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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

CONCERNED CITIZENS FOR RESPONSIBLE GOVERNMENT et al., Plaintiffs and Appellants, v. WEST POINT FIRE PROTECTION DISTRICT et al., Defendants and Appellants.	C061110 (Super. Ct. No. CV33828)

APPEAL from a judgment of the Superior Court of Calaveras County, John E. Griffin, Jr., Judge. Dismissed in part and reversed in part with directions.

Stephanie J. Finelli; and Robert K. Reeve for Plaintiffs and Appellants.

Nossaman LLP and Stephen N. Roberts for Defendants and Appellants.

* Pursuant to the California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part I. of the Discussion.

 (***SEE CONCURRING OPINION***)

Squeezed by a lack of resources from existing tax revenues, the tiny, rural West Point Fire Protection District (the District) decided to levy what it called a "special assessment" that would bring in $146,000 per year for additional fire suppression services. The District commissioned an engineer's report that created a three-tiered structure for imposing assessment fees, purporting to allocate the assessments based on the "special benefits" accruing to improved and unimproved properties from enhanced fire protection services.

An election was held, the assessment passed by 62 percent of the vote, and the District's board passed a resolution to levy the assessments. The resolution authorized the County of Calaveras to collect the assessments beginning with the 2007-2008 tax year.

Plaintiffs and appellants Concerned Citizens for Responsible Government and William Doherty (collectively Concerned Citizens) filed this reverse validation action, claiming the new assessment violated the provisions of Proposition 218,[1] which restricts a public agency's ability to impose special assessments. The trial court ruled against Concerned Citizens, finding that the assessment was valid. It also awarded the District more than $104,000 in attorney fees.

[1] Article XIII D of the California Constitution; further references to articles are to the California Constitution.

We shall reverse the judgment because the assessment did not comport with the substantive provisions of Proposition 218, as elucidated by the California Supreme Court in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 (*Silicon Valley*). This disposition also necessitates reversal of the attorney fee award.

We shall also reject the District's fallback arguments that, due to procedural defects, the lawsuit should have been dismissed at its inception.

FACTUAL AND PROCEDURAL BACKGROUND

The District is a special district located in Calaveras County that was formed in 1948 for the purpose of responding to structural fires, wildland fires, vehicle accidents and medical emergencies within its borders. The District encompasses 2,364 parcels and generates $149,000 in property taxes to meet its community service obligations.

Between 2000 and 2006, there was a 340 percent growth in service calls within the District. However, this increase was not being matched by increases in revenue. At a special meeting of the District's board in May 2006, the directors discussed a benefit assessment that would generate an additional $130,000 to $150,000 in revenue.

An engineer's report was commissioned in purported compliance with the requirements of Proposition 218. The engineer noted the lack of sufficient resources to provide fire

suppression services 24 hours per day, seven days per week, and recommended the "low cost" solution of a ballot assessment to generate the needed additional revenue. The report identified three "goals" to be achieved: (1) to "make missed calls for assistance a 'thing of the past'" by providing at least one full-time emergency medical technician (EMT) senior firefighter on duty at all times; (2) to increase the number of volunteer firefighters on duty at any given time; and (3) to "[e]mpower the community" and hold the District accountable by conducting periodic town hall meetings and reviewing the assessment every five years.

The report calculated that it would cost the District $146,000 to keep one senior firefighter on duty around the clock. The report used a methodology taken from a 1995 law review article to calculate the benefits (based on proportionate costs) conferred on three different types of parcel owners—improved, unimproved and exempt[2]—for fire protection services.

Acknowledging that under Proposition 218 only "special benefits" to each parcel could be subject to the assessment, the report purported to separate "special benefits" conferred upon the parcels from the "general benefits" accruing to the community at large. In order to reach the goal of an additional $146,000 in funds for increased fire suppression, the report

[2] Properties whose land value was less than $5,000 *and* whose structural improvements did not exceed $5,000 according to county records, were considered exempt.

proposed the following allocation of assessments: Improved parcels—$87.58, unimproved parcels—$45, exempt parcels—$0.

Following receipt of the engineer's report, the District conducted an election in which each parcel owner was asked to vote on the proposed assessment. The ballot counting started on April 19, 2007, (all further unspecified calendar dates are to that year) and the final results were certified on April 22. The measure passed, with 61.8 percent voting in favor and 38.1 percent voting against.

