Filed 7/6/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SILICON VALLEY TAXPAYERS ASSN., INC., et al., Plaintiffs and Appellants, v. SANTA CLARA COUNTY OPEN SPACE AUTHORITY, Defendant and Respondent.	H026759 (Santa Clara County Super. Ct. Nos. CV804474, CV000705)

A. INTRODUCTION

Two taxpayer organizations and several individual taxpayers appeal from a judgment of the trial court validating an assessment levied by the Santa Clara County Open-Space Authority (OSA) in 2001. Plaintiffs claim that the assessment, which is intended to fund the acquisition and maintenance of open space land, runs afoul of Proposition 218, the Right to Vote on Taxes Act.

We hold that although Proposition 218 tightened the required procedure by which special assessment districts are formed and increased judicial scrutiny of an assessment as finally confirmed, Proposition 218 did not alter the fundamental rule that the courts shall not interfere with legislative acts except where those acts clearly depart from constitutional requirements. We further hold that Proposition 218 did not narrow the historical concept of special benefit, the sole justification for any special assessment.

Applying these holdings to the facts of this case we conclude that OSA formed the 2001 assessment district consistent with Proposition 218's requirements. In particular,

OSA demonstrated that the acquisition and maintenance of open space would provide a special benefit to the assessed properties and that the 2001 assessment was levied in proportion to the special benefits conferred. Accordingly, we shall affirm the judgment.

B. FACTUAL AND LEGAL BACKGROUND

1. The Creation of OSA and the Nature of Special Assessments

OSA was created by the Santa Clara County Open-Space Authority Act. (Pub. Res. Code, § 35100 et seq.) The express purpose of the act was to preserve open space within Santa Clara County in order to counter the conversion of land to urban uses, to preserve quality of life, and to encourage agricultural activities. (Pub. Res. Code, § 35101, subd. (a).) The act does not provide any particular mechanism to fund the acquisition of open space; it leaves that to OSA. Among other things, the act gives OSA the power to levy special assessments[1] pursuant to the Streets and Highways Code. (Pub. Res. Code, § 35173.)

The nature of a special assessment was explained by our Supreme Court in the pre-Proposition 218 case of *Knox v. City of Orland* (1992) 4 Cal.4th 132, 141-143 (*Knox*). As *Knox* explained, a special assessment is a " ' " 'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein . . . .' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for

[1] Special assessments are sometimes referred to as special benefit assessments, local assessments, or simply as assessments. For our purposes, the terms are interchangeable.

special benefits for the few, and the few specially benefited should not be subsidized by the general public. [Citation.]' [Citation.] . . .

"A tax, on the other hand, is very different. Unlike a special assessment, a tax can be levied ' "without reference to peculiar benefits to particular individuals or property." ' [Citations.] Indeed, '[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.' [Citations.] . . .

"Therefore, while a special assessment may, like a special tax, be viewed in a sense as having been levied for a specific purpose, a critical distinction between the two public financing mechanisms is that a special assessment must confer a special benefit upon the property assessed beyond that conferred generally." (*Knox, supra*, 4 Cal.4th 132, 141-142.)

The power of a local agency to form an assessment district is based upon statute. The pertinent statutory scheme in this case is the Landscape and Lighting Act (LLA). (Sts. & Hy. Code, § 22500 et seq.) The basic procedure for forming an assessment district under the LLA begins with a resolution by the assessing agency's governing board. (Sts. & Hy. Code, § 22585.) The resolution must include an order directing an engineer to prepare a report containing plans and specifications for the proposed improvement, an estimate and assessment of its costs, and a diagram of the proposed assessment district. (Sts. & Hy. Code, §§ 22567, 22585, subd. (d), 22586.) After approving the engineer's report, the agency must provide notice and an opportunity for the affected property owners to be heard. (Sts. & Hy. Code, § 22588.) If a majority of the property owners protest the proposal, the agency must abandon it. (Sts. & Hy. Code, § 22593.)

OSA formed an assessment district in 1994 under the procedures then provided by the LLA. Certain taxpayers challenged the 1994 assessment and this court subsequently found it to be valid. (*Coleman v. Santa Clara County Open Space Authority* (Oct. 20,

1997) H014730 [nonpub. opn.].) The 1994 assessment raised approximately $4 million annually and led to the acquisition of thousands of acres of open space.

2. Creation of the 2001 Assessment District and Proposition 218

Toward the end of 2000, OSA concluded that it needed to seek additional funding sources and considered the formation of another assessment district. Since the formation of the 1994 assessment district, however, the voters of this state had passed Proposition 218, which changed the law pertaining to special assessments. The history and purpose of Proposition 218 has been well-described by others:

" 'Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. "The purpose of Proposition 13 was to cut local property taxes. [Citation.]" [Citation.] Its principal provisions limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to 2 percent per year unless and until the property changed hands. (Cal. Const., art. XIII A, §§ 1, 2.)

" 'To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4; *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 6-7.) It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. [Citation.] Accordingly, a special assessment could be imposed without a two-thirds vote.

" 'In November 1996, in part to change this rule, the electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution. Proposition 218 allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. (Cal. Const., art. XIII D, § 3, subd. (a)(1)-(4); see also [*id.*], § 2, subd. (a).) It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges.' " (*Apartment Assn. of Los Angeles*

County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 836–837, quoting *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681-682.)

Article XIII D of the California Constitution contains the provisions at issue in this case.[2] Section 4 (a) of that article[3] provides that an agency proposing to levy an assessment "shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall 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. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. 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." Section 2 (i) defines special benefit as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute 'special benefit.' "

The notice, hearing, and protest requirements of the initiative are codified in Government Code section 53753, which is incorporated by reference into the LLA. That section now requires the assessing agency to give notice to every record owner of property in the proposed assessment district and to include with the notice a ballot to use

[2] The sections of article XIII D pertaining to special assessments (sections 1-5) are set forth in full in the appendix.

[3] Hereafter, all unspecified section references are to article XIII D.

in voting for or against the assessment. (Gov. Code, § 53753, subd. (c).) The form and content of the ballot is spelled out in detail in the statute. The agency must also hold a public hearing at the conclusion of which the ballots are tabulated according to a specified procedure. (*Id*. subds. (d), (e)(1).) If there is a majority protest, the legislative body may not impose the assessment. (*Id*. subd. (e)(3).) A majority protest exists if the ballots in opposition to the proposed assessment exceed the ballots in its favor, "weighting those assessment ballots by the amount of the proposed assessment to be imposed upon the identified parcel for which each assessment ballot was submitted." (*Id*. subd. (e)(2).) If no majority protest is filed (which would generally mean that a weighted majority has voted in favor of the assessment), the legislative body may order the improvement and the formation of the assessment district and confirm the assessment. (Str. & Hy. Code, § 22594, subd. (a).)

Finally, section 4 (f) provides: "In any legal action contesting the 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."

With the new provisions of Proposition 218 in effect, OSA pursued the possibility of creating a new assessment district. OSA first commissioned a survey to determine whether the property owners in its jurisdiction would favor a further assessment to fund the acquisition of additional open space. The survey concluded that approximately 55 percent of property owners would vote in favor of a $20 per year increase in their property taxes for the purpose of acquiring and maintaining open space.

OSA engaged Shilts Consultants, Inc. (SCI) to prepare the required engineer's report. The engineer's report described the proposed work and improvements as: "Acquisition, installation, maintenance and servicing of public areas and public facilities, property owned or property rights, easements, leases or dedications including, but not

limited to, open space lands, greenbelts, hillsides, viewsheds and watersheds, bay lands, riparian corridors, urban open space, parklands, agricultural lands, development rights on agricultural lands and other land-use types, conservation easements, and other property rights, wetlands, utility right-of-ways [*sic*], surplus school sites, quarries, benches, signage, fencing, fire breaks, picnic areas, restrooms, trails, lighting and foot bridges . . . ." Although the report set forth the considerations OSA would use in identifying and acquiring open space, it did not identify any particular parcels to be acquired. Among the goals listed in the report is the goal "to achieve a geographical distribution of open space throughout the Authority's boundaries."

The boundaries of the proposed 2001 assessment district were coterminous with OSA's boundaries. Thus, all the lands within Santa Clara County other than those contained within the Midpeninsula Regional Open Space District were to be included in the 2001 assessment district. The engineer's report identified the special benefits accruing to the assessed parcels, estimated the proportion of all the benefits that could be considered special, set the assessment for a single family home at $20 per year, and provided a formula for estimating the proportionate special benefit every other property on the tax rolls would receive.

The OSA Board of Directors (the Board) discussed the engineer's report at its meeting on August 30, 2001 and filed the preliminary report at that time. The Board set a public hearing for November 8, 2001, and adopted balloting procedures. On September 1, 2001, OSA mailed an informational brochure to the property owners that described the assessment district and its goal to raise more than $8 million annually for the purpose of acquiring open space in urban and rural areas of the county. The brochure informed the recipients that OSA would mail ballots on September 14.

On September 14, 2001, OSA mailed a notice of the proposed assessment and an official ballot to all affected property owners. Return postage for the ballot was prepaid. The return address was for Assistance Plus, a third party vendor retained by OSA to

tabulate the ballots. OSA conducted an informational meeting on October 25, 2001, at which OSA's general manager and special counsel and a representative from SCI responded to numerous questions from the public. The formal public hearing was held on November 8, 2001.

Assistance Plus reported the results of the balloting at a public hearing on December 13, 2001. Forty-eight thousand, one hundred ballots had been received. Of those, 32,127 (66.8 percent) voted in favor of the assessment. The rest were "no" votes. When weighted based upon the amount each parcel was to be assessed, the result was 50.9 percent in favor and 49.1 percent opposed. The Silicon Valley Taxpayers Association (SVTA) objected that the tabulation did not include the forms returned by some of the 2500 large property owners to whom SVTA had mailed informal ballots as part of its opposition campaign. After consulting with counsel, OSA rejected the unofficial forms because the forms did not meet Proposition 218's requirements.

The final engineer's report, which was before OSA at the December meeting, contained some changes from the draft that had been on file since September. In particular, the final report stressed that the "overriding" and "most important" criterion to be used in acquiring land is that the land be distributed throughout OSA's jurisdiction.

At the conclusion of the December 13, 2001 hearing, the OSA board accepted the final engineer's report and established the new assessment district.

C. PROCEDURAL HISTORY

SVTA, Howard Jarvis Taxpayers' Association, and several individuals (collectively, plaintiffs) filed this action for a writ of mandate, declaratory relief, and injunction seeking to invalidate the 2001 assessment. Plaintiffs' second amended complaint contains two causes of action. The first cause of action complains that OSA did not properly conduct the balloting and tabulation of the property owners' votes. The second cause of action challenges the substantive validity of the assessment.

The parties filed cross motions for summary judgment or in the alternative, summary adjudication. Plaintiffs' papers included declarations and deposition excerpts in addition to their references to the record before OSA. OSA objected to the extra-record evidence. Without expressly ruling on the evidentiary objection the superior court granted summary adjudication in favor of OSA on the second cause of action, referring only to material contained in the record of the proceedings leading up to formation of the assessment district.

Plaintiffs filed a second complaint challenging the 2003-2004 assessment approved by OSA in June 2003. As pertinent here, the new complaint raised the same issues plaintiffs raised in the first case. The two cases were consolidated. The parties stipulated to certain facts relating to the first cause of action and resubmitted the matter to the superior court for final resolution. The court granted summary adjudication of the remaining causes of action and entered judgment in favor of OSA.

D. ISSUES

Although plaintiffs state several of the issues separately, there are three primary issues on appeal:

1. Is an assessment for the future acquisition and maintenance of unspecified open-space land constitutionally permissible?

2. Did OSA mislead property owners so that the results of the balloting are invalid?

3. Is the assessment valid as finally confirmed? That is, does the acquisition and maintenance of open space confer a special benefit on the assessed properties and is the assessment levied in proportion to the special benefits conferred; did OSA separate the general from the special benefits; and did OSA properly exempt certain parcels from the assessment?

E. STANDARDS OF JUDICIAL REVIEW

Before proceeding to the merits we must first determine the applicable standard of review on appeal. The standard differs depending upon the issue we are considering. The first issue we address is whether the Constitution permits the use of a special assessment to fund the acquisition of land that is unidentified at the time the assessment is levied. This is an issue of constitutional interpretation upon which we exercise our independent judgment. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.)

In considering whether OSA misled the property owners, we proceed as with any other factual allegation. We are not limited to the record before the OSA Board, which, as we shall discuss *infra*, is a limitation upon our review of the substantive validity of the assessment. (See *Not About Water Com. v. Board of Supervisors* (2002) 95 Cal.App.4th 982, 1003 (*Not About Water*).) The only way plaintiffs could develop their claim that OSA misled the property owners would be to litigate the facts in the trial court. Accordingly, we apply the same standard of review we apply in reviewing any appeal following the grant of a summary judgment motion. (Cf. *Ibid.*) We look to the whole record to determine whether plaintiffs have established a triable issue of fact. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.)

Our review of the validity of the assessment as finally confirmed, however, is narrowly restricted. Because of the changes included in Proposition 218 it warrants a somewhat detailed discussion.

Prior to the passage of Proposition 218, the standard of review of the validity of an assessment was settled: "A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be

bestowed on the properties to be assessed or that no benefits will accrue to such properties." (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685 (*Dawson*).)

Dawson distilled this standard from a number of older cases. *Lent v. Tillson* (1887) 72 Cal. 404 is especially instructive. In *Lent*, property owners challenged an assessment claiming that unless there was affirmative evidence of benefit in the record before the agency the assessment was invalid. (*Id.* at p. 427.) The Supreme Court rejected the argument, pointing out that the power of taxation does not arise from the existence of the benefit but was inherent in the taxing power vested in the legislative body. (*Id*. at p. 428.) *Lent* was not unaware of the potential for abuse of the taxing power, noting that many cases involved "great hardship and clear extortion, in which the local benefit claimed is only a pretense to cover the unjust exaction." (*Ibid.*) Nevertheless, the court refused to inquire into the particulars of the supposed benefit. The court explained that the Legislature must act upon its judgment as to what will prove beneficial. Judicial interference is warranted only "when the courts *can* plainly see that the legislature has not really exercised this judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result." (*Id.* at p. 429.) Under this analysis, as restated by *Dawson*, although special benefit and proportionality are necessary to a valid assessment, their existence is presumed. A reviewing court might hold an assessment to be valid even if neither foundational requirement affirmatively appears in the record before the legislative body.

