# New Developments in Special Assessment Law

*In the past, courts have routinely validated the determination of local bodies to construct improvements and their decision to finance them through special assessment districts. This article discusses recent developments in case law and new statutory construction which establish ways property owners can obtain court nullification of their assessments.*

Political subdivisions use special assessments[1] to finance the construction of public improvements that specially benefit a limited area within their jurisdiction. By using special assessments, a city can raise revenue to construct streets and sewers, or to develop local parks and playgrounds, or to acquire future water rights for one part of town without taxing the whole town.[2] When it so assesses property owners, a city imposes a proportionate share of the costs of constructing an improvement as a lien against individual pieces of property; if a property owner fails to pay an assessment, the city has the right to foreclose on the property to satisfy the lien. By imposing liens on individual pieces of property, a city ensures that those property owners who directly benefit pay the costs of the improvement.

Courts routinely validate the determination of local bodies to construct improvements and their decision to finance them through special assessment districts. In part, this results from liberal construction of statutes enacted in the early 1900's. Traditionally, deference to the local bodies has made it difficult for disgruntled property owners to successfully challenge special assessments. Courts have used the

1. A special assessment district, the subject of this article, is utilized by a preexisting political entity to define the area, benefited by special public improvements, which is to be assessed to pay the cost of the improvements. This article does not discuss special districts. A special district is an independent corporate entity governed by its own board of directors. The district exercises such powers and functions as may be conferred by the statute under which it is created. *See generally* Mullen, *The Use of Special Assessment Districts and Independent Special Districts as Aids in Financing Private Land Development*, 53 CALIF. L. REV. 364 (1965).

2. CAL. STS. & HY. CODE §§ 5101 and 10102 (West 1969); E. STURGIS, HANDBOOK FOR SPECIAL ASSESSMENT BONDS 3 (3d ed. 1968). These sources list other possible improvements, in addition to those named in the text, which can be financed through special assessments.

doctrine of waiver and a narrow scope of review to deny property owners relief. This article discusses recent developments in case law and new statutory construction which clearly establish ways disgruntled property owners should be able to avoid these traditional concepts generally applied by the courts to obtain court nullification of their assessments.

This article first describes through a hypothetical how a local government establishes a typical special assessment district. Working with this hypothetical, the article then examines the means for attaining court review of an allegedly defective assessment in face of a waiver allegation. Finally, the article suggests the appropriate standard of review for evaluating local body decisions concerning special assessment districts.

## I. ESTABLISHING A SPECIAL ASSESSMENT DISTRICT

The authority for local governments in California to levy special assessments derives primarily from two legislative acts: the Municipal Improvement Act of 1913[3] and the Improvement Act of 1911.[4] These acts set forth the procedures most commonly used for accomplishing the work of a local improvement and for levying assessments to pay for such work. Under the 1911 Act, a local body levies assessments after a contractor has fully completed the improvement and the costs are known.[5] Then the costs are distributed among those parcels benefited. Several hearings are held before and after the construction of the improvement for the property owners to assert any objections they may have.[6] In contrast, under the 1913 Act, a local body levies assessments before any work is done.[7] The amount of the assessment levied against each piece of property is based upon an estimate of the

3. CAL. STS. & HY. CODE §§ 10000-10610 (West 1969).

4. *Id.* §§ 5000-6794 (West 1969). The following general procedure is used to levy assessments under the Improvement Act of 1911 [hereinafter cited as the 1911 Act]. The project engineer prepares and files the improvement plans, specifications, and cost estimates with the county clerk. The local body passes a resolution announcing its intention to construct a public improvement. Afterwards, notice of the intended improvement is given to the property owners. After the notice is sent out, a hearing is held. If, after the hearing, the legislative body decides to proceed with the work, a resolution ordering the work is adopted. (After the hearing on the resolution, if the local body subsequently orders any changes in the work, another hearing is held.) The local body then awards the contract and gives notice of its award. At this time, property owners with grievances can again object. Afterwards, the contractor whose bid was selected proceeds with construction. Upon construction of the project, the cost is tentatively apportioned among the property owners. After appropriate notice, another hearing is held at which property owners may protest these tentative assessments. The protests of property owners ordinarily do not prevent the local body from affirming the assessment. When affirmed, a lien attaches to each piece of property involved. *Id.* §§ 5130, 5131, 5195, 5220, 5233, 5240, 5241, 5258, 5343, 5362, 5363, 5366, 5367, 5369, 5372 (West 1969).