PROCEDURAL HISTORY

Filing of the Lawsuit and Service of Summons

On June 14, the District adopted Resolution No. 07-06, authorizing the imposition of the assessments recommended in the engineer's report. The resolution authorized Calaveras County to collect the assessment for the District and to deduct 1 percent from the billed assessment as an administrative cost. On June 21, Concerned Citizens filed the present lawsuit as a "reverse validation" action, requesting judicial invalidation of the assessment. (Code Civ. Proc., §§ 860, 863;[3] *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 30, fn. 16.) A first amended complaint was filed on July 13.

[3] Undesignated statutory references are to the Code of Civil Procedure.

On August 10, Concerned Citizens filed proof of publication of summons, showing service on July 20, July 27 and August 3. (§ 861.)

The District filed a motion to quash service, contending that the form of publication was improper. On October 10, the court granted the motion, citing defects in the proofs of service.

In the meantime, Concerned Citizens applied ex parte and was granted an extension until November 5 to allow further publication of summons. Additional rounds of publication occurred on October 16, 23 and 30.

On November 5, the District moved to dismiss the action for lack of jurisdiction, based on improper publication of summons. On December 3, Concerned Citizens applied ex parte and was granted another extension, until December 14, to file proof of service.

On December 12, the trial court denied the District's motion to dismiss. The next day, Concerned Citizens filed an ex parte application to extend time for filing proof of publication of summons until December 17. Although the application was denied, a proof of service was filed on December 17, showing publication had occurred on November 30, December 7 and December 14.

Pointing out that Concerned Citizens' proof of publication was filed a day late without court permission, the District

moved for reconsideration of the denial of its motion to dismiss. The court agreed to reconsider its prior order but reaffirmed its denial of the motion to dismiss. The District then sought relief in this court by way of petition for writ of mandate and/or prohibition, seeking to overturn the trial court's refusal to dismiss the case. (*West Point Fire Protection District v. Superior Court*, No. C058426.) We denied the petition without comment on April 30, 2008.

Trial, Judgment and Postjudgment Events

After Concerned Citizens filed a second amended complaint, the case was tried before assigned Judge John E. Griffin, Jr.

The trial court ruled against Concerned Citizens and in favor of the District on all causes of action. The court ruled that "the benefit assessment was legally created and passed, and is determined to be valid."

After entry of judgment, the District moved to recover its attorney fees, either as the prevailing party or as a discovery sanction for the wrongful failure to admit certain requests for admission. The court granted the motion and awarded the District $104,153 in attorney fees, finding that Concerned Citizens had unreasonably denied the District's requests for admissions, thereby requiring the District to defend Concerned Citizens' claims at trial.

Concerned Citizens appeals from the judgment and from the order awarding attorney fees to the District. The District

filed a notice of cross-appeal from the denials of its motion to dismiss and motion for reconsideration.

DISCUSSION

I. The Trial Court's Refusal to Dismiss*

Before reaching the merits of Concerned Citizens' challenge to the assessment, we must first address the District's claim that its motion to dismiss on jurisdictional grounds was erroneously denied. The contention must be addressed at the outset since, if the entire case should have been thrown out before trial on procedural grounds, there would be no need for us to reach the substantive issues.

A. No Cross-appeal

The District claims it has preserved its arguments by way of cross-appeal. No cross-appeal lies here.

The District won a total victory below. The trial court rendered judgment in its favor, and awarded costs and attorney fees. It is elementary that, as a general rule, a party who wins a judgment or order in its favor is not aggrieved, and therefore cannot appeal. (*Maxwell Hardware Co. v. Foster* (1929) 207 Cal. 167, 170; *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 431; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 41, pp. 102-103.)

In apparent recognition of this rule, the District's notice of cross-appeal states that it is *not* appealing the judgment.

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* See footnote, *ante*, page 1.

Rather, the District claims to be cross-appealing from the trial court's orders denying its pretrial motions to dismiss and for reconsideration. However, each of those orders is nonappealable. (See *Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1049–1050 [order denying reconsideration]; *Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 237 [denial of motion to dismiss].)

