No. S136468

Sixth District Court of Appeal, Case No. H026759

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

vs.

SANTA CLARA COUNTY OPEN SPACE AUTHORITY,
Defendant and Respondent.

APPELLANTS' OPENING BRIEF ON THE MERITS

On Appeal from the Superior Court of Santa Clara County
Superior Court Case Nos. 1-02-CV804474 and 1-03-CV000705
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Cole, *Special Assessment Law Under California's Proposition 218 and the One-Person, One-Vote Challenge* (1998) 29 *McGeorge L. Rev.*845. 36,44

2 Elliott on Roads and Streets, 4th ed. 55

Murphy, *Comment on Knox v. City of Orland* (1994) 22 Pepp.L.Rev. 323 23

INTRODUCTION

Defendant Santa Clara County Open Space Authority (OSA) is a public agency in charge of purchasing and maintaining open space. OSA went on a mission to triple its annual spending budget from $4 million to $12 million. To fund the increase, it imposed on all the real estate in its territory an assessment that is unmatched in size, scope, or assessment methodology in 150 years of California judicial history. OSA's levy was a flat-rate, $20-per-household amount on more than 314,000 parcels covering 800 square miles[1] for what OSA merely asserted would be "special benefits" from its augmented budget that would somehow be evenly distributed among all parcels.

Section 4(a) of article XIII D, adopted by the voters as part of Proposition 218,[2] enacted explicit substantive rules that narrow the kinds of

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[1] See Statement of Facts below.

[2] Proposition 218 was enacted as a constitutional initiative measure on November 5, 1996. It is codified in articles XIII C and XIII D of the California Constitution and in four uncodified sections numbered 1, 2, 5, and 6 that appear before and after the two articles and contain a title, voter findings and declarations, a liberal construction provision, and a severability clause. This case deals with the assessment provisions of article XIII D; therefore all constitutional and section references are to article XIII D unless otherwise indicated. Article XIII C will be cited by its roman numeral where appropriate. The uncodified sections will be cited "Proposition 218" followed by the section number. For convenience, a copy of the ballot pamphlet submitted to the voters, which contains the full text and much of the history of Proposition 218, is attached to this brief as Exhibit A. The ballot pamphlet will be cited by the Joint Appendix in Lieu of Clerk's Transcript (JA) page numbers it bears in the record.

special-benefit assessments that can be levied. As Taxpayers will show, OSA's assessment clashes head-on with every one of them:

- In violation of section 4(a)'s *cost-of-definite-improvement rule*, OSA's levy did not fund an identified "public improvement" with a real calculable "cost," such as a particular park, trail, or greenbelt. Instead, it simply increased its annual spending budget to cover projects of its choice.
- In violation of section 4(a)'s *special-benefits-only rule*, OSA did not assess only for demonstrable special benefit to particular parcels, nor did it exclude all general benefit from its levy. Instead, OSA collected a flat per-parcel amount from hundreds of thousands of properties for immense general benefits it claimed would accrue to all people and all property in its assessment district merely from the larger stock of open space that OSA's spending would provide.
- In violation of section 4(a)'s *strict parcel-by-parcel proportionality rule*, OSA did not charge individual parcels in proportion to any special benefit received; rather, it charged every single-family home the same sum and other properties

multiples of that sum based on formulas unrelated to any parcel-by-parcel benefits.

In rejecting the constitutional challenges just stated, and others as well, the majority of the Court of Appeal chose to disregard both section 4(a)'s language and what the voters were told it meant in the ballot pamphlet.[3] Relying on selected pre-Proposition 218 caselaw that was superseded by section 4(a)'s plain terms, the majority endorsed OSA's own self-serving definitions of general and special benefit and proportionality in assessment. Fortunately, the numerous constitutional flaws in OSA's assessment were eloquently described by Justice Patricia Bamattre-Manoukian in her dissenting opinion, which endorsed every one of Taxpayers' section 4(a) substantive challenges to OSA's so-called assessment.[4]

Before discussing section 4(a)'s substantive hurdles blocking assessments and OSA's failures to clear them, it is important to clarify what this case is and what it is not about. It is not about whether open space is good for communities. That point is both irrelevant and easily conceded. Nor is it about whether a particular open-space project – such as a park or greenbelt –

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[3] References to the Majority and Dissenting Opinions will be by page cite to the slip opinion versions attached to Taxpayers' Petition for Review.

[4] With the few exceptions noted in this brief, Taxpayers incorporate and rely on the Dissent's analysis.

can be funded by an assessment. If such an assessment satisfies section 4(a)'s explicit requirements and is approved by parcel owners, it can be imposed.

Rather, this case is about how broad-based government spending programs like OSA's are to be funded after Proposition 218 – whether by special assessment or special tax. As Taxpayers will show, the language and history of section 4(a) provide a clear answer. They preclude the use of assessments to fund general government spending that merely confers community benefit that cannot be directly tied to specific parcels that have a unique physical and economic relationship to a particular public project. Government spending such as OSA's lies in the realm of taxes, not assessments. OSA's assessment is no more than a thinly-disguised special parcel tax that was imposed without the constitutionally-required voter approval. (Art. XIII C, §2(d).) For that reason, Taxpayers will ask this Court to declare it void.

STATEMENT OF FACTS

A. The Parties

Plaintiff and appellant Silicon Valley Taxpayers Association, Inc. ("SVTA") is a nonprofit public benefit corporation comprised of taxpaying members who reside in Santa Clara County. SVTA is organized and exists under California law to engage in advocacy and action to achieve tax

reduction. SVTA has members who own property that is subject to OSA's assessment. (JA 2147:16-21.)

Plaintiff and appellant Howard Jarvis Taxpayers Association ("HJTA") is a nonprofit public benefit corporation comprised of over 200,000 California taxpayers. HJTA is organized and exists under California law for the purpose, among others, of advocating the reduction of taxes and engaging in civil litigation on behalf of its members and all California taxpayers to achieve its tax reduction goals. HJTA also has members who own property that is subject to OSA's assessment. (JA 2147:22-27.)

Plaintiffs and appellants Eric and Vivian Bracher, Theodore Felton, Mary Thompson, B.F. Henschke, and Richard Orlando own homes, apartments, and businesses within OSA's territory and are subject to the assessment at issue in this appeal. (JA 2148:1-20.)[5]

Defendant and respondent Santa Clara County Open Space Authority ("OSA") is a special district created on February 1, 1993 by the Santa Clara County Open-Space Authority Act. (Pub. Res. Code, §§35100 et seq.) In creating OSA, the Legislature declared that open-space preservation and creation of greenbelt were "immediate high priorities" in Santa Clara County. (§35101(a).)

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[5] Plaintiffs and Appellants will be referred to as Appellants or Taxpayers.

The Legislature appropriated no funds to accomplish OSA's mission. Instead, it authorized OSA to establish a "local funding program" (§35101(b)) through special taxes (§35172), grants and donations (§35158), sale of municipal bonds (§35174), and assessments levied under specified statutes (§35173).[6]

B. OSA's Use of Assessments to Fund Its Operations

OSA levied a $4 million perpetual annual assessment against the property owners within its territory in April 1994, approximately 2½ years before Proposition 218 was enacted.[7] That assessment was OSA's only effective source of funds until 2001, when OSA levied its second assessment – the one at issue in this case. That assessment is undisputably governed by Proposition 218.

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[6] The statute under which the assessment at issue was levied, the Landscaping and Lighting Act of 1972, Streets and Highways Code, §§22500 et seq., is *not* among the statutes under which OSA is authorized to assess property.

[7] The Santa Clara County Taxpayers Association, a predecessor of SVTA, sued to block the assessment. (JA 1925.) Its complaint alleged, among other things, violation of due process rights regarding proper notice to affected property owners, abuse of discretion by a board member, and violations of CEQA procedural guidelines and violations of other statutes. (JA 1928:13-1930:9.) The Santa Clara County Superior Court rejected the taxpayers' challenge; the Court of Appeal affirmed in an unpublished opinion and this Court denied review. No Proposition 218 issues were presented or decided.

OSA levied its second assessment under the Landscaping and Lighting Act of 1972 (Sts. & Hy. Code, §§ 22500 et seq.; hereinafter "LLA") on December 13, 2001 (JA 905-908) after taking each of the following steps:

1. *OSA Chose a Flat Per-Parcel Assessment Rate of $20 Per Single Family Equivalent Dwelling Based on a Public Opinion Poll*. To carry out the assessment process, OSA engaged Shilts Consultants, Inc., a public sector consulting firm that claimed over 20 successful assessment campaigns and boasted that it had never lost an assessment. (JA 154, p. 37:11-15.) To arrive at a per-parcel flat assessment rate, OSA commissioned a public opinion poll. (JA 103:19-24; 1416.) In March 2001, OSA's polling firm, Godbe Research & Analysis, reported the results of its canvas of OSA residents, describing what it called the "tax threshold" of the new assessment. Godbe concluded that approximately 55% of district property owners would support a $20 property tax increase to fund OSA's operations. (JA 1416.) Based on Godbe's report, OSA decided to assess all the property in its territory at the flat rate of $20 per single-family household because a clear majority of persons surveyed supported that level of additional taxation for open space. (JA 117:7-16.)

Using the $20 per single-family parcel as a baseline with multiples of that rate charged to larger properties, Shilts originally arrived at a total

assessment amount of $8,813,880, but later reduced the number to $8,036,282 because of various miscalculations. (JA 175; 212:21-22; 575; 1296; 1876-1877.)

2. *OSA Based Its Assessment on Shilts' Engineer's Report*. OSA commissioned from Shilts the engineer's report required by section 4(b), and based its assessment on that report. The report included sections entitled introduction, plans and specifications, fiscal 2002-03 estimates of cost and budget, method of apportionment, assessment, and assessment diagram. (JA 538-588.)

a. *Introduction*. The report broadly describes OSA's purpose as the "preservation of [o]pen [s]pace and creation of greenbelts between communities, lands on the valley floor, hillsides, viewsheds and watersheds, baylands and riparian corridors" and the "[d]evelopment and implementation of land management policies that [1] provide proper care of open space lands, [2] allow public access appropriate to the nature of the land for recreation," and [3] "are consistent with ecological values and compatible with agricultural uses." (JA 540.) Referring to a map of OSA's territory, the report notes that OSA is responsible for preserving and maintaining open

space for approximately 1.2 million people who represent over ⅔ of Santa Clara County's population. (*Id.*)[8]

b. *Plans and Specifications.* The report does not refer to any existing plans or specifications that describe any particular public improvement such as a park, trail, or greenbelt. Instead, it speaks broadly of the general kinds of "work and improvements" OSA plans to undertake, and promises to file "[a]ny plans and specifications for these improvements with [OSA's] General Manager" at some future indefinite time. (JA 545.)

OSA's contemplated activities include the "[a]cquisition, installation, maintenance, and servicing" of property, "including, but not limited to, open space lands, greenbelts, hillsides, viewsheds and watersheds, baylands, riparian corridors, urban open space, parklands, agricultural lands, development rights . . .," as well as other kinds of property owned or controlled either by the OSA or by local government agencies within its territory. (*Id.*)

c. *OSA's Annual Budget Expenditure Priorities*. OSA's $8,036,282 net annual assessment amount and budget for fiscal year 2002-2003 were based on a flat assessment rate of $20 per single family equivalent

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[8] OSA's 800-square-mile territory actually covers about ¾ of Santa Clara County, with the exception of a northwestern segment allocated to the Mid-Peninsula Open Space Authority. (JA 964:3-10.)

housing unit applied to 401,814[9] assessed parcels within OSA's territory. (JA 558.)