Proposition 218 has called this standard of review into question. Section 4 (f) now provides that in "any legal action" challenging the validity of an assessment, "the burden shall be on the agency to demonstrate" that the properties will receive "a special benefit over and above the benefits conferred on the public at large" and that the amount of the contested assessment "is proportional to, and no greater than, the benefits conferred." In interpreting this provision to determine how it has affected the standard of review on appeal we apply the same principles we apply when interpreting a statute. We turn first

to the language, giving the words their ordinary meaning. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

The language of section 4 (f) is clear--the agency has the burden to demonstrate special benefit and proportionality. That said, we must nevertheless determine how that burden works in practice and how it affects the appellate standard of review. The Legislative Analyst referred to the provision in the ballot materials as shifting the "burden of proof" to make it "easier for taxpayers to win lawsuits." In the typical adjudicative proceeding the burden of proof is different than the standard of review. The burden of proof is an evidentiary concept. The party with the burden of proof has to convince the trier of fact to a specified degree of certainty that a particular fact exists. (*Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.* (1993) 508 U.S. 602, 622.) The standard of review is the test applied by the reviewing court when determining whether the lower tribunal made a mistake. (*Ibid.*)

In a validation action like this one the superior court does not function like a trial court in an ordinary adjudicative proceeding. The factual evidence before the court in such an action is limited to that which was produced in the legislative proceedings before the agency. (*Dawson, supra,* 16 Cal.3d 676.) Although plaintiffs urge us to permit them to rely upon new evidence in the validation proceeding, we cannot do that. *Dawson* clearly contemplates that evidence in a legal action challenging the validity of an assessment is confined to the record before the agency. (*Ibid*; see also *Knox, supra,* 4 Cal.4th at p. 148, fn. 24.) There is nothing in the burden-shifting clause of Proposition 218 that changes that rule. It follows, therefore, that by placing the burden to demonstrate special benefit and proportionality on the agency the new law must now

require that which *Lent* held was not necessary, i.e., that the record contain affirmative evidence of the two substantive bases for the assessment.[4]

That said, we must remember that the decision on review is the act of a legislative body. As such, the constitutional separation of powers demands that we give it deference. (Cal. Const., art. III, § 3; see *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572; *Connecticut Indemnity Co. v. Superior Court* (2000) 23 Cal.4th 807, 814.) Deference is also warranted because invalidating an assessment that received the support of a majority of the property owners would frustrate the will of those property owners. We recognize that the voters intended that we liberally construe the provisions of Proposition 218 "to curb the rise in 'excessive' taxes, assessments, and fees exacted by local governments without taxpayer consent." (*Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.) However, the burden-shifting clause is, in effect, an exception to that purpose if it makes it easier for one taxpayer to overturn an assessment that was enacted with the consent of the taxpayers. Accordingly, we invoke the rule that exceptions to the general provisions of a law should be strictly construed. (*Ibid*.) That means that so long as the challenged assessment was levied according to Proposition 218's procedural requirements we continue to accord the final legislative determination substantial deference.

These principles demand a standard of review that retains the deference we are constitutionally required to show to legislative acts while also giving effect to section 4 (f) and acknowledging the appropriateness of judicial intervention where an abuse of discretion is clearly apparent. Further, any standard should be consistent with the

[4] In light of our conclusion that review of the final assessment is limited to the record before the legislative body, we grant OSA's motion to strike or disregard portions of Taxpayers' opening brief to the extent the brief relies upon evidence outside that record in challenging the validity of the assessment.

primary purpose of Proposition 218 to limit assessments enacted without the consent of the taxpayers but at the same time must not disregard that consent when it is given.

With the foregoing in mind, we conclude that the standard of review in any legal challenge to the validity of a special assessment may be stated this way: A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts so long as the local legislative body demonstrates, by reference to the face of the record before that body, that the property or properties in question will 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. 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.[5]

[5] OSA refers us to the standard used in *Not About Water*, which applied the *Dawson* standard verbatim, amended with the proviso shown in brackets: "A court 'will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed[, or that the agency has failed to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large].' " (*Not About Water*, *supra*, 95 Cal.App.4th at p. 994.) Although we concur with our colleagues' discussion of the issue, we believe this standard is incomplete without the requirement that the agency demonstrate proportionality. Further, retaining the *Dawson* language verbatim is unnecessarily confusing because if the court can plainly see the assessment is not proportional or that no benefits could accrue, the agency will have *a fortiori* failed to demonstrate those factors.

F. DISCUSSION

1. Proposition 218 Does Not Prohibit An Assessment to Fund Future, Unspecified Acquisitions

Plaintiffs argue that Proposition 218 forbids the use of special assessments to fund the future acquisition of unspecified property. Plaintiffs do not argue that the future acquisition of property cannot be considered a public improvement subject to assessment. As we understand it, plaintiffs' concern is that when the land to be acquired is not specified the assessment cannot be determined relative to the cost of the improvement as section 4 requires.

Our aim in deciding whether section 4 should be interpreted as plaintiffs suggest is to determine and effectuate the intent of the voters when they passed Proposition 218. As always, we begin with the text. (*Richmond v. Shasta Community Services Dist*. (2004) 32 Cal.4th 409, 418.) The text that is pertinent here is section 4 (a), which requires that an assessment 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." The plain language of this provision requires the assessment to be calculated based upon cost. It plainly does not prohibit the use of projected costs to make the calculation. Plaintiffs' argue, however, that the total assessment in this case is not the cost of anything but is merely the maximum amount OSA believed property owners would approve. Even assuming this is so, there is nothing in section 4 or anywhere else in the language of Proposition 218 that prohibits an agency from projecting costs by working backward from anticipated funding.

Plaintiffs seem to suggest that in order to pass muster under Proposition 218 an improvement must be more definite or specific than the improvements described in the engineer's report here. But we find nothing in Proposition 218 or elsewhere in the law that requires an improvement to be as specific as plaintiffs suggest. Proposition 218 does not define public improvement. The LLA, however, includes among its list of

improvements, the acquisition and maintenance of land for parks and open spaces. (St. & Hy. Code, § 22525, subd. (f).) And although the LLA requires the engineer's report to contain plans and specifications for an improvement, it expressly provides: "The plans and specifications need not be detailed, but shall be sufficient if they show or describe the general nature, location, and extent of the improvements." (St. & Hy. Code, § 22568.) The improvements described in this case meet that requirement.

If we were to read into the law the specificity that plaintiffs urge we would eliminate the ability of local agencies to undertake many fundamental improvements that everyone agrees are properly funded by assessments. In the array of such works there are many sound reasons why a legislative body might choose to proceed based upon projected costs. It is certainly not unusual for a public improvement to be something that will be acquired in the future. (Cf. *Dawson, supra*, 16 Cal.3d at p. 689 validating an assessment to fund acquisition of sewer capacity and disposal rights prior to construction of a sewage collection system.) In such a case the actual costs necessarily must be projections, even where the project itself is clearly specified. Where a project is less clearly specified, it seems eminently sensible to estimate costs based upon funding projections as OSA appears to have done here. Furthermore, in proposing the purchase of real property, whether for open space or any other purpose, many very practical considerations counsel against actually specifying the target parcels in advance of securing the funding to buy them. As OSA points out, identifying a property in advance would place the agency in a very disadvantageous negotiating position and force it to spend, prematurely, significant funds for appraisals and environmental evaluations. We do not read Proposition 218 or the associated ballot materials as demonstrating the voters' intention to jeopardize valuable projects in this way.

In short, we detect nothing in the language or the intent of Proposition 218 that would per se prevent an agency from levying an assessment to fund the future acquisition and maintenance of unspecified real property.

2. There is No Evidence that OSA Misled Voters

In connection with their first cause of action plaintiffs argue that OSA misled property owners with the information it provided in both written and oral form. They contend that as a result of this misleading information the balloting results do not fairly represent the will of the property owners.

Plaintiffs' first point is that the final engineer's report is not the same as the engineer's report that was on file when the ballots were mailed. The engineer's report calculated the assessment based upon the assumption that all properties of a similar type would be equally benefited regardless of their location. The assumption presumed that the open space would be acquired throughout the assessment district. The draft version of the report stated that the land to be acquired would be distributed throughout the district. The final version, filed after the vote was completed, stressed that "over time, the areas acquired or conserved shall be disbursed throughout the boundaries of the Authority." According to plaintiffs, this revision deprived the property owners of the full picture at the time they marked their ballots. But the revision is not material; it simply stresses that which was stated in the draft version. More to the point, there is no evidence that any property owners would have changed their vote from "yes" to "no" if they had access to the final version when they cast their ballot.

Plaintiffs argue that OSA failed to tell property owners that the assessment would be "perpetual." That is not so. The informational mailer stated that the measure would create "an ongoing funding source" and that the "proposed annual benefit assessment would be $20 for a single-family home." The ballot stated: "The assessment cannot be increased in future years without approval from property owners in another assessment ballot proceeding, except for an annual adjustment tied to the Consumer Price Index not to exceed 4%." At the informational meeting in October 2001 one speaker explained that the reason the agency had decided not to proceed by way of a bond was that the improvements would need "long term permanent maintenance" that required a continual

funding source. In short, OSA alerted the property owners to the ongoing nature of the assessment from the beginning.

Plaintiffs also contend that OSA led property owners to believe that it would include certain informal votes when it counted the ballots to determine whether there was a majority protest. The informal votes to which plaintiffs refer are the forms that SVTA sent to some property owners in the course of its opposition campaign. Those forms were regular, letter-sized paper containing a preprinted protest. There was no place for the property owner to mark "yes" if he or she happened to support the assessment. At least some of these forms were sent to property owners with correspondence from SVTA assuring the recipient that use of the unofficial form would count toward a majority protest. Some forms were signed and returned but OSA declined to include them in ballot tabulation because they did not conform to the specifications of Government Code section 53753.

Plaintiffs do not suggest that the SVTA forms conformed to the constitutional requirements for ballots; they merely assert that the final vote does not reflect the true will of the property owners if those voting "no" on the irregular forms believed their vote would count toward the majority protest. There is no evidence that OSA contributed to such a misperception.

In bold type on the front of the official ballot was printed the words: "Official Assessment Ballot for Open Space in the Silicon Valley." Each ballot contained the parcel numbers owned by the individual recipient and the amount of the assessment for that parcel. Inside the mailer containing the ballot was the instruction: "To count, this Ballot must be marked with your vote . . . ." Under "Method of Voting" was the instruction: "Complete the attached postage paid ballot and return it immediately."

At the informational meeting on October 25, 2001, there were many questions about the balloting process. In referring to "ballots" the record indicates that the speakers were generally referring to the official ballots. The OSA speakers explained that every

ballot that was returned would be counted "as long as it's a legal ballot." "In order to be a valid ballot, ballot must be clearly marked with a yes or no and it must be signed by the property owner or an authorized representative." "[W]e can only count ballots that are returned and are valid so all property owners were mailed a ballot, all ballots that are returned and are valid will be counted."

There were questions pertaining to irregular ballots, although none specifically referred to SVTA's mailer. One person asked whether the vote would count without the bar code that was included on all the official ballots. The speaker answered, "Yes, any valid ballot returned, any ballot that is returned, and is signed and clearly indicates yes or no and we can identify the property from which it came will be tabulated with or without the bar code." Immediately following this explanation was a discussion about how to get another ballot if the property owner decided to change his or her vote. One person asked whether she had to get another official ballot or if an unofficial form containing the same information would be enough. The OSA speaker responded that to be counted, the vote "would need to be on the official balloting form." The speaker explained that the reason for this was that there was no way to verify signatures, so in order to make sure that only the property owners cast votes, only official ballots that were sent to the owners of record would be counted. The speaker went on at some length to explain that even so, all forms would be submitted to the Board for its consideration in making its ultimate decision but that only official ballots would be used to decide if there was a majority protest.

The only other evidence on the subject is the stack of unofficial forms that plaintiffs submitted to the superior court in connection with their summary judgment motion. Some of these forms are marked in a way that suggests that the sender believed it would count as an official ballot. But there is absolutely no evidence to support a finding that OSA was responsible for that misunderstanding.

Finally, plaintiffs contend that the information OSA provided was misleading because it did not include any arguments in opposition. Plaintiffs point to no requirement

that OSA include arguments against the assessment, nor do we find the materials OSA prepared to be unfairly one-sided. The notice contained with the ballot clearly apprised the voter that "[i]f a majority of weighted ballots returned are opposed, this assessment will not be levied."

In short, there is no evidence to support a finding that the balloting was unfair in any of the ways plaintiffs claim. It follows that the trial court did not err in concluding that there is no triable issue of fact relating to the first cause of action.

3. Validity of the Assessment as Confirmed by OSA

Plaintiffs contend that the 2001 assessment does not meet Proposition 218's requirement that it be imposed to pay for only special benefits conferred and be levied in proportion to the special benefits conferred. Plaintiffs further argue that OSA did not separate the general benefits from the special benefits and impermissibly exempted public lands from the assessment. (§ 4 (a).) We consider each contention in turn.

a. Special Benefit

Plaintiffs argue that Proposition 218 significantly narrowed the definition of special benefit and that an assessment for acquiring open space is not a special benefit under that definition. Although we do not question that the voters intended Proposition 218 to limit the use of assessments as a source of public funding, we conclude that the law effects that limitation primarily by placing strict procedural requirements upon the creation of assessment districts. The introductory text of the proposition emphasizes its procedural nature: "This measure protects taxpayers by limiting the *methods* by which local governments exact revenue from taxpayers without their consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of proposed law, Prop. 218, p. 108, italics added.) Indeed, the measure is entitled, "Right to Vote on Taxes Act."

The argument in favor of Proposition 218 did state: "Proposition 218 will significantly tighten the kind of benefit assessments that can be levied." (Ballot Pamp., Gen. Elec., *supra*, argument in favor of Prop. 218, p. 76.) But there is no other reference

to the issue in the ballot materials. Even the Legislative Analyst's list of the four conditions the initiative would impose upon the creation of an assessment district does not include any reference to changing the definition of a special benefit. (*Id*. at pp. 73-74.)