5. *Id.* §§ 5360, 5366 (West 1969).

6. *Id.* §§ 5220, 5233, 5258, 5366 (West 1969).

7. *Id.* §§ 10310, 10312 (West 1969).

total cost of the completed improvement and the special benefits[8] accruing to each piece of property.[9] Property owners have only one opportunity for a hearing on possible grievances they may have.[10]

To understand the creation and function of a special assessment district, it is helpful to use a hypothetical.[11] Assume that the city council of Pleasant Valley decided that the homes adjacent to Chestnut Street needed a sewage line. The council determined that the best means of financing the construction of the new sewage line was to create a sewer assessment district according to the procedure specified in the California Municipal Improvement Act of 1913.[12] After consulting an engineer regarding the costs and benefits of the sewer,[13] the council mailed notices to property owners on Chestnut Street.[14] This notice informed them of the council's intention to create the assessment district and specified the date for a hearing on the proposed assessment.

On the date specified in the notice, the council held a hearing on two issues: first, whether to undertake the sewer improvement, and second, the projected amount of the assessment against each piece of property.[15] One week later the council voted to confirm the proposed assessment.[16]

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8. *See* text accompanying notes 61-67 *infra*.

9. CAL. STS. & HY. CODE § 10204 (West 1969).

10. *Id.* § 10355 (West 1969).

11. By illustrating the general procedures for establishing a special assessment district, this hypothetical serves as a basis for the remainder of the article.

12. CAL. STS. & HY. CODE §§ 10000-10610 (West 1969). Most assessments today are established pursuant to the California Municipal Improvement Act of 1913 [hereinafter cited as the 1913 Act]. Remarks Made to the California Society of Municipal Finance Officers and State Association of County Auditors, Marriott Hotel, Los Angeles and Nut Tree Restaurant, Vacaville (September 30 and October 1, 1976). Because the 1913 Act is more commonly used, it serves as the statutory basis for the assessment in the hypothetical.

13. The engineer's report includes: 1) plans and specifications of the proposed improvements; 2) maps and descriptions of lands, easements, and property which must be acquired; 3) a diagram of the assessment district; and 4) a proposed assessment of the estimated costs and expenses against the properties benefited. Once an estimate of the total cost has been obtained, a hearing is called by the local legislative body. CAL. STS. & HY. CODE §§ 10203, 10204, 10300, 10301 (West 1969).

14. *Id.* §§ 10302, 10303, 10304, 10306, 10307 (West 1969), provide in part that the notice requirements of the 1913 Act include: 1) notice by publication twenty days prior to the hearing; 2) posted notices on the streets in the proposed assessment district; and 3) detailed specific notices to each record property owner.

15. *Id.* § 10301 (West 1969) requires thirty days to elapse between the adoption of the resolution of intention and the public hearing.

16. When the legislative body confirms the assessment, a lien is created on the property. The property owners have 30 days in which to pay their assessments in cash. At the end of this period, bonds are issued to represent unpaid assessments. These bonds permit property owners to pay off the liens against their land in installments over a period of years. In this sense, bonds are roughly analogous to notes or mortgages which permit individuals to pay off obligations in installments. The different bond acts provide alternate ways of securing the indebtedness and of obtaining redress in case of delinquency or default. Improvement Act of 1911 (CAL. STS. & HY. CODE §§ 6400-6632 (West 1969) and the Improvement Bond Act of 1915 (CAL. STS. & HY. CODE §§ 8500-9481 (West 1969)). When the money is in the hands of the local government, the

After receiving notice of the assessment, some property owners desired to attack the assessment in court. Some felt that the assessment was too high, while others alleged that their property would receive no special benefit from the proposed sewer line. The remainder of this article discusses the obstacle that waiver of rights,[17] because of failure to appear at the scheduled hearing, presents to property owners and the recent developments which mitigate the effects of such waiver. The article then discusses the further problems presented to the property owners by the narrow standard of review presently used by the courts to validate special assessments. It proposes a standard of review for such assessments which is consistent with California courts' review of similar decisions of local governmental bodies.