The engineer's report contains a 12-page-single-spaced explanation of OSA's intentions regarding expenditure of assessment-derived revenues. (JA 547-559.) The explanation abounds in dozens of policies, criteria, priority considerations, potential means of acquisition, plans, checklists, maps, processes, and factors that OSA claims it will use in selecting open-space sites for acquisition and maintenance. (*Id.*) OSA purports to reserve not less than 20% of its funds for urban open-space projects conducted by other local government agencies. The use of funds is granted by OSA's board in its discretion based on applications submitted to it. (JA 555-557.) The remaining 80% of OSA's budget is spent on projects approved by the board after considering environmental and financial criteria, an existing five-year plan for acquisitions, the views of a Citizen's Advisory Committee and other

[9] There is an unexplained discrepancy in the record as to the actual number of benefit units or parcels. The Shilts engineer's report gives a 401,814 figure (JA 558) and identifies the property type as "units." OSA's board meeting minutes show the number of "benefit units" as 405,592 (JA 1880), but later approximated that "320,000 parcels" (JA 1882) were to be tabulated. A copy of the tax roll in the record shows approximately 314,300 parcels. (Illustrative pages of the tax roll appear at JA 1160-1165; most of the 802 page document was intentionally omitted, JA 1159.) In any event, there is no dispute that the figure is at least 314,000 and Taxpayers will refer to this as the actual number.

agencies, and numerous other factors. An undescribed "geographical distribution" of open-space properties throughout OSA's territory is also referred to as an "overriding criterion" to be achieved "over time." (JA 546.)

Despite its complex listings of criteria, priorities, plans and procedures, the engineer's report carefully preserves the OSA board's authority and discretion to alter any plan or criterion and to choose or not choose to undertake any project. (JA 546 [OSA may develop "open space and/or greenbelt" within or without priority areas of OSA's five-year-plan]; 547 ["acquisition goals" subject to annual review and revision]; 548 [OSA's board must approve priority ranking of properties]; 550 [30 listed priority areas "not binding" on OSA]; 555 [OSA's annual budget includes "[r]eview and revision of [OSA] goals and policies"].)

3. *Method of Assessment.* The report outlines a two-step process of assessing property. It first identifies what it alleges to be the "types of special benefit" arising from OSA's spending budget and then estimates the "relative special benefit for each type of property." (JA 560.)

The report lists and discusses eight (8) categories of alleged special benefits of open-space spending to all property in OSA's territory, including perceived improvements in: (1) recreational opportunities; (2) protection of views and environmental benefits; (3) economic activity; (4) employment

opportunity; (5) cost of government; (6) quality of life and desirability of the area; (7) water quality, pollution reduction, and flood prevention; and (8) specific enhancement of property value. (JA 561-567.)

In support of its assertions of special benefit, the report quotes extensively from print and media sources stating that recreational opportunities, environmental protection, and economic activity are good for communities. (*Id.*) It then assumes that each of the broadly-described benefits of government activity alternatively "benefit property by making the community more desirable and property, in turn, more valuable." (JA 564; see also 568.)

The report states that any general benefits to the public and to all properties in OSA's assessment territory can be completely and accurately measured by the use transients will make of OSA's open space, i.e. the "proportionate amount of time" open space is "used and enjoyed by individuals who are *not* residents, employees, customers or property owners in the OSA." (JA 568.) Finding that such transient use does not provide any benefits to property and represents less than 5% of overall open-space use, the report excludes from assessment what it calls a "conservative" 10% of OSA's budget as general benefit. (JA 568 & fn. 1.)

In apportioning the assessment amount to parcels, the report assumes that "all properties of similar type and characteristics are deemed to receive approximately equivalent benefit" from OSA-funded open space. (JA 569.) Without regard to the location of particular assessed parcels or their relationship to specific open-space improvements, the report assigns all single-family homes an SFE factor of 1.0 and an assessment amount of $20 based on the Godbe opinion poll. Other residential properties are assigned SFE factors based on assumed numbers of persons per household. (JA 570-571.)

Commercial and industrial properties are assigned SFEs based on assumed numbers of employees per acre in accordance with a San Diego Association of Governments Traffic Generators Study (the "SANDAG Study"). (JA 571-572.) Vacant parcels are assigned an SFE of 0.35 based on "passive benefit factors" such as "enhancement of property value" from open space "based on its future potential use." (JA 572-573.)

The report exempts from assessment whole classes of public and private property, including "[a]gricultural property without residential dwelling units, open space parcels, watershed parcels, church parcels, parks, property used for educational purposes, greenbelt lands without improvements and common areas . . ." (JA 573.) The engineer's report justifies the exemption based on its assumption that these kinds of properties "typically

offer open space and recreational areas on the property that serve to offset the benefits from the Preservation District." (*Id.*) The exemptions are blanket ones; no account is taken as to whether particular parcels do or do not provide such "offsetting benefits."

4. *Citizen and Expert Objections to OSA's Assessment.* The assessment methodology in OSA's engineer's report was criticized both by citizens appearing at OSA's public hearings and meetings and by experts in engineering and geography submitting declarations on the parties' cross-motions for summary judgment and adjudication. Witnesses in both forums assailed the assessment on numerous grounds, including:

- The absence of any special benefit to property from an assessment for undefined and unlocated "open space" (JA 318-320; 322-324; 348-350; 1800; 1848);
- The lack of any specific public improvement with a defined geographical area and calculable cost (JA 318-322; 1796; 1840; 1846-1847);
- The inherent lack of proportionality in the amounts assessed to different kinds of parcels (JA 324-326; 352; 1783-1784); and
- The illegitimate use of an assessment to disguise a parcel tax to fund a government agency's spending budget that was legally

required to be put to a vote of the electorate. (JA 1840-1841; 1847-1848.)

Geographical and engineering experts also pointed out flaws in the report's methodology, including a flagrant misinterpretation of data and a collection of faulty assumptions. (JA 319-322; 348-352; 2234-2237.)

5. *OSA's Property Owner Balloting Procedure*. OSA sought property-owner approval of its assessment by mailing written ballots to some portion of the assessed property owners. (JA 313:4-8.) Property-owner turnout was an abysmal 18%, which even Shilts admitted was among the lowest it had ever experienced. (JA 156, p. 50:18; 156, p. 50:16-22; 159, p. 62:12-17.) In fact, the turnout was exactly half of what it was in the previous election year. (JA 157, p. 54:6-10.) The assessment squeaked by with 50.9% in favor and 49.1% opposed. (JA 344.) If OSA's board had accepted informal written protests submitted by property owners who had inadvertently lost or discarded their ballots, the assessment would have failed by a vote of 51.1% opposed and 48.9% in favor. (JA 344.)[10]

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[10] Plaintiffs' challenges to the manner in which the written balloting process was superintended and carried out by OSA were rejected by both the majority and the dissent, with the exception of the dissent's view that the perpetual character of the assessment violated the specific-duration mandate of section 4(c) and was not adequately disclosed to property owners. (Dis. Opn., pp. 40-44.) In their Petition for Review, plaintiffs chose to abandon those challenges (except for the one sustained by the

C. The Parties' Lawsuits

Plaintiffs brought two separate suits – one against the assessment and a second against its renewal for a second year – alleging violations of the California Constitution, Proposition 218, and the Landscaping and Lighting Act. The first action, case number 1-02-CV804474, proceeded to summary judgment on a second amended complaint that contained: (1) a first cause of action challenging OSA's balloting process under Proposition 218 and on other grounds; and (2) a second cause of action challenging the substance of OSA's assessment. The second suit, case number 1-03-CV000705, was filed in response to OSA's continued assessment for 2003-2004. It contained allegations similar to the first suit, and added a cause of action contesting the assessment increase without a public hearing, ballot, and taxpayer approval as required by Proposition 218. (JA 2831-2845.)

The two suits were consolidated for summary judgment and trial. (JA 2880-2885.) The parties made voluminous cross-motions for summary judgment and summary adjudication. The court granted OSA's motion for summary adjudication as to plaintiffs' second cause of action, dealing with the

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dissent). This streamlining decision was not made as a result of any lack of confidence in the merits of the balloting-process challenges, but because they are more case-and-fact-specific than plaintiffs' substantive arguments which have greater statewide impact for Rule 28(b)(1) purposes.

substance of OSA's assessment, but denied the motion as to the first cause of action based on the presence of factual issues regarding the impartiality of OSA's ballot tabulation procedure. The court offered no reason for its decision. (JA 2827-2829.)

After the parties stipulated to facts regarding the impartiality issue, the court granted summary adjudication in favor of OSA on all unresolved issues in both consolidated cases in an order dated October 17, 2003. (JA 3117-3121.) Again, the court did not explain its reasoning. Based on the two favorable summary adjudication rulings, OSA obtained summary judgment. Plaintiffs' appeal from the summary judgment was rejected by the Court of Appeal in a 2-1 decision. Plaintiffs' Petition for Review was granted on October 12, 2005.

INTERPRETING PROPOSITION 218

This Court has described the people's right to amend our state constitution by initiative as an "outstanding achievement of the progressive movement of the early 1900's" and "one of the most precious rights of our democratic process." (*Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) As such, the people's initiative power is "jealously guard[ed]" by California courts and "liberal[ly] constr[ued] . . .whenever it is challenged." (*Id.*) As Justice Baxter declared for

this Court: "The people's reserved power of initiative is greater than the power of the legislative body." (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715; see also *Santa Clara County Local Trans. Authority v. Guardino* (1995) 11 Cal.4th 220, 253.)

Constitutional initiative provisions are construed according to established principles similar to those governing statutory construction. To ascertain the intention of the voters who enacted a constitutional initiative, courts "look first to the language of the constitutional text, giving the words their ordinary meaning." (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122.) Constitutional language is "construed in the context of the [measure] as a whole . . . giv[ing] 'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.'" (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) Constitutional provisions receive a "'liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people. . . The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.'" (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567.)

In construing Proposition 218 as part of the California constitution, prior statutory and caselaw concerning assessments necessarily give way to the

express constitutional provisions enacted by the voters, including their explicit definitions of terms. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 236-237.) In *Richmond v. Shasta Community Services Dist*. (2004) 32 Cal.4th 409, this Court found that a capacity charge was not an "assessment" under Proposition 218 because the charge simply did not satisfy the Proposition 218 definition, even though such charges were previously considered to be assessments in *San Marcos Water Dist. v. San Marcos Unified School Dist*. (1986) 42 Cal.3d 154. In addressing why such capacity levies were not assessments under Proposition 218, the following statement from *Richmond* supplies guidance as to how the term "special benefit," as well as the other terms defined in Proposition 218, should be interpreted:

> "Plaintiffs invoke the rule that when a term has been given a particular meaning by a judicial decision, it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions. . . ***But the rule that plaintiffs invoke does not apply when, as here, the statute or constitutional provision contains its own definition of the term at issue: 'If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.'***" (*Curle v.*

Superior Court (2001) 24 Cal.4th 1057, 1063.) Here, article XIII D provides both an express definition of assessment and an implied qualification of that definition through the requirement that the agency identify the specific parcels on which the assessment will be imposed." (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 422-423.)[11]

Thus, the first task of this Court in construing Proposition 218 is to look to *its language*, not the holdings of pre-Proposition 218 cases that have been left in its wake.

If constitutional language is ambiguous, legislative history and evidence of the "ostensible objects to be achieved" may be consulted to determine the voters' intent. (*People v. Elliot* (2005) 37 Cal.4th 453, 478; *Thompson*, *supra*, 25 Cal.4th at p. 122.) California courts will act to "promot[e] rather than defeat[ ]" the general purpose of the construed provision and to avoid absurd consequences. (*Id.*) The ballot materials sent to voters hold particular persuasive force in ascertaining their purpose and intentions. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 579; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349.)

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[11] In all quotations from authorities, emphasis shown has been added unless otherwise indicated.

In its decisions construing Proposition 218, this Court has relied on the ballot pamphlet, including the Legislative Analyst's Analysis of the meaning and impact of the initiative, the ballot arguments, and a pamphlet entitled *Understanding Proposition 218* prepared and published by the Legislative Analyst in December 1996 immediately after the election as a "guide to help the Legislature, local officials, and other parties understand Proposition 218, including the actions local government must take to implement it." (*Richmond v. Shasta Community Services Dist*. (2004) 32 Cal.4th 409, 426; *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 837-839 & fn. 1; Dis. Opn. 39-40 & fn. 14; see RJN, Ex. A, p. 1.)[12] Finally, the Attorney General prepared an Official Title and Summary of Proposition 218 that was included in the ballot pamphlet. (JA 2348.) The Attorney General's description is also a valuable and authoritative source of voter intent. (*Carter v. Seaboard Finance Co*. (1949) 33 Cal.2d 564, 580-581.)

