerous aspects of the assessment to secure informed property owner consent. (§ 4(c).)

DISCUSSION

I. THE MAJORITY’S NEW STANDARD OF REVIEW FOR LOCAL ASSESSMENT DECISIONS UNDERMINES PROPOSITION 218’s SUBSTANTIVE PROTECTIONS AND CONTRAVENES ITS BURDEN-OF-PROOF PROVISION.

In applying what is essentially the pre-Proposition 218 standard of review (a highly deferential “anything goes” approach to assessments), the Majority breezes past every substantive restriction described in section 4(a) and imposed by California voters on all post-Proposition 218 assessments. Unless the new standard of review is to override all of the initiative’s substantive and burden-of-proof protections, this Court must intervene.

A. The Majority’s Highly Deferential Standard of Review Is Inconsistent With the Letter and Spirit of Proposition 218.

Relying chiefly on the 1887 case of *Lent v. Tillson*, 72 Cal.404, and other pre-Proposition 218 cases, the Majority invents a new standard of review that it claims is faithful to Proposition 218 while at the same time highly deferential to the determinations of assessing local governments in accordance with *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685 (*Dawson*). Under the Majority’s standard, a government agency seeking to levy an assessment must only create a record

with at least *some* affirmative evidence of special benefit and proportionality; it may no longer rely on *Lent's* blanket presumption of assessment validity. (Maj. Opn.. 10-15.)

But once the Majority's easy threshold of *some evidence* is crossed, the taxpayer inevitably loses. According to the Majority, no assessment may be declared invalid unless the taxpayer demonstrates that "an abuse of [the assessing agency's] discretion is clearly apparent." (Id. at 13.) As long as an assessment is adopted by a government agency after taking the necessary steps, it cannot be set aside as long as the agency demonstrates, in the exercise of its own discretion based on its own self-created record, some semblance of special benefit and proportionality. (Id. at 14.)⁵

The Majority's standard of review undermines *all* of the substantive restrictions in Proposition 218 discussed in the Overview Section above. As the Dissent observes, this is not what the voters intended. (Diss. Opn., 14-39.) If that were their sole or even primary purpose, only sections 4 (c), (d), and (e) dealing with balloting would be needed; sections 4(a) and (f)

⁵ If the assessment is challenged for any reason other than alleged absence of special benefit or lack of proportionality, even greater deference to the agency is required by the Majority: "In all other respects, such an assessment shall not be set aside by the courts unless it clearly appears on the face of the record before the legislative body, or from facts which may be judicially noticed, that the assessment constitutes a manifest abuse of discretion." (Id.)

would be superfluous. The Majority’s attempt to “read out” these key provisions contravenes the seminal rule of construction that every word and phrase in a constitutional provision is deemed to have a significant and distinct meaning. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799.)

To the extent anything in the substantive provisions is ambiguous, the voters left clear instructions as to how the uncertainty was to be resolved: “The provisions of this act shall be liberally construed to effectuate its purposes of [1] limiting local government revenue and [2] enhancing taxpayer consent.” (Postamble, § 5.) There are *two distinct purposes* listed here, not just one. Proposition 218 is most faithfully construed if all of its provisions are construed in harmony and in furtherance of both purposes. This is the approach taken by the Dissent, which, unlike the majority, reads all of Proposition 218's provisions in context.

The Majority also misconstrues section 4(f), the burden-of-proof provision of Proposition 218. As the Dissent points out, plaintiffs in *Knox*, supra, 4 Cal.4th at pp. 146-147, asked this Court to reevaluate the traditional deferential standard of reviewing assessments and to substitute for that standard the rule of *Beaumont Investors v. Beaumont-Cherry Valley*

Water Dist. (1985) 165 Cal.App.3d 227. (Dis. Opn. at 17-18.) On the burden of proof issue, the *Beaumont* court held that the solemn judicial duty to effectuate the constitutional initiative process, and the purpose of Proposition 13 to impose broad restrictions on special taxes, combined to require that a government agency bear the burden of establishing that it fell within an exception allowing it to charge service fees. (*Beaumont Investors*, 165 Cal.App.3d at p. 235.)

After this Court declined plaintiffs' invitation in *Knox* to shift the burden of proof to the assessing agency based on *Beaumont* (see 4 Cal.4th at pp. 146-147), the voters adopted Proposition 218, including section 4(f) which provides that:

“In any legal action contesting 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.”