## II. WAIVER

The first obstacle the residents of Chestnut Street must overcome in seeking review of Pleasant Valley's decision to specially assess their property is the doctrine of waiver. The courts have generally failed to reach the merits in most cases which have attacked special assessment districts by dismissing complaints on the ground that the plaintiffs waived their right to court review by failing to appear and protest at the local hearing. Currently there are some exceptions to this waiver doctrine. In addition, a recent class action suit successfully circumvented the doctrine. The following sections discuss the traditional ways around waiver and suggest new alternatives.

### *A. The Doctrine*

Under the waiver doctrine, property owners who do not appear and object before the local body at the hearing forfeit their rights to seek damages or to prevent completion of the work.[18] Moreover, if they did appear at the hearing, the court restricts property owners to grounds they presented in writing to the local board.[19] The basic reasoning behind these restrictions is that property owners must avail themselves of all administrative remedies[20] so that the local body receives notice of any objection and has an opportunity to act promptly upon

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contractor proceeds to do the work and receives cash progress payments as though he were completing a cash contract. CAL. STS. & HY. CODE §§ 10312, 10402.5, 10404, 10501, 10503 (West 1969).

17. CAL. STS. & HY. CODE §§ 10312, 10400 (West 1969).

18. *Id.* § 5152 (West 1969); Hutchinson Co. v. Coughlin, 42 Cal. App. 664, 672-73, 184 P. 435, 439 (1st Dist. 1919) (plaintiff failed to appear at the local hearing and the court found he had waived his right to court review).

19. Duncan v. Ramish, 142 Cal. 686, 696, 76 P. 661, 665 (1904) (objection was that the assessment district as fixed by the local body did not include all property fronting on the streets improved).

20. Roberts v. City of Los Angeles, 7 Cal. 2d 477, 493, 61 P.2d 323, 330 (1936); Lambert v. Bates, 137 Cal. 676, 679, 70 P. 777, 778 (1902).

it.[21]

### *B. Court Acknowledged Exceptions to the Waiver Doctrine*

In several decisions, courts have mentioned, in *dicta*, possible exceptions to the waiver doctrine.[22] For example, if a plaintiff can show that the local body had no "jurisdiction" to levy the assessment, the court will not apply the waiver doctrine.[23] No court has invalidated an assessment, however, for lack of jurisdiction of the local body. Courts have also stated that if a plaintiff can show there has been fraud, or the local body abused its discretion, or the assessment is "grossly unjust", the court will not apply the waiver doctrine.[24] So far, however, these exceptions have not materially aided property owners in contesting assessments.[25]

Other new ways are emerging to circumvent the waiver hurdle. For example, through the mechanism of the class action suit[26] *Harrision v.*

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21. *Id. See generally, California and Federal Administrative Due Process: Development, Interrelation and Direction*, 5 DAVIS L. REV. 1 (1972).

22. *See, e.g.*, Brydon v. City of Hermosa Beach, 93 Cal. App. 615, 624, 270 P. 255, 259 (2d Dist. 1928) and Hutchinson Co. v. Coughlin, 42 Cal. App. 664, 672-73, 184 P. 435, 439 (1st Dist. 1919) where the court found the plaintiffs had waived their rights to court review by failing to appear and protest before the local body when there was no fraud and the local body had jurisdiction to do the work.

23. Hutchinson Co. v. Coughlin, 42 Cal. App. 664, 672-73, 184 P. 435, 439 (1st Dist. 1919).

24. *Id.*

25. In only one case has the court set aside an assessment that was "manifestly" and "grossly unjust" upon its face without the property owners having protested before the local board. This case was a class action suit, in which some of the plaintiffs had protested before the local board. The court found the assessment to be unjust because there was no special benefit to justify the levying of the assessment. *See* Harrison v. Board of Supervisors, 44 Cal. App. 3d 852, 118 Cal. Rptr. 828 (1st Dist. 1975).

26. Code of Civil Procedure section 382 provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." CAL. CIV. PROC. CODE § 382 (West 1969). Under this statute, two requirements must be met to sustain a class action. The first is existence of an ascertainable class, and the second is a well-defined community of interest in the questions of law and fact involved. Vasquez v. Superior Court, 4 Cal. 3d 800, 809, 484 P.2d 964, 969, 94 Cal. Rptr. 796, 801 (1971); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 704, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967).