Assessments are traditionally defined as "'compulsory charge[s]'" on particular parcels of real property "'to recoup the cost of a public improvement made for the special benefit of [that] property.'" (*Knox v. City of Orland*

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[12] A copy of the pamphlet is included in Appellant's Motion and Request for Judicial Notice, filed with this Court, as Exhibit A and will be referred to as "RJN, Ex. A."). There is a partial copy in the record of which the trial court declined to take judicial notice. (JA 2759-2760, 2768-2778, 2828:12-14.)

(1992) 4 Cal.4th 132, 142 [citations omitted]; see also section 2(a).) They differ from taxes in that each assessment "must confer a special benefit upon the [assessed] property" that goes beyond the general benefit provided by a public improvement, whereas a tax need confer no benefit at all on any person or property. (*Id*.) If an assessment does not confer special benefit on assessed property, it "effectively amounts to a special tax upon the assessed property owners for the benefit of the general public." (*Id*. at p. 143.)[13]

Assessments are grounded on the principle that: "The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public." (*Solvang Municipal Improvement District v. Board Supervisors* (1980) 112 Cal.App.3d 545, 552, citing *Burnett v. Mayor etc. of Sacramento* (1859) 12 Cal. 76, 84.)

From the earliest 19th century cases, California courts have adopted a highly deferential approach to judicial review of assessments, confining their examination to a record largely created by the assessing agency and bowing to agency determinations of special benefit and apportionment of improvement costs among assessed parcels. (See *Knox*, *supra*, 4 Cal.4th at p. 146, citing *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685.) In *Knox*, this

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[13] Special-benefit assessments of real estate to finance public improvements will be referred to as "assessments" or "special assessments."

Court relied on the deferential standard of review to uphold a non-traditional, broad-based, flat-rate assessment for maintenance of five city parks within a 20-mile radius. (*Knox*, *supra*, 4 Cal.4th at p. 139.)

After this Court's decision in *Knox*, California's local agencies experienced a new sense of empowerment to levy ever-broader "creative and non-traditional" assessments to escape voter-approval-of-taxes requirements. (See Murphy, *Comment on Knox v. City of Orland* (1994) 22 Pepp.L.Rev. 323, 326-327 & fn. 26 [quoting six articles published in government and popular media revealing that *Knox* was "the impetus for expanded non-traditional use of assessment powers."].) The assessment provisions of Proposition 218 were a reaction to what proponents perceived as local government attempts to accomplish end-runs around Proposition 13's[14] two-thirds-voter-approval-of-special-taxes requirement by funding general government spending through assessments. (Art. XIII A, §4; see *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 835-837 [history and reasons for Proposition 218].) As the Legislative Analyst explained:

> "In general, the intent of Proposition 218 is to ensure that all taxes and most charges on property owners are subject to voter approval. *In addition, Proposition 218 seeks to curb some*

[14] Cal. Const., art. XIII A (1978).

perceived abuses in the use of assessments and property-related fees, specifically the use of these revenue-raising tools to pay for general governmental services rather than property-related services." (RJN, Ex. A, p. 2.)

To stem what its proponents perceived to be a tidal wave of post-*Knox* assessment abuse by local governments, article XIII D of Proposition 218 erects a tripartite set of constitutional barriers that must be overcome to validate assessments:

Substantive Restrictions in Section 4(a). As Proposition 218's proponents told the voters: "Proposition 218 will significantly tighten the kind of benefit assessments that can be levied." (JA 2352.) This "tightening" included three significant new substantive restrictions on assessments in sections 2(i) and 4(a): (1) a narrow definition of "special benefits" and a correspondingly broad definition of "general benefits;" (2) mandatory exclusion of general benefits from assessments; and (3) strict proportionality of assessments on particular parcels based on relative special benefit provided to each parcel that would effectively mandate agencies to set assessment amounts "on a parcel-by-parcel or block-by-block basis." (JA 2349-2350.)

Reversed "Burden of Proof" in Section 4(f). Not content with a single approach to assessment reform, Proposition 218's authors were also concerned

that taxpayers faced daunting procedural disadvantages when they sued agencies to challenge assessments. What the Legislative Analyst described as local government's "significant flexibility in determining fee and assessment amounts" was effectively enforced by what she called a "burden of proof" on the taxpayer to demonstrate illegality. (JA 2350.) Proposition 218 reversed that burden, requiring the government agency to demonstrate, parcel by parcel, both special benefit and proportionality in any lawsuit challenging an assessment. (§4(f).)

Weighted-Parcel Approval of Assessments of Sections 4(c), (d), and (e). Those assessments that government agencies could demonstrate met section 4(a)'s substantive hurdles faced one final obstacle under Proposition 218 – approval by a weighted majority of the assessed parcels in mailed ballots. (§4(c), (d), (e).) The substitution of the usual one-person one-vote principle with weighted property owner ballots was based on the rationale that: "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." (§4(g).)

DISCUSSION

Article XIII D, sections 4(a) and 4(f), contains several rules designed to maintain the legal boundary between special-benefit assessments and special

parcel taxes. Taxpayers contend that OSA's assessment should be declared invalid because it contravenes four of these rules and crosses that forbidden boundary. These rules will be discussed in Sections I through IV:

- *A cost-of-definite-improvement rule* requiring that assessments begin with a definite public improvement with calculable capital, maintenance, and servicing costs. (§4(a).) Section I.
- *A special-benefits-only rule* narrowing the definition of special benefit, correspondingly broadening the definition of general benefit, and mandating that any general benefit be excluded from assessment. (§4(a).) Section II.
- *A strict parcel-by-parcel proportionality rule* insisting that the assessment amount levied on each parcel be proportional to, and no greater than, the special benefit received by that parcel. (§4(a), 4(f).) Section III.
- *A burden-of-demonstration rule* requiring agencies to bear the burden of proving special benefit and proportionality of each parcel, and otherwise demonstrating compliance with article XIII D. (§4(f).) Section IV.

Section V explains how sustaining OSA's assessment methodology will blur the fundamental constitutional distinction between assessments and taxes,

allow agencies to replace special parcel taxes with easier-to-enact assessments, and effectively repeal the two-thirds-voter-approval-of-special-taxes provisions of Propositions 13 and 218, potentially triggering a new taxpayer revolt and Draconian initiative measures constraining assessments.

Finally, Section VI asks this Court to decide a question of importance to future cases concerning the scope of an assessing agency's discretion to exempt particular classes of parcels from assessment.

I. AS A MERE PERPETUAL ANNUAL SPENDING BUDGET, OSA's LEVY VIOLATES BOTH SECTION 4(a)'s COST-OF-DEFINITE-IMPROVEMENT RULE AND SECTION 4(c)'s DURATION REQUIREMENT.

Article XIII D contains explicit safeguards against agency abuse of assessments to fund perpetual open-ended spending budgets. Section 4(a) contains a *cost-of-definite-improvement rule* under which the special benefit received by each assessed parcel must be calculated in relation to the "cost of a public improvement . . . or . . . property-related service." (§4(a).) As the Legislative Analyst explained, assessments were thereby distinguished from parcel taxes whose rates were not cost-based: "[A]ssesment rates were linked to the cost of providing a service or improvement, whereas parcel taxes could be set at any amount." (RJN, Ex. A, p. 7.)

Moreover, to insure fully informed property-owner consent to all levies, section 4(c) demands that parcel owners be told exactly what they are being charged, for how long, and why.

OSA's flat-rate assessment on 314,000 parcels to increase its open-space spending budget transgresses the threshold requirements of sections 4(a) and 4(c). It does not levy on parcels based on the cost of an identified public improvement because there is no public improvement. There is only an annual sum, calculated on a rate OSA believed property owners would accept, that OSA can spend. And it does not have a specific and disclosed duration because it is never-ending. In these respects, OSA's assessment goes beyond any prior judicially-approved assessment in California history, whether before or after Proposition 218. It is constitutionally beyond the pale.

A. OSA's Assessment Violates Section 4(a) Because It is Not Grounded on Identified Public Improvements or Property-Related Services That Have Specific and Determinable Dollar Costs.

Section 4(a) precludes government agencies from using assessments to increase their budgets in part by demanding a real public improvement with calculable capital, maintenance, and servicing costs. OSA's defiance of the rule is transparent and dooms its assessment at its threshold. Its so-called

assessment is neither improvement-related nor cost-related. It would have been invalid as exceeding the cost of an improvement even before Proposition 218.

1. OSA's General-Budget-Enhancement Levy at Flat Parcel Rates is Neither Cost-Related Nor Improvement-Related Within the Meaning of Section 4(a).

For a levy to qualify as an assessment, section 4(a) requires that the assessing agency begin with a specific public improvement or property-related service that is: (1) undertaken for the special benefit of an identified parcel or parcels; and (2) has a known or estimable "cost" subject to up-front itemization. It then positively forbids any assessment that exceeds the "reasonable cost" of the special benefit conferred on the assessed parcel. Section 4(a) states in part:

> "***The proportionate special benefit derived by each identified parcel shall be determined in relationship to [1] the entirety of the capital cost of a public improvement, [2] the maintenance and operation expenses of a public improvement, or [3] 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.*"**

All of section 4(a)'s "costs" are real ones. "[C]apital cost" means "the cost of acquisition, installation, construction, reconstruction or replacement of a permanent public improvement." (§2(c).) "[M]aintenance and operations expenses" refers to the "cost of rent, repair, replacement, rehabilitation, fuel, power, electric current, care, and supervision necessary to properly operate and maintain a permanent public improvement." (§2(f).) And a "property-related service" is "a public service having a direct relationship to property ownership." (§2(h).)[15]

To comply with the plain meaning of section 4(a), OSA was required to base its assessment on one or more of the three kinds of improvement or property-related services costs:

- The whole "cost" of acquiring any property or constructing anything on property (§2(c));

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[15] Article XIII D does not contain a definition of "permanent public improvement." The Court of Appeal has construed the term in accordance with its plain meaning as reflected in a dictionary definition as follows: "'Permanent' means 'continuing or enduring . . . without fundamental or marked change.'" . . . "'Improvement' means an 'addition to or betterment of real property that enhances its capital value . . . and is designed to make the property more useful or valuable.'" (*Keller v. Chowchilla Water District* (2000) 80 Cal.App.4th 1006, 1013.)

- The "cost" of operating or maintaining any property acquired or any item constructed on it (§2(f));
- The "cost" of providing any property-related public service related to OSA's legally authorized functions (§2(h)).

As used here, there is no question that "cost" is not an arbitrarily-selected sum, but an actual amount based on a calculation of the sums of money needed to fund, for example, the purchase of particular property, the building of a trail, or the maintenance of a park.[16]

OSA has not calculated the entire capital cost of a public improvement, the expense of a maintenance program, or the cost of a property-related service for the simple reason that it is not proposing to undertake any specific public

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[16] The ordinary meaning of "cost" is "an expenditure or expense *actually incurred*." (*County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1285.) Moreover, the word "cost" is also used in section 6(b)(3) of article XIII D, which refers to the "proportional cost of the service attributable to the parcel," as well as in section 4(a). If a particular word or phrase is used in multiple instances in a constitutional initiative, it is presumed to have the same meaning in each. (*People v. Dillon* (1983) 34 Cal.3d 441, 468; *Canyon North Co. v. Conejo Valley Unified School Dist.* (1994) 19 Cal.App.4th 243, 250.) "Cost" in section 6 is plainly an actual monetary outlay contributing to the performance of a service, not an up-front fee that is not tied to real expenditures. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 922 ["cost" means "funds required to provide the property related service," not the value of service or profit from service]; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 648 [in-lieu fee set by agency for municipal water, sewer, and refuse collection invalidated because agency did not show it represented "costs" for service].)

improvement, maintenance program, or property-related service. The majority was not troubled by this departure from the express restrictions of section 4(a) because it felt that assessment financing should also be available for other socially-valuable ideas and programs, such as staffing an agency that will watch for future opportunities to buy as-yet-unidentified parcels of land for public open space should they become available at the right price. But such a program falls outside of the three "cost" categories for which assessments can be levied under Proposition 218. As the dissent recognized, by adding a fourth category of permissible assessment "costs" to satisfy its public policy views, the majority sought to rewrite the constitution and thus exceeded its judicial powers. (Dis. Opn., pp. 32-33; *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 ["We may not interpret article XIII D as if it had been rewritten."].)