A protective cross-appeal is available after a *posttrial* motion for new trial or to vacate judgment, in order to protect the party that won the motion from possible reinstatement of the judgment in the event of an appellate reversal of the posttrial order. (See Eisenberg et al., Civil Appeals and Writs (The Rutter Group 2010) ¶¶ 2:139, p. 2-72.4, 3:169 to 3:171.1, pp. 3-72 to 3-73 (Eisenberg).) However, that is not the situation here.

What the District seeks to do is raise error in the denial of its pretrial motions as an alternative reason why the judgment should be affirmed. This it is permitted to do. An appellate court has the power to review any intermediate order upon the respondent's request in order to determine whether the appellant has been *prejudiced* by the errors asserted on appeal. (§ 906; Eisenberg, Civil Appeals and Writs, *supra*, ¶ 8:196, p. 8-134.) Here, if the case should have been dismissed at the outset, the fact that errors may have *subsequently* occurred cannot require a reversal, since the court would have lacked jurisdiction to proceed further.

Therefore, we retain jurisdiction to reach the District's arguments without the necessity of a cross-appeal. However, for the reasons just explained, the District's purported cross-appeal from the judgment is defective and must be dismissed.

B. The Trial Court's Refusal to Dismiss Was Proper

The District argues the trial court lacked jurisdiction to proceed with the trial because: (1) the action was filed beyond the 60-day time period for filing a reverse validation action; and (2) Concerned Citizens inexcusably failed to properly publish the summons until December 2007, six months after the action was filed. Neither claim persuades us.

1. Statute of Limitations.

Section 860 gives a public agency 60 days from the date on which it takes governmental action to file a lawsuit to validate its action.[4] A reverse validation action by an interested person must be filed within the same time period. (§ 863.) "A validation proceeding . . . is a lawsuit filed and prosecuted for the purpose of securing a judgment determining *the validity of a particular local governmental decision or act*." (*Blue v. City of Los Angeles* (2006) 137 Cal.App.4th 1131, 1135, fn. 4, italics added, citation omitted.) Here, the District began

[4] Section 860 provides: "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

tallying the vote on April 19, the election results were certified on April 22, and a resolution authorizing collection of the assessment was adopted on June 14. Concerned Citizens filed its reverse validation action on June 21.

The District appears to claim that the complaint was untimely because it was filed 63 days after *April 19*, the date the District started counting the vote. That notion cannot be seriously entertained. The earliest the action could have been filed would have been the date a governmental decision to impose the assessment became effective, or June 14 when Resolution No. 07-06 was adopted. The complaint here easily met that deadline.

2. Publication of Summons.

As we have recounted in the Procedural History (pp. 5-6, *ante*), Concerned Citizens went through three rounds of service of summons by publication, before finally completing valid service on December 14.

While admitting that Concerned Citizens properly published summons on the third attempt, the District nevertheless argues that because publication was defective on the first two attempts, the action should have been dismissed.

As the District acknowledges, section 863 provides that if proper publication by summons is not effected within 60 days, "the action shall be forthwith dismissed on the motion of the public agency *unless good cause for such failure is shown by the interested person*." (Italics added.)

In denying the District's motion to dismiss and in reaffirming such denial on reconsideration, the trial court impliedly found that there existed "good cause" for counsel's failure to effectuate service properly on the first two attempts. The District's argument thus amounts to an assertion that there was no good cause *as a matter of law*. This is a high hill to climb, and the District fails to make it to the top.

The record shows that the first series of publications was defective because the newspaper in which publication occurred—the Calaveras Enterprise—published the wrong form of summons. This mistake was not the fault of counsel. Counsel had provided the correct summons, but the Enterprise staff substituted its own language, suitable for use when publication serves notice to an individual who is otherwise unamenable to service. Counsel thereafter applied for and was granted an extension until November 5 to re-serve by publication.

Plaintiffs' counsel, reasonably believing the time for service had been suspended by the pendency of the District's motion to dismiss for failure to timely publish and return summons (§ 583.240, subd. (c)),[5] then noticed "a subtle but potentially fatal distinction inherent in the content of the governing code sections, i.e., [Code of Civil Procedure section]

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[5] Section 583.240 provides, in pertinent part, "In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [¶] . . . [¶] (c) The validity of service was the subject of litigation by the parties."

