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FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

OCT 12 2018

BY CHARLENE JOHNSON, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

RONALD AUSTIN, and DOES 1 through 100, inclusive,

Petitioners,

vs.

SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT; and DOES 101 through 110, inclusive,

Respondents.

Case No. CIVDS1826749

VERIFIED PETITION FOR WRIT OF MANDATE
(Code of Civ. Proc. § 1085)

Petitioner Ronald Austin, pursuant to Code of Civil Procedure § 1085, and Article I Section 3 of the California Constitution alleges, as follows:

I.

INTRODUCTION

1. In November 1996, California voters approved Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution. This case concerns the validity under Proposition 218 of a fire services special tax by Respondents to include an additional 19,073 square miles

comprising almost the entire unincorporated County, which special tax has not been approved by a required two-thirds of the voters who own the properties that will be taxed.

2. The San Bernardino County Fire Protection District was formed on June 20, 2008 by the Local Agency Formation Commission in Action 3000. The San Bernardino County Fire Protection District is a distinct government entity that is funded mainly by San Bernardino County's allocation of a certain portion of the existing Proposition 13 mandated 1% maximum property tax paid by all assessed property owners in the County. Contrary to San Bernardino County Fire Protection District's assertion that the affected property owners in San Bernardino County are not currently paying a "fair share" for fire prevention services, **<u>all</u>** assessed parcels in San Bernardino County currently fund San Bernardino County Fire Protection District through these general-levy *ad-valorem* property taxes. These revenues are then transferred from San Bernardino County to the San Bernardino County Fire Protection District and are (according to the District) allocated to various areas within the County of San Bernardino in proportion to the amount of services provided to those areas by the San Bernardino County Fire Protection District.

3. The San Bernardino County Fire Protection District involves six "Service Zones" within the County of San Bernardino. These Service Zones are relatively small in comparison to the overall size of San Bernardino County, each comprising a few hundred square miles or less in relatively populated urban areas of the County. Zone FP-5 itself, at the time of its formation, covered only 5.6 square miles in the unincorporated area known as Helendale / Silver Lakes. Each of these Service Zones has a special parcel tax that appears on the annual property tax bills for those living within their respective boundaries. In order for the tax assessment for these Service Zones to have been lawfully adopted, over two-thirds of the parcel owners in those specific areas voted to be assessed a tax *in addition* to the county-wide 1% ad valorem tax. Moreover, as required by Proposition 218, the funds collected in each Service Zone may only be applied within those Service Zones to confer "special benefits" to real property in those zones and said benefits must be provided in direct proportion to the tax assessment. Zone FP-5 itself was formed as a local Improvement District limited to fire-service-related improvements within

its 5.6 square mile service area known as Helendale / Silver Lakes, and was expressly limited by the ballot which approved it by the requirement that it "shall not be expanded" without compliance with "all" laws, including (though not expressly so stating) the procedural mandates of law embodied in Article XIII C of the Constitution of California.

4. Service Zone FP-5 currently has an assessment of $157.26 per parcel, a much larger assessment than some other Service Zones wherein at least two thirds of the voters have voted in favor the assessment. In some areas, far less is paid: for example, in the unincorporated community of El Mirage, the annual special assessment is only about nine dollars per year. The San Bernardino County Fire Protection District now proposes to have the tiny originally-5.6-square-mile Service Zone FP-5 “annex” virtually the entire rest of the County of San Bernardino’s 21,000 square miles of the County in order that the $157.26 be applied to every parcel in the unincorporated areas consisting of mostly vacant desert land. The San Bernardino Fire Protection District intends to do this without any constitutionally-mandated 2/3-majority vote, and two of its own five-member board have already rejected the proposal. Thus, a vote of the Board purports to supplant the decision of hundreds of thousands of San Bernardino residents who have a constitutional right to vote on the imposition of any property tax assessment. Since two of the five-member Board have already rejected the proposal, the swing-vote of one third Director against this proposed tax will probably make that Director the popular hero of up to 300,000 people to whom this notice has been mailed affecting 190,000 parcels. Board Members such as Director James C. Ramos especially, who is presently running for higher office, will probably give particular attention to this consideration, in determining whether or not to continue voting for this tax.

5. The majority of the hundreds of thousands of parcels that will be taxed under this scheme consist of vacant desert land located in the unincorporated portion of San Bernardino County. Because vacant land is relatively inexpensive compared to improved land, this special tax assessment will cause current property taxes to increase by well over 100% in many, if not most, cases. Land owners in these areas will receive virtually nothing in exchange for the proposed annual property tax assessment of $157.26 to be imposed upon them. Many of these

owners will simply abandon their vacant desert parcels to be auctioned off by the County Assessor five years after default and no one is likely to buy them given the proposed annual assessment. This would actually result in an overall decline in property tax revenue for San Bernardino County. The economic consequences for many thousands of property owners will be significant and physical under CEQA and financially devastating for many owners. For example, the owner of a parcel of land worth $1,000 will lose "all" value of his property to this one special tax alone, in only 6.3 years, and thus this tax goes "too far" and is unconstitutional.