Turning to the language of the law, we compare the common law definition of special benefit with the plain language of Proposition 218's definition. The common law defined special benefit as a benefit that " 'particularly and directly' " benefits the assessed property; it is a " 'benefit over and above that received by the general public.' " (*Knox*, *supra*, 4 Cal.4th at p. 142.) Prior cases held that an increase in property value alone did not amount to a special benefit. (*Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852, 858.) Proposition 218 defines special benefit as: "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large" and expressly excludes "[g]eneral enhancement of property value." (§ 2 (i).) If there is a significant difference between the two definitions, we do not detect it. At best, the new law emphasizes the separation of general benefits from special benefits. But we see no change in terms of the type of benefit that is special.

The main concern of the proponents of Proposition 218 as expressed in the ballot arguments favoring the measure was to prevent local governments from expanding the use of special assessments as they had been doing since the passage of Proposition 13. Given that express concern it appears to us that rather than change the historical definition of special benefit Proposition 218 enshrined it as a constitutional amendment, thereby preventing future erosion of the concept. (See *Ventura Group Ventures*, *Inc. v. Ventura Port Dist*. (2001) 24 Cal.4th 1089, 1106 (*Ventura Group Ventures*) observing that pre-Proposition 218 cases were consistent with the initiative's special benefit requirement.) It follows that we may rely upon pre-Proposition 218 cases in analyzing the special benefits the assessment is claimed to confer upon the properties in this case.

The engineer's report identifies a list of special benefits. They are:

- "Enhanced recreational opportunities and expanded access to recreational areas for all property owners, residents, employees and customers throughout the OSA."
- "Protection of views, scenery and other resources values and environmental benefits enjoyed by residents, employees, customers and guests and preservation of public assets maintained by the OSA."
- "Increased economic activity."
- "Expanded employment opportunity."
- "Reduced cost of local government in law enforcement, public health care, fire prevention and natural disaster response."
- "Enhanced quality of life and desirability of the area."
- "Improved and protected water quality, pollution reduction and flood prevention."
- "Specific enhancement of property values."

Each described benefit was supported by reference to various studies and reports that supported the assertion that properties located in and around open-space areas enjoyed the benefits listed and were worth more as a result.

Plaintiffs argue that these benefits are, by their nature, general benefits and are not proper subjects of an assessment. They contend that these benefits accrue to people, not to property, and as such cannot be special benefits. But it has long been held that benefits that accrue to residents and other occupants of property may ultimately flow to the property owners and, therefore, may be deemed special benefits. For example, in *Federal Construction Co. v. Ensign* (1922) 59 Cal.App. 200 (*Federal Construction*), the appellate court concluded that renovation of the city's sewer system specially benefited the land even though the direct benefit was to the people who used the sewers: "Practically every inhabitant of a city either is the owner of the land on which he resides or on which he pursues his vocation, or he is the tenant of the owner, or is the agent or

servant of such owner or of such tenant. And since it is the inhabitants who make by far the greater use of a city's sewer system, it is to them, as lot owners or as tenants, or as the servants or agents of such lot owners or tenants, that the advantages of actual use will redound. *But this advantage of use means that, in the final analysis, it is the lot owners themselves who will be especially benefited in a financial sense.* . . . [¶] . . . [W]hether the improvement shall tend to enhance the land values or merely to keep them at their present level, the lot owners, as lot owners, will necessarily receive direct and immediate special benefits in which the other members of the community do not and cannot participate." (*Id.* at pp. 211-213, italics added.)

Amici, San Jose Silicon Valley Chamber of Commerce and Silicon Valley Manufacturing Group build upon the reasoning of *Federal Construction* by pointing out that the acquisition of open space confers a special benefit upon office, commercial, and industrial properties because it improves the quality of life in the district, making it easier to recruit and retain highly skilled workers. This is a special benefit because it insures that businesses will find it desirable to locate in the area, thereby increasing demand for the properties, which in turn increases rents and property values. The general public does not share in this benefit. It belongs to the owner of the property. Similar special benefits would accrue to residential property.

The challengers in *Knox*, *supra*, made an argument similar to the one plaintiffs make here. In *Knox*, the challengers argued, "while street lights, sewers, sidewalks and flood control may, by their nature, confer a peculiar and special benefit to property, the primary characteristic of a park is that it benefits only people, that is, members of the general public." (*Knox*, *supra*, 4 Cal.4th at p. 143.) The Supreme Court rejected the argument, pointing out: "Parks, like street lights, sewers and sidewalks, have long been considered by the Legislature to be within the domain of special assessments." (*Id.* at p. 144.) *Knox* recognized that the community at large would benefit by the presence of parks in the area but that "residential property owners are uniquely benefited by the

proximity of these facilities to their properties." (*Id.* at p. 149.) *Knox* concluded that having readily accessible facilities in nearby public parks was a special benefit because the assessed owners had those improvements available for use by their families or their tenants and would not have to privately install such improvements on their own properties. Pertinent here, *Knox* also pointed out, "the presence of well-maintained open park land contributes to the attractiveness of the district and thereby also enhances the desirability of the properties therein." (*Ibid.*) In other words, the special benefit is the enhanced desirability of the properties resulting from their proximity to the parks. (See also *City of San Diego v. Holodnak* (1984) 157 Cal.App.3d 759, 763 holding that neighborhood and community parks will specially benefit properties in the immediately surrounding community.)

Plaintiffs point to the 1996 Ballot Pamphlet in which the initiative's proponents listed several objectionable assessments levied without the taxpayer's consent. One of the assessments listed was "taxpayers 27 miles away from a park are assessed because their property supposedly benefits from that park." Plaintiffs argue that this example shows that Proposition 218 is intended to limit the type of assessment under review here. They further claim that since the instant assessment will not provide for a park in every neighborhood it will not result in the kind of special benefits a neighborhood park would confer upon nearby property. These contentions have little bearing upon our analysis.

The "27 miles away" example means little out of context. It certainly does not mean that parks and open space cannot, as a matter of law, confer special benefits. Furthermore, the improvements at issue here involve the acquisition of "thousands" of acres of land to be spread throughout OSA's boundaries. The identified benefits are those that flow from the preservation of large tracts of open space throughout the assessment district so that proximity would play a lesser role in the determination of benefit.

The fact that the benefits will accrue to a large number of parcels throughout OSA's jurisdiction does not alter their character as special benefits. Indeed, *Federal Construction* also proves helpful on this point. In ruling on the question of whether an assessment district that embraced all of the privately owned real property within the city could still be considered a "local improvement" the appellate court concluded: "[I]it seems clear that there can be no sound reason why the magnitude of the project or the extensiveness of the area to be assessed should have any decisive bearing on the question, provided the included area will derive a special benefit apart from that enjoyed by the public as a whole. In other words, the size of the assessment district presents only a question of degree in the enjoyment of the special benefits, and is not necessarily decisive that the benefit is general in its results." (*Federal Construction*, *supra*, 59 Cal.App. at p. 215.) We find this reasoning to be unaffected by intervening law, including the passage of Proposition 218.

We recognize that section 2 (i) excludes the general enhancement of property value from the definition of special benefit. But as plaintiffs concede, the increased market value of property is the fairest way to measure a special benefit. In any event, we are not here concerned with an improvement alleged to confer merely a general increase in the value of the assessed properties. Rather, the special benefits conferred are enhanced recreational opportunities, protection of views and scenery, improved and protected water quality, etc., all of which confer benefits upon property in which the general public does not share.

We do not doubt that the community as a whole will benefit by the acquisition and maintenance of open space throughout OSA's jurisdiction. But the existence of general public benefits does not preclude an assessment for the special benefits flowing to particular parcels of real property. Every assessment contains some element of a public benefit. (*Mills v. City of Elsinore* (1928) 93 Cal.App. 753, 769.) Indeed, Proposition 218 acknowledges as much by requiring the assessing agency to separate the general from the

special benefits. And it is certainly true that there is a large gray area between improvements that specifically benefit only private property and those that primarily benefit the public as whole. But considering the limited scope of our review, we decline to construe the definition of special benefit too narrowly. The duty to identify special benefits belongs to the local agency. There is a solid basis in the law for characterizing as special the benefits identified by the engineer's report. We conclude, therefore, that OSA carried its burden to demonstrate the existence of special benefits.

b. Proportionality

Section 4 (f) provides that the agency must demonstrate that the assessment "is proportional to, and no greater than, the benefits conferred on the property or properties in question." Plaintiffs contend that OSA has not done that here.

The Constitution prescribes no particular method for apportioning an assessment. To be sure, apportionment is not a determination that lends itself to precise calculation. (*White v. County of San Diego* (1980) 26 Cal.3d 897, 903.) Since the identified benefits of acquiring open space flow from the actual use of the open space OSA apportioned the assessment among parcels based upon the number of persons associated with each parcel.

The engineer's report explains that since the open space to be acquired will be distributed throughout the district, all properties of a similar type will receive an "approximately equivalent" benefit. The report describes a formula for apportioning the cost of the benefit among different types of parcels by use of a multiplier known as a single-family home equivalent (SFE). The estimated cost of the benefit accruing to a parcel improved with a single-family home is $20. Thus, the assessment for a property assigned one SFE is $20. Multi-family residential units are assigned SFEs that are greater than 1.0. Condominiums and mobile homes have SFEs of less than 1.0. Commercial properties are ranked by size and typical employee density per acre. Since larger properties generally support larger buildings and have higher numbers of employees, customers and guests, larger properties generally receive higher SFE's that

smaller properties. A large property developed as a self-storage facility, however, would receive an SFE that is smaller than a property of similar size that is improved with an office building. Vacant property, which receives the passive benefits of open space but none of the active benefits, is assessed .35 SFE per parcel. Churches, parks, property used for educational purposes, existing greenbelts, and agricultural lands that are unimproved do not receive a net benefit from open space and are assessed an SFE of 0.

Plaintiffs claim that this proportionality calculation fails Proposition 218's requirements because it ignores the benefits flowing from the location of the benefited parcels relative to the open space to be acquired. Plaintiffs assume that property located adjacent to the open space will benefit more than a property located miles away. In our view, OSA did not ignore location in its proportionality calculation. It stressed that the thousands of acres to be acquired would be located throughout the district, thereby conferring benefits throughout the district. True, this methodology disregards any additional special benefits some properties might enjoy if OSA ultimately acquires open space immediately adjacent to them. But the benefit is not as significant as plaintiffs suggest since the properties that will be adjacent to open space parcels to be acquired are already adjacent to that open space and already receive some of the benefit of proximity. In any event, at this stage it is impossible to tie the benefit calculation to a property's proximity to the various lands to be acquired. The problem is not fatal to this assessment however because, as we have said, the size and distribution of the land to be acquired is intended to spread the benefit approximately equally throughout the district.

Plaintiffs cite *Ventura Group Ventures*, *supra*, 24 Cal.4th 1089 in support of their claim that the impossibility of including location in the proportionality calculation defeats the use of assessment as a means to fund the project. *Ventura Group Ventures*, however, does not stand for the proposition plaintiffs assert. In the first place, *Ventura Group Ventures* did not strike down an existing assessment. Rather, the Supreme Court considered two questions certified to it by the United States Ninth Circuit Court of

Appeals. (*Id*. at p. 1094.) One question was whether a port district has authority to impose an assessment to raise funds to satisfy a judgment against it. (*Id.* at p. 1104.) The Supreme Court answered the question in the negative for three reasons. First, the benefit to be derived from the continued operation of the port district was too non-specific to be considered special. Second, such an assessment could not meet the Water Code's requirement that an assessment be apportioned per acre according to the benefits to be derived from the district's reclamation works since the marina project from which the judgment had arisen was defunct. (*Id.* at p. 1107.) Third, the port district would never be able to obtain voter approval of such an assessment as required by Proposition 218 because anyone entitled to vote would almost certainly vote to deprive the judgment creditor of recovery on the judgment rather than to increase his or her tax bill without any corresponding benefit. (*Ibid.*) The assessment here is quite different. The property owners did vote in favor of it. And the benefits to be derived constitute substantially more than a mere general continuation of the assessing agency.

Considering the limited scope of our review, it is enough that the agency has utilized some reasonable method of apportionment among the affected properties. We conclude that the methodology employed by the engineer's report to apportion the assessment is reasonable and constitutes affirmative evidence of proportionality.

c. OSA Separated General Benefits from Special Benefits

The engineer's report recognizes that some percentage of the benefit of open space accrues to the public at large and as such would be considered general in nature. The report measures the general benefit as "the proportionate amount of time that the OSA's . . . recreational areas are used and enjoyed by individuals who are not residents, employees, customers or property owners in the OSA." The rationale for dividing the benefits in this way is that benefits flowing from the open space are special benefits only to the extent that they make the assessed property more desirable as a place to live, work, or do business. Thus, the engineer's report concludes that one way it could separate the

general benefits from the special benefits is by looking at who uses the open space areas. If people come into the district to use the areas but do not live, work, or do business there, the properties do not receive a benefit from the existence of open space. But if a person comes into the district to use the open space and patronizes one or more of the businesses in the district while there, then the commercial properties where those business are located has received a special benefit flowing from the existence of the open space.

SCI conducted surveys that found that less than five percent of the users of OSA's existing open space do not reside, work, own property, or patronize businesses within the boundaries of the proposed assessment district. Using that figure as benchmark, the engineer's report estimates that no more than 10 percent of the benefits conferred by the proposed improvements could be characterized as general. The total cost of the improvements is estimated to be $8,927,000 for fiscal year 2002-2003. Of that amount, OSA would supply $1.1 million from sources other than the assessment. Thus, approximately 12 percent of OSA's budget will come from non-assessment sources so that the revenue attributable to the assessment (88 percent of the budget) is approximately proportional to and not more than the cost of the special benefits conferred.

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.

As with apportioning the assessment among the properties, the Constitution prescribes no particular method for separating general from special benefits. It merely requires the agency to separate the two and to levy the assessment only for the special benefits. It is enough that the agency has utilized some reasonable method to do so. It is not our role to second guess the agency's legislative judgment on this point or to impose

any more exacting requirements than those contained in the Constitution. OSA separated the general and special benefits based upon the expected actual use of the improvements by the district's residents, employees, and business patrons. This was a reasonable method for dividing the general from the special. We perceive no abuse of discretion.

d. OSA Properly Exempted Public Lands

Section 4 (a) provides: "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."