861.1 and [Government Code section] 6063, that had compromised plaintiffs's [*sic*] previously published summons up to that point." A new extension was sought and granted, extending time for service until December 14.

It is undisputed that publication of summons was complete on December 14, and that Concerned Citizens "got it right" this time.

The standard of review of a trial court's order finding "good cause" for relief from the 60-day deadline for service of publication is well established: "Whether plaintiff demonstrated good cause for failing to comply with the summons publication requirements . . . is a question that is committed to the sound discretion of the trial court." (*Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1031 (*Katz*).) "'"[I]n matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and appellate tribunals will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion."'" (*Community Youth Athletic Center v. City of National City* (2009) 170 Cal.App.4th 416, 430 (*Community Youth*), quoting *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 347 (*City of Ontario*).)

It is undisputed that the infirmity in the first round of service by publication was not Concerned Citizens' counsel's fault. The newspaper took it upon itself to substitute an

incorrect form of publication rather than the one that counsel had provided.

After the second round of publications, Concerned Citizens' counsel spotted an obscure but potentially significant contradiction between Code of Civil Procedure section 861.1 and Government Code section 6063 regarding service by publication. Accordingly, counsel obtained a second extension to serve until December 14, a deadline which was met.[6]

An honest and reasonable mistake of law by counsel can qualify as "good cause" for relief under section 863. (See *City of Ontario*, *supra*, 2 Cal.3d at pp. 345-346 [counsel's misreading of the applicable statutes constituted sufficient grounds for relief]; *Community Youth*, *supra*, 170 Cal.App.4th at p. 431 [counsel's "understandable procedural mistake" coupled with other events beyond his control amounted to good cause as a matter of law].)

Here, the trial court acted within its discretion in determining that the newspaper's mistake and counsel's belated discovery of a subtle contradiction between two statutes governing service by publication provided sufficient grounds for relief. As our Supreme Court has observed, "Counsel are not expected to be omniscient, as the Legislature plainly recognized

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[6] Although a third request for extension until December 17 was denied, the filed proof of service by publication showed that service was completed by December 14. The one-day delay in filing the proof of service was attributable to the newspaper and did not prejudice anyone.

by writing the 'good cause' exception into section 863." (*City of Ontario*, *supra*, 2 Cal.3d at p. 346.)

Moreover, section 866, which is found in the same set of statutes governing publication of summons, provides that "[t]he court hearing the action shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties." Here, as the trial judge recognized, the technical snafus in publication resulted in no prejudice to the District, which was not only aware of the lawsuit from its inception, but fought to dismiss it at every step of the way. Nor could there have been prejudice to the public at large. If anything, the sequence of events resulted in more widespread coverage and notoriety for the lawsuit, since the newspaper wound up publishing a public notice of the action *nine times* between August 10 and December 14. Under the mandate of section 866, the irregularities in the first two publications could reasonably be regarded as minor and resulting in no infringement upon the substantial rights of the parties.

The cases cited by the District for the proposition that dismissal was mandatory are inapposite, because in each one, the defects in publication of summons were *never cured*. (*Katz*, *supra*, 144 Cal.App.4th at p. 1036 ["given that the failure involves faulty notice, resulting prejudice is impossible to assess"]; *County of Riverside v. Superior Court* (1997) 54 Cal.App.4th 443, 450-451.) Here, as the District concedes, proper service was ultimately effectuated.

We conclude the trial court acted within its discretion in refusing to dismiss the case due to alleged improper service. [THE REMAINDER OF THE OPINION IS PUBLISHED]

II. Validity of the Assessment

A. History and Overview of Proposition 218

Proposition 218 was passed in 1996 as a constitutional adjunct to Proposition 13. (See *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, 1519 (*Beutz*).) Proposition 13, which was passed in 1978, "'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.'" (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 836 (*Apartment Assn.*), citing 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. [Citations.] 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."'" (*Silicon Valley, supra*, 44 Cal.4th at p. 442.)

This angered the proponents of Proposition 218, who felt that courts and legislators were trying to make an "end-run" around Proposition 13's two-thirds voter approval requirement by levying taxes under a different name. The ballot argument in

favor of Proposition 218 declares that "'politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes "assessments" and "fees." [¶] . . . [¶] Proposition 218 will significantly tighten the kind of benefit assessments that can be levied.'" (*Silicon Valley*, *supra*, 44 Cal.4th at p. 449, fn. 5, quoting Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 218, p. 76).