OSA's assessment makes no attempt to comply with section 4(a)'s insistence on cost-based assessments to pay for specific public projects. The engineer's report broadly describes OSA's unspecified and amorphous "work and improvements" as including the acquisition, maintenance, and servicing of any "open space lands," listing more than two dozen types of those lands and their potential uses. (JA 545-546.) Although section 4(b) directs that all assessments "be supported by a detailed engineer's report," OSA's report is

woefully short of the mark. No plans or specifications are included. No public improvement is identified or described.[17]

OSA has admitted that its assessment amount is not based on any actual or even estimated cost of acquiring or maintaining any specific open-space property or properties. Rather, the $8 million annual sum was chosen for reasons of political strategy because an opinion poll of property owners commissioned by OSA from Godbe Research, a public opinion survey firm, showed that most single family property owners in OSA's territory would not oppose payment of $20 per year for open space spending. (JA 103, 114:25-117:16, 592.) Extending the $20 figure through the County tax roll with fixed multipliers for larger properties, OSA simply arrived at the $8 million total assessment figure, and decided to increase its budget in that amount. (JA 569-573.)

No "cost" of any "public improvement" was ever calculated. As an arbitrarily-set levy on parcels, OSA's assessment is at loggerheads with section 4(a)'s requirement of cost-of-improvement-based charges and is void under Proposition 218. OSA's violation is a critically important one in relation to the

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[17] As Taxpayers have observed, the report merely promises future plans and specifications, musingly meanders through a diverse collection of goals and priorities, and ultimately preserves the unfettered discretion of OSA's board to revise any program, alter any goal, or make any decision it chooses. (Statement of Facts, Section B, above.)

fundamental constitutional objective of maintaining a clear and certain boundary between assessments and taxes. If any agency seeking a budget increase can conduct an opinion poll, commission an "engineer's" report broadly describing its purpose and operations, and receive $20 (or some other amount) per parcel to augment its discretionary spending programs, the constitutional distinction between assessments and special parcel taxes is obliterated. The agencies will do end-runs around the voter-approval requirement for taxes (art. XIII C, §2(d)) to increase their budgets. This is clearly not what the voters intended.

2. OSA's Assessment Would Have Been Invalid Even under Pre-Proposition 218 Law.

OSA's novel approach to assessment would not pass muster under California law even before Proposition 218. Traditionally, assessments are not arbitrarily-set, open-ended spending budgets. They are cost-limited charges designed to recoup the expenses of specific public improvements that are defined in advance. As this Court has held: "[I]f the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment." (*Knox v. City of Orland* (1993) 4 Cal.4th 132, 143 & fn. 15, citing *City of Los Angeles v. Offner* (1961) 55 Cal.2d 103, 108-109.)

In the *Offner* case, the City of Los Angeles imposed an arbitrarily-set, up front fixed connection charge of $400 per acre as a condition of providing sewer service to properties within an assessment district, and then attempted to label the charge an "incidental expense" of sewer construction work that was the subject of an assessment under the Improvement Act of 1911. (*Offner, supra*, 55 Cal.2d at pp. 106-107.)

This Court looked beneath the City's "expense" label and invalidated the charge in *Offner*. As it observed: "[T]he amount of $400 an acre charge was not fixed with reference to the cost of providing sewer connections in this particular assessment district," but was "a general city-wide charge" established three years before the assessment. (*Id*. at p. 110.) In upholding a decision of the Secretary of the City's Board of Public Works refusing to proceed with bidding for sewer construction work, this Court squarely held that assessments are confined to financing particular public improvements, as contrasted with collecting flat arbitrarily-selected charges:

> "'*The assessment can be levied only for the actual cost of the improvement 'and the authorities cannot include in the assessment the expense of any other work than such as is necessary to complete the particular improvement in a reasonable and fair mode*.' . . . 2 Elliott on Roads and Streets, 4th

ed., p .892," quoting *County of San Diego v. Childs* (1932) 217 Cal. 109, 117. (*Offner*, *supra*, 55 Cal.2d at p. 108.)

OSA's $20 per parcel assessment is precisely the kind of arbitrary, non-cost-related exaction forbidden by *Offner*. It was levied simply and only because OSA was not satisfied with its total "current funding," and sought additional revenues over its existing budget. (JA 542.) If this assessment is upheld, OSA will use its proceeds to augment its discretionary spending on all types and kinds of open space OSA might decide to acquire or develop. (JA 542-557.)

B. As a Perpetual $8-Million-a-Year Levy That Never Sunsets, OSA's Assessment Also Runs Afoul of the Duration Provision of Section 4(c).

Assessments for capital costs are typically imposed for fixed total sums based on the amount of time it takes to pay off the cost of the public improvement or, if the assessing agency incurred bonded indebtedness to fund the improvement, to retire that indebtedness.[18] This is confirmed in section 4(c)

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[18] As one commentator explains the assessment financing process: "Local governments have used assessments to provide a wide range of public improvements, including street lighting, sidewalks, parks, flood control, off-street parking and many others. These improvements are funded by bonds and financed through the assessments, which operate as liens against the properties assessed." (Cole, *Special Assessment Law Under California's Proposition 218 and the One-Person, One-Vote Challenge*,

which requires that owners of assessed parcels be told the "total amount" of the assessment, the "amount chargeable to the owner's parcel, *the duration of the payment*, the reason for the assessment, and the basis upon which the amount of the proposed assessment was calculated."

Because OSA's assessment does not include the whole capital cost of any specified improvement, it has no finite "duration of payments." Payments continue indefinitely. As the dissent points out, this, too, is a constitutional defect:

> "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* (1979) 94 Cal.App.3d 974 981, 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.)

(1998) 29 *McGeorge L. Rev*.845, 852; footnotes omitted.)

> 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." (Dis. Opn., p. 44.)

But even to the extent Proposition 218 might be construed as permitting an assessment of infinite duration not linked to the capital cost of a specific and described improvement, OSA did not sufficiently disclose the effect of its assessment to property owners as required by section 4(c). OSA's written ballot disclosure to property owners nowhere stated, plainly and conspicuously, that the assessment would never be paid off. Rather, it stated in an oblique and misleading fashion, that the assessment could not be *increased* in "future years" without property owner consent, except by a cost of living factor. (JA 912.) Property owners were required to draw an inference – that the assessment could be reimposed at the same level forever without property owner approval – to arrive at the disclosure mandated by section 4(c).

Requiring property owners to study a text, parse its language, and draw inferences to learn the fact that OSA's assessment was perpetual, of infinite duration, and not based on the cost of a definite public improvement, transgresses the voters' intent and their direction that article XIII D be construed to "enhanc[e] taxpayer consent." (Proposition 218, §5.) As the

dissent recognizes, OSA's levy was invalid for this additional reason. (Dis. Opn., pp. 43-44.)

In sum, OSA has contravened Proposition 218 at its threshold by parading a parcel tax to increase its spending budget as an assessment. To properly police the border between assessment and tax, OSA's levy must be declared void and unenforceable.

II. AS AN ASSESSMENT ON TAXPAYERS' PARCELS FOR THE IMMENSE GENERAL BENEFIT OF OPEN SPACE, OSA's LEVY VIOLATES SECTION 4(a)'s SPECIAL-BENEFITS-ONLY RULE.

An "[a]ssessment" is "a levy or charge upon real property by an agency for a *special benefit* conferred upon the real property." (§2(b).) Section 4(a) defines special benefit narrowly, conceives general benefit broadly, and allows only special benefit to be assessed. (§4(a), incorporating §2(i).) OSA's levy defies section 4(a)'s *special-benefits-only rule* by charging Taxpayers' property for the overwhelming general benefits of an annual open-space spending program.

After they explain the explicit constraints on special-benefit assessments imposed by Proposition 218, Taxpayers will discuss two separate and fatal constitutional flaws in OSA's assessment:

First, none of OSA's asserted special benefits – to the extent those benefits are real – is special within section 2(i). They are all vast general benefits to the community emanating from OSA's augmentation of its open-space spending budget.

Second, even if there were some modicum of special benefit in OSA's assessment, its measure of general benefit intentionally disregards all benefit to people and property *within* OSA's assessment district. By refusing to acknowledge and exclude this vast general benefit, OSA runs roughshod over section 4(a)'s separation-of-all-general-benefit rule, and profoundly skews its assessment to avoid section 4(a)'s andated exclusion of what it concedes to be the massive general benefit of open space.

For either or both of these reasons, OSA's assessment should be declared void.

A. Under Section 4(a), Assessments Are Constrained By the Framers' Narrow View of Assessable Special Benefit and Their Correspondingly Broad View of Absolutely Non-Assessable General Benefit.

Section 4(a)'s language and what the voters were told it meant in the ballot pamphlet permit but one conclusion: The voters intended to limit the kinds of special benefit assessments that could be levied by confining the

assessment method of revenue raising to traditional levies supporting public projects that gave greater access or physical protection to immediately adjacent property. Broad-based general spending programs such as OSA's that bear no more than a speculative or theoretical relationship to any parcel, and assert only that their social benefits made property in general more valuable, were perceived as constitutionally impermissible.

Constitutional Language. Section 4(a) commands that only special benefit, and absolutely no general benefit, be included in an assessment:

> "*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.*" (§4(a).)

Assessing agencies must demonstrate assessable *special benefit* on a parcel-by-parcel basis. (§4(a), (c), (f).) *Special benefit* is defined by contrast with non-assessable general benefits. Section 2(i)'s definition points to two kinds of general benefits as well as "general enhancement of property value," all of which are barred from an assessment:

> ***"'Special benefit' means a particular and distinct benefit over and above general benefits [1] conferred on real property***

located in the district or [2] to the public at large. General enhancement of property value does not constitute 'special benefit.'"

Section 2(i)'s definition constrains post-Proposition 218 assessments in multiple ways. Under prior law culminating in *Knox*, a special benefit was one that "particularly and directly benefited" the assessed property in a way that was "over and above that received by the general public.'" (*Knox*, *supra*, 4 Cal.4th at p. 142.) While section 2(i) contains similar references to "particular" special benefits to property and general benefits to the "public a large," even the visceral similarity ends there. Section 2(i) contains *three* additional elements not appearing in *Knox* that further narrow the concept of assessable special benefit:

First, special benefit must be "over and above" two distinct kinds of non-assessable general benefit:

(1) "general benefits conferred on real property located in the district" [i.e., under section 2(d), the "district" is the area determined by the assessing agency to contain "all parcels which will receive a special benefit"]; *as well as*

(2) "general benefits . . . to the public at large."

Second, "[g]eneral enhancement of property value does not constitute 'special benefit.'"

Third, section 4(a) demands that the agency assess "[o]nly special benefits" and that it "separate the general benefits from the special benefits conferred on a parcel."

As Taxpayers will show in Sections II(B) and (C) below, OSA's flat-parcel levy is practically devoid of special benefit and chock-full of unassessable general benefit. No *parcel* receives a "particular" or "distinct" benefit from OSA's open-space spending. Rather, OSA's own engineer admits that its budget confers vast across-the-board benefits on more than 314,000 parcels (*all* the alleged specially-benefited property identified by OSA), and all members of the public who live and work in the assessment district. (JA 562, 564, 566.) Any claimed value enhancement is realized only because OSA's spending is assumed to make all property worth more. (*Id.*) This violates section 4(a).