As the Legislative Analyst explained, the effect of section 4(f) was to alter the impact of pre-Proposition 218 law that gave “significant flexibility” to assessing government agencies and to shift the burden of

proving illegality to taxpayers. (JA 2350.) The Legislative Analyst thus refutes the Majority's view that section 4(f) was intended to overrule the 1887 case of *Lent v. Tillson*, 72 Cal. 404, removing a presumption of legality by requiring "some facts." (Maj. Opn. 9-14.) There is no support for the Majority's position in the language or history of Proposition 218 or, for that matter, even in any pre-Proposition 218 case law.

B. The Majority Delegates Judicial Powers to Local Government Agencies By Refusing to Enforce the California Constitution.

The Majority says the constitutional doctrine of separation of powers demands deference to local legislative decisions. (Maj. Opn. 13.) But, as this court has held, a legislative body, whether state or local, has no power to violate the California Constitution. (*Hotel Employees and Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 602 ["A statute inconsistent with the California Constitution is, of course, void."].

Nor can a legislative body narrow the meaning of constitutional provisions or otherwise obstruct or undermine the enforcement of constitutional rights. (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471 ["[L]egislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not [,] in any particular [,] attempt to

narrow or embarrass it.”]; *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 79 [“[T]he Legislature may not change the meaning of a provision in the constitution by legislation.”]; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 184 [“The Legislature cannot limit a constitutional right.”].)

Once the historical facts are ascertained, the question of a constitutional violation becomes one of law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-801 [constitutional protection against usury applied de novo to historical facts of transaction].) For reasons discussed by the Dissent and in Sections II and III below, OSA has violated the California constitution – as a matter of law. With the aid of the Majority Opinion, OSA, and other agencies like it, will persist in its violation and serve as an example to other agencies, unless this Court grants review.

C. The Majority Improperly Excludes Evidence Submitted by Appellants In the Trial Court.

Under the Majority’s approach, not only is the assessing agency accorded broad discretion in levying assessments, it is permitted to create the sole record on which its own discretion will be exercised. As this case illustrates, the agency’s evidence normally comes from a bought-and-paid-

for source – an engineer’s report from a firm (here one called Shilts Consultants, Inc.) that specializes in promoting assessments and advertises a “we succeed at assessments” service to local governments – a price tag of several hundred thousand dollars for a package of surveys, reports, and other activities. (JA 147-148; 1066; 10981; 1129 [Shilts’ \$400,000 price-tag for promoting OSA’s assessment].)

Under the Majority’s standard, an engineer’s report from the agency’s own retained and self-interested assessment promoter becomes conclusive. Nothing else can be considered by the court. Taxpayers may not supply any contrary evidence – even to point out that the factual statements and assumptions in the engineer’s report are unfounded or false. (Id. at 12-13.)

The Majority’s confined record approach extends even further than its opinion implies. It means that only government-produced evidence can be considered – even if taxpayers appear at government hearings. Dozens of taxpayers, many of them members of Appellant Silicon Valley Taxpayer Association, appeared at hearings before the OSA. They made many of the same points Appellants have made in their challenge to OSA’s assessment. Taxpayers complained that alleged benefits were non-existent or at least indeterminable because no specific parcels were designated for acquisition

and the so-called cost of the assessment was really just a spending plan to fund discretionary government activity. (JA 1788-1790; 1847-1848; 1896-1897.)

One taxpayer, real estate broker William Becker, was the only real estate professional to address the board. Mr. Becker stated that the assessment did not benefit his property and, as a follow-up to his statement, filed a declaration in Appellants' lawsuit setting forth his qualifications and giving his more detailed opinion that the assessment would depress, not increase, land values. (JA 1788-1789; 2270-2289.) OSA ignored his uncontroverted evidence. So did the Majority.

Indeed, the Majority ignored every bit of the evidence supplied by taxpayers at public hearings. Nothing in its opinion even acknowledges that taxpayers appeared and spoke against the assessment. According to the Majority, OSA's engineer was unassailable; in contrast, anything taxpayers had to say, no matter what their level of learning or expertise, was incompetent.

The Majority's unfairness to taxpayers seeking only to be heard is manifest elsewhere in its opinion. The Majority used the opinions of amici curiae San Jose Silicon Valley Chamber of Commerce and Silicon Valley Manufacturing Group to establish special benefit to commercial property.