B. Changes in the Law Wrought by Proposition 218

In *Silicon Valley*, the California Supreme Court explained that Proposition 218 was designed to end this perceived mischief by changing the law in significant respects. "'"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."'" (*Silicon Valley*, *supra*, 44 Cal.4th at p. 443, quoting *Apartment Assn.*, *supra*, 24 Cal.4th at pp. 836-837.)

Proposition 218 "restricts government's ability to impose assessments in several important 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 a

particular property. (Art. XIII D, §§ 2, subd. (b), 4, subd. (a).) A special benefit is 'a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large.' (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).) . . . Because only special benefits are assessable, and public improvements often provide both general benefits to the community and special benefits to a particular property, the assessing 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).)" (*Silicon Valley*, *supra*, 44 Cal.4th at p. 443.)[7]

The initiative also changed the burden of proof in validation lawsuits. Under prior law, the burden was on the taxpayer to show that an agency's action in adopting a special assessment was invalid. Proposition 218 reverses that burden. (*Silicon Valley*, *supra*, 44 Cal.4th at p. 445.) Thus, regardless

[7] In addition to substantive changes, Proposition 218 also imposed stricter procedural requirements for imposing special assessments. (See *Beutz*, *supra*, 184 Cal.App.4th at p. 1523.) Because we find the substantive requirements of Proposition 218 were not satisfied, we need not decide whether the District fulfilled these procedural requirements.

of the legal theories pleaded in the complaint, in any action contesting the validity of any assessment the public agency bears the burden of demonstrating that a given assessment satisfies both the "special benefit" and "proportionality" prongs of article XIII D. (*Beutz*, *supra*, 184 Cal.App.4th at p. 1535; art. XIII D, § 4, subd. (f).)

Finally, Proposition 218 altered the standard for judicial review. Before its enactment, courts reviewed the special assessments levied by governmental agencies under the highly deferential "abuse of discretion" standard. (*Silicon Valley*, *supra*, 44 Cal.4th at p. 443.) However, the California Supreme Court has made clear that, because compliance with Proposition 218 is now a *constitutional* question, courts must exercise their independent judgment on whether assessments imposed by local agencies violate article XIII D. (*Silicon Valley*, at p. 448; see *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1075 (*Tiburon*).)

This sea change in the law has undoubtedly made it harder for local districts to justify their assessments in validation lawsuits. But this is precisely the result the drafters of the initiative desired. The Legislative Analyst predicted that if Proposition 218 passed "'it would be easier for taxpayers to win lawsuits, resulting in reduced or repealed fees and assessments.'" (Ballot Pamp., Gen. Elec., *supra*, analysis of Prop. 18 by Legis. Analyst (*Burden of Proof*) at p. 74, as quoted in *Silicon Valley*, *supra*, 44 Cal.4th at p. 445.) Or, as the

California Supreme Court put it: "[P]roposition 218 was intended to make it more difficult for an assessment to be validated in a court proceeding." (*Silicon Valley*, at p. 445.)

III. General Versus Special Benefits

As noted, Proposition 218 limits local government's ability to impose real property assessments in two significant ways: An assessment can be imposed only for a "special benefit" conferred on real property, and the assessment must be in proportion to the special benefit conferred on any particular parcel. (Art. XIII D, §§ 2, subd. (b) & 4, subd. (a); *Silicon Valley*, *supra*, 44 Cal.4th at p. 437). Proposed assessments must be supported by a detailed engineer's report, and the formation of the district, as well as new or increased charges, must be approved by weighted vote of property owners. (Art. XIII D, §§ 4 & 6).

Article XIII D, section 2, subdivision (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 a 'special benefit.'" Moreover, the agency must separate general benefits from special benefits conferred on a parcel, and impose the assessment only for special benefits. (*Id.*, § 4, subd. (a).) "The requirement that the agency 'separate the general benefits from the special benefits conferred on a parcel' (art. XIII D, § 4, subd. (a)) helps ensure that the special benefit requirement is met." (*Beutz*, *supra*, 184 Cal.App.4th at p. 1522.)