OSA's 2001 assessment applies to all publicly owned property that is used for purposes similar to improved private residential, commercial, industrial or institutional uses. Agricultural property without residential dwelling units, other open space parcels, churches, parks, property used for educational purposes, and greenbelt lands without improvements are not subject to the assessment. OSA's rationale for excluding these properties is that they typically offer open space and recreational areas of their own that would serve to offset the benefits from the open space to be acquired.

Plaintiffs argue that to the extent the "exemption" applies to public schools, it violates Proposition 218's no-exemption clause. We conclude that the no-exemption provision of section 4 (a) does not apply to the situation here. Section 4 (a) is plainly intended to require an agency to include all public property in its assessment calculations. OSA did that. It did not exempt any property. OSA applied its apportionment formula to every type of property within the district and concluded that some types of properties, both public and private, did not receive a net benefit and, thus, were not assessed. The engineer's report specifies that if those properties are later rezoned so that they could be used for purposes similar to the properties that receive a net special benefit, then those properties would be included in the assessment calculations. This is consistent with the Constitutional requirements.

G. DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

I CONCUR:

Walsh, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BAMATTRE-MANOUKIAN, J., DISSENTING.

In 1996, the voters of California passed Proposition 218, which was intended, according to the ballot argument, to "significantly tighten the kind of benefit assessments that can be levied" on real property. (1996 General Election Ballot Pamphlet, Argument in Favor of Proposition 218.) Proposition 218 added detailed provisions to the California Constitution, setting forth the requirements that must be met by local government in order to impose a valid assessment. Five years later, in 2001, the Santa Clara County Open Space Authority (OSA) imposed an assessment that increased real property taxes county-wide, in order to fund a program involving future acquisition and improvement of unspecified open-space lands throughout the county. The question before us is whether OSA's 2001 assessment is a constitutionally valid assessment, when measured against the requirements added to the Constitution by the passage of Proposition 218.

OSA's assessment imposes an equivalent amount on virtually all properties on the county tax rolls, except for those already located within another open space district. Monies generated through this means will fund a budget to be spent in the discretion of the OSA Board, under certain guidelines and policies, to acquire and improve open-space lands in various broad "priority conservation areas" throughout the county. Since no particular open-space properties in these priority areas have been identified for purchase, no specific acquisition or maintenance costs can be estimated. Furthermore, the assessment on Santa Clara County properties will be collected annually, with no fixed duration, and can be increased each year tied to a cost of living index. The benefits to be derived from the open space that will be acquired and maintained by OSA will generally affect the quality of life of everyone who lives, works and does business in the county.

The majority has concluded that this is a valid assessment, even though its purpose is to fund an ongoing county-wide program benefiting all people and properties, rather

than to finance a local improvement benefiting particular properties. I do not agree. While I clearly recognize the importance of open-space and I strongly support the acquisition and maintenance of such lands throughout the county, my review of existing authorities and the new constitutional provisions leads to the conclusion that OSA's 2001 assessment represents an unprecedented and unsupported extension of the law governing assessments in this state. Moreover, it runs directly counter to the intent of the voters in passing Proposition 218, which was to restrict the ability of local government to use the assessment process as a substitute for taxation. The constitutional provisions added by Proposition 218 carefully define and distinguish between assessments and special taxes. The distinctions between these two forms of public financing, which have long been recognized in California case law, are at the heart of the controversy before us, and thus warrant a brief review.

A "special tax" is a "tax levied to fund a specific governmental project or program . . . ." (*Knox v. City or Orland* (1992) 4 Cal.4th 132, 142.) Examples of special taxes are those collected for the specific purposes of providing fire and police protection (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481), funding construction of county justice facilities (*Rider v. San Diego County* (1991) 1 Cal.4th 1), funding various county-wide transportation projects (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220), funding education (*Hoogasian Flowers, Inc. v. State Board of Equalization* (1994) 23 Cal.App.4th 1264) and funding libraries throughout the county. (See special tax proposed on Santa Clara County April 2005 ballot measures A and B.) A special tax supports programs or projects that benefit all property owners within the taxing district. Since the passage of Proposition 13 in 1978, a special tax requires a two-thirds vote of the electorate within the taxing district. (Cal. Const., art. XIII A, § 4.)

An assessment, on the other hand, is a means to recoup the cost of a local "permanent public improvement." (Cal. Const., art. XIII D, § 2, subd. (c)[1]; *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 553 (*Solvang*).) Examples of such public improvements are: widening a street (*White v. County of San Diego* (1980) 26 Cal.3d 897); construction of a sewage plant (*Federal Construction Co. v. Ensign* (1922) 59 Cal.App. 200); construction of street improvements in a subdivision (*County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974); creation of a public parking lot (*Solvang*, *supra*, 112 Cal.App.3d 545); installation of street lighting (*Roberts v. Los Angeles* (1936) 7 Cal.2d 477); construction of a flood control system (*Los Angeles County Flood Control Dist. v. Hamilton* (1917) 177 Cal. 119); and installation of underground utility conduits (*Irish v. Hahn* (1929) 208 Cal. 339). Under Proposition 218, an assessment to pay for a local improvement requires a majority vote of property owners assessed. (Art. XIII D, § 4, subds. (b), (c), & (e).)

While such local improvements may result in an incidental general benefit to the public at large, they essentially provide a unique benefit to the particular properties directly affected by them. "The theory underlying special assessment is that the local improvement, such as the paving or lighting of a street, directly benefits and increases the value of adjacent real property." (*Solvang*, *supra*, 112 Cal.App.3d at p. 553.) An assessment is imposed on property "within a limited area" to pay the cost of a "local improvement" benefiting property within that area. (*Northwestern Etc. Co. v. St. Bd. Of Equal.* (1946) 73 Cal.App.2d 548, 552; *Knox v. City of Orland*, *supra*, 4 Cal.4th 132.) It can only be imposed "on the specific property benefited and not on all the property in the district." (*Anaheim Sugar Co. v. County of Orange* (1919) 181 Cal. 212, 216.) "[A]

[1] All further references to articles XIII C and XIII D are to the California Constitution. Sections 1 through 5 of article XIII D are contained in the appendix to the majority opinion.

special assessment, being a charge for benefits conferred upon the property, cannot exceed the benefits the assessed property receives from the improvement; a special tax on real property need not so specifically benefit the taxed property." (*County of Fresno v. Malmstrom, supra,* 94 Cal.App.3d at p. 984.) If the assessment "exceeds the actual cost of the improvement," the exaction is a tax and not an assessment. (*City of Los Angeles v. Offner* (1961) 55 Cal.2d 103, 108.) Because an assessment is a means "to recoup the cost of a public improvement" (*Solvang, supra,* 112 Cal.App.3d at p. 553), it is necessarily of limited duration, lasting only until the cost of the improvement is paid. It "does not continue indefinitely, but rather is for a set term and is extinguished upon completion of payment of the principal." (*County of Fresno v. Malmstrom, supra,* 94 Cal.App.3d at p. 981, fn 2.)

When OSA's assessment is viewed in the light of these well-established distinctions, I believe it is clear that it possesses the defining characteristics of a special tax, rather than an assessment. Monies collected from properties county-wide, based on a flat rate for all properties of similar status, will fund an annual budget managed by OSA for the purpose of purchasing and maintaining open-space land at some time in the future in a number of priority areas throughout the county. Because particular properties have not been identified, their exact location in the county is not known. Nor is it known when or if the purchase will take place, or how much the purchase price will be. For these reasons, OSA is unable to meet the two essential requirements for a constitutionally valid assessment. It cannot determine which property owners will receive a " 'special benefit' " from proximity to the open-space lands, over and above the acknowledged "general benefit" to the citizens of Santa Clara County from living in an area where there is abundant open space. (Art. XIII D, § 2, subd. (i).) And it cannot calculate the estimated " 'capital cost' " of the project, in order to be able to allocate the assessment in proportion to the benefit received by each assessed parcel. (Art. XIII D, § 2, subd. (c); § 4, subd. (a).) Furthermore, in the absence of an estimated cost to complete a particular "public

improvement," OSA is unable to inform assessed property owners of "the duration of the payments" needed to fully finance the project, as the Constitution requires. (Art. XIII D, § 2, subd. (c); § 4, subd. (c).)

Proposition 218 was intended to extend the tax reform begun by Proposition 13 and Proposition 62 to the area of assessments. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681-684.) It specifically targeted a growing practice of local government to compensate for a shortfall in tax revenue by imposing property assessments that are in actuality special taxes, thus avoiding the requirement of the super-majority two-thirds vote. The constitutional provisions put into effect by Proposition 218 seek to accomplish this tax reform by clarifying the differences between special taxes and assessments (art. XIII C, § 1, subd. (d); art. XIII D, §§ 2, 3), and by setting forth in detail the requirements that must be met in order for an assessment to be valid, including securing the approval of a majority of the property owners assessed. (Art. XIII D, § 4.) And in a new provision intended to make it easier for taxpayers to win lawsuits challenging assessments, Proposition 218 introduced a burden-shifting measure that places the burden on the government agency to show a court of law that the assessed properties will receive a special benefit from the proposed improvement, and that the amount of the assessment is no greater than the benefits conferred on the assessed properties. (Art. XIII D, § 4, subd. (f).)

OSA's assessment must be measured against the constitutional standards imposed on local agencies by Proposition 218. After careful study of the constitutional amendment and the controlling case authority in this state, by which we are bound as an intermediate court, and after considering the intent of the voters in passing Proposition 218, and the record in this case, I must conclude that OSA failed to meet its burden to demonstrate that its assessment complied with constitutional requirements. I would therefore reverse the trial court's judgment in favor of OSA.

BACKGROUND

The Open Space Authority and the 1994 Assessment District

OSA was created in 1992, when the Legislature passed the Santa Clara County Open-Space Authority Act. (Pub. Res. Code, § 35100 et seq., added by stats, 1992, ch. 822, § 1.) The Legislature found that it was "in the public interest to create the Santa Clara County Open-Space Authority so that local open-space preservation and greenbelting decisions can be implemented in a timely manner to provide for the acquisition and maintenance of these properties." (Pub. Res. Code, § 35101, subd. (c).) The Act creating OSA did not provide any particular funding mechanism, finding instead that "the county needs to develop and implement a local funding program. . . ." The jurisdiction of OSA included all lands in Santa Clara County except those already within the boundaries of the Midpeninsula Regional Open-Space District.[2] (Pub. Res. Code, § 35121.)

In 1994, the OSA Board commissioned a preliminary feasibility study on funding a special assessment district for the acquisition of land for open-space preservation, under the authority of the 1972 Landscaping and Lighting Act. (Sts. & Hy. Code, § 22500 et seq.) Pursuant to the requirements set forth in the Landscaping and Lighting Act, an engineer's report was prepared, which identified areas within OSA's jurisdiction that would be targeted for acquisition and preservation as open-space land. Single-family homes were to be assessed $12 per year. Properties other than residences were assessed on a benefit point system. Public hearings were held and OSA accepted written protests. As required by the Landscaping and Lighting Act, OSA calculated that the protests submitted did not constitute a majority. OSA then adopted a resolution to form an

[2] The Midpeninsula Regional Open Space District is a multi-county special district organized under Public Resources Code section 5500, et seq., for the purpose of acquiring and preserving open space in the San Francisco Bay area.

assessment district and to levy a special assessment on the district's property owners. The 1994 assessment district included over 300,000 parcels.

The 1994 assessment district was challenged by an individual taxpayer and by the Santa Clara County Taxpayers Association, which is one of the plaintiffs in the action before us.[3] Plaintiffs claimed various due process violations in the formation of the district, and contended that the assessment was in reality a special tax requiring approval by a two-thirds majority of voters. Judgment was granted in favor of OSA. The taxpayers appealed and the judgment was affirmed in *Coleman v. Santa Clara County Open Space Authority* (Oct. 20, 1997, H014730) [nonpub. opn.]). OSA has raised approximately $4 million annually by virtue of the 1994 assessment.

The Passage of Proposition 218 in 1996

In 1996, the voters of California passed Proposition 218. "Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. 'The purpose of Proposition 13 was to cut local property taxes. [Citation.]' (*County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1451.) Its principal provisions limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to 2 percent per year unless and until the property changed hands. (Cal. Const., art. XIII A, §§ 1, 2.)

"To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4; *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 6-7.) It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. (*Knox v. City of Orland* (1992) 4

[3] The Santa Clara County Taxpayers Association later changed its name to the Silicon Valley Taxpayers Association.

Cal.4th 132, 141, and cases cited.) Accordingly, a special assessment could be imposed without a two-thirds vote.

"In November 1996, in part to change this rule, the electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution. Proposition 218 allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. (Cal. Const., art. XIII D, § 3, subd. (a)(1)-(4); see also Cal. Const., art. XIII D, § 2, subd. (a).) It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges." (*Howard Jarvis Taxpayers Assn. v. City of Riverside, supra,* 73 Cal.App.4th at pp. 681-684.)

Proposition 218 restricts local government's ability to impose assessments in several ways. First, it tightens the definition of the two key findings necessary to support an assessment: special benefit and proportionality. An assessment can be imposed only for a " 'special benefit' " conferred on the particular property. (Art. XIII D, § 2, subd. (b).) A " 'special benefit' " is defined as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." The definition specifically provides that "[g]eneral enhancement of property value does not constitute '"special benefit."' (Art. XIII D, § 2, subd. (i).) Further, an assessment on any given parcel must be in proportion to the special benefit conferred on that parcel: "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (Art. XIII D, § 4, subd. (a).) The proportional special benefit "shall be determined in relationship to the entirety of the capital cost" of the public improvement or service that the assessment is funding. (*Ibid.*)

Proposition 218 also spells out certain requirements and procedures that an agency must comply with in order to impose a lawful assessment. Because public improvements often provide both general benefits to the community and special benefits to particular property, and since only special benefits are assessable, the agency must first "separate

the general benefits from the special benefits conferred on a parcel," and impose the assessment only for the special benefits. (Art. XIII D, § 4, subd. (a).) The assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) Property owned by the state or by a public entity is not exempt from assessment unless the assessing agency can show "by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit." (Art. XIII D, § 4, subd. (a).) Written notice of the proposed assessment must be mailed to the record owner of each affected parcel, setting forth "the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated." (Art. XIII D, § 4, subd. (c).) The notice must contain a ballot, with instructions for returning it, and a disclosure statement that a majority protest will prevent the assessment from passing. (*Ibid.*) At a noticed public hearing the agency must consider all protests and "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Ballots are to be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)

Finally, Proposition 218 made an important procedural change to assessment law that was intended to alter the highly deferential standard of judicial review traditionally accorded taxing decisions of a government agency. Section 4 of article XIII D of the Constitution now provides: "In any legal action contesting the 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." (Art. XIII D, § 4, subd. (f).)