Legislative History. The ballot pamphlet and related legislative history reinforce section 4(a)'s narrowed concept of special benefit. The Attorney General's Official Summary of Proposition 218 plainly states the substance of the limitation on assessments: "*Assessments are limited to the special benefit conferred*." (JA 2348.)

In her analysis, the Legislative Analyst discusses section 4(a) in detail. Noting that existing law did not require strict separation of general benefit, she stated: "Often, the rest of the community or region also receives some general benefit from the project or service, *but does not pay a share of cost*."[19] (*Id*.)

Emphasizing the sea change section 4(a) affected in prior law, the Analyst observed: "*This limitation on the use of assessments represents a major change from the law prior to Proposition 218, when local governments could recoup from assessments the costs of providing both general and special benefits*." (RJN, Ex. A, p. 10.) She then explained that agencies with hybrid general/special benefit projects could charge parcels only for the cost of providing special benefit while using "general revenues (such as taxes) to pay the remaining portion of the project or service's cost." (JA 2349.) If the

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[19] Pre-Proposition 218 caselaw effectively allowed assessed parcels to be charged for all general benefits as well as the special benefits of a public improvement. (*Federal Const. Co. v. Ensign* (1922) 59 Cal.App. 200, 210 [100% of cost of new sewage treatment plant was fully assessable notwithstanding immense general benefit: *"To invalidate the assessment the general public benefit must be the only result of the improvement.*"]; see also *Allen v. City of Los Angeles* (1930) 210 Cal. 235, 238-239 ["It would be well within the power of the city council to make the cost of the entire [street improvement assessment] rest upon the shoulders of the property owners of a given district especially benefited thereby."]; 51 Cal.Jur.3d, *Public Improvements*, § 19 ["For an assessment to be invalid because it confers a general public benefit, the general benefit must be the only result of the assessment."]; Cole, *supra*, 29 McGeorge L.Rev. at p. 856 & fn. 87 ["[C]ourts never have invalidated assessments simply because they provide general benefits to the public in addition to requisite special benefits."].)

project was overwhelmingly general, the agency might have to scale it back or not undertake it at all. (*Id*.)

The proponents' ballot argument was similarly clear and straightforward about the monumental impact of the initiative on the subject matter of assessments: "Proposition 218 will *significantly tighten* the kind of benefit assessments that can be levied." (JA 2352; see also RJN, Ex. A, p. 10 [Legislative Analyst's observation that agencies will experience difficulty in "satisfy[ing] *this tightened definition of special benefit*"].)

As OSA would have it, the Legislative Analyst totally misrepresented the law and proponents really meant "*significantly loosen*" instead of "*significantly tighten*." OSA's levy recoups from parcel owners what its engineer admits is vast benefit to people and property throughout OSA's district emanating from the simple fact of an increase in open-space spending. As the ballot pamphlet explains, this kind of wholly or largely general-benefit levy is expressly forbidden in the post-Proposition 218 era.

The proponents also complained in their ballot pamphlet argument about what they called a "loophole" in the law that had allowed agencies to label tax increases "assessments" to avoid Proposition 13's two-thirds voter approval requirement for special taxes. They referred to four examples of what they called "imaginative" (meaning "abusive") assessments:

[1] "A view tax in Southern California – the better the view of the ocean you have the more you pay.[20]

[2] In Los Angeles, a proposal for assessments for a $2-million scoreboard and a $6-million equestrian center to be paid for by property owners.

[3] In Northern California, taxpayers 27 miles away from a park are assessed because their property supposedly benefits from that park.[21]

[4] In the Central Valley, homeowners are assessed to refurbish a college football field." (JA 2352.)

The four "imaginative" assessment projects thus condemned by the proponents as disguised parcel taxes are reminiscent of OSA's levy. They all share three characteristics in common:

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[20] This example was based on the case described in *Blake v. City of Port Hueneme* (1997) 68 Cal.Rptr.2d 627, depublished January 28, 1998. The *Blake* trial court decision was available when Proposition 218 was in the drafting stages in 1996. (JA 2541:26-2542:14.)

[21] This example was based on this Court's decision in *Knox* which upheld a maintenance assessment for five parks observing that some assessed properties were 20 miles away from a park. The example used 27 rather than 20 because Jon Coupal, the principal drafter of Proposition 218, measured the distance himself and arrived at the larger number. (JA 2539:1-4, 2542:21-2543:4.)

First, each provides a public improvement or service that is open and readily accessible to the public and affords great benefit to the community as a recreational resource. The proponents' projects involve two public parks (one on the ocean and another inland) and two sports stadiums. Similarly, OSA's open-space spending program promises to provide parks and trails open to the public, although its refusal to identify any specific improvement renders it even more "imaginative," and thus more abusive, than any of these examples.

Second, each is a *non-traditional* kind of assessment. In traditional assessments, each assessed parcel gains access from or receives physical protection from the improvement. The parcel also typically either directly abuts the improvement (e.g., sidewalks, streets, lighting and landscaping) or is physically connected to it (e.g., sewers, water, flood control, drainage systems).[22] None of the four ballot argument examples is on that list. Neither is OSA's assessment.

Third, the assessing government agencies apparently assessed non-adjacent properties that had no immediate physical or geographical connection with the project based on an assumed relationship between the project and a property value increase. In parallel fashion, OSA's assessment levies on

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[22] Examples of traditional levies are taken from Legislative Analyst's Analysis and pamphlet (JA 2349; RJN, Ex. A, p. 7), and the list of assessments exempt from article XIII D, section 5(a).

314,000 parcels at a flat rate regardless of their connection or lack of connection to any discernable OSA-provided open space, based on broad suppositions of generalized value increases in "open-space communities." (JA 562, 564, 566.)

To the extent there may be any lingering doubts about section 4(a)'s constrained concept of special benefit, uncodified section 5 requires that the provisions of Proposition 218 be "liberally construed to effectuate its purposes of [1] limiting local government revenue and [2] enhancing taxpayer consent." (Proposition 218, §5.) Section 5's twin purposes work in tandem with the specific provisions of the measure. Substantive provisions like section 4(a) that limit the scope of permissible assessments are to be construed narrowly to confine each revenue-raising device within its proper sphere and to insure that all prerequisites to its use have been fully complied with by the agency. Taxpayer consent provisions are construed broadly to make the property owner or voter franchise, whichever is appropriate, fully effective. Here, limiting government revenue and enhancing the consent of voters to a disguised parcel tax they were never asked to approve both favor voiding OSA's assessment.

B. OSA's Levy Assesses Taxpayers' Parcels for Eight Overwhelmingly General Benefits of Open Space.

As special benefits of its assessment, OSA touts a nondescript $8 million a year worth of additional spending on open space acquisition and maintenance, resulting in eight alleged advantages ranging from better recreational opportunities and protection of views to better quality of life and enhanced property values. (JA 561-567.)

OSA's supposedly special benefits of an amorphous open space spending program in Santa Clara County are merely the global advantages to urban dwellers (property owners and tenants alike), from their connection with a community that may, at some modest general level, be a more desirable place to live because it experiences somewhat more public spending on open space. As Taxpayers will show these are, if anything, general benefits.[23]

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[23] Taxpayers do not concede that any of the listed so-called benefits will accrue proportionately to assessed parcels as OSA claims. OSA has provided no evidence, substantial or otherwise, that they will. From start to finish, the engineer's report is a collection of bald assumptions that are devoid of factual support and founded on no more than a promoter's speculation. It is a humanistic essay that strings together quotations about the virtues of wide open spaces and draws sweeping conclusions about amorphously and incoherently-described social goods. This is neither engineering opinion nor real estate appraisal. It is rank conjecture that should not be accepted to justify any serious public decision. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563-564 [expert opinion has no evidentiary value if based on speculation or unsound or unsupported assumptions].)

1. OSA's First Seven Benefits Are Merely General Benefits of Open-Space Spending.

In section 2(i) terms, there is nothing "particular" or "distinct" about the relationship of any of OSA's alleged benefits to any specific parcels of property. They are indistinguishable from the general benefits of open space preservation received by "all property in the [assessment] district" and enjoyed by the "public at large" under section 2(i). Everyone alive in the district breathes the air, drinks the water, views the surroundings, has access to trails and parks, participates in the economy, lives in the environment, and enjoys the quality of life. As the engineer's report alleges, all property benefits to some degree from being part of a community where local government creates and preserves recreational opportunities, provides fire and police protection, and protects the environment. (JA 562, 564, 566.) None of OSA's alleged benefits is special.

For example, OSA lists as its first special benefit: "Enhanced recreational opportunities and expanded access to recreational areas *for all property owners, residents, employees and customers in the OSA*." (JA 561.) OSA's second alleged benefit for "[p]rotection of views . . . and other resources[,] values[,] and environmental benefits" is likewise enjoyed by all "*residents, employees, customers and guests*." (JA 562.)

OSA's third benefit, "increased economic activity," is not focused on any particular line of business or kind of property, let alone a specific parcel. According to OSA, it is "a benefit ultimately to *residential, commercial, industrial and institutional property*." (JA 563.) Even assuming Chicago-style trickle-down economics, an increase in undescribed economic activity might generally benefit all people or all property, but it does not necessarily benefit any specific parcel of property in a particular or unique way. For example, one property might benefit from more tourists, while that alleged benefit might destroy another property's views, increase traffic, or bring other disadvantages. Because OSA does not tell us which parcels will benefit or how, OSA's "increased economic opportunity" cannot be anything but general benefit.

Nor does OSA tell us which parcels will benefit from OSA's fourth benefit – "expanded employment opportunity" that allegedly creates "*additional employment opportunities for OSA residents*." (JA 563.) Nor can it explain which parcels will benefit from its fifth benefit – an alleged but vaguely described community advantage from the "reduced cost of local government." (JA 564.) And, while "water quality, pollution reduction, and flood prevention" (OSA's sixth benefit) may benefit specific properties by protecting them from particular natural or human-generated environmental risks, OSA does not tie a specific kind of risk to an endangered parcel or even

a collection of parcels. (JA 565.) Some parcels in OSA's vast territory may have flood risks; others may have none at all.

It is difficult to imagine a more quintessential general benefit than OSA's seventh "enhanced quality of life and desirability of the area" advantage in an area that is more than 800 square miles and contains over a million people. (JA 564-565.) Yet this is the essence of OSA's entire assessment – environmental preservation for the benefit of all. This is hardly a special benefit to any discrete parcel.

In sum, OSA failed to carry its section 4(f) burden of demonstrating special benefit from any of its seven nebulous alleged advantages of open space.

2. OSA's Eighth Benefit Is General Enhancement of Property Value that Does Not Qualify as a Special Benefit.

As its eighth and final benefit, OSA claims: "Specific enhancement of property values" that accrues across the board to all "property in the OSA." (JA 566.) OSA's engineer arrives at this benefit by reasoning that the "environmental and economic benefits" of open-space spending "ultimately benefit property by making the community more desirable and property, in turn, more valuable . . ." (JA 562, 564, 566.)

OSA's last benefit runs headlong into section 2(i)'s plain and absolute rule that "***[g]eneral enhancement of property value does not constitute 'special benefit***.'" OSA's transparent substitution of the word "specific" for the word "general" does not change the value enhancement it claims. Given the type of assessment it has levied, it has failed to carry its burden of demonstrating special benefit to each assessed parcel because:

- OSA's own engineer admits that the enhancement of value it claims results from *a community made generally more desirable by open space spending*. As he states: "All of these [community open-space benefit factors] ultimately benefit property by making the community more desirable and property, in turn, more valuable." (JA 564; see also 562, 566-567.) This is *general* enhancement of value and is, by definition, *not* a special benefit. (JA 562, 564, 566-567.)
- Even if OSA could, as its engineer claims, assert some kind of value enhancement from open space as a special benefit, its evidence proves no more than that those parcels in *close proximity* to parks and greenbelts might be worth more. (JA 567.) Because OSA refuses to identify any particular open-space

improvement that will be funded by its assessment, it can claim no benefit from a proximity-to-open-space effect.