6. The San Bernardino County Fire Protection District wrongly asserts it is lawful to assess such a tax on property without the voter approval required by Proposition 218 because the District says such “annexations” do not require voter approval under an overbroad interpretation of the appellate court ruling in *Citizens Assn. of Sunset Beach v. Orange Co. LAFCO* (2012) 209 Cal.App.4th 1182. However, that appellate case is inapposite for the reasons set forth herein. If such a strained interpretation of the ruling therein makes it applicable to the annexation of an entire county by a relatively small local district the purpose and State Constitutional protections afforded by the passage of Proposition 218 are effectively circumvented.

II.

PARTIES

7. Petitioner RONALD AUSTIN (hereinafter “AUSTIN”) is a resident of the State of California, County of San Bernardino, a registered voter and a land owner in the area affected by the proposed fire services special tax.

8. Petitioners, DOES 1 through 100 (hereinafter “DOES”) include some residents of the State of California, County of San Bernardino, as well as some registered voters of the State of California, County of San Bernardino, as well as some landowners in the State of California, County of San Bernardino, as well as some who have more than one of these capacities. Petitioner is currently unaware of the true names and capacities of those Petitioners sued herein as DOES 1 through 100, inclusive. Petitioner will seek leave of the Court to amend this Petition to allege said Petitioners’ true names and capacities as soon as the same have been ascertained. Petitioner is informed and believes and thereon alleges that DOES 1 through 100, inclusive, are

similarly situated as Petitioner Austin, and will each suffer irreparable harm if the relief herein is not granted.

9. Respondent SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT (hereinafter "SBFPD") is a California Special District formed and existing under the Fire Protection District Law of 1987 (Health & Safety Code Section 13800, the "Act") formed on June 20, 2008 by the Local Agency Formation Commission in Action 3000.

10. Petitioner is currently unaware of the true names and capacities of those Respondents sued herein as DOES 101 through 110, inclusive. Petitioner will seek leave of the Court to amend this Petition to allege said Respondents' true names and capacities as soon as the same have been ascertained. Petitioner is informed and believes and thereon alleges that DOES 101 through 110, inclusive, are responsible in some manner or form for the acts or omissions complained of herein and/or are otherwise liable for the damages herein alleged.

III.

JURISDICTION AND VENUE

11. Jurisdiction is proper in the Superior Court for the County of San Bernardino pursuant to California Code of Civil Procedure Section 1085, and Article VI, Section 1, of the Constitution of the State of California.

12. Venue is proper in the County of San Bernardino pursuant to California Code of Civil Procedure Section 393, because the acts and omissions complained of herein occurred in the County of San Bernardino.

IV.

GENERAL ALLEGATIONS

A. <u>THE SUBJECT "SPECIAL TAX" IS UNCONSTITUTIONAL BECAUSE IT FAILS TO COMPLY WITH MANDATORY PROCEDURES, AS CONSTITUTIONALLY DEFINED IN ARTICLE XIII C AND AS REQUIRED BY PROPOSITION 218</u>

13. Under article XIII C, the adoption of a "special tax" requires a 2/3-majority vote among those affected.

14. There has been no 2/3 majority vote among those affected, pursuant to Article XIII C of the Constitution.

B. <u>IN THE ALTERNATIVE: THE SUBJECT FIRE "ASSESSMENT" DOES NOT CONFER ANY "SPECIAL BENEFITS" ON REAL PROPERTY, AS CONSTITUTIONALLY DEFINED AND REQUIRED BY PROPOSITION 218</u>

15. Under article XIII D of the California Constitution, the term "assessment" is defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." (Cal. Const., art. XIII D, § 2, subd. (b).) The term "special benefit" is constitutionally defined as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute 'special benefit.'" (Cal. Const., art. XIII D, § 2, subd. (i).)

16. Thus, to constitute an "assessment" under Proposition 218, there must at least exist a "special benefit" that is "conferred upon the real property." Proposition 218 makes it clear that only "special benefits" are assessable. (Cal. Const., art. XIII D, § 4, subd. (a).) Thus, any other benefits must be excluded from any permissible assessment, including general benefits to real property or to the public at large, any benefits to personal property (See Civ. Code, § 663), and any benefits to people. Proposition 218 also requires a local agency to "separate the general benefits from the special benefits conferred on a parcel." (Cal. Const, art. XIII D, § 4, subd. (a).)