The Proposition 218 Omnibus Implementation Act, codified at Government Code section 53750, et seq., was enacted by emergency legislation in 1997 to help local

jurisdictions comply with the requirements of the new law. (Stats. 1997, ch. 38, § 5.) These statutes detail the procedure for determining voter approval, including notice, protests, and hearing requirements. The provisions of these statutes expressly supersede any other statutory provisions applicable to the levy of a new assessment. (Gov. Code, § 53753, subd. (a).)

In a preamble, Proposition 218 includes an express statement of its purpose: "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Ballet Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 2, reprinted at Historical Notes, 2A West's Ann. Const. (2005 supp.) foll. art. XIII C, p. 68.) The concluding sections of Proposition 218 provide that it "shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Const. (2005 supp.) foll. art. XIII C, p. 68.)

The 2001 Assessment District

In 2001, recognizing that a $4 million annual budget might not be able to meet its vision for a land acquisition program, the OSA Board began exploring the feasibility of forming a second assessment district to raise additional funds. The board authorized a poll of Santa Clara County property owners in order to determine how much they would be willing to have their property taxes increased each year for the purpose of preserving open space in the county. The results of this poll showed that approximately 55 percent of property owners would be likely to support up to a $20 per annum property tax increase for open space acquisition and maintenance.

The OSA Board designated Shilts Consultants, Inc. to prepare the "detailed engineer's report" required by Proposition 218. (Art. XIII D, § 4, subd. (b).) The Shilts report used the $20 figure, calculating that a tax increase of that amount per single-family housing unit, or its equivalent, would produce an annual budget of approximately $8 million to further OSA's mission to preserve, protect and manage open space for the public's use and enjoyment. The engineer's report prepared by Shilts Consultants proposed a budget for the first year of $8,036,282, and discussed the assessment's purpose, OSA's acquisition policies, the special benefits that would accrue to all properties within the district, and the method of apportioning the $8 million among all of these properties, with the result that each single-family residence would be assessed $20 per year.

In August of 2001, the OSA Board filed the preliminary report and authorized an assessment ballot proceeding. (Art. XIII D, § 4, subds. (d) & (e).) An informational pamphlet was mailed to approximately 314,000 property owners, describing the proposed assessment district and the goal to raise approximately $8 million annually to acquire open space in urban and rural areas in Santa Clara County. (Gov. Code, § 53753, subd. (b).) The official ballot was mailed to the same property owners on September 14, 2001. (Gov. Code, § 53753, subd. (c).)

An informational hearing was held on October 25, 2001, and the formal public hearing was conducted on November 8, 2001. (Gov. Code, § 53953, subd. (a).) A representative from Shilts Consultants spoke at the hearing. Members of the public also spoke, both supporting and opposing the assessment. The hearing was continued until the ballots were tabulated by Assistance Plus, a company retained by OSA for that purpose. (Gov. Code, § 53753, subd. (e)(1).)

At the continued hearing on December 13, 2001, Assistance Plus delivered the certified results of the balloting to the OSA Board. Of the approximately 314,000 ballots that were sent out to property owners throughout the district, only 48,100 ballots were

mailed in, a return of approximately 15 percent. On a weighted basis (weighing each parcel's vote on the amount of its proposed assessment), the "Yes" votes constituted 50.9 percent and the "No" votes were 49.1 percent. (Gov. Code, § 53753, subd. (e)(2).) The OSA Board approved the results of the ballot tabulation, accepted the final engineer's report, and passed a resolution establishing the open space preservation assessment district.

On June 12, 2003, a year and a half later, the OSA Board renewed the assessment for 2003-2004 and added a cost-of-living increase of $0.34 per parcel.

The Proceedings in Superior Court

The Silicon Valley Taxpayers Association and several individual taxpayers (collectively, appellants)[4] filed this action on January 11, 2002. Their second amended complaint for declaratory and injunctive relief and for a writ of mandate contained two causes of action. The first cause of action alleged that OSA's notice and balloting process did not comply with the requirements of Proposition 218 and Government Code section 53753. The second cause of action challenged the assessment itself as violating both the Landscaping and Lighting Act and Proposition 218. Plaintiffs contended that the assessment was invalid under section 4 of article XIII D because OSA failed to carry its burden of demonstrating that the assessment conferred a special benefit on the properties assessed and that the amount of the assessment was proportional to the benefits conferred.

In June of 2003, the parties filed joint motions for summary judgment and/or summary adjudication based on declarations and deposition excerpts as well as the administrative record. Following a hearing, the court issued an order on July 9, 2003. The court denied summary judgment but granted summary adjudication in favor of OSA

[4] Plaintiff Howard Jarvis Taxpayers Association was added as a plaintiff in the first amended complaint.

as to the second cause of action, finding that OSA "met its initial burden and there is no triable issue of material fact."

After the OSA Board had renewed its assessment for the 2003-2004 year, plaintiffs filed a second lawsuit containing allegations similar to the original lawsuit, and adding claims contesting the increase in the assessment. The two lawsuits were consolidated and the remaining causes of action were submitted to the court on the record of the summary judgment/summary adjudication proceeding and on additional stipulated facts regarding Assistance Plus. The only issues submitted to the court were whether Assistance Plus was an "impartial" ballot counter within the meaning of Proposition 218 and Government Code section 53753, subdivision (e)(1); whether Proposition 218 required OSA to obtain property owner approval of the 2003-2004 assessment; and whether OSA could charge a cost-of-living increase in the 2003-2004 assessment without a new balloting process.[5] Following written briefing and a hearing, the court issued an order on October 17, 2003, granting summary adjudication in favor of OSA on all unresolved issues. Based upon that order and the previous order of July 9, 2003, judgment was entered in favor of OSA on November 5, 2003.

ISSUES

The majority has identified three issues and begins with the general question whether "an assessment for the future acquisition and maintenance of unspecified open-space land [is] constitutionally permissible." (Maj. opn., *ante*, at p. 9.) I would begin instead by focusing on appellants' specific contentions that OSA's 2001 assessment in this case does not comply with the substantive requirements of Proposition 218. Because the provisions of Proposition 218 have become a part of the California Constitution,

[5] On appeal, appellants have abandoned any separate challenge to the 2003-2004 assessment.

which is binding on us, I believe the resolution of these issues necessarily decides the question whether this assessment is constitutional.

Appellants argue that OSA failed to carry its burden of showing that the proposed assessment would confer a special benefit on the parcels assessed, and that the amount assessed was in proportion to the benefit conferred, within the meaning of article XIII D. In addition they contend that OSA's exemption of properties used for educational purposes failed to comply with the requirements of article XIII D, section 4, subdivision (a). Finally, they argue that OSA did not comply with the voter consent provisions of Proposition 218, with the result that the voters were misled and the election was invalid. I will address these arguments in turn, and also respond to several points raised by amici curiae appearing in support of OSA.

Before addressing the merits, however, it is necessary, as always, to define the appropriate standard of review that will guide the legal analysis.

Standard of Review

Historically, legislative and quasi-legislative acts of local governmental agencies, such as the formation of an assessment district, have been reviewed by courts under a deferential abuse of discretion standard. (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 682-684 (*Dawson*); *Knox v. City of Orland, supra,* 4 Cal.4th 132 (*Knox*).) As the majority points out, the prevailing standard prior to the passage of Proposition 218 was well settled: "A special assessment finally confirmed by a local legislative body in accordance with applicable law will 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 as finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties." (*Dawson, supra,* 16 Cal.3d at p. 685.)

Under the *Dawson/Knox* standard, an assessment was presumptively valid, and anyone challenging it in a court of law bore a heavy burden. In order to invalidate it, the

challenger had to show that the record "clearly" did not support the underlying findings of benefit and proportionality.

This deferential standard of review was specifically targeted for change by the drafters of Proposition 218, in line with other reforms aimed at restricting the ability of local government to use the assessment process as a substitute for taxation. Proposition 218 amended the Constitution to add a new provision governing the standard to be applied to legal challenges to assessments. Section 4, subdivision (f) (hereafter section 4(f)), now provides: "In any legal action contesting the 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." (Art. XIII D, § 4, subd. (f).) Thus in addition to setting forth the specific requirements with which an assessment must comply, Proposition 218 also shifted the burden to the agency imposing the assessment to demonstrate compliance.

In analyzing the effect of section 4(f), courts apply the familiar principles of constitutional interpretation, the aim of which is "to determine and effectuate the intent of those who enacted the constitutional provision at issue." (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418.) We begin with the text of the constitutional provision, giving the language its ordinary meaning. (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122.) The meaning of the language in section 4(f) is not difficult to discern. It provides that in the event of a court proceeding challenging an agency's imposition of an assessment, the agency must carry the burden of showing that its assessment complied with the constitutional requirements of special benefit and proportionality. However, as the majority points out, burden of proof is a concept that comes into play in an evidentiary proceeding. A judicial action to review the validity of an assessment imposed as a result of an administrative process that includes a

public hearing does not involve the taking of new evidence. (*Knox, supra*, 4 Cal.4th at p. 147.) In this context, where the court hears no new evidence, the language imposing a "burden" upon the agency is somewhat imprecise. Thus, it is necessary to examine further indicia of the voters' intent as to the meaning of this provision in section 4(f).

In determining voter intent, a court may consider ballot materials sent to the voters who passed Proposition 218, including the Legislative Analyst's analysis and ballot arguments for and against the initiative. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) The Legislative Analyst is authorized to supply the voters "an impartial analysis of [an initiative] measure," that "may contain background information, including the effect of the measure on existing law . . . ." (Elec. Code, § 9087.) The Supreme Court and courts of appeal have routinely relied on the Legislative Analyst's evaluations of initiative measures as a primary indication of voter intent. (See, e.g., *Legislature v. Eu* (1991) 54 Cal.3d 492, 505; *Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 282, fn. 19; *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78, 82.)

Here the Legislative Analyst's summary of Proposition 218 explained to the voters that the proposition contained numerous provisions designed to "constrain local governments' ability to impose . . . assessments . . . ." The analysis included a separate paragraph, entitled "***Burden of Proof***" regarding the effect of section 4(f). The Legislative Analyst explained that this part of Proposition 218 would effect a significant change in the way assessments were reviewed by courts, making it more difficult for an assessment to be validated in a court proceeding. "Currently, the courts allow local governments significant flexibility in determining fee and assessment amounts. In lawsuits challenging property fees and assessments, the taxpayer generally has the 'burden of proof' to show that they are not legal. This measure shifts the burden of proof in these lawsuits to local government. As a result, it would be easier for taxpayers to win

lawsuits, resulting in reduced or repealed fees and assessments." (Analysis by the Legislative Analyst, 1996 Ballot Pamphlet.)

The inclusion of a provision in Proposition 218 shifting the burden of proof cannot be viewed as merely incidental. Such a change was suggested by the challengers of the assessment in the pre-Proposition 218 case of *Knox, supra,* 4 Cal.4th 132. Plaintiffs in *Knox* asked the court to reevaluate the traditional deferential standard of reviewing assessments. Plaintiffs reasoned that a benefit assessment was in the nature of an exception to Proposition 13, which generally restricted the power of local authorities to impose special taxes without a two-thirds vote. (Art. XIII A, § 4.) Thus, plaintiffs argued that the agency imposing the assessment and seeking to avoid the general rule must bear the burden of establishing that its assessment fit within the exception. (See, e.g., *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235.) The court in *Knox* declined to depart from established precedent, however, finding "no basis" for requiring the agency to bear the burden of proof "in the context of benefit assessments." (*Knox, supra,* 4 Cal.4th at p. 147.) The drafters of Proposition 218 were clearly aware of *Knox*.[6] These circumstances suggest that the burden of proof provision included in Proposition 218 was intended to supply the "basis" the court in *Knox* found lacking.

Such an interpretation is consistent with other indications of voter intent. In passing Proposition 218, the voters clearly sought to limit the ability of local government to impose property taxes under the rubric of special assessments. (*Howard Jarvis Taxpayers Assn. v. City of Riverside, supra,* 73 Cal.App.4th at p. 684.) The arguments in favor of the proposition in the ballot materials informed the voters that "Proposition 218 will significantly tighten the kind of benefit assessments that can be levied." The

[6] The facts of *Knox* were referred to in the ballot materials as an example of an abuse of the assessment process.

Legislative Analyst explained that Proposition 218 "would place extensive requirements on local governments charging assessments," and that it would make it "easier" for taxpayers challenging assessments to win in court. In order to give effect to these expressions of voter intent, I believe the new burden of proof requirement contained in section 4(f) must be interpreted as significantly altering the degree of deference traditionally applied to an agency's decision to levy an assessment.

I therefore disagree with the majority that we continue to apply a "limited scope of [] review" as to the essential questions whether the challenged assessment is for the purpose of providing a special benefit to the properties assessed and whether the amount assessed is in proportion to the benefit conferred. (Maj. opn., *ante,* at p. 26.) Furthermore, these and other questions regarding the validity of an assessment imposed in the post-Proposition 218 era are now constitutional questions, and thus warrant a more rigorous standard of review. The majority acknowledges that we exercise our independent judgment in matters involving constitutional interpretation. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.) However, the majority limits application of that standard to the broad inquiry it poses, whether assessments funding future acquisition of unidentified property are constitutionally permissible. I would apply a more focused constitutional analysis. Assessments passed after Proposition 218 must comply with detailed substantive and procedural requirements contained in article XIII D of the Constitution. Thus in order to determine whether a local agency has imposed an assessment that is in accordance with applicable law, courts must necessarily turn to the provisions of article XIII D and interpret and apply those provisions to the particular assessment challenged. Only after such an analysis can the ultimate question of whether the assessment complies with constitutional requirements be determined.