(Maj. Opn. 23.) In contrast, it refused to consider similar evidence submitted by Appellants in the trial court to demonstrate lack of special benefit, even to the point of striking Appellants' references to it in their appellate briefs. (Id. at 13, fn. 4.) According to the Majority, evidence from parties is extra-record, inadmissible, and unspeakable in an appellate brief. An amicus brief supporting the government, on the other hand, is a valuable source of facts. This kind of double-standard treatment favoring the government is exactly the opposite of what the voters decreed as standard operating procedure in lawsuits challenging legal assessments. (JA 2350.)

II. OSA'S VAST SPECIAL ASSESSMENT FOR OPEN SPACE VIOLATES PROPOSITION 218'S SUBSTANTIVE RESTRICTIONS ON THE KINDS OF ASSESSMENTS THAT CAN BE IMPOSED BY GOVERNMENT AGENCIES.

OSA's 800-square-mile, flat rate assessment of more than 300,000 parcels of property for \$8,000,000 a year worth of open space tramples on every one of Proposition 218's specific restrictions on assessments. The numerous flaws in OSA's assessment, and in the Majority's attempt to defend it, are thoroughly described in Justice Bamattre-Manoukian's

Dissenting Opinion. (Dis. Opn. 1-10, 13-14, 21-35.)⁶ The Dissent analyzes both the language and the history of Proposition 218 as revealed in the Ballot Pamphlet mailed to voters, pointing out the ways in which the Majority Opinion either flatly disregards or distorts key provisions of the California Constitution. Without endeavoring to repeat the Dissent's criticisms, with which Appellants naturally agree, Appellants will comment briefly on OSA's principal violations of the constitutional law of assessment. Each of these violations is apparent from the face of OSA's own engineer's report because each illustrates a fatal flaw in the scope and methodology of OSA's assessment.

A. OSA's Measurement of General Benefit Violates Section 4(a)'s Exclusion-of-General-Benefit Requirement.

The separation of general benefit hurdle may be the most significant substantive change wrought by Proposition 218. By its terms, property owners may no longer be assessed for any *general benefit*; instead, all general benefit must be excluded from an assessment – and paid for with the agency's non-assessed funds. In section 4(a), the initiative states:

⁶ The structure and tone of the Dissent leaves the reader with the impression that it was drafted as a majority opinion that failed to garner a second vote.

“Only special benefits are assessable and an agency shall separate the general benefits from the special benefits conferred on a parcel.” (Emphasis added.)

As explained by the Legislative Analyst, this was a massive change from pre-Proposition 218 law. (JA 2349.) Under that law: “Often, the rest of the community or region also receives *some* general benefit from the project or service, but does not pay a share of the cost.” (*Id.*; emphasis added.) Proposition 218 changed all of this by requiring that only special benefits be assessed and that general benefits be separated, excluded, and paid for with non-assessed funds. (§4(a).) As a result, in the words of the Analyst:

“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.” (JA 2349; emphasis added.)

OSA violated this requirement. Proposition 218 provides that: “‘Special benefit’ means a particular and distinct benefit over and above general benefits [1] conferred on real property located in the district [i.e., the area covered by the assessment] or [2] to the public at large. General enhancement of property value does not constitute ‘special benefit.’” (§ 2(i), incorporating § 2(d).)

In contrast with Proposition 218's definition, OSA's sole measure of the general benefit from its assessment is described in the following passage in the Shilts engineer's report:

“A measure of this general benefit is *the proportionate amount of time that the OSA's or participating city's open spaces and recreational areas are used and enjoyed by individuals who are **not** residents, employees, customers or property owners in the OSA.*” (JA 568; emphasis added.)

Thus, OSA's measure disregards *both* kinds of general benefit described in section 2(i): all benefit to property (including general enhancement of its value) *within* OSA's district *and* all benefit to the public at large *within* that same area.

1. General Benefit to the Public at Large, Including the Public Within OSA's District, Must Be Separated from Special Benefit and Excluded from Assessment.

OSA's measure flatly disregards the indisputable fact that there are over a million people who do live, work, or shop in OSA's territory every day. As members of the “public at large,” they also use and enjoy OSA's open space. Indeed, OSA itself estimates that they will use its open space 95% of the time. (JA 568 [fewer than 5% of open space users are non-

residents, non-employees, or non-customers].) Yet OSA refuses to allocate even a fraction of 1% general benefit to their public use. According to OSA, their use does not count.