Section 2(i)'s "general enhancement of value" language does not appear in pre-Proposition 218 special assessment law. But the concept was recognized under California *eminent domain* law as it existed at the time Proposition 218 was enacted. Under that law, when property was taken from a larger parcel, the owner was entitled to severance damages suffered by the remainder. Special benefits were set off against those damages. General benefits were not. (*Beveridge v. Lewis* (1902) 137 Cal. 619, 623-626; see also *Pierpont Inn, Inc. v. State* (1969) 70 Cal.2d 282, 296.)

Shortly after voters passed Proposition 218, this Court overruled *Beveridge*, *Pierpont*, and other cases, abolished the special/general benefit distinction in eminent domain law, and held that both special and general benefits would henceforth be offset from severance damages. (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 705-711, 718 (*MAT*).) *MAT* refers to "general enhancement in the value of property" in the sense of a value increase enjoyed by all properties because of proximity to a transit station. (*Id.* at p. 716.) Because the general enhancement of property value concept is a technical one incorporated into section 2(i) from another body of law, reference to its origin

and development in the earlier eminent domain cases will shed light on its meaning. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19.)

OSA's benefit claims are quintessentially general under *Beveridge* and the prior eminent domain cases. They broadly assert that across-the-board value enhancement occurs because OSA's open-space spending "makes the OSA a more attractive and safer place to live and locate new businesses." (JA 566.) This is no more than "an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement." Or, echoing section 2(i)'s language, it is "an expected enhancement of value through the general improvement of the country." (*Beveridge*, *supra*, 137 Cal. at pp. 624-625.) *Beveridge* classifies this as general, not special. (*Id*. at pp. 623-625.)

In order to be a special value enhancement in eminent domain, the improvement typically had to be adjacent to or in very close proximity to the parcel whose value had been enhanced. "Special benefits, by contrast, have some direct and peculiar relationship to the remainder, often arising from the contiguity of the remainder and the project." (*MAT*, Kennard, J., dissenting, 16 Cal.4th at. P. 727, citing *Beveridge*, *supra*, 137 Cal. at pp. 624, 626, and other authorities.) OSA does not confine its assessment to parcels abutting

improvements, and so fails to establish any special enhancement in eminent domain terms.

OSA itself admits that its so-called "specific" value enhancement[24] varies depending on the location of a particular assessed parcel in relation to an open-space improvement. The engineer's quoted sources say that value impact accrues to parcels *in close proximity to parks, greenbelts, or other uniquely advantageous open-space areas*. (JA 566 [Value accrues to "other property *in or near the recreation area*;" "*proximity to parks*" increases value]; 567 [land and housing values "*near [a] greenbelt*" and "close to quality recreational areas."].) As the engineer admits: "Enhancement value is the tendency of open space to enhance the property value of *adjacent properties*." (*Id*.)

But OSA steadfastly refuses to do what its own sources say it must do to establish a conceivable basis for a value increase – locate each assessed parcel in relation to some particular kind and quality of open space. Without knowing whether any assessed parcel will be *adjacent* to an open-space

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[24] No California law, either before or after Proposition 218, supports the proposition that a value increase in a parcel is *in and of itself* a special benefit. Rather, value enhancement to particular parcels has been employed as an essential component and measure of the amount of assessable special benefit – once that benefit has been found to exist. (*Federal Const. Co. v. Ensign* (1922) 59 Cal.App. 200, 212; see also *People ex rel. Doyle v. Austin* (1874) 27 Cal.353, 359.) Nothing in Proposition 218 says that enhanced value of any kind *is* a special benefit.

improvement that would have a direct impact on its value, OSA cannot under its own sources purport to be assessing for *specific* enhancement of value. Its alleged greater value accrues, if at all, across-the-board and is *not* a special benefit.

C. OSA's Levy Is Based on a Constitutionally Erroneous Measure of General Benefit That Disregards Immense General Benefit to People and Property Within OSA's Assessment District.

As the Taxpayers have explained, the separation-of-general-benefit requirement is one of the most significant substantive changes wrought by Proposition 218. By the plain terms of section 4(a), agencies may no longer assess property owners for any *general benefit*; instead, all general benefit must be excluded from assessment – and then paid for with the agency's non-assessed funds. (JA 2349.)

Under sections 4(a) and 4(f), OSA bore the burden of separating all general benefit from its assessment and demonstrating that it had done so. OSA claimed this benefit was no more than 10%, allowing it to levy taxpayers' property for 90% of its desired funding. (JA 568.) Its attempt to measure and exclude from assessment the general benefit of its open space spending program is described in the following passage in the engineer's report:

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

This operational definition of general benefit is constitutionally flawed. It does not separate and exclude from assessment either of two kinds of immense general benefit referred to in section 2(i): (1) all benefit to property *within* OSA's district; or (2) all benefit to the public at large *within* that same area.

OSA's general benefit measure disregards the indisputable fact that there are over a million people who do live, work, or shop in OSA's territory every day.[25] As members of the "public at large," they also use and enjoy OSA's open space. Indeed, OSA itself estimates that they will use its open space 95% of the time. (JA 568 [fewer than 5% of open space users are non-residents, non-employees, or non-customers].) Yet OSA refuses to allocate *any* general benefit to their public use and enjoyment of parks, greenbelts, trails, hillside

[25] Santa Clara County has a population of 1.66 million. (JA 2297.) At least two-thirds of that number, or about 1.1 million people, reside in OSA's territory. (JA 158.)

views, and other OSA-funded open spaces. According to OSA, and for reasons it refuses to explain, their use simply does not count.

OSA's unjustified refusal to take account of general benefits to people *within its territory* necessarily and profoundly skews its general/special benefit allocation. For example, 40% of OSA's residents are tenants who pay absolutely nothing in OSA's levy because they do not own property subject to assessment. (JA 2296.) Yet they enjoy all of the supposed benefits of open space. They take in the views. They drink the water and breathe the air. They have access to recreational areas. They enjoy educational and employment opportunities. And they experience a better quality of life. Yet OSA assumes they receive *no general benefit at all*.

OSA also refuses even to consider benefits to all property in the district. Section 2(i) defines special benefit to exclude "*general benefits conferred on real property located in the district* . . ." OSA pretends the italicized phrase is not there. Yet much of the claimed benefit from OSA's assessment as revealed in the engineer's report accrues to *property in general* within the district. OSA repeatedly makes broad claims that each of its so-called special benefits accrues across-the-board to all property in its territory. (See, e.g., JA 562-565.) This is quintessential *general* benefit, yet OSA's estimate of general benefit refuses to take account of it or to exclude it from assessment.

Thus, even if *any* of OSA's claimed open-space advantages were to accord a modicum of special benefit to some assessed parcel, OSA's 90%/10% allocation of special-to-general-benefit is plainly erroneous because it is based on a legally incorrect measure of general benefit.

OSA's error was prejudicial to Taxpayers. A full consideration of all general benefit, including advantages accruing to all persons and property *within* the district, would clearly have resulted in a much more favorable allocation, more likely 90% general to less-than-10% special. To the extent OSA had any "discretion" in the allocation, its use of an erroneous legal standard designed to skew the result is a per se abuse of that discretion that requires voiding the assessment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 [misconstruction of law is abuse of discretion]; *Paterno v. State* (1999) 74 Cal.App.4th 68, 85 [abuse of discretion to apply the wrong legal standard].)

III. AS A FLAT PARCEL ASSESSMENT, OSA's LEVY VIOLATES SECTION 4(a)'s STRICT PARCEL-BY-PARCEL PROPORTIONALITY RULE.

Article XIII D requires that OSA bear the burden of proving in any action contesting its assessment that "*the amount of any contested assessment*

is proportional to, and no greater than, the [special] benefits conferred on the property . . ." (§4(f).)

As Taxpayers will show, OSA did not and cannot bear its section 4(f) burden because its flat-parcel assessment rate of $20 per single-family-equivalent household is incapable of accounting for the inevitable disparities that result from the distribution of special benefit from OSA's $8 million annual spending program across 314,000 parcels on 800 square miles of Santa Clara County.

The "particular and distinct benefit" (§2(i)) that any assessed parcel would receive from OSA's annual $8 million worth of open space spending necessarily differs based on a myriad of factors, including actual parcel location in relation to one or more open-space improvements funded by OSA. A rural or suburban parcel on a greenbelt, with unique and breathtaking views of surrounding hillsides and trees not shared by other parcels, receives vastly more special benefit than an urban dwelling with no immediate access to any of OSA's open space and no views. Yet both pay $20 per year to OSA. Such inequality in the distribution of assessment costs among benefitted parcels renders the assessment profoundly disproportionate and hence invalid under sections 4(a) and (f).

A. Section 4(a) Demands Strict Parcel-by-Parcel Proportionality Between the Parcel Assessment Amount and the Special Benefits Received By the Assessed Parcel.

Article XIII D insists that OSA prove, in relation to each assessed parcel, that it has assessed only the "proportionate special benefit" of the proposed public improvement to that parcel. (§4(a), 4(f).) To emphasize the point, it goes on to admonish that: "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (*Id*.) OSA must demonstrate its compliance with this strict proportionality rule in a "detailed engineer's report prepared by a registered professional engineer certified by the State of California." (§4(b).)

The Legislative Analyst explained the towering height of the Proposition 218 parcel-by-parcel proportionality hurdle as follows: "***This provision would require local governments to examine assessment amounts in detail, potentially setting them on a parcel-by-parcel or block-by-block basis.***" (JA 2350.) The Analyst re-emphasized the point in *Understanding Proposition 218*, when she listed as part of the assessment calculation process:

> "***Third: Set Assessment Charges Proportionally***. *Finally, the local government must set individual assessment charges so that no property owner pays more than his or her proportional share*

of the total cost. This may require the local government to set assessment rates on a parcel-by-parcel basis." (RJN, Ex. A, p. 10.)[26]

Before Proposition 218, there was no requirement that assessments be levied for the precise amount of benefit each parcel would receive or that parcel-by-parcel proportionality be achieved. To the contrary, the law expressly allowed agencies to adopt assessment methods that did not levy for the amount of benefit received by a parcel, thereby encouraging broad-based, flat or nearly flat levies. No levy could be voided for lack of proportionality in assessment "'in the absence of fraud, mistake, or gross injustice.'" (*White v. County of San Diego* (1980) 26 Cal.3d 897, 905, quoting *City of Baldwin Park v. Stoskus* (1972) 8 Cal.3d 563, 568-569.)

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[26] The requirement of parcel-by-parcel proportionality is emphasized in every sentence in section 4(a): "An agency . . . shall identify *all parcels* which will have a special benefit conferred upon them . . . The proportionate special benefit derived by *each identified parcel* shall be determined . . . No assessment shall be imposed *on any parcel* which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. . . . [A]n agency shall separate the general benefits from the special benefits conferred *on a parcel. Parcels* . . . shall not be exempt . . ." It is also included in section 4(f)'s insistence that the agency bear the burden of demonstrating that the "*property or properties*" receive special benefit and that the "amount of *any contested assessment*" be proportional to, and no greater than, benefits conferred "on the *property or properties* in question."

Before Proposition 218, the agency's discretion in adopting apportionment of benefit by whatever method it thought was fair was practically absolute. The Taxpayers' research has revealed no case in the last century invalidating an assessment for disproportional allocation of improvement cost. In the present case, the parcel-by-parcel detailed analysis required by sections 4(a) and 4(b) and described by the Legislative Analyst is notably absent from the engineer's report. Instead, the report substitutes broad and unsupported assumptions, sweeping social policy judgments, and even quotations from appellate decisions not dealing with Proposition 218 for an objective parcel-by-parcel examination of actual special benefit conferred. (JA 318:15-319:9.)