Courts are familiar with the process of determining whether a tax, fee or assessment imposed by local government squares with the Constitution. (See *Richmond*

v. Shasta Community Services District, supra, 32 Cal.4th 409 [determination whether charge imposed by a water district violated article XIII D restrictions involved de novo review of state Constitution]; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637 [court found that in-lieu fee imposed by city was unconstitutional under article XIII D]; *Howard Jarvis Taxpayers Assn. v. City of Riverside, supra,* 73 Cal.App.4th 679 [question whether existing streetlight assessment was subject to Proposition 218 limitations involved court's de novo interpretation of the Constitution and the intent of the voters]; *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351 [court independently interprets constitutional amendments contained in article XIII D to determine whether water fee was a property-related fee requiring a vote of property owners]; *Graber v. City of Upland* (2002) 99 Cal.App.4th 424 [question whether local ordinance violated constitutional provisions relating to tax increment financing was subject to de novo review].)

The rule of law operating here is that a local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect. (See, *Hale v. Bohannon* (1952) 38 Cal.2d 458, 471; *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 79.) Courts must therefore independently review local agency decisions that are governed by express constitutional requirements. In so doing, courts are obligated to construe constitutional amendments in a manner that effectuates the purpose of the voters in adopting the law. (*Howard Jarvis Taxpayers Assn. v. City of Salinas, supra,* 98 Cal.App.4th at p. 1355.) And the voters in the case of Proposition 218 included an express directive that its provisions "shall be liberally construed to effectuate its purposes . . . ."

The majority states the standard of review following Proposition 218 as follows: "A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts so long as the local legislative body

demonstrates, by reference to the face of the record before that body, that the property or properties in question will receive a special benefit over and above the benefits conferred on the public at large and that the amount of the contested assessment is proportional to, and no greater than, the benefits conferred." (Maj. opn., *ante,* at p. 14.)

While I generally agree with this statement of the standard of review, I believe that it does not properly acknowledge the effect of the constitutional status of the law governing assessments post-Proposition 218. Questions regarding whether the assessment is imposed "in accordance with applicable law," whether the properties assessed will receive special benefits over and above benefits conferred on the general public, and whether the amount of the assessment is no greater than the benefits received, are now to be determined by reference to the appropriate provisions in the Constitution.

Therefore, I believe the applicable standard of review should be stated as follows: "A special assessment finally confirmed by a local legislative body in accordance with applicable *constitutional* law will not be set aside by the courts so long as the local legislative body demonstrates, by reference to the face of the record before that body, *and to the applicable provisions contained in article XIII D of the Constitution,* that the property or properties in question will receive a special benefit over and above the benefits conferred on the public at large and that the amount of the contested assessment is proportional to, and no greater than, the benefits conferred." As to special benefit and proportionality, the local agency has the burden of showing that its assessment is constitutionally valid, under the mandate of section 4(f). As to other determinations, the challenger must show that the assessment is unconstitutional.[7]

---

[7] Because I believe that assessments imposed after Proposition 218 are subject to constitutional standards of review, I disagree with *Not About Water Com. v. Board of Supervisors* (2002) 95 Cal.App.4th 982 (*Not About Water*). In *Not About Water* the court acknowledged the constitutional amendment contained in section 4(f), but nonetheless concluded that "case law decided prior to passage of Proposition 218, under which legislative-like determinations by public improvement agencies are reviewed under an (continued)

As to appellants' contentions that the balloting process in this case was tainted and that the voters were misled, I agree with the majority that the resolution of these issues depends to some extent upon evidence outside the record before the OSA Board. Consequently, the trial court correctly received extra-record evidence on these issues in deciding the summary judgment motions. (See, *Not About Water, supra,* 95 Cal.App.4th at p. 1003.) On appeal, our court's review of these issues, as the majority has stated, is the same as any other appeal following the grant of summary judgment. We review the record of the summary judgment in order to determine whether defendants are entitled to judgment as a matter of law, or whether plaintiffs have raised a triable issue of fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826.)

I. The Special Benefit Requirement

"Under Proposition 218, only special benefits are assessable. [Citation.] Local governments may not impose assessments to pay for the cost of providing a general benefit to the community and are directed to 'separate the general benefits from the special benefits conferred on a parcel.' " (*City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1223, quoting art. XIII D, § 4, subd. (a).) Thus if a project will provide both general benefits to the community and special benefits with reference to the particular properties assessed, article XIII D requires that the agency separate the general benefits from the special benefits, secure other funding for the general benefits, and impose an assessment based only the special benefits. (Art. XIII D, § 4, subd. (a).)

---

abuse of discretion standard, continues to apply in the post-Proposition 218 legal environment." (*Not About Water*, *supra*, 95 Cal.App.4th at p. 995.) To the extent that the court in *Not About Water* endorsed a practice of continuing to rely on standards expressed in pre-Proposition 218 cases in reviewing challenges to post-Proposition 218 assessments, I must disagree. In my view, the degree of deferential review described in the pre-Proposition 218 cases is irreconcilable with the court's obligation to interpret and apply constitutional provisions now governing assessment law.

As the majority points out, special benefit is by no means a new concept in assessment law. It has always been the essential requirement of an assessment, distinguishing this method of fund raising from a tax. (*Knox, supra*, 4 Cal.4th at p. 142; *Ventura Group Ventures, Inc. v. Ventura Port Dist.* (2001) 24 Cal.4th 1089, 1106.) Proposition 218 did not introduce the requirement of special benefit. It did, however, tighten the definition of special benefit, in response to what was perceived as an unwarranted expansion of its use by local government. And it clarified, and emphasized, that special benefit cannot be synonymous with general enhancement of property value. (Art. XIII D, § 2, subd. (i).) It also added the specific requirement that during the assessment process the agency must distinguish between the special and general benefits to be derived from the project and assess only for the special benefits. (Art. XIII D, § 4, subd. (a).) A further change under the definitions in article XIII D is that general benefits are those accruing generally to property located in the district, as well as to the public at large. (Art. XIII D, § 2, subd. (i).) The prior definition used by the court in *Knox* had referred only to "a special benefit over and above that received by the general public." (*Knox, supra*, 4 Cal.4th at p. 142.)

The engineer's report in this case acknowledges that the acquisition, maintenance and preservation of open space "provide[s] a degree of general benefit to the public at large." Thus, in accordance with Proposition 218, the report attempts to separate general and special benefits. It finds that the ratio of general and special benefit that will be derived from OSA's open space acquisition program will be 10 percent general benefit and 90 percent special benefit. This is based on the determination that general benefit is measured only as the benefit conferred on "individuals who are *not* residents, employees, customers or property owners in the [assessment district]." (Italics added.) Under article XIII D, however, general benefit is not synonymous with benefit conferred on persons and property outside the assessment district, but can include benefit "conferred on real property located *in the district* or to the public at large." (Art. XIII D, § 2, subd. (i),

italics added.) The report's measure of general benefit as the benefit affecting only those outside the assessment district assumes that people and property within the district--an area covering hundreds of square miles, where 1.2 million people live--will receive *no* general benefit at all, but will receive only special benefits from OSA's open space acquisition program. This assumption is not supported by the findings contained in the engineer's report, which describe numerous general benefits that will flow to real property within the district and to residents, employees, customers and property owners within the district.

For instance, the report starts with a statement of OSA's mission: "To preserve, protect and manage, *for the use and enjoyment of all people*, a well-balanced system of urban and non-urban areas of scenic recreational and agricultural importance." (Italics added.) OSA is responsible, the report explains, "for preserving and maintaining open space for approximately 1.2 million people residing within its boundaries, representing over two-thirds of the population within Santa Clara County." The report finds that the preservation of open space will provide "[e]nhanced recreational opportunities . . . for all property owners, employees and customers throughout the OSA," that "[a]ll properties will benefit from the assessment . . ." and that the "assessment . . . benefits all properties in rural and urban areas of the Authority . . . ." The report therefore acknowledges that people and property located in OSA's territory will benefit broadly and generally from the assessment, and that open space acquisition will benefit property throughout the county by making "property . . . more valuable." Under Proposition 218 definitions, these are clearly general benefits "conferred on real property located in the district or to the public at large." (Art. XIII D, § 2, subd. (i).)

Although the engineer's report uses the term "special benefits" to describe the various types of benefits the proposed open-space program will confer upon the hundreds of thousands of properties located in the district, these benefits for the most part do not fall within the narrow definition of special benefit contained in the Constitution. A

special benefit must be "a particular and distinct benefit" to the assessed property that is separate from general benefits conferred on "real property located in the district or to the public at large." (Art. XIII D, § 2, subd. (i).) Any "[g]eneral enhancement of property value" is expressly excluded as a special benefit. (*Ibid.*) Thus under the plain language of article XIII D, in order to be a special benefit a benefit must affect the property being assessed in a way that is particular and distinct from other parcels and is not shared by property in general or by the public at large.

Many of the benefits denominated "special benefits" in the engineer's report do not meet these criteria. These benefits include advantages to everyone within the district, such as enhanced recreational opportunities, protection of views, increased economic activity, protection of water supply, more employment opportunity, reduced government cost for law enforcement, health care, and disaster response, enhanced quality of life and desirability of OSA's territory, and enhanced property values. Preserving extensive open space in Santa Clara County, the report states, will make the county "a more attractive and safer place to live and to locate new businesses by improving overall quality of the community, providing pleasant places for residents to enjoy, increasing recreational opportunities and increasing public resource values."

The first listed "special benefit" is "[e]nhanced recreational opportunities and expanded access to recreational areas." This benefit will be conferred on "*all property owners, residents, employees and customers in the OSA*." (Italics added.) The provision of recreational opportunities that will be made available to over a million members of the public is clearly of general benefit to people and property. The same can be said for the second listed "special benefit": "Protection of views, scenery and other resources values and environmental benefits *enjoyed by residents, employees, customers and guests . . . .*" (Italics added.) According to the report, the views provided by open space areas are enjoyed by everyone. No attempt is made to tie this benefit to particular properties from

which the views might be visible. All properties throughout the district, whether they have a view of open space or not, are considered to receive this benefit.

"Increased economic activity" and "[e]xpanded employment opportunity" are also listed in the report as "special benefits." These are linked to open space because increased recreational opportunities will likely attract more people to the county who will utilize county services and businesses, thereby fostering economic growth. Again, there is no effort to tie these benefits to particular property. Rather it would appear that increased economic activity affects people and property throughout the county in diverse ways, thus amounting to a general benefit.

The report also cites as a "special benefit" the "[r]educed cost of local government in law enforcement, public health care, fire prevention and natural disaster response." It explains that open space and recreational areas promote good health and thereby reduce the cost of health care, thus "*free[ing] public funds for other services that benefit properties*." (Italics in original.) The report cites studies showing that more parks also help to reduce crime and vandalism, thus ultimately cutting costs for law enforcement. Furthermore, it relies on other studies showing that open space protects water quality and helps to prevent flooding; thus the open space assessment will eventually result in the reduction of the costs of public utility services for properties in the district. All of these factors, the report concludes, "*ultimately benefit property by making the community more desirable and property, in turn, more valuable*." (Italics in original.)

In my view, the reduction of costs of a variety of county services, which may well contribute to an "[e]nhanced quality of life and desirability of the area," is undeniably a general benefit, accruing to all people in the district. None of the quality-of-life benefits described in the report are measured by the impact on particular parcels of property, but instead affect all of the 1.2 million people living within OSA's jurisdiction. And to the extent that property values are enhanced by being located in a desirable community, this

is a "[g]eneral enhancement of property values" and is thus by definition *not* a special benefit. (Art. XIII D, § 2, subd. (i).)

In an effort to avoid this aspect of the definition of special benefit, the report includes a category of "special benefit" entitled "Specific enhancement of property values." The title belies the content of this section, however, which speaks of open spaces as "improving the overall quality of the community." The supporting studies cite the "correlation between enhanced property values and expanded and well-maintained open space areas and recreational areas." However, these same studies show that the properties benefiting from enhanced property value due to open space and recreational areas statistically are those that are "in or near the recreation area," or "in proximity to parks," or "near [the] greenbelt." No attempt is made in the engineer's report to show that certain properties in the OSA's district will be in proximity to the open space such that their value will be enhanced. Indeed, since no particular open space parcels have been identified for purchase, the engineer's report cannot make this correlation.

In sum, the evidence contained in the engineer's report shows that OSA's open-space program will result in an enhancement of property values generally affecting the several hundred thousand parcels throughout the entire county, and that it will improve the quality of life of all of the county's inhabitants. To conclude that these are "special benefits" within the meaning of assessment law ignores the distinction between special and general benefits. As the Supreme Court observed in *Ventura Group Ventures, Inc. v. Ventura Port Dist., supra,* 24 Cal.4th at page 1107, "if everything is special, then nothing is special."

The majority points out that acquisition and maintenance of land for parks and open spaces can be a proper subject for assessment under the Landscaping and Lighting Act. (Sts. & Hy. Code, § 22525, subd. (g).) In addition, OSA relies on a line of cases

upholding the use of special assessments with regard to parks, including most recently the Supreme Court case of *Knox, supra,* 4 Cal.4th 132.[8] I agree with the general proposition that assessments can be levied to pay for improvements such as parks and open space. However, the cited cases are distinguishable from ours, for several important reasons. First they are pre-Proposition 218 cases and are therefore not subject to the new constitutional standards. Secondly, all of these cases involved particular parks or recreation areas, the costs of which could be determined and then allocated to the properties assessed. Finally, the record in all of these cases demonstrated that the properties assessed received special benefits from the particular park by virtue of their location in its vicinity.

For example, *City of San Diego v. Holodnak* (1984) 157 Cal.App.3d 759, involved an assessment to pay for community and neighborhood parks and other public facilities located in a new development on the outskirts of the city. The court found that the properties within the development area would specially benefit because of their location in the vicinity "immediately surrounding" the planned parks. (*Id.* at p. 763.)