OSA's legal error in disregarding general benefits to people within its territory necessarily and profoundly skews the general/special benefit allocation. For example, 40% of OSA's residents are tenants who pay absolutely nothing because they do not own property subject to assessment. (JA 2296.) They enjoy all of the supposed benefits of open space. They absorb the views. They drink the water and breathe the air. They have access to recreational areas. They enjoy educational and employment opportunities. And they experience a better quality of life. And yet, this group of some 500,000 people is completely factored out of the special/general benefit allocation. OSA assumes they receive no general benefit at all.

2. General Benefits to Real Property Must Also Be Separated from Special Benefit and Excluded from Assessment.

Under common law as quoted by the Majority from *Knox v. City of Orland* (1992) 4th Cal.4th 132, 142, a special benefit is one that “particularly and directly” benefits the assessed property as “over and above that received by the general public.” (Opinion, p. 21.) Thus, the common

law definition is based on a distinction between two kinds of benefit that come from public improvement – those accruing to property and those accruing to the public. Under the common law before Proposition 218, any benefit at all accruing to property justified an assessment.

In contrast, Section 2(i) defines special benefit as follows: “A particular and distinct benefit *over and above [1] general benefits conferred on real property located in the district* or [2] to the public at large.” (Emphasis added.) The Majority pretends the italicized phrase is not there. It attributes no meaning at all to its language in violation of the most fundamental canon of construction: Meaning must be assigned to every word and phrase in a constitutional provision. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799.)

The significance of the added language in section 2(i) is monumental. In addition to general benefits to the public at large, there are now *general benefits to “real property located in the district.”* Neither *Knox* nor any other pre-Proposition 218 case acknowledges the prospect of *general benefit to property in the district*, as well as to the public. Prior decisions, including *Knox*, distinguished merely between benefit to property as special and benefit to the public as general. Henceforth, that distinction is insufficient. Now public agencies and reviewing courts must factor out

of special benefits not only benefits to the public, but benefits to property in general within the territory of every assessment district.

Although the majority declines to candidly acknowledge the fact, much of the claimed benefit from OSA's assessment accrues to *property in general* within the district. Indeed, OSA's lynch-pin assumption that all properties in the district benefit in proportion to their status on the tax rolls, number of employees per acre, etc., plainly reveals that OSA is speaking of benefits to property in general, i.e., *all* property lying within OSA's 800-square-mile territory, and not of particular parcels that enjoy unique benefits from specified public improvements. (JA 569-573.)

Every item on OSA's benefit assessment list – “scenic views,” “employment opportunities,” “quality of life,” etc. – is something OSA maintains will accrue to property in general in the community, not to particular parcels. Indeed, this is the very way in which OSA manages to argue that location and type of open space make no difference in its assessment – because all property in the community gets *some* benefit just by being in a community that has a few thousand acres of open space. What OSA (and the majority) miss is the general-benefit-to-property language of section 2(i) as the framers wrote it and the voters passed it. That language makes this kind of benefit general, not special.

3. General Enhancement of Property Value Must Be Separated from Special Benefit and Excluded From Assessment.

Although the majority admits that section 2(i) excludes “general enhancement of property value” from the definition of special benefit, it claims that this is not an innovation. It cites *Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852, 858, but fails to note the inconsistency between the approach to special benefit taken there and that taken in other cases, such as *Federal Const. Co. v. Ensign* (1922) 59 Cal.App. 200, a case extensively relied on by the majority, as well as *Auburn Lumber Co. v. City of Auburn* (1968) 258 Cal.App.2d 732, 737-738, and *Cogan v. City of Los Angeles* (1973) 34 Cal.App.3d 516, 521-522. In a cryptic sentence, *Harrison* summarily criticizes *Federal Const. Co.* without attempting to chart the course of the law of benefit assessments.

In the other three cases cited above, the courts allowed enhancement of property value in relation to reasonably potential uses to constitute special benefit. To rectify this perceived fundamental error, Proposition 218 narrowed the definition of special benefit by excluding general enhancement of property value in order to overrule cases like *Auburn Lumber* which “held that an increase in the value of property in relation to

its potential use provided sufficient benefits to justify an assessment.”

(Cole, Special Assessment Law Under California’s Proposition 218 and the One-Person One-Vote Challenge (1998) 29 McGeorge L. Rev. 845, 868-869.)

Moreover, even if *Harrison* represented mainstream law before Proposition 218, the majority inexplicably declines to apply its holding here. If it did so, OSA’s assessment would not survive.