The *Harrison* Court was the first California court to recognize a class action suit for the purposes of contesting a special assessment district. It found that there was an easily ascertainable class consisting of property owners in the assessment district and that these property owners shared a well-defined community of interest in obtaining the invalidation of the assessment. The legal issues of whether the public improvement specially benefited the property owners in the assessment district and whether a valid formula had been used to spread the assessments were found to be "common questions," which did not have to be litigated separately for each property owner. The court stated that in light of these legal issues, the uniquenesses of the individual pieces of property involved were irrelevant. The court recognized that every property owner in the class was interested in acquiring a small assessment on his own property and a large assessment for other class members. However, the court found that this was not the type of adversity which would defeat a class action because all property owners are

*Board of Supervisors*[27] presents a creative solution to the problem of waiver. In *Harrison*, plaintiffs attacked an assessment established under the 1913 Act alleging lack of special benefit.[28] The court allowed the plaintiffs to raise this issue even though some of the plaintiffs, including the named plaintiffs, had failed to appear and protest at the local hearing and would have lacked standing had they brought the suit as individual plaintiffs.[29] The court found that, in substance, plaintiffs had exhausted their administrative remedies, since the board had learned of the class' objections from those members who had appeared and lodged objection. Therefore, the court did not bar the class action simply because not every member of the class raised objections at the hearing. It was sufficient that some members of the class had raised the objections, allowing the board to act to modify the assessment had it so desired. Because the suit was prosecuted on behalf of a class, the court did not use waiver or lack of standing to deny court review to those who had failed to object before the local body. As noted by the *Harrison* court, the class action suit may be the only way to protect most property owners from "inadvertent forfeiture of rights" due to failure to appear or object at the local hearing.[30]

Of course, the class action route will not be available to all property owners. Those who do not share in the class community of interest[31] but have a "peculiar" interest will not be able to participate in a class action suit and so will remain frustrated by the waiver hurdle. For example, assume that in our hypothetical, Bates and Barnwall (septic tank owners) failed to appear and protest at the local hearing. Each had been out-of-town on business on the day of the hearing. Crane and Conners (also septic tank owners), however, did appear at the local hearing. All four[32] agreed that their property will receive a special benefit[33] from the proposed sewer. All four complained, however, that the Pleasant Valley city council did not levy the assessments on their properties in proportion to[34] the special benefit they would receive. The protests of Bates and Barnwall are identical to those of Crane and Conners. Therefore, they share a "community of interest" and will be able to join in a class action suit to contest the assessment.

On the other hand, assume that Adams also failed to appear and protest at the local hearing, and that the waiver doctrine will prevent him from bringing suit as an individual. Adams interest is "peculiar"

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constitutionally bound to favor assessments in proportion to benefits. 44 Cal. App. 3d 852, 862-63, 118 Cal. Rptr. 828, 834-35 (1st Dist. 1975).

27. 44 Cal. App. 3d 852, 118 Cal. Rptr. 828 (1st Dist. 1975).
28. *See* text accompanying notes 61-67 *infra*.
29. 44 Cal. App. 3d 852, 860, 118 Cal. Rptr. 828, 833 (1st Dist. 1975).
30. *Id.* at 862, 118 Cal. Rptr. at 835.
31. *See* note 26 *supra*.
32. The use of four individuals is meant to qualify these individuals under section 382 of the Code of Civil Procedure to bring a class action suit. *See* note 26 *supra*.
33. *See* text accompanying notes 61-67 *infra*.
34. *See* note 51 *infra*.

in that he claims that he will receive no special benefit, because his property already connects to a sewer line. Since the class of property owners are seeking an adjustment of the assessment and not a nullification, Adams cannot join their class. Because he does not share a "community of interest" with Bates, Barnwall, Crane, and Conners, Adams seemingly has no means of contesting the assessment on his property. Thus, the *Harrison* class action mechanism will not be available to counteract the waiver doctrine when one resident seeks a different form of relief because of a different injury.

### *C. Alternative Arguments Against Waiver*

#### 1. Differences Between the 1911 and 1913 Act

Although Adams cannot join in the class action, there are other arguments Adams can use to get the court to review the merits of his case. First, Adams can point out that the 1913 Act, under which the Pleasant Valley city council established the sewer,[35] does not mandate waiver. While the 1911 Act specifically provides that a property owner must present his objections to the local body by filing a written protest,[36] there is no similar provision in the 1913 Act. Moreover, the 1911 Act expressly prohibits oral protests while the 1913 Act is silent on this issue.[37]

Furthermore, the policy behind waiver under the 1911 Act does not apply to assessments under the 1913 Act. Under the 1911 Act, the contractor has finished the work when the assessment proceedings begin,[38] and a strict waiver policy is necessary to protect the local body's ability to pay for an obligation already incurred. Under the 1913 Act, however, the local body makes no expenditures or commitments prior to assessment.[39] It, therefore, has no outstanding debt to finance. Thus, the rationale for a strict waiver policy under the 1911 Act is absent in assessments under the 1913 Act.