OSA made no effort in the engineer's report to identify and prove special benefit to particular regions or neighborhoods, let alone to the over 314,000 specific parcels it assessed. Instead, it blithely and globally *assumed* total equality among parcels of similar property type and tax roll status, stating in its engineer's report:

> "*[A]ll properties of similar type and characteristics are deemed to receive approximately equivalent benefit from the future acquisition, maintenance and preservation of open spaces, public resources and*

recreational lands that would be funded by the Preservation District."

(JA 569.)

OSA's monumental "deemed to receive equal benefit" assumption disregards what its own engineer's report contends to be the overriding special benefit from parks, greenbelts, and recreational areas: *proximity to a specific open space improvement that has a direct, immediate, and positive impact on value*. (JA 566-567; see discussion in Section II above.)

Like OSA's violations of the cost-of-definite-improvement and special-benefits-only rules in section 4(a), OSA's transgression of the strict parcel-by-parcel proportionality rule stems from its steadfast refusal to identify any specific improvement to any parcel it assesses. OSA's bald assumptions about what special benefit properties are "deemed to receive" fall a country mile short of meeting the strict parcel-by-parcel proportionality hurdle of Proposition 218.

B. OSA's Use of Each Parcel's Tax Roll Status, Without Reference to Special Benefit Actually Conferred on the Parcel, Renders Its Assessment A Disguised Parcel Tax.

As Taxpayers have shown in Section II above, the assessment of parcels by *tax roll status* will inevitably result in a disproportionate assessments. OSA's asserted benefits of views, recreational opportunities, employment and economic advantages, and others will vary widely based on characteristics of

both assessed parcels and funded public improvements, as well as their physical and geographical relationships. (JA 324:10-27, 348-350; 350:15-352:20.)

OSA cannot justify its assessment without numerous sources and references contending that any value impact on property resulting from open space depends squarely on its *location* in relation to a particular kind of open space. The report abounds in references to parks and other kinds of open space that are directly connected to and enhance property values in ***immediately surrounding*** areas. (E.g., JA 566-567 ["property ***in or near the recreation area*** . . .]"; 566 ["***[p]roximity to parks in urban areas***"]; 567 ["undeveloped land ***near that greenbelt***"; "homes located ***close to quality recreational areas***"; "***adjacent properties***"]; see generally 563-567.)

Despite these admissions, OSA brazenly refused to consider the physical or geographical relationship of any assessed parcels to open space in determining their respective assessment amounts. This fatal flaw in methodology – the complete disregard of *location* as at least one ingredient in the measurement of relative special benefit – is manifest throughout the engineer's report and results in the following examples of disproportionality, among many others:

- A parcel with a view of OSA's open space or immediate access to a park or trail is assessed the same as a parcel with no view or access at all.
- A business parcel located in downtown San Jose with no physical or geographical connection to any of OSA's open space receives a whopping assessment based on the number of employees per 1/5 acre (JA 571-572) – a completely arbitrary factor that OSA never justified.[27]
- A rural estate parcel with immediate access to a park is assessed the same as an urban parcel many miles away from the park with no such access.

Proposition 218's proponents contemplated precisely this kind of disproportionality in relative special benefit when they described as "imaginative," and hence abusive, the special assessment in which: "In Northern California, taxpayers 27 miles away from a park are assessed because their property supposedly benefits from that park." (JA 2352.) The example was drawn from this Court's decision in *Knox*. (JA 2539:1-4, 2542:21-2543:4.) As a further example of "unfair[ness]," they pointed to the regressive character

[27] OSA's engineer falsely stated that he followed the so-called SANDAG study when he did not. (See JA 2231-2237.)

of a flat levy which does not consider relative benefit to different kinds of single family parcels, noting: "The poor pay the same assessments as the rich. *An elderly widow pays exactly the same on her modest home as a tycoon with a mansion*." (JA 2352.)

In sum, since the "particular and distinct" benefit to each parcel must necessarily be allocated on a strict parcel-by-parcel basis (§2(i)), OSA's $20-per-parcel assessment is inherently and fatally disproportionate. OSA's blanket assertion that every one of 314,000 parcels gets $20-per-household worth of benefit from an across-the-board increase in OSA's budget is not only rank speculation, it is legally impermissible based on the plain terms of section 4(a) and its revealing history in the ballot pamphlet. OSA's assessment is void.

IV. ANYTHING LESS THAN A STRICT AND INDEPENDENT STANDARD OF REVIEW UNDERMINES BOTH SECTION 4(f)'s BURDEN-OF-DEMONSTRATION PROVISION AND SECTION 4(a)'s SUBSTANTIVE RESTRICTIONS ON THE TYPE AND SCOPE OF PERMISSIBLE ASSESSMENTS.

Observing that Proposition 218 had called into question this Court's *Knox/Dawson*[28] standard of judicial review of assessments, the majority

[28] The pre-Proposition 218 standard was based on this court's decisions in *Knox v. City of Orland* (1992) 4 Cal.4th 132, 146 and *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685. Under that standard: "'A

fashioned a new standard to be applied in post-Proposition 218 cases. (Maj. Opn., pp. 10-14.) Its standard replicates *Knox/Dawson*, except that it requires assessing agencies to demonstrate "by reference to the face of the [agency's] record," special benefit and proportionality. (Maj. Opn., p.14.)

As the dissent points out, the practical effect of the majority's approach to assessment review is so obsequiously deferential to local agency discretion that it defeats Proposition 218's explicit restrictions on assessments, effectively abdicating the judicial function of constitutional interpretation and enforcement to 7,000 self-interested assessing agencies. (Dis. Opn., pp. 14-21.)

In this section, Taxpayers will establish that the majority's standard of review:[29]

- Disregards the provisions of section 4(f), which places squarely on assessing agencies the burden of demonstrating special benefit and proportionality on a parcel-by-parcel basis; and

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special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside 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."

[29] The same criticisms can be directed at the somewhat different standard of review described in *Not About Water Com. v. Board of Supervisors* (2002) 95 Cal.App.4th 982, 990-994, which is also erroneous and should be disapproved. (See Dis. Opn., pp 20-21 & fn. 7.)

- Undermines section 4(a)'s explicit restrictions designed to curb abusive assessments.

A. Only a Strict and Independent Standard That Allows Taxpayers to Submit Evidence and Insists That Agencies Demonstrate the Legality of Their Levies under Section 4(a) Will Serve to Enforce the Constitution.

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."

As its language reveals, section 4(f) is not a mere "burden-of-proof" provision designed for a traditional lawsuit, but rather a "burden-of-demonstration" provision that imposes on the assessing agency an overall obligation to fully establish its compliance with the constitution in all validation and mandamus actions dealing with assessments.

The concept of the burden-of-demonstration provision in section 4(f) came from *Beaumont Investors v. Beaumont Cherry Valley Water District* (1985) 165 Cal.App.3d 227, a case in which the Court of Appeal held that the burden of establishing the validity of a facilities fee was to be borne by the local agency that imposed the fee. In *Knox*, this Court declined the plaintiff-taxpayers' invitation to extend the *Beaumont Investors* approach to special assessments, noting: "We are not persuaded by the *Beaumont Investors* decision . . . to deviate from the traditional standard of review [for assessments] which we reaffirmed in *Dawson*." (*Knox, supra,* 4 Cal.4th at p. 147.)[30]

Although this Court declined the taxpayers' invitation to extend *Beaumont Investors* to assessments, its holding was subject to change in the constitutional initiative process. In the text of Proposition 218, an invitation was given to California voters to extend the *Beaumont Investors* analysis to assessments by enactment of section 4(f) of article XIII D as a state

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[30] Although both the majority and the dissent express some confusion regarding the difference between a "burden of proof" and a "standard of judicial review," the difference in terminology has no significance. (Maj. Opn., p. 12; Dis. Opn., pp. 15-16.) Section 4(f) does not refer to a burden of proof, but to a burden of demonstration. This Court was not confused. In *Knox*, it clearly understood the taxpayers' *Beaumont Investors* argument to be addressed to the *Dawson* standard of judicial review. (*Knox*, *supra*, 4 Cal.4th at pp. 156-157.)

constitutional amendment. In approving Proposition 218, the voters accepted the invitation which this Court had previously declined in *Knox*.

The Legislative Analyst's Analysis explains that section 4(f) effected a significant change in California assessment law – one powerful enough to shift the bottom-line results of taxpayer lawsuits from judicial approval to disapproval of previously valid assessments:

> "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*." (JA 2350.)

In *Understanding Proposition 218*, the Legislative Analyst reinforced the statement just quoted, adding: "Now local governments must prove that any disputed fee or assessment is legal." (RJN, Ex. A, p. 17.) According to the Analyst, section 4(f) and the other changes in California assessment law were economically significant. They required agencies to reduce or eliminate $100 million worth of assessments with general benefits, such as "park and

recreation" assessments, with greater revenue losses, potentially hundreds of millions annually, as time goes on. (JA 2351.)

OSA's open-space assessment is even more amorphous and unfocused than the park and recreation assessments the Legislative Analyst targets for extinction by operation of section 4(f). Yet, under the majority's deferential standard of review, these kinds of "assessments" thrive and expand.

The majority's continuing deference to assessing agencies eviscerates section 4(f)'s burden-of-demonstration provision. If, as the majority maintains, an agency need do no more than supply an engineer's report that baldly claims special benefits and proportionality by adopting operational definitions at odds with those in Proposition 218 and by making sweeping and unsupported assumptions about the effect of open-space spending, it will be business as usual under the anything-goes, government-always-wins view of the *Knox/Dawson* standard.[31] Taxpayers will find it harder, not easier, to win suits. And assessments will vastly increase, not decrease. Once again, taking two steps backward in taxpayer rights was obviously not what voters who adopted

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[31] While it is unquestionable that the proponents targeted the *Knox/Dawson* standard in sections 4(a) and 4(f) (see Section II(A) above), fairness demands the further observation that neither *Knox* or *Dawson* is reasonably capable of the kind of extension needed to validate OSA's vast and amorphous open-space spending assessment. Rather, both are distinguishable for the reasons explained in the dissent. (Dis. Opn., pp. 27-28, 33-34.)

Proposition 218 intended. The majority's standard of review is incompatible with section 4(f).

B. The Majority's Standard of Review Effectively Repeals Section 4(a)'s Substantive Protections for Taxpayers.

Finding what it called a "gray area" in distinguishing general and special benefit, the majority simply deferred to OSA rather than construing and applying the plain meaning of constitutional language in light of its history. It effectively held that notwithstanding the impact of article XIII A: "The duty to identify special benefits belongs to the local agency." (Maj. Opn., p. 26.) In similar fashion, it declined to adopt strict proportionality in assessments or to require agencies to assess based on the cost of a definite public improvement. (Maj. Opn., pp. 15-16, 26-28.) The majority's standard of review thus undermines *all* of the substantive restrictions on assessments imposed in section 4(a) by a servile obeisance to assessing agencies, rendering these limitations on assessments effectively unenforceable in California courtrooms.

As the dissent observes, this is clearly not what the voters intended. (Dis. Opn., pp. 14-39.) If that were their sole or even primary purpose, only sections 4(c), (d), and (e) dealing with balloting would be needed; the detailed language in sections 4(a) and 4(f) would be superfluous. The majority's decision to "read out" these key provisions contravenes the seminal rule of

construction that every word and phrase in a constitutional provision is deemed to have a significant and distinct meaning. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799.)

To support its continued adherence to the *Knox/Dawson* standard, and presumably its failure to apply the plain meaning of sections 4(a) and 4(f) as well, the majority invokes the separation of powers and property owner democracy. (Maj. Opn., p. 14.) Neither justifies allowing a local legislative body or property owners – both of which are bound by our state's constitution – to usurp the judicial function of construing and enforcing constitutional provisions.

Legislative decisions are not immunized from judicial review for compliance with our state's constitution. (*Hotel Employees and Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 602.) Nor can a legislative body narrow the meaning of constitutional provisions or otherwise obstruct or undermine the enforcement of constitutional rights. (*Hale v. Bohannon* (1952) 38 Cal.2d 458, 471; *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 79; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 184.)