General benefits are "benefits conferred generally 'on real property located in the district'" (*Silicon Valley*, *supra*, 44 Cal.4th at p. 451), while "a special benefit must affect the assessed property in a way that is particular and distinct from its effect on other parcels and that real property in general and the public at large do not share." (*Id.* at p. 452.)

IV. The Assessment Confers Only General Benefits

The engineer's report leaves little doubt that the assessment did not confer "particular and distinct" benefits on identifiable parcels within the District over and above the benefits conferred on all parcels or on the public at large. The report makes no secret of its goal: to generate enough revenue to maintain year-round fire protection, 24 hours per day, seven days per week, and to hire enough firefighters and emergency technicians to meet National Fire Protection Standards, all at "low cost" to the community. The report calculates that $146,000 in additional revenue generated by a special assessment would be enough to (1) pay half of a part-time chief's salary, (2) subsidize a two-days-on, four-days-off station captain's salary, and (3) provide a senior firefighter to cover the remaining weekly schedule.

Thus, the goal of the assessment is plain: double the District's existing budget for fire protection service. Such an objective, however lofty, does not contemplate the conferring of

special benefits on *specific parcels* sufficient to qualify as a special assessment.[8]

Fire suppression, like bus transportation or police protection, is a classic example of a service that confers general benefits on the community as a whole. A fire endangers everyone in the region. No one knows where or when a fire will break out or the extent of damage it may cause. Fire protection is a service supported by taxpayer dollars for the benefit of all those who reside in the entity's jurisdiction and those unlucky members of the public who may need it while temporarily within its borders. Such protection cannot be quantifiably pegged to a particular property, nor can one reasonably calculate the proportionate "special benefits" accruing to any given parcel. As the Legislative Analyst pointed out in the

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[8] The District claims that in *Silicon Valley* the state Supreme Court "*redefined* what constitutes a special benefit, arguably partially disapproving *Not About Water* [*Com. v. Board of Supervisors*] (2002) 95 Cal.App.4th 982 (*Not About Water*)] in that respect." (Italics added.) Because it "specifically relied" on *Not About Water* in creating the assessment, the District asks us, on equitable grounds, not to apply *Silicon Valley* retroactively.

The District completely misreads *Silicon Valley*. The Supreme Court in that case did not "redefine" what constitutes a special benefit. On the contrary, it pointed out that "*Proposition 218* made several changes to the definition of special benefits." (*Silicon Valley*, *supra*, 44 Cal.4th at p. 451, italics added.) The definitional change came from Proposition 218, enacted in 1996, not *Silicon Valley*, decided in 2008. The Supreme Court disapproved of *Not About Water* only on the narrow issue of the standard of judicial review to be applied in determining an assessment's constitutional validity. (*Silicon Valley*, at p. 450, fn. 6.)

ballot materials that accompanied Proposition 218, "'[t]ypical assessments that provide *general* benefits' [are] '*fire*, park, ambulance, and mosquito control assessments.'" (Ballot Pamp., Gen. Elec., *supra*, analysis of Prop. 18 by Legis. Analyst (*Current Practice*) p. 73, as quoted in *Tiburon*, *supra*, 180 Cal.App.4th at p. 1077, fn. 11, italics added.) Thus, the assessment generates only general benefits.

Our conclusion is supported by established case law explaining what constitutes a "special assessment." "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 . . . .'"'" (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141-142, italics added.) "[A] special assessment is a charge levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement." (*Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 554 (*Solvang*). As our Supreme Court put it in *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, "'a special assessment, sometimes described as a local assessment, is a charge imposed on particular real property for *a local public improvement of direct benefit to that property*, as for example a street improvement, lighting improvement, irrigation improvement, sewer

connection, drainage improvement, or flood control improvement.'" (*Id.* at p. 162, italics added.)

Other examples of special assessments include relocation of overhead utility lines underground (*Tiburon*, *supra*, 180 Cal.App.4th at pp. 1079-1080 ["benefits are plainly tied to specific properties located adjacent to utility poles and lines"]) and "widening and improving . . . a major thoroughfare adjacent to the assessed parcels" (*White v. County of San Diego* (1980) 26 Cal.3d 897, 900).