Moreover, the 1911 Act provides several opportunities for the property owners to protest at various stages of the proceedings.[40] While it may be reasonable to punish a property owner for failing to attend any of these hearings, it seems less reasonable to punish a property owner for failing to attend the single hearing provided for under the 1913 Act. In summary, since neither the statutory provisions of the 1913 Act nor

35. *See* text accompanying notes 12-15 *supra*.
36. Cal. Sts. & Hy. Code § 5259 (West 1969): All objections to any act or proceeding occurring prior to the time within which such objections are permitted to be filed in relation to the work, not made in writing and in the manner and at the time specified shall be waived if the resolution of intention to do the work has been actually published as provided in this division. *See also Id.* §§ 5233, 5258, 5366 (West 1969).
37. CAL. STS. & HY. CODE § 5220 (West 1969).
38. *Id.* §§ 5360, 5366 (West 1969).
39. *Id.* §§ 10310, 10312 (West 1969).
40. *Id.* §§ 5220, 5233, 5258, 5366 (West 1969).

the policy behind the Act mandates waiver, the court should not use the waiver rationale to dismiss complaints alleging defects in assessments established pursuant to the 1913 Act.[41]

In the event, however, that the court does not distinguish between the 1911 and the 1913 Acts, there are constitutional arguments for allowing Adams to proceed with his complaint. On the one hand, Adams can assert that he received inadequate notice. Alternatively, Adams can argue that constitutional defects cannot be waived.

2. Inadequate Notice

Procedural due process requirements demand that the local body give notice of the assessment hearing to those affected. The specific information constitutionally required in the notice,[42] other than the date and place for the hearing, has received little consideration in California case law, however. Generally, the notice must describe the specific parcels of property to be assessed.[43] This information is necessary to prepare owners to participate meaningfully in the hearing process.[44]

The assessment acts themselves require that the notice contain the following: 1) a description of the property to be assessed, 2) an estimate of individual assessments, 3) a statement that any person interested may file a protest, and 4) the time, place, and purpose of the

41. The *Harrison* court recognized the differences between the 1911 and the 1913 Acts. *See* 44 Cal. App. 3d 852, 860 n.1, 118 Cal. Rptr. 828, 833 n.1 (1st Dist. 1975).

42. Until the recent Fifth District Court of Appeal decision in Johnson v. Alma Inv. Co., notice by publication was thought to satisfy the requirements of procedural due process in an assessment proceeding. 47 Cal. App. 2d 155, 120 Cal. Rptr. 503 (5th Dist. 1975). The Johnsons had failed to pay their assessment because they had not actually received notice of the assessment. The city had merely published notice pursuant to the then existing statutory requirements. The defendant purchased the property at the city's foreclosure sale on the lien. The plaintiffs brought a quiet title action wherein the trial judge quieted title in favor of the defendant. Plaintiffs appealed alleging that they were deprived of their property without due process of law. The appellate court found notice by publication constitutionally defective, when the mailing address of the holder of title to the property was known. The appellate court then quieted title in favor of the plaintiffs.

The Johnson holding is based on the well-known United States Supreme Court case of Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950). The *Mullane* court held that the Constitution required "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. In language subsequently adopted by the *Johnson* court, the Supreme Court approved notice by publication only where it was not reasonably possible or practicable to give individual notice to all interested parties. *Id.* at 317.

43. Flynn v. Chiappari, 191 Cal. 139, 147, 215 P. 682, 685-86 (1923). (The resolution of intention which was posted and published failed to describe the property to be assessed and the court found such notice constitutionally defective. The court said that the mere fact that the records and files of the board of public works contained such description and that these were open to inspection did not remedy the defect.)