17. Significantly, the San Bernardino County Fire Protection District makes no pretense at all that any “special benefit” would be provided to those in the area proposed to be “annexed” and taxed an annual $157.26. Rather, SBFPD Fire Chief Mark A. Hartwig has stated the proposed tax assessment is to make up for a County-wide budget shortfall that has resulted in diminishing reserves. (*See* <u>https://www.sbcfire.org/ServiceZoneFP-5.aspx</u>.) Chief Hartwig claims that essentially all areas in San Bernardino County that lie outside any existing Special Districts do not pay their “fair share.” Thus, Chief Hartwig proposes that one of those small Special Districts, FP-5, “annex” the entire rest of San Bernardino County to boost general revenue and that SBFPD do so without two-thirds majority approval.

C. **<u>RESPONDENT ASSERTS THAT AN APPELLATE RULING PERMITTING THE ANNEXATION OF AN AREA OF LESS THAN ¼ SQUARE MILE WITHOUT VOTER APPROVAL PERMITS THE PROPOSED "ANNEXATION" OF ABOUT 19,073 SQUARE MILES NOTWITHSTANDING PROPOSITION 218's REQUIREMENT OF A TWO-THIRDS VOTE AND "SPECIAL BENEFITS" REQUIREMENT</u>**

18. Proposition 13 authored by California businessman Howard Jarvis is still very well-known some 40 years after its passage by California voters on June 6, 1978. It put limits on how high and how fast property taxes can climb and requires a vote of the people on new local taxes. After Prop 13's success, bureaucrats looked for ways to raise revenues while avoiding Prop 13's restrictions. They hit upon assessment districts, which were historically used to fund capital improvements that directly benefited property. Over time, bureaucrats molded assessments into property taxes that avoid Proposition 13's restrictions. The courts supported this artistry by ignoring the historical precedent demanding a link between assessments and a direct benefit to property. They held that assessments could be used for operational budgets and maintenance costs and were not covered by Proposition 13's limits and vote requirements. Because assessments could be imposed without a vote, they were attractive to local governments.

19. Thus, to close this loophole created by the bureaucrats and our courts, California voters approved Proposition 218 in November 1996, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution. Proposition 218 continued Proposition 13's legacy of protecting property owners from being the cash cow forced to fund most local services.

20. Local governments and Special Districts have now seized upon what they believe to be a new judicially created loophole. The San Bernardino County Fire Protection District now relies on a new ostensible loophole created by the Court of Appeal ruling in a case of first impression, *Citizens Assn. of Sunset Beach v. Orange Co. LAFCO* (2012) 209 Cal.App.4th 1182 (hereinafter "*Citizens Assn.*").

21. The facts in *Citizens Assn.* were markedly different than those underlying the instant Writ of Mandate. The court therein concluded Proposition 218 was not intended to require a two-thirds vote incident to annexations of territory by local governments. However, the court was only considering an "island annexation" by the County of Orange consisting of 133 acres, or approximately **<u>one-fifth of one square mile</u>**. By comparison, San Bernardino County is approximately 12.8 million acres in size, or **<u>20,105 square miles</u>**. It is the vast majority of this territory that San Bernardino County Fire District seeks to annex. In *Citizens Assn.* it was the case that the County of Orange was truly annexing a very small area. San Bernardino County Fire District is attempting the opposite by using a very small area which has voted a tax upon itself to "annex" the entire rest of the San Bernardino County which has had no say at all in being saddled with a special assessment. Thus, an area perhaps less than one percent of the size of San Bernardino County purports to "annex" the entire rest of the County. The court in *Citizens Assn.* may well have reached an opposite conclusion if confronted with the facts in this case, i.e. that in the largest county in California the tail cannot be permitted to wag the dog. If the holding in *Citizens Assn.* were held to apply to San Bernardino County then the bureaucrats will once again have found a loophole and achieved an end-run on the two-thirds vote requirement in the constitutional amendment created by Proposition 218.

22. *Citizens Assn.* is further inapposite because the tax imposed therein was unquestionably for a "special benefit" provided to real property, i.e. a 5% utility tax on the residents of Sunset Beach. Even if the two-thirds majority approval of taxed land owners is effectively circumvented by *Citizens Assn.*, it is still the case that special assessments must confer a "special benefit." A special assessment cannot be imposed on particular properties to make up for the projected County-wide SBCFD budget shortfall explained by Fire Chief Hartwig.

23. Nor can a special assessment be imposed for services not directly related to property. Clearly fire prevention services are specifically related to real property. However, other services related to *people* and/or the general public and not real property in a service area, such as police and medical emergency services, have repeatedly been held by our courts to be

unlawful under Proposition 218. The majority of calls to the San Bernardino County Fire Prevention District are not for fire prevention at all but, rather, medical emergency services. Like police services which cannot be specially assessed on property taxes, medical emergency services must be funded from the existing 1% maximum tax on real property or by ballot initiative.