These levies go toward paying for specific tangible benefits of which each parcel partakes, and which can be apportioned in relationship to the total cost of the improvement. By contrast, fire protection, as well as public park maintenance and library upkeep, are supported by ad valorem property taxes, which "are deemed to benefit all property owners within the taxing district, whether or not they make use of or enjoy any direct benefit from such expenditures and improvements." (*Solvang*, *supra*, 112 Cal.App.3d at p. 552.)

By earmarking the proposed funds to pay only for additional fire suppression services, the District has, in effect, created a special tax. Special taxes are "'taxes which are levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes.'" (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1183 (*City of Roseville*), quoting *City and*

County of San Francisco v. Farrell (1982) 32 Cal.3d 47, 57; see also art. XIII C, § 1, subd. (d).)

In *City of Roseville*, the city council placed on the ballot an initiative (Measure Q) imposing a utility user's tax, the proceeds of which would be used "'solely for police, fire, parks and recreation or library services.'" (*City of Roseville*, *supra*, 106 Cal.App.4th at p. 1182.) The measure passed with 52 percent of the vote. (*Ibid.*) This court held that Measure Q clearly proposed a special tax, and was therefore invalid under Proposition 218 because it did not garner the requisite two-thirds majority vote. (*City of Roseville*, at pp. 1185-1187, 1189; see *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681-682 ["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."])

Like *City of Roseville's* Measure Q, the District's assessment here, which also failed to win two-thirds voter approval, charges each property owner and adds to the District's coffers funds for a single designated purpose: fire protection. It is, in practical effect, a special tax hidden behind the label of an "assessment," the very creature the proponents of Proposition 218 sought to eradicate. "[*P*]*roposition 218 was designed to prevent a local legislative body from imposing a special tax disguised as an assessment*. (*Apartment Assn.*, *supra*, 24 Cal.4th at p. 839 ['The ballot arguments identify what

was perhaps the drafter's main concern: tax increases disguised via euphemistic relabeling as "fees," "charges," or "assessments."'].)" (*Silicon Valley*, *supra*, 44 Cal.4th at p. 449, italics added.)

We conclude the District failed to meet its burden of demonstrating that the assessment confers special benefits on particular parcels of property above and beyond those granted to all properties in the district. Consequently, the assessment fails to comply with Proposition 218. (*Silicon Valley*, *supra*, 44 Cal.4th at pp. 454-456.)

V. Proportionality

Even assuming that the District's assessment somehow conferred special benefits on the assessed parcels, it would still be invalid for failure to comply with the proportionality requirement of Proposition 218.

The court's opinion in *Tiburon*, *supra*, 180 Cal.App.4th 1057 provides a lucid explanation of this requirement. "Under article XIII D, '[f]or an assessment to be valid, the properties must be assessed in proportion to the special benefits received . . . .' (*Silicon Valley*, *supra*, 44 Cal.4th at p. 456.) The public agency bears the burden of demonstrating that the amount of any contested assessment is proportional to the benefits conferred on the property. (Art. XIII D, § 4, subd. (f).) [¶] . . . [A]n assessment reflects costs allocated according to relative benefit received. As a general matter, an assessment represents the entirety of the cost of the improvement or

property-related service, less any amounts attributable to general benefits (which may not be assessed), allocated to individual properties in proportion to the relative special benefit conferred on the property. [Citations.] Proportional special benefit is the '"equitable, nondiscriminatory basis"' upon which a project's assessable costs are spread among benefited properties. [Citation.] Thus, the 'reasonable cost of the proportional special benefit,' which an assessment may not exceed, simply reflects an assessed property's proportionate share of total assessable costs as measured by relative special benefits. (See art. XIII D, § 4, subd. (a).)" (*Tiburon*, at p. 1081.)

An examination of the engineer's report discloses several violations of these principles. The report identified a set of fire suppression objectives and then calculated how much it would cost ($146,000) to reach them. The engineer then *worked backwards* from that figure to arrive at a system of assessments that would yield the desired amount of revenue. The methodology used by the engineer was thus *cost*-driven, rather than *benefit*-driven. This is precisely the same defect that caused the assessments in both *Tiburon* and *Beutz* to be held invalid. (*Beutz*, *supra*, 184 Cal.App.4th at pp. 1535-1536; *Tiburon*, *supra*, 180 Cal.App.4th at pp. 1082-1083.)