44. *Id.* (The court said such a description was necessary so that owners affected by the assessment may be accorded a real opportunity to be heard.)

local hearing.[45] But are these statutory requirements sufficient to satisfy constitutional scrutiny? The United States Supreme Court's decision in *Schroeder v. New York*[46] suggests that, in order to comply with due process, notice must contain additional information.

In *Schroeder*, New York City instituted a condemnation proceeding to divert a river from plaintiff's property. The notice explained neither the civil damage remedy open to the owners nor the time limitation for filing such a claim. After the period of limitation had run, plaintiff sued alleging that the defective notice deprived her of property without due process of law. The Court held that under the Due Process Clause of the fourteenth amendment the notice must contain an explanation of available courses of action for a property owner seeking damages and must state the applicable statute of limitation.[47]

As in *Schroeder*, adequate notice must protect a property owner's constitutional right to a proper special assessment. Therefore, the *Schroeder* court's discussion of the constitutional notice requirements suggests that California's assessment acts do not meet those requirements, because they fail to provide that the property owners be notified of two limitations on their right to court review. One limitation is that generally in California, a property owner who does not object to the special assessment at the local hearing waives the right to later sue.[48] A second limitation is that the 1913 Act requires plaintiffs to file challenges within thirty days after the establishment of a special assessment district.[49] Without notice informing property owners of their rights to court review and of these limitations on this right, property owners could be deprived of important rights[50] without an opportunity for judicial review.

In the hypothetical, the mailed notice to the property owners along Chestnut Street complied with California's statutory requirements.

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45. CAL. STS. & HY. CODE §§ 5132, 5195, 10303, 10307 (West Cum. Supp. 1977).
46. 371 U.S. 208 (1962).
47. *Id.* at 214.
48. *See* text accompanying notes 18-21 *supra*.
49. CAL. STS. & HY. CODE § 10400 (West 1969) provides:

> The validity of an assessment or supplementary assessment levied under this division shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the assessment is levied. Any appeal from a final judgment in such an action or proceeding shall be perfected within 30 days after the entry of judgment.

In Bliler v. San Diego, 61 Cal. App. 3d 530, 132 Cal. Rptr. 185 (4th Dist. 1976), plaintiffs challenged the 30 day limitation as to appeal from a final trial court judgment. Plaintiffs had filed their appeal to the appellate court 37 days after final judgment by the trial court on the assessment. The assessment district challenged was formed pursuant to the San Diego Park District Procedural Ordinance of 1969, which incorporates by reference the Municipal Improvement Act of 1913. Plaintiffs argued that there should be a 60 day limit for appeal from a judgment pursuant to the Cal. Rules of Court, rule 2a. The court rejected this argument and reaffirmed the 30 day limitation as to appeal from a final judgment. The constitutional issue was not raised.

50. *See* text accompanying note 51 *infra*.

The notice, however, did not inform the property owners of the following: 1) if they do not personally raise objections to assessments at the local hearing, they lose the right to object, and 2) if they wish to contest the assessment after it is levied, they must file their complaints in superior court within thirty days of the establishment of the special assessment district. Because their notice was deficient according to *Schroeder*, any disgruntled property owners, including Adam, who failed to attend the local hearing or file their complaints within the thirty day period could argue that they have been deprived of their constitutional right to receive adequate notice and that therefore their assessments should be invalidated.

### 3. The Waiving of Constitutional Defects

In the event that the court rules adversely on the notice issue, Adams might still prevail by claiming the assessment is constitutionally deficient[51] because of "lack of special benefit".[52] He could argue that such defect cannot be waived. In California, there has been no express ruling on whether the right to assert constitutional defects in assessment proceedings can be waived.[53] In some jurisdictions, par-

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51. There is United States Supreme Court authority in Norwood v. Baker, 172 U.S. 269 (1898) for the proposition that assessment without special benefit violates the Due Process Clause of the United States Constitution. In *Norwood*, the Supreme Court specifically held as follows:

> [T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be a material character, ought not be be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

The California Supreme Court in Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217 (1915) recognized that the absence of special benefit renders an assessment constitutionally invalid. For further discussion of the *Spring* case, *see* text accompanying notes 68-71 *infra*.