Similarly, a weighted majority of parcels cannot trump express constitutional commands designed to protect all taxpayers any more than

freedom of speech or religion can be repealed by majority vote. In the wake of Proposition 218, all valid assessments must *both* clear the substantive hurdles in section 4(a) *and* be approved by a weighted majority of owners under 4(c), (d), and (e). The weighted-majority owners faced with a void assessment can promote a parcel tax or voluntarily donate money to the agency.

Moreover, to the extent the language and history of sections 4(a) and 4(f) leave any doubt that the voters intended to radically revise the *Knox/Dawson* standard of review, Proposition 218's express provision stating its purpose and its rules of construction resolve any uncertainty. (Proposition 218, §§2 and 5.) These provisions are valuable intrinsic aids in determining the scope and meaning of sections 4(a) and 4(f). (*People v. Canty* (2004) 32 Cal.4th 1266, 1280; *People v. Allen* (1999) 21 Cal.4th 846, 860-861.)

Sections 2 and 5 both emphasize the twin voter objectives of "*limiting local government revenue*" and "*enhancing taxpayers consent*." In the case of OSA's assessment, the purpose of limiting local government revenue is advanced by a strict and independent standard of review, not continued deference to local agency discretion. And the taxpayer consent objective is furthered by recognizing the so-called assessment for what it is: a special parcel tax for the community benefit of open space spending *that must be approved*

by voters, not property owners. No other approach will effectively enforce section 4(a) and 4(f).

Just as the tail cannot wag the dog, so the standard of judicial review must not be allowed to defeat the enforcement of section 4(a)'s substantive hurdles facing would-be assessments. To give meaning to what the voters did in sections 4(a) and 4(f), California courts must strictly and independently review the entire record in a validation or mandamus action challenging an assessment, including any evidence taxpayers may submit in lawsuits, as well as the so-called record created by the assessing agency's bought-and-paid-for consultants, to determine whether the agency has cleared each and every substantive hurdle and satisfied each and every rule in section 4(a).

V. UNLESS VOIDED BY THIS COURT, OSA's METHOD OF ASSESSMENT-BY-PARCEL-TAX WILL EXPAND TO EFFECTIVELY REPEAL THE VOTER-APPROVAL-OF-TAXES PROVISIONS OF PROPOSITIONS 13 AND 218.

As Taxpayers have shown above, OSA's flat-rate levy on 314,000 parcels for the community benefit of county-wide open-space spending contravenes: (1) the cost-of-definite-improvement rule; (2) the special-benefit-only rule; and (3) the strict proportionality rule. (Sections I-III above.) As

such, it is not a true assessment, but rather a special parcel tax requiring two-thirds voter approval masquerading as an assessment. (Art. XIII C, §2(d).)

As Justice Mosk once reminded us: "[I]f an object looks like a duck, walks like a duck, and quacks like a duck, it is likely to be a duck." (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1256, quoting from *In re Deborah C.* (1981) 30 Cal.3d 125,141 (conc. opn. of Mosk, J.).) OSA's assessment is based on a $20 flat-rate parcel levy; it funds an increase in an agency's spending budget; it escalates based on the cost of living. Regardless of OSA's "assessment" label, it looks, acts, and functions in all its relevant incidents like a parcel tax. It therefore is a parcel tax, and is void because OSA neither sought nor obtained the mandatory two-thirds voter approval. (Art. XIII A, §4; art. XIII C, §2(d); see *Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084, 1094 & fn. 7 [parcel tax artfully denominated a special excise tax that has all the incidents of a property tax is nonetheless "a duck even if a resourceful counsel paints it white and puts a sign around its neck labeling it a goose."].)

California has nearly 7,000 cities, counties, and special-purpose government agencies like OSA. (RJN, Ex. A, p. 1.) Practically any agency could adopt OSA's "assessment" methodology for virtually any kind of public spending. Very little that government agencies do – from building, maintaining, and operating schools, libraries, parking garages, civic centers, and

other public buildings, to police and fire protection and public service programs – would not be susceptible to an assessing engineer's all-consuming assumption that it benefits the environment, the quality of life, and the physical, emotional, and economic well-being of everyone in the community, and thereby increases the value of all property.

Considered in isolation, OSA's assessment is a relatively modest $20. But the consequences to California real estate taxation of extending OSA-style flat-parcel assessments are earth shattering. Given the choice, many agencies seeking the most favorable conditions for approval would prefer mailed assessment ballots to special tax elections. Mailed ballots may be less expensive than special tax elections which tend to involve media campaigns. As OSA's assessment shows, mailed ballots from an obscure special-purpose agency may be less conspicuous to voters.[32] And, in some instances, large-parcel owners may be an easier population to target for agency public relations campaigns. Finally, as explained above, assessments need only garner approval of a weighted-parcel majority of property-owners rather than two-thirds approval of all voters. (Art. XIII C, §2(d); art. XIII D, §4.)

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[32] In contrast to OSA's 18% ballot return rate (JA 156, p. 50:18), the voter turnout rate for the Santa Clara County general and special elections from the years 2000 through 2005 varied from 41% to 60.1% with a five-year average of about 50%. Statistical data was taken from the following websites: http://www.sccgov.org and http://www.smartvoter.org.

The use of general-benefit assessments in place of parcel taxes to enhance the public purse also impacts the constitutional rights of voters, especially renters who do not pay assessments. The sole constitutional justification for denying the franchise to these citizens is that "only special benefits are assessable." (§4(a).) When vast public spending projects such as OSA's can be funded through assessment, voters lose their right to control the course of their government to a wealth-concentrated group of property owners. This sounds more like medieval England than modern America.

If a levy is improperly imposed as a special assessment and is really a special tax which confers general benefits, then it is the registered voters who are denied the right to vote, including many renters. (Art. XIII C, §2(d) [voters must approve special taxes]; art. XIII D, §4(g) [franchise denied to non-property-owners solely because "only special benefits are assessable"].) Furthermore, allowing only property owners to vote on property levies where general benefits are conferred violates the Equal Protection Clause (one person, one vote). (U.S. Const., 14th Amendment, §1; Cal. Const., art. I, §7; *Kramer v. Union Free School Dist*. (1969) 395 U.S. 621, 632-633.)

If OSA's assessment is upheld, local governments will attempt to impose thinly-veiled special parcel taxes without voter approval by submitting them to property owners as an array of assessment proposals ($20 for parks and open

space, $25 for police, $10 for libraries, etc.). Taxpayer anger will kindle as it did in 1978 and again in 1996, resulting in future Draconian constitutional initiatives that place even tighter restrictions on assessments than those envisioned by Proposition 218. This will hardly enhance the constructive functioning of California's government, let alone the efficient and effective enforcement of its state constitution.

VI. OSA'S ASSESSMENT ALSO VIOLATES SECTION 4(a)'s NO-EXEMPTION-FROM-ASSESSMENT RULE.

OSA's assessment contains blanket exemptions for public and private schools, churches, and other classes of property.[33] (JA 573.) For the reasons expounded in Sections I-V above, OSA's exemption provisions necessarily fail along with the rest of its assessment. However, for the guidance of taxpayers and public agencies imposing future assessments, Taxpayers request that this Court review and invalidate OSA's exemptions. This will prevent unnecessary litigation over a straightforward and simple issue that ought to be put to rest.

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[33] The majority characterized the Taxpayers' argument on this point as applying only to "public lands" and "public schools." (Maj. Opn., p. 30.) This is incorrect. Taxpayers referred to schools as only one example of exemption. They have challenged all of OSA's exemptions based on its engineer's "offsetting benefits" theory. (Petition for Review, pp. 38-40; Appellants' Opening Brief, pp. 61-63.) OSA had no reason to exempt private schools, for example, without a determination, by clear and convincing evidence under section 4(a), that they receive no special benefit.

Proposition 218 altered prior law by infusing a no-exemption-from-assessment rule. Section 4(a) requires the assessing agency to "*identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed*." The agency is then directed to determine and assess each parcel for "*[t]he proportional special benefit derived by each identified parcel . . .* " No exemptions are expressed or implied.

To emphasize that public as well as private property must bear its proportional share of the cost of public improvements, section 4(a) goes on to declare that government parcels "*shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publically owned parcels in fact receive no special benefit*."

The ballot pamphlet leaves no doubt that the no-exemption provision means what it says and contemplates that schools as well as other public parcels will be assessed. As the Legislative Analyst told voters: "[L]ocal governments must charge schools and other public agencies their share of assessments. Currently, public agencies generally do not pay assessments." (JA 2350.) In similar fashion, the ballot arguments revealed that Proposition 218's opponents fully understood the no-exemption rule. (JA 2352-2353 ["Proposition 218 . . . worsens SCHOOL CROWDING by making public

schools pay NEW TAXES . . . Section 4(a) imposes a new tax on public school property. . .”].)

Notwithstanding the language and history of Proposition 218 just recounted, the majority upheld OSA’s blanket exemption of public and private schools, churches, and whole classes of other parcels based on an “offset theory.” (Maj. Opn., p. 30.) According to the engineer’s report, the exempted parcels “typically offer open space and recreational areas on the property that serve to offset [OSA’s] benefits.” (JA 573.) From this assumption, the engineer reasons: “Therefore, these parcels receive minimal benefit and are assessed an SFE factor of 0.” (*Id*.) The engineer’s offset theory suffers from multiple constitutional flaws.

First, nothing in the language of Proposition 218 suggests an intention to exempt parcels that provide open space or recreational benefits. To the contrary, the offset theory contravenes the assess-every-parcel provision of section 4(a), and must be rejected at the outset for that reason.

Second, the engineer makes no finding, let alone one by clear and convincing evidence as section 4(a) demands, that every single exempted parcel receives no special benefits. Indeed, his report suggests that such parcels do receive special benefit, which explains why the engineer must exempt them by using his offset theory.

Third, section 4(a) demands a parcel-by-parcel analysis of benefit, not a set of bald assumptions about what benefits broad classes of parcels may "typically offer." Even if the offset theory were viable, OSA's assessment would violate the proportionality rule unless it applied the theory to each parcel. For example, private schools and churches generally do not provide open spaces or recreational areas available to the public. Yet they are exempt from assessment by OSA's fiat. In contrast, Marriott's Great America, a large amusement park lying within OSA's assessment district, provides shows, rides, and other recreational opportunities to thousands of people. Yet its property is fully assessed. This is profoundly disproportionate and constitutionally unacceptable.

In sum, the majority was not permitted to interpret Proposition 218 as if it had been rewritten to allow agencies to exempt parcels in their discretion. That was not part of its constitutional function. (*Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 ["We may not interpret article XIII D as if it had been rewritten."].) OSA's exemptions cannot be permitted to stand.

CONCLUSION

The majority and dissenting opinions reveal vastly different judicial philosophies about the interpretation of state constitutional initiatives,

especially those governing local taxes. In a manner reminiscent of a prior era in judicial history, the majority effectively adopts a canon of construction under which prior California caselaw recognizing broad governmental tax-and-assessment powers trumps subsequent constitutional text and history. The dissent eschews such an approach, preferring to address the plain meaning of constitutional language and what the voters were told it meant as revealed chapter-and-verse in the ballot pamphlet.

If, as this Court has said, the people's constitutionally-expressed power to control their own destiny, including the taxing authority of their local governments, is supreme, only the dissent's philosophy can prevail here. The dissent did exactly what this Court has repeatedly admonished is essential in properly exercising judicial review. The majority fell wide of the mark.

In her dissent, Justice Bamattre-Manoukian pointed out the correct disposition of this case in light of the myriad of Proposition 218 violations that are revealed by the engineer's report and the undisputed facts in OSA's record. If the assessment restrictions in article XIII D are to have practical meaning and effect in the way described to California voters in Proposition 218's ballot pamphlet, the judgment of the Court of Appeal must be reversed and this case remanded with instructions to enter summary judgment in Taxpayers' favor declaring OSA's assessment void, with the consequence that it is removed as

a lien on property, and a full refund is paid to all taxpayers of amounts illegally collected and other sums allowed by law. (Dis. Opn., p. 44.)

Dated: January 25, 2006.

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