Because the assessments coincidentally add up to the project's entire cost, the engineer's approach also engages in the unwarranted assumption that the "improvement" would generate

no general benefits. Such a premise is not only false on its face (see *Beutz*, *supra*, 150 Cal.App.4th at p. 1531 ["as courts of this state have long recognized, . . . virtually all public improvement projects provide general benefits"]), but is contradicted elsewhere in the report itself. As *Tiburon* points out, because general benefits may not be charged to the property owner, they must be subtracted from the assessment. (*Tiburon*, *supra*, 180 Cal.App.4th at p. 1081.) This assessment does not do that.

Moreover, the engineer's report divides properties into three general, unrefined categories for purposes of assessment: Improved, unimproved, and exempt. Improved properties pay nearly twice the amount ($87.58) as unimproved parcels ($45), and exempt parcels pay nothing at all. These arbitrary categories result in gross inequities. For example, a 200-acre parcel with an $800,000 luxury home built on it would be taxed the same as a five-acre parcel with a barn worth $5,500.[9] Seventy-five other parcels, whose value and improvements are less than $5,000 pay zero, even though, as the report acknowledges, they receive a "major benefit" from enhanced fire protection in the form of reduced exposure to negligence claims

[9] Although this example is a hypothetical, the engineer's schedule of assessments shows the owner of a parcel with improvements valued at $6,016 was charged the same assessment rate ($87.58) as the owners of another parcel whose improvements are valued at $447,000 and whose property tax bill is 20 times greater than the former parcel.

by neighboring landowners. By any measure, the assessment's structure does not resemble a proportionate system.

The above deficiencies glaringly show that the assessment does not meet the proportionality requirement, which is designed to ensure that "each property owner pays an equitable share of the overall assessable cost as measured by the relative special benefit conferred on the property." (*Tiburon*, *supra*, 180 Cal.App.4th at p. 1084.)

VI. Conclusion

We conclude that the assessment violates both the special benefits and proportionality requirements of Proposition 218. This conclusion dispenses with the need to reach any of the other arguments for reversal raised by Concerned Citizens, including the claim that Resolution No. 07-06 was never legally passed. And because the judgment must be reversed, the order awarding the District attorney fees must also be vacated.[10]

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[10] The District contends that attorney fees were properly awarded as a "cost-of-proof" sanction for Concerned Citizens' unreasonable refusal to admit the truth of certain pretrial requests for admissions (RFA's) propounded by the District. (See § 2033.420, subd. (b); Weil & Brown, Civil Procedure Before Trial (The Rutter Group 2011) ¶ 8:1404.) However, as the District concedes, all 10 of the RFA's pertained to the legal validity of the assessment. In light of our reversal, any sanction award purporting to compensate the District for attorney fees incurred in defending an invalid assessment obviously cannot stand.

DISPOSITION

The District's purported cross-appeal is dismissed. The judgment and order awarding attorney fees are reversed. The cause is remanded to the trial court for further proceedings consistent with this opinion. Concerned Citizens shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).) **(*CERTIFIED FOR PARTIAL PUBLICATION*)**

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.

Concurring Opinion by BUTZ, J.

I write separately to lament the fact that, while the result we reach here is compelled, it is a regrettable and unfortunate consequence of the passage of Proposition 218. (Cal. Const., art. XIII D.) A small fire district, starving for the funds to furnish full-time fire protection, proposed a modest levy to achieve that goal, which was approved by a 62 percent majority vote. However, because of the complex requirements of Proposition 218, the assessment must be struck down. This result was not unforeseeable.

The ballot summary to Proposition 218 warned that passing it would result in "[s]hort-term local government revenue losses of more than $100 million annually," and "[l]ong-term local government revenue losses of potentially hundreds of millions of dollars annually." Those losses, it warned, "would result in comparable reductions in spending for local public services." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) summary of Prop. 218 by Attorney General ("Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact") at p. 72.)

Fifteen years later, in this era of chronic budget deficits and massive shortages of funds for public services, those predictions have turned out to be all too accurate. **(*CONC. OPN. CERTIFIED FOR PUBLICATION*)**

BUTZ, J.