Harrison invalidated an assessment because there was no evidence to support the public entity’s naked assumption that property on high ground several blocks from streets that flooded in the rainy season would enjoy an increase in market value from draining the flooded streets.

Harrison refused to allow a public entity to surmise that property value increases (and any special benefit) would occur in property only a few blocks away from flooded streets. (*Id.* at pp. 858-859.)

In this case, the OSA has engaged in even wilder speculation than the public agency in *Harrison*. It has surmised that all property within an 800-square-mile area benefits in equal fashion in proportion to its tax roll status from unspecified and unlocated open space. The Majority declines to explain why *Harrison* does not require invalidating OSA’s assessment.

**4. Proposition 218 Demands a Strict Separation of All
General Benefit – Something OSA Flatly Refused To Do.**

Although the Majority does not so acknowledge, its favorite case of *Federal Const. Co. v. Ensign* (1922) 59 Cal.App. 200, 209, allows 100% of the benefits of a public improvement that creates *any* special benefit to be assessed *entirely against property owners*. Property owners thus pay for *all* benefits, whether general or special, of public improvement. The public pays *nothing* despite potentially enormous general benefit.

To rectify this misallocation of benefit and burden, section 4(a) of Proposition 218 demands a strict separation of general and special benefit to the point where assessments with largely general benefits must be paid for by taxpayer dollars or abandoned. (JA 2349.) The majority refuses to acknowledge this vital part of Proposition 218's history or to deal with the overwhelmingly general benefits in OSA's assessment. Unable to address this key aspect of Proposition 218, the majority mischaracterizes appellants' argument, transfiguring it into another assertion it prefers to answer. It says:

“Plaintiffs assert that this division of benefits is not proper because it ignores the general benefits enjoyed by the persons and property located within the district. This is really just

another way of saying that benefits accruing to people cannot be special benefits or that benefits accruing to all properties cannot be special. As we have explained, that is not so.”

(Opinion, p. 29.)

This is not appellants’ position. What Appellants are saying is this: Sections 2(i) and 4(a) demand that an assessing agency distinguish between special benefit *and* general benefit to: (1) all property in the assessment district; *and* (2) the public or community as a whole. The agency must then make sure that neither of these two distinct kinds of general benefit is assessed.

OSA’s approach to this language, now endorsed by the Majority, is to ignore it. But OSA’s operational definitions of special and general benefits as set forth in the Engineer’s Report are not matters of discretion; they are matters of law governed by Proposition 218. The Majority is thus incorrect when it purports to apply abuse of discretion review to the separation of general benefit issue. When a public agency disregards the law or commits legal error, it necessarily abuses its discretion. (*Paterno v. State* (1999) 74 Cal.App.4th 68, 85 [abuse of discretion to apply the wrong legal standard]; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 [no discretion to misconstrue law; misconstruction is abuse].)

Having proceeded from the faulty premises just described in defining and separating general benefit, OSA necessarily reached a fatally flawed conclusion that underestimated general benefit. For this independent reason, the assessment is invalid.

B. OSA’s Assessment is Not Based on the Actual Cost of a Definite Public Improvement.

Proposition 218 requires that the “proportionate special benefit” assessed to properties 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.*”⁷ It also requires that assessed property owners be given written notice of, among other things, the “*duration of the payments*” for the assessment. (§ 4(a) & (c); emphasis added.)

OSA’s assessment is not a levy based on the cost of a defined permanent public improvement. Nor does it have a fixed duration. It is instead an annual spending program to fund whatever open space projects

⁷ § 4(a); emphasis added. “Capital cost” is “the cost of acquisition, installation, construction, reconstruction or replacement of a permanent public improvement.” § 2(c). “Maintenance and operations expenses” is the “cost of rent, repair, replacement, rehabilitation, fuel, power, electric current, case, and supervision necessary to properly operate and maintain a permanent public improvement.” § 2(f). The term “permanent public improvement” is not defined.

OSA might desire. The assessment simply raises an annual block of funds for largely undefined and unspecified “open space.”

OSA’s enabling act (Public Resources Code, §§ 35100 et seq.) does not define open space. The engineer’s report purports to define it as any “area of land or water” that can be used to preserve or restore the environment, to provide public recreation, to preserve scenic views, to buffer urban areas, or to sustain agriculture. (2 JA 545.) Its definition encompasses practically anything the government might do except build housing or commercial structures.