The *Knox* case is similarly distinguishable. *Knox* involved an assessment to raise funds necessary to maintain five existing parks serving four school districts in the city. Studies of usage of the parks showed that people living within the boundaries of the four school districts served by the parks used them to roughly the same degree and would therefore be equally benefited by the proposed maintenance and improvements. Although there were some acknowledged general benefits accruing to people outside the

---

[8] OSA also relies extensively on the analysis in our unpublished opinion in *Coleman v. Santa Clara County Open Space Authority* (Oct. 20, 1997, H014730) [nonpub. opn.]. I acknowledge that OSA's prior assessment, which was affirmed in the *Coleman* case, is necessarily a part of the record and background in the case before us now. However, both *Coleman* and *Knox,* on which *Coleman* primarily relied, were pre-Proposition 218 cases. Moreover, as an unpublished opinion, *Coleman* may not be cited as precedential authority. (Cal. Rules of Court, rule 977.)

area and to the community at large, the city did not perform any separation of general and special benefits, as is now required by Proposition 218. Furthermore, under prevailing law governing *Knox*, the city's determination regarding special benefit was deemed to be conclusive in the absence of a showing by the challengers that the city clearly abused its discretion. The city in *Knox* found, based on its studies, that property owners within the vicinity of the five parks were "uniquely benefited by the proximity of these facilities to their properties." (*Knox*, *supra*, 4 Cal.4th at p. 149.) The estimated costs of the project ($103,152) were therefore allocated among all residential properties within the area comprised of the four school districts.

OSA's assessment is not similarly supported by statistics showing any unique benefit to the assessed properties from their location in relation to a permanent public improvement. Instead of several thousand properties located in proximity to five established parks, as in *Knox*, here several hundred thousand parcels of property were to be assessed equally for open space that was not yet identified, purchased, or developed, but was to be selected at some future time from numerous "priority areas" throughout the county. OSA's determination that this program provided a special benefit to each and every parcel in the district is not subject to the same deferential standard as in *Knox*. Rather it is governed by the new standard expressed in section 4(f) of article XIII D, which places the burden on the assessing agency to show that the proposed improvement meets constitutional requirements for special benefit.

The majority is of the opinion that "proximity" plays a lesser role in the determination of special benefit in this case because OSA proposes to select large tracts of open space from numerous priority areas distributed throughout the county. I do not agree. I believe that proximity is necessarily a key factor in the special benefit analysis where the subject of the assessment is a park or open space. Both *Knox* and *Holodnak* recognize this, as do the studies in the engineer's report, which show that the special benefits accrue to those properties "near" or "in proximity to" a park or greenbelt.

The majority relies on *Federal Construction Co. v. Ensign, supra,* 59 Cal.App. 200 (*Federal Construction)* to support the proposition that the extensiveness of the area to be assessed should not have any bearing on the special benefit determination. The facts of *Federal Construction* set it apart from our case. In *Federal Construction,* the city responded to the failure of its existing sanitation facilities by forming an assessment district whose boundaries were co-terminous with the city's, and then allocating the cost of the new sewer system among all the parcels in the city. The court found that the properties thus served by the new sewer plant would receive "direct and immediate special benefits" from its construction. (*Id.* at p. 213.) The court then responded to an argument that the new sewer facility should not be considered a " 'local improvement,' " because the properties benefited by it were not actually adjacent to it--as is generally the case with an assessment for the paving of a street, or the installation of lighting--but included all the parcels of property located throughout the city. It is in this context that the court made the statement quoted by the majority, that "there can be no sound reason why the magnitude of the project or the extensiveness of the area to be assessed should have any decisive bearing on the question, provided the included area will derive a special benefit apart from that enjoyed by the public as a whole." (*Id.* at p. 215.) Even assuming the continued vitality of a case written 74 years prior to the passage of Proposition 218, I believe the distinctions between *Federal Construction* and our case are obvious. The benefits to a parcel of property from construction of a facility that delivers sewer service to that property are specific and direct, whether the sewer facility being constructed serves five properties or 5,000.[9] OSA is unable to show any comparable specific and direct benefit flowing from its open space program to each of the 314,000 assessed parcels throughout Santa Clara County.

[9] Apparently, the population of Dinuba, the city in *Federal Construction,* was somewhere in between those two figures in 1922.

The conclusion in the engineer's report that hundreds of thousands of parcels of property county-wide will receive the same "special benefit" from OSA's open-space program extends the concept of special benefit well beyond established law. (See *Solvang*, *supra*, 112 Cal.App.3d at pp. 553-554.) The intent of the voters in passing Proposition 218 was just the opposite. The Legislative Analyst explained in the ballot materials that after Proposition 218, local government would most likely *not* be able to continue imposing assessments for such things as "park and recreation programs," "fire protection," "business improvement programs," and libraries. The argument in favor of Proposition 218 referred to a "growing list of assessments imposed" in the wake of Proposition 13 that are in actuality special taxes. For instance, "[i]n Northern California, taxpayers 27 miles away from a park are assessed because their property supposedly benefits from that park."[10] The assessment imposed here by OSA is precisely the type of assessment that was targeted by the voters, and that Proposition 218 was intended to prohibit.

In sum, I would find that the engineer's report in this case did not provide evidence of a special benefit to all the assessed properties, within the meaning of Proposition 218, and that OSA failed to carry its burden on this issue.

II. The Proportionality Requirement

The second essential element of an assessment, proportionality, is closely tied to the first. The assessing agency must show that the assessment is allocated among the properties receiving a special benefit in such a way that the amount of the assessment is in proportion to the benefit received. "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (Art. XIII D, § 4, subd. (a).)

---

[10] The significance of the 27 miles is that this example was based on the facts of the *Knox* case.

In this step of the assessment methodology, the engineer's report assigned all single family homes in the district one SFE (Single Family Equivalent) unit and assigned other types of property greater or lesser SFEs, depending on the estimated number of people using such properties. For instance, condominiums received a lower SFE because the average number of people per unit was estimated to be lower than in a single family residence. And commercial properties received a higher SFE than a single family residence because they were used by greater numbers of people. Each SFE represented an assessment of $20.

Since all single family homes were assessed the identical amount of $20, the underlying assumption of this allocation is that all single family residences throughout the 800-square-mile district "are deemed to receive approximately equivalent benefit" from OSA's open-space program, no matter where they are located in relation to the open space that may be acquired at some time in the future. Thus a single family residence that may be miles from any open space will be assessed the same amount as one that may have immediate access and views.

The majority concedes that it is "impossible to tie the benefit calculation to a property's proximity to the various lands to be acquired" in circumstances such as these, but finds that this problem is not fatal to OSA's assessment because OSA fully intends to purchase open-space lands that will be spread "approximately equally throughout the district." (Maj. opn., *ante,* at p. 27.) The engineer's report lists 30 general priority acquisition areas, explains that this is not an exclusive list, and then identifies a number of other areas as "potential acquisition and improvement areas." There is no way to determine from this list where, when or if open space property will be purchased, or at what cost. I do not believe that this satisfies the proportionality test of Proposition 218. Although apportionment of costs among properties benefited by an improvement may not lend itself to precise calculation, I believe Proposition 218 requires something more than

a projection that improvements that are yet to be located will confer approximately equal benefits on properties across hundreds of square miles.

In my view, the inadequacy of proportionality analysis in the engineer's report stems in large part from the fact that it starts from a projected annual budget to fund its open space program rather than from a calculation or estimation of the cost of the particular public improvement to be financed by the assessment. The Constitution requires that the "proportionate special benefit" assessed to each property must 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." (Art. XIII D, § 4, subd. (a).) " 'Capital cost' " is defined as "the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency." (Art. XIII D, § 2, subd. (c).) The whole purpose of an assessment is to require the properties which have received a special benefit from some improvement "*to pay the cost of that improvement*." (*Ventura Group Ventures, Inc. v. Ventura Port Dist.*, *supra*, 24 Cal.4th at p. 1106, italics added; *Knox*, *supra,* 4 Cal.4th at p. 142.) Without a calculation or estimation of the cost of the improvement to be financed, an allocation of that cost is impossible.

Here the engineer's report described a program to acquire such varied properties throughout the county as "greenbelts, hillsides, viewsheds and watersheds, baylands, riparian corridors, urban open space, parklands, agricultural lands, development rights on agricultural lands and other land-use types, conservation easements, other property rights, wetlands, utility right-of-ways, surplus school sites, [and] quarries," as well as to provide maintenance and servicing of these public areas. It did not identify any particular parcel or parcels that OSA had plans to acquire, or any particular "permanent public improvement" that the assessment would finance, as required by the Constitution. (Art. XIII D, § 2, subd. (c).) Instead, the approximately $8 million collected by the assessment annually would provide a continuing source of revenue for OSA's budget. This figure

was derived from a survey commissioned by OSA indicating that a majority of property owners polled would be willing to have their property taxes raised by $20 per year to support the preservation of open space. Multiplied by the number of properties on the tax rolls in the district, this amount would yield approximately $8 million per year.

The majority finds that "there is nothing in section 4 or anywhere else in the language of Proposition 218 that prohibits an agency from projecting costs by working backward from anticipated funding." (Maj. opn., *ante,* at p. 15.) I do not agree. It is well established in the law that the purpose of an assessment is to pay for "*the actual cost of the improvement*." (*City of Los Angeles v. Offner, supra,* 55 Cal.2d at p. 108, italics in original.) I do agree that such costs can be reasonably estimated or projected. However, an assessment calculation that works backward by starting with an amount taxpayers 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. I can find no authority endorsing this method of assessment calculation.

The majority cites *Dawson, supra,* 16 Cal.3d 676, finding that it is "not unusual" for a public improvement, within the meaning of assessment law, to be something that will be acquired in the future. (Maj. opn., *ante,* at p. 16.) I do not believe *Dawson* supports this proposition. The assessment in *Dawson* was imposed to pay for obligations (approximately $670,000) that had already been incurred by the taxing authority to acquire capacity rights in the sewer system of a neighboring township. Thus the cost was known and it could be allocated among the properties receiving the benefits from the rights to increased capacity. The court found the assessment was not invalid due to a failure to provide the "[p]lans and specifications" required by the Streets and Highways Code (Sts. & Hy. Code, § 10204), because the facility in the neighboring municipality was already installed and only the capacity rights were being financed. (*Id.* at p. 687.) Furthermore, the fact that new collectors would eventually need to be built in order to make the expanded system fully operable did not render the assessment invalid. The

assessment was only to pay for the capacity rights, the cost of which was known. It was not to pay for the future installation of the collectors.

The large body of law governing assessments prior to Proposition 218 clearly reflects that the calculation or estimation of the cost of some type of specific public improvement is a necessary prerequisite for allocating costs proportionately on properties benefited by the improvement. Proposition 218 focused on this requirement in an effort to curb perceived abuses of the process by local government, such as a "view tax" or a benefit assessment on properties miles away from a park. The ballot materials assured voters that the proportionality requirement would mean that local government could not assess a particular property owner more than the cost to provide a specific improvement or service to that property. In order to comply, the assessing entity would have to, in some cases, "examine assessment amounts in detail, potentially setting them on a parcel-by-parcel or block-by-block basis." The imposition of a $20 assessment in this case on all residential parcels across 800 square-miles is far from the type of detailed calculation intended by Proposition 218. In my opinion this falls short of satisfying the proportionality requirement of Proposition 218.

OSA argues that apportionment can be accomplished by any reasonable methodology that "fairly distributes the net amount among all assessable lots and parcels in proportion to the estimated benefits to be received . . . ." (Sts. & Hy. Code, § 22573.) OSA contends that its apportionment in this case, based on the nature of the use and the number of people using the properties assessed, complied with this fairness standard. A fair distribution is difficult to determine, however, where the cost of the improvement and its location are unknown. Assessment law requires that the distribution of the assessment be based in some way on the benefits to the property. According to the Legislative Analyst, Proposition 218's new proportionality language was intended to ensure that there is a direct and demonstrable relationship between special benefit to assessed property and the amount of the assessment. A blanket assessment of properties over

hundreds of square miles by virtue of their status as single family residences, rather than their proximity to any improvement providing benefits, does not meet this test. Furthermore, the Streets and Highways Code, which states the fairness standard relied upon by OSA, does not take into account the more exacting proportionality requirements of article XIII D; nor does it recognize that the agency now has the burden of demonstrating that the proportionality calculation meets constitutional standards. (Art. XIII D, § 4, subd. (f).)

Finally, OSA makes the point that it would be economically impractical to require it to identify in advance the parcels it contemplates acquiring because this would place it in a disadvantageous negotiating position and thus drive up the purchase prices. This circumstance, however, only serves to point up an essential difference between a broad spending program like OSA's, which is more properly funded by an ongoing source of revenue such as a special tax, and a local improvement, the cost of which is already determined and thus can be allocated among those benefiting from it.

In sum, the evidence contained in the engineer's report does not demonstrate that the $8 million to be collected annually from this assessment is tied to the capital cost of any public improvement that can be fairly spread among properties in proportion to the benefits received. I would conclude that OSA's assessment does not comply with the constitutional requirements of article XIII D as to proportionality, and that OSA has failed to carry its burden under section 4(f) of article XIII D to demonstrate this element.

III. The School Exemption

Prior to Proposition 218, schools and other public agencies were exempt from paying their share of assessments. Proposition 218 included a provision intended to change this, once again placing the burden on the assessing agency to justify exemptions with a strong evidentiary showing. Section 4, subdivision (a) of Article XIII D provides: "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." Appellants object to OSA's exemption of whole classes of property, including "property used for educational purposes" from any assessment whatsoever. They contend that the exemption failed to comply with the requirements of section 4(a). I agree.

The engineer's report found that properties used for educational purposes were excluded from the assessment on the basis that such properties "typically offer open space and recreational areas on the property" that "serve to offset the benefits" of OSA's open-space program. There was no attempt to distinguish between publicly and privately owned schools, and no determination was made as to which particular school properties actually provided open space or recreation opportunities. Furthermore, the concept of offsetting benefits is not a basis for an exemption under article XIII D, section 4, subdivision (a). There was no clear and convincing evidence in the report, or any showing whatsoever, that these properties "receive no special benefit" from the proposed open space acquisitions, as required by article XIII D. (Art. XIII D, § 4, subd. (a).) The Legislative Analyst in the Proposition 218 materials informed the voters that under the new law "[l]ocal governments must charge schools and other public agencies their share of assessments." This record does not show that the agency has complied with this mandate.

IV. Arguments of *Amici Curiae*

OSA's assessment has garnered much support from local interest groups, such as the Silicon Valley Chamber of Commerce and the Silicon Valley Manufacturing Group, as well as from associations of local government, namely the California State Association of Counties, the League of California Cities, and the California Special Districts Association.