24. Proposition 218 requires that local governments must make sure that no property owner's tax is greater than the proportionate cost to provide the property-related service to his or her parcel. This tax rate calculation requirement is referred to as the "proportionality" requirement of Proposition 218. The issue of voter approval aside, SBCFPD must differentiate the services it provides to benefit the general public in the form of medical services from the fire prevention services it provides to land owners. SBFPD must then determine the proportion of the projected budget shortfall directly attributable to fire prevention services in those specific areas to be assessed. It strains credibility that SBFPD has performed this calculation and come up with an assessment amount that *exactly* coincides with the $157.26 currently paid by those in Service District FP-5 who voted on the tax.

25. "For an assessment to be valid, the properties must be assessed in proportion to the special benefits received." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 456.) Under Proposition 218, the burden is on the local agency to demonstrate compliance with the special benefit and proportionality requirements thereunder. (Cal. Const., art. XIII D, § 4, subd. (f).) "[It] is not for a plaintiff challenging the validity of an assessment to place the special benefit and proportionality requirements in issue. These requirements are always in issue in any legal action challenging the validity of an assessment and the burden of demonstrating they have been met is always on the agency." (*Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, 1535.)

26. "There are several further grounds on which the Sunset Beach case, supra, is distinguishable and of no application here, so care should be taken not to misinterpret the Sunset Beach case and not to misapply its holdings. Although the annexation in the Sunset Beach case was upheld and although the tax there was extended to cover those in the annexed area without a

2/3-majority vote, that case is distinguishable, because it involved a very different factual situation. There:

> "In the Sunset Beach case, the City of Huntington Beach sought to annex the small adjoining strip of land known as Sunset Beach, '… *consisting of about 133 acres, … an unincorporated part of the County of Orange.*'" (Id., at 1185, emphasis added.)

The facts of the FP-5 expansion are different. Firstly, Huntington Beach is a City (which is one of only two statutorily-limited types of entity authorized by the empowering statute to use the procedures of Government Code § 57075; and this District is not the other type which might qualify because its Directors are appointed, not directly elected.) Secondly, the particular form of the reorganization being undertaken there was an annexation (as defined by Government Code § 56017) (which is one of only four statutorily-limited forms of reorganization qualifying to use the § 57075 procedures; and the other three clearly do not apply.) Thirdly, the size of the territory being annexed was "small", in fact so small that it was less than the 150-acre threshold contemplated by statute for so-called "island" annexations and therefore qualified for the truncated no-vote procedures applicable only to "island" annexations. Fourthly, the District is not a LAFCO "commission" so it does not qualify to use § 57075 anyway, whereas the Sunset Beach case involved the Orange County Local Agency Formation Commission (as a named defendant) applying the protest vote procedures to the annexation by the City. Therefore, unlike this Fire District, the City of Huntington Beach was successfully able to pass through each of the statutory pre-conditions specified at the beginning of § 57075 so as to avoid falling under the 2/3-majority vote procedures of Article XIII C of the California Constitution. In contrast, the SBFPD satisfies ***none*** of these threshold requirements, and is thus blocked from qualifying to use the § 57075 "protest vote" procedures.

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FIRST CAUSE OF ACTION

Writ of Mandate

27. Petitioner incorporates the allegations of the preceding paragraphs 1 through 26 as though fully set forth herein.

28. Petitioner is a member of the public and is personally interested in the outcome of these proceedings with a clear, present and substantial right to the relief sought herein. Petitioner has no plain, speedy and adequate remedy at law other than that sought herein.

29. Respondents have a clear, present and sacrosanct duty to comply with articles XIII C and XIII D to the California Constitution.

30. Petitioner has performed all conditions precedent to filing this petition.

31. Petitioner, and the general public, have been and continue to be harmed by Respondents' improper refusal to comply with articles XIII C and XIII D to the California Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for judgment by this Court as follows:

1. For the issuance of a peremptory Writ of Mandate directing Respondents to comply with Articles XIII C and XIII D to the California Constitution by requiring two-thirds majority voter approval . . .

2. In the alternative, for the issuance of an order to Respondents to show cause why the Court should not issue such a writ;

3. For attorneys' fees and costs of suit; and

4. For all other relief the Court deems proper.

Dated: October 11, 2018

Respectfully Submitted,

LAW OFFICE OF BRENT J. BORCHERT

By: Brent J. Borchert

Brent J. Borchert, Esq.
Attorney for Petitioner Ronald Austin

VERIFICATION

I, Ronald Austin, declare:

1. I am the Petitioner in the above-entitled action.

2. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE and know the contents thereof. The facts stated in the Petition are either true and correct of my own personal knowledge, or I am informed and believe that such facts are true and correct and, on that basis, I allege them to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 11, 2018, in Kramer Junction, California.

Ronald Austin

Ronald Austin