OSA’s engineer’s report contains no information concerning the nature or location of any specific improvement, no mention of the use to which any particular acquired land might be put, and no identification of any parcel OSA intends to acquire. (See 2 JA 545-556.) As a result, OSA cannot calculate or even estimate any capital or maintenance “costs” of a public improvement in assessing plaintiffs’ property.

Nor does OSA’s chosen assessment figure signify the capital or maintenance cost of anything. Instead, OSA simply chose the sum of \$8,036,282.00 because Godbe Research, a firm OSA hired to conduct a public opinion poll, found that most single family property owners would not oppose a \$20 per year levy for open space. (1 JA 103.) Extending this

number through the tax roll, OSA's engineer arrived at the \$8+ million total assessment figure. (1 JA 114:2 – 117:14.)

By its very nature, a special assessment requires a determination that a specifically identified public improvement – such as a sidewalk, street, street light, or neighborhood park – confers a unique and distinct benefit on a parcel of property in its vicinity. The Legislative Analyst so recognized in the ballot pamphlet, stating that examples of traditional pre-Proposition 218 assessments included “sidewalks, streets, lighting, or recreation programs *in [the property owner's] neighborhood.*” (8 JA 2349.) OSA's assessment took no account of the mandate that it identify a specific project in any neighborhood that has a “capital” and/or “maintenance” cost. Instead, it chose to raise \$8 million for public spending on one or more projects of unknown capital and maintenance costs that it may select and undertake, in its discretion, at some time in the future. This violates Proposition 218.

C. OSA’S Flat Parcel Assessment Is Profoundly Disproportionate Because it Rests on a Flawed Assumption of Equal Benefit to All Assessed Properties Within Particular Tax Classifications.

Proposition 218 directs that: “No assessment shall be imposed on any parcel which exceeds the reasonable cost of the *proportional* special benefit conferred on that parcel.” It further provides that the “*proportionate* special benefit derived by each identified parcel” is to be “determined in relationship to the entirety of the capital cost of a public improvement [or] the maintenance and operation expenses of a public improvement.” (§ 4(a); emphasis added.) Finally, it squarely places the burden on OSA to demonstrate that “the amount of any contested assessment is proportional to, *and* no greater than, the benefits conferred on the property or properties in question.” (§ 4(f); emphasis added.)

The Majority assumes that this language is nothing new. The Legislative Analyst disagreed. She concluded that the proportionality language of Proposition 218 imposed a significant new condition that would require more detailed and specific methodology. As she explained:

“[L]ocal governments must ensure that no property owner’s assessment is greater than the cost to provide the

improvement or service to the owner's property. *This provision would require local governments to examine assessments amounts in detail, potentially setting them in a parcel-by-parcel or block-by-block basis.*" (JA 2350; emphasis added.)

Preferring not to address the Analyst's comments, the Majority adopts a 100% deferential "close enough for government work" approach to proportionality. It describes OSA's methodology and upholds it based solely on "the limited scope of review." (Maj. Opn. 27-28.) Although it recognizes the fundamental disproportionality of an assessment for a park that is identical whether the park is two minutes or two hours away, it attributes no significance to the difference. The Dissent, in contrast, finds OSA's proportionality analysis to be flawed because it is based on a spending budget rather than a specific public improvement that can be costed, located, and evaluated on its impact on surrounding real estate. (Dis. Opn. 30-35.) The Dissent has it right.

**D. OSA’S Decision to Exempt from Assessment Whole
Classes of Properties Is a Blatant Violation of Proposition
218’s No-Exemption Clause.**

Before Proposition 218, public agencies such as schools generally did not have to pay assessments. Other exemptions were also possible. California’s voters changed all that. Section 4(a) of Article XIII D provides:

“An agency which proposes to levy an assessment shall identify all parcels which have a special benefit conferred upon them and upon which an assessment will be imposed. . . . Parcels within a district that are owned or used by any agency, the State of California, or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.”

(Emphasis added.)

In the face of this no-exemption rule, OSA excludes whole classes of properties from its assessment on the sole ground that they allegedly offer “offsetting benefits” in the form of open space and recreational areas. Among the exempted lands are agricultural property, church property, and “property used for educational purposes” (public or private). (2 JA 573

[Engineer's Report].) Because OSA made no finding – and offered no evidence – that any of the exempt parcels in fact receive no special benefit, all of the exemptions are invalid on their face.