The amici emphasize that open space and recreational areas provide a multitude of benefits to a community, including health benefits, economic benefits, and environmental

benefits. Numerous studies have documented the ways in which parks and open space enhance the quality of life. And the Legislature has specifically found with respect to Santa Clara County that open-space preservation is a high priority in order to "preserve the quality of life in the county . . . ." (Pub. Res. Code, § 35101, subd. (a).) I strongly agree that open space, parks and recreational areas are important to California's communities. However, the value of open space is not at issue before this court. Appellants challenge only OSA's use of the assessment process to fund its program to preserve open space in this county. The benefits described by the amici that come from living in a community with plentiful open space are plainly benefits enjoyed by the public at large. Such benefits, no matter how desirable, do not fit within the limited definition of special benefits contained in Proposition 218, as "particular and distinct" benefits that are "conferred upon the real property" being assessed. (Art. XIII D, § 2, subds. (b) & (i).) And a program with broad purposes and objectives such as OSA's is not a "local improvement," within the meaning of assessment law, the cost of which can be calculated and allocated among the properties directly benefited. (*Solvang*, *supra*, 112 Cal.App.3d at p. 553.)

The Public Land Trust (PLT) has also filed an amicus brief, expressing concern that appellants' interpretation of Proposition 218 amounts to a "complete ban" on special assessments to fund acquisition of land for open space and will essentially signal the end of open-space preservation in this state. Appellants do not maintain that all open-space assessments are prohibited by Proposition 218. In order to be valid, however, assessments for open space must meet the requirements set forth in the constitutional amendments. Thus, a public park or recreation area could be financed by assessments, at least in part, where the cost of acquisition or maintenance of such property can be fairly estimated, and that cost can be amortized and then levied on properties in proportion to the specific benefit they receive from their proximity to the park or open space. It is well accepted that parks confer both "broad public benefits" and "special benefits on

neighboring properties." (*City of Livermore v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1410, 1417.) Only the special benefits "justify the imposition of a special assessment." (*Ibid.*)

According to the PLT, history has demonstrated that Californians support acquisition of open space to enhance the quality of life in their communities. PLT urges that Proposition 218 must not be interpreted to deprive the people of California of the means to support these important objectives. But again, assessments are still a viable means to finance acquisition of open space, so long as constitutional requirements are met. Furthermore under Proposition 218, OSA could proceed by way of a two-thirds voter approval for a special tax to fund a general program for open space acquisition. (Article XIII C, § 1, subd. (d), § 2, subd. (d).) As PLT points out, California voters have shown their strong support for open space by passing various measures over the years to finance open-space acquisition.[11] A tax approved by a two-thirds vote, OSA concedes, may be the most expedient method of funding its open-space acquisition program.[12]

Several of the amici argue that Proposition 218 sought to accomplish its purposes of limiting government assessments mainly by guaranteeing that property owners would be able to vote on assessments to be levied on their properties. The majority also appears to accept this view, pointing out that Proposition 218 was entitled "the Right to Vote on Taxes Act." To the extent that the majority and amici contend that the purpose of Proposition 218 was to add the voter consent requirement, and that no significant

---

[11] The PLT represents that Proposition 18, approved in 1984, Proposition 43, approved in 1986, Proposition 70, approved in 1988, Proposition 117, approved in 1990, Proposition 12, approved in 2000, and Proposition 40, approved in 2002, are examples of ballot measures approved in this state that allocated funding for open space.

[12] In its respondent's brief, OSA states "In Santa Clara County, where 40% of the registered voters are not property owners, it may well have been easier to obtain a 2/3 vote of registered voters than a weighted majority vote of property owners."

substantive changes in the law were effected by the proposition, I disagree. I believe this is too narrow a reading of the intent of Proposition 218, and it is contradicted by the language of article XIII D, section 4, subdivision (a), the Legislative Analyst's analysis of the Proposition, and arguments in the voter's pamphlet, as well as by various treatises analyzing the substantial changes wrought in existing assessment law by Proposition 218.[13]

Section 4, subdivision (a) of article XIII D imposes explicit requirements on an assessing authority regarding the determination of special benefit, the separation of general and special benefit, the actual cost of a public improvement, and the proportionality calculation. This entire section would be superfluous if it merely restated existing law. The Legislative Analyst recognized that Proposition 218 had a dual purpose: to impose limitations on the types of permissible assessments *and* to guarantee voter approval. The Legislative Analyst noted the "extensive requirements on local governments charging assessments," and explained the differences between what was allowed in contemporary assessment practice and what would be allowed post-Proposition 218. Of the four conditions listed that must be met by any new assessment post-Proposition 218, two of them related to the substantive elements of special benefit and proportionality, the third was the new requirement regarding exemptions for public property, and only the fourth concerned the voting requirements. Furthermore, significant substantive changes in the assessment process were noted by the Legislative Analyst in a pamphlet entitled "Understanding Proposition 218," published by the Legislative Analyst's Office in December of 1996. As to the special benefit determination, the Legislative Analyst noted that the new law "represents a major change

[13] See, e.g., Cole, Special Assessment Law Under California's Proposition 218 and the One-Person, One-Vote Challenge (1998) 29 McGeorge L. Rev. 845, 868-869.

from the law prior to Proposition 218, when local governments could recoup from assessments the costs of providing both general and special benefits."[14]

The Proposition 218 ballot identified the main concern of the drafters, namely "tax increases disguised via euphemistic relabeling as 'fees,' 'charges,' or 'assessments.' " (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra,* 24 Cal.4th at p. 839.) The ballot arguments urged voters to put a stop to "imaginative" assessments, and promised that the proposition would "significantly tighten *the kind of benefit assessments* that can be levied." (Italics added.) There can be no doubt that the proposition effected changes in the substantive requirements of assessment law, in addition to guaranteeing property owners the right to vote on property assessment.

V. The Voter Consent Requirements

Appellants contend that OSA failed to comply with Proposition 218's requirements for taxpayer consent, and that these failures misled the voters and affected the outcome. My conclusions regarding the substantive validity of OSA's assessment make it unnecessary to reach these claims. However, because the consent of property owners whose property will be assessed is an important requirement of article XIII D, and because I would find a failure to comply in one respect, I will briefly address appellants' claims.

First, appellants argue that OSA made "significant changes" to the engineer's report during the balloting process. I agree with the majority that the differences between the preliminary engineer's report and the final report were not significant.

Next, appellants contend that because the informational pamphlet and ballot were prepared by consultants hired by OSA, the materials had a decided bias in favor of the

[14] This pamphlet was contained in the record of the summary judgment proceedings in this case. It is also a proper subject of judicial notice. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838, fn 1.)

assessment, extolling the benefits of open space while including no arguments against the assessment. Furthermore, because ballots were sent out around the time of the September 11, 2001 tragedy, the attentions of voters were diverted. Appellants argue that the low voter response (approximately 15 percent of the ballots sent out were returned), and the slight margin of victory (50.9 percent to 49.1 percent) indicate that the outcome could likely have been affected by these factors.

I would agree with the majority in rejecting these arguments. There is no requirement in the constitutional provisions or in the statutes that the notice and ballot must contain opposition arguments. The pamphlet and ballot prepared by OSA provided considerably more detailed information than that required by Proposition 218. The ballot expressly informed property owners that they were receiving a ballot by mail because "Proposition 218 specifies that property owners must determine by mailed ballot whether the community supports this proposed assessment for open space preservation." It told voters how to lodge objections and exactly how to cast their vote for or against the assessment.

The timing of the balloting does not justify invalidating the process. The first pamphlet was sent out on September 1, 2001, informing property owners that the ballots would be sent out on September 14, 2001, and noting the scheduled hearing dates. The notice and ballots were already printed prior to September 11, 2001. And the property owners had until November 8, 2001 to turn in their votes. Under the circumstances I do not believe the intervening tragedy of September 11 rendered the balloting invalid. Furthermore, low voter turnout and close results are not indicative of any failure on the part of OSA to follow the law; nor is the fact that OSA hired consultants to prepare the materials.

Next appellants contend that OSA misled the public as to whether unofficial ballot forms would be counted. This contention arises because appellant Silicon Valley Taxpayers Association (SVTA) sent out its own mailings opposing the assessment. The

notices stated that the assessment violated Proposition 218 and was in fact a special tax because it was "open-ended," could be continued "in perpetuity" and "fail[ed] to meet a fundamental test of what constitutes an assessment for a capital improvement." The notice sent out by SVTA included a "ballot" on a sheet of paper, and it urged the property owner to fill in the parcel number and address, and sign the sheet indicating a "No" vote. The ballot sheets were to be sent to Assistance Plus at the same address as the official ballots, with a copy to SVTA.

Denise Whitaker, owner of Assistance Plus, stated that the official ballots were tabulated by scanning a bar code on the ballots with a bar code reader. The information was then matched with the original data regarding parcels and assessments. The "No" vote ballot sheets that were received in response to SVTA's letters contained no bar code. Whitaker said they were not tabulated "as they were not official ballots issued by the OSA." At the final OSA meeting on December 13, 2001, OSA certified the results of Assistance Plus's tabulation of the official ballots and determined not to accept ballots that had not been submitted on official forms.

Here again, I agree with the majority. I would find that OSA's decision to count only official ballots was within its discretion. The ballot forms submitted in response to the letters sent out by the SVTA did not meet the requirements of Government Code section 53753, and did not contain all of the information required by Proposition 218. Among other things, the ballot sheets did not include any space for a "Yes" vote. (Gov. Code, § 53753, subd. (c).) Government Code section 53753, subdivision (e)(1) specifically provides for tabulation of "optically readable (bar-coded) assessment ballots," which was the method used by Assistance Plus. (Gov. Code, § 53753, subd. (e)(1).) The ballots sent out by SVTA could not be tallied by this method. At the public meeting it was explained that "every ballot that is returned is counted *as long as it's a legal ballot*," and that that a valid vote "would need to be *on the official balloting form*." (Italics added.) Finally, a rule requiring an agency to count all privately prepared and

disseminated ballots would leave the assessment balloting process vulnerable to abuse and fraud. Neither the text of Proposition 218 nor the Omnibus Act authorizes private interest groups to conduct their own balloting.

One argument regarding the contents of the ballot I believe has merit, and thus I disagree with the majority on this point. This is the contention that the information on OSA's ballot did not set forth either the total extent of the obligation or the "duration of the payments" as required by article XIII D, section 4, subdivision (c), and Government Code section 53753, subdivision (b). Article XIII D is very specific about the requirements for taxpayer consent, including the contents of the ballot: "the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment." (Art. XIII D, § 4, subd. (c); Gov. Code, § 53753, subd. (b).)

The ballot in this case informed the voters that the amount collected from the assessment would be approximately $8,000,000 per year. However, this is the annual budget of OSA and not the estimated cost of any public improvement. Furthermore, the ballot did not include *any* information telling the voters about the duration of payments. The majority is of the view that OSA complied with the information regarding the duration of payments because the brochure sent out prior to the ballot informed voters that the assessment would create "an ongoing funding source." In other words, there was no "duration of the payments" since they would continue in perpetuity. (Art. XIII D, § 4, subd. (c).) First, I believe section 4, subdivision (c) contemplates that the information about the duration of the payments be on the ballot itself. Furthermore, although it may be accurate in this particular case to describe the duration of the payments as "ongoing," notifying the voters that there would not be *any* duration to the tax payments imposed on

their parcels does not satisfy the requirement contained in article XIII D, section 4, subdivision (c).

A necessary characteristic of an assessment, and one that distinguishes it from a special tax, is that it "does not continue indefinitely, but rather is for a set term and is extinguished upon completion of payment of the principal." (*County of Fresno v. Malmstrom, supra,* 94 Cal.App.3d at p. 981, fn. 2.) OSA's assessment has no "set term" and does "continue indefinitely." (*Ibid.*) Since there is no estimated "capital cost" of any "permanent public improvement" (art. XIII D, § 2, subd. (c)), there can never be the "completion of payment of the principal" and this assessment will never be extinguished. (*County of Fresno v. Malmstrom, supra,* 94 Cal.App.3d at p. 981, fn. 2.) Thus, OSA's failure to include the required information about "the duration of payments" in its ballot is indicative of a more fundamental constitutional defect in the assessment itself. I would find, with respect to the information required to be contained in the ballot, that OSA did not substantially comply with the voter consent provisions of article XIII D, section 4, subdivision (c).

For all of the reasons stated herein, I would reverse the judgment in favor of the Santa Clara County Open Space Authority and direct that the trial court enter judgment in favor of plaintiffs.

_____

BAMATTRE-MANOUKIAN, J.

Appendix

California Constitution, Article XIII D, sections 1-5:

Section 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:
(a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.
(b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.
(c) Affect existing laws relating to the imposition of timber yield taxes.

Section 2. Definitions. As used in this article:
(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.
(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.
(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.
(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.
(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.
(h) "Property-related service" means a public service having a direct relationship to property ownership.
(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

Section 3. Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.
(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.
(3) Assessments as provided by this article.
(4) Fees or charges for property related services as provided by this article.
(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

Section 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall 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. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. 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.
(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.
(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.
(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.
(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the

hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.
(f) In any legal action contesting the 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.
(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

Section 5. Effective Date. Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:
(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.
(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.
(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.
(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.

Trial Court:	Santa Clara County Superior Court Superior Court Nos. 1-02-CV804474, 1-03-CV000705
Trial Judge:	Hon. William J. Elfving
Attorneys for Plaintiffs/Appellants: Silicon Valley Taxpayers Assn., Inc.	Law Offices of Tony J. Tanke Tony J. Tanke Law Offices of Gary Simms Gary L. Simms Howard Jarvis Taxpayers Association Timothy Arthur Bittle
Attorneys for Defendant/Respondent: Santa Clara County Open Space Authority	Nielsen, Merksamer, Parrinello, Mueller & Naylor James R. Parrinello John E. Mueller Christopher E. Skinnell
Attorneys for Amicus Curiae The Trust for Public Land	Heller Ehrman White & McAuliffe Vanessa OttilieWells Ingrid S. Leverett David A. Thomas
Attorney for Amicus Curiae for respondent: Cal. State Assoc. of Counties et al.	Office of the County Counsel Steven M. Woodside Sue Andra Gallagher, Deputy County Counsel
Attorney for Amicus Curiae for respondent: San Jose Silicon Valley Chamber of Commerce	Hopkins & Carley Jay M. Ross
Attorneys for Amicus Curiae for appellant: Pacific Legal Foundation	Pacific Legal Foundation James Sherman Burling

Silicon Valley Taxpayers Assn., Inc., et al. v. Santa Clara County Open Space Authority
H026759