For example, public schools are fully assessable, yet OSA flatly refuses to assess them. School districts are expressly included within the class of “special districts” that are government “agencies” whose property is subject to assessment. (§ 2(a), incorporating Cal. Const. Art. XIII C, §§ 1(b) & (c).) As the Legislative Analyst recognized: “Local governments must charge schools and other public agencies their share of assessments.” (8 JA 2350.) Proposition 218's school property assessment requirement was fully understood even by its opponents, who alleged in their ballot arguments that new school “taxes” would generate cuts in classroom teaching that would “worsen school crowding.” (8 JA 2352-2354.) Yet OSA, which apparently regards itself as above even the clearest commands of the California constitution, brazenly refuses to assess schools.

The Majority's approach to Appellants' no-exemption challenge to OSA's assessment is mystifying. (Maj. Opn. 30.) Initially, the Majority misconstrues the challenge as applying only to schools when Appellants clearly directed their argument to all of OSA's exemptions, none of which were accompanied by any no-special-benefit findings. (See AOB 73-74.)

The Majority then concludes that the crystal clear no-exemption language of Section 4(a) “does not apply here,” explaining that OSA somehow must have applied an undescribed “apportionment formula” to “every type of property” and found that there was no “net benefit” to those properties.

The Majority then declares, by judicial fiat if not force of reasoning: “This is consistent with the Constitutional requirements.” (Maj. Opn. 30.)

As the Dissent points out, there are numerous flaws in the Majority’s analysis which disregards both the clear language of Proposition 218 and its history. (Dis. Opn. 35-36.) For this additional reason, review should be granted.

III. OSA’s FAILURE TO DISCLOSE TO PROPERTY OWNERS THE DURATION OF ITS ASSESSMENT AND THE TOTAL AND PER PARCEL AMOUNTS ASSESSED VIOLATES THE OWNER CONSENT PROVISIONS OF PROPOSITION 218.

As the Dissent observes, OSA’s assessment does not inform property owners receiving ballots, in the clear and unmistakable terms required by sections 4(c), (d), and (e) and section 5 of the Postamble, that this is a perpetual assessment that will cling to their property forever, has no actual or discernable cost, and will never be paid off. Even if such an assessment were substantively permissible, the failure to give property

owners clear information about what they were voting on is a violation of Proposition 218's canon requiring a construction that “enhanc[es] taxpayer consent.” (Postamble, § 5.)

CONCLUSION

Without this Court’s review, the Court of Appeal’s decision in this case will become controlling California constitutional law in the area of special assessments. OSA’s “creative” and “imaginative” three-step method of assessment – (1) impose a flat tax on 300,000 parcels to amass a discretionary fund; (2) call better views, more recreation, environmental protection, and a better quality of life “special benefits;” and (3) rely on “legislative discretion” to defeat any taxpayer challenge – will become the standard local government revenue-raising mechanism. After all, environmental protection and a better quality of life accompany a host of public spending projects, including school construction and maintenance, public libraries, parking garages, civic buildings, and police and fire protection. As this Court said in *Ventura Group Ventures*, supra: “If everything is special, then nothing is special.” (24 Cal.4th at p. 1106.)

It does not take Nostradamus to foresee the next move. Local governments will use assessments in place of special and general tax increases for public spending projects of all kinds because. As in this case,

assessments are easier to get passed because ballots are mistaken for junk mail and property owner turnout is 15%. (Dis. Opn. 11-12.) Proposition 218's tax approval provisions will be undermined. California taxpayers will engage in another "taxpayer revolt" and enact a Draconian initiative, just to recoup the advantages they built into Proposition 218, but then lost when the Court of Appeal took them away.

Such a process is neither good law or good policy. This Court, and only this Court, should determine what the California constitution means in the vitally important area of special assessments. Review should be granted.

DATED: August 12, 2005

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 8,394 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief. The entire brief is double spaced. The font is 13 point Times New Roman.

DATED: August 12, 2005

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**PROOF OF SERVICE
STATE OF CALIFORNIA - COUNTY OF SAN DIEGO**

I am employed in the City of Davis, County of Yolo, State of California. I am over the age of 18 and not a party to this action; my business address is: 2050 Lyndell Terrace, Suite 240, Davis, CA 95616.

On August 12, 2005, I served the document(s) described as: **PETITION FOR REVIEW** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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- (STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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