52. Though special benefit has not been precisely defined by the courts, the best test for special benefit seems to be an enhancement in the land's market value because of the construction of the improvement in question. In looking for an enhancement in market value, courts generally consider the land's reasonable potential uses as well as its present use. Auburn Lumber Co. v. City of Auburn, 258 Cal. App. 2d 732, 737-38, 66 Cal. Rptr. 58, 62 (3d Dist. 1968); Jeffery v. City of Salinas, 232 Cal. App. 2d 29, 36, 42 Cal. Rptr. 486, 492 (1st Dist. 1965); Howard Park Co. v. City of Los Angeles, 119 Cal. App. 2d 515, 522, 529 P.2d 977, 981-82 (2d Dist. 1953). For further discussion of special benefit, *see* text accompanying notes 63-71 *infra*.

53. In Noyes v. Chambers & DeGolyer, 202 Cal. 542, 261 P. 1007 (1927), the California Supreme Court may have offered some guidance on whether constitutional defects can be waived. In *Noyes*, plaintiffs who had failed to appear at the local hearing, asserted that the assessment district created consisted of two separate and distinct sections of the city and that work performed in each section was without benefit to the other. The court refused to review the assessment, because it found that the plaintiffs had waived their right to assert lack of benefit.

However, in the *Noyes* case, each assessed section apparently did receive special benefits from the improvement constructed in that section. Therefore, Noyes did not really decide the issue of whether a complete lack of special benefit could be waived.

ties may raise constitutional defects in assessment proceedings at any time and objection before the local body is not a prerequisite.[54] In other jurisdictions, however, the court will not consider on appeal constitutional grounds which the parties failed to present before the local body, even though they might be sufficient to invalidate the assessment.[55]

California courts have stated that certain objections to assessment proceedings are so important that they cannot be waived by failure to raise them before the local body.[56] The courts have described these defects as "jurisdictional". "Jurisdictional" defects include constitutional defects as well as some nonconstitutional defects.[57] Thus, property owners should be able to assert the constitutional defects of lack of notice,[58] lack of opportunity for protest,[59] or lack of "special benefit"[60] without having to appear at the local hearing.

In summary, property owners wishing to challenge special assessments have been unable to use successfully the court enunciated exceptions to the waiver doctrine. The court's recent utilization of the class action suit as a means of avoiding the waiver doctrine will give relief to some property owners. When the class action device is unavailable, property owners can argue that the waiver doctrine should not be applied to the 1913 Act. Alternatively, they can allege that they received constitutionally defective notice and consequently an insufficient opportunity to be heard. If these theories are unsuccessful, the property owners can argue that allegations of constitutional defects cannot be waived. These means for surmounting the waiver doctrine should ensure increased court review of special assessment challenges.

## III. JUDICIAL REVIEW

Assuming that the property owners in the hypothetical overcome the waiver hurdle, the courts must then decide the merits of their case. Of course, in the case where the notice is initially challenged, if the California Supreme Court is persuaded by *Schroeder,* the court will invalidate the assessment upon its finding of a lack of procedural due process and will not, in effect, reach any substantive merits of the

54. *E.g.*, City of Charlotte v. Brown, 165 N.C. 435, 81 S.E. 611, 612 (1914).

55. *E.g.*, Tjaden v. Town of Wellsburg, 197 Iowa 1292, 198 N.W. 772, 772-73 (1924).

56. Southlands v. San Diego, 211 Cal. 646, 656, 297 P. 521, 526 (1931).

57. The following have been said to be "jurisdictional": 1) the property to be assessed must be within the "jurisdiction" of the local board, 2) there must be actual performance of some work to be paid for by the property owners, 3) an assessment of the amount to be raised must be made, and 4) sufficient notice and opportunity must be given for the hearing and determination of grievances and objections "to constitute due process of law." Chase v. Trout, 146 Cal. 350, 360-61, 80 P. 81, 85 (1905).

58. *Id.* The *Chase* Court relied on both the state and federal constitution.

59. *Id.*

60. *See* text accompanying notes 51 *supra* and 63-71 *infra*.

petitioners' complaint. However, in all other cases—those where the claimants avoided waiver by one of techniques discussed in the preceding section or those where the claimants lodged objection with the local governmental body to no avail and now seek to challenge in court the merits of the assessment—the court will have to reach a decision based on the substantive merits of the complaint before them. The only viable substantive means for attacking a special assessment is to allege that the assessment was rendered without regard to special benefit.[61] The constitutional right to special benefit[62] is of little value without judicial review of the determination of that benefit. Whether any of the property owners in the hypothetical receive relief depends in large measure upon the standard of review with which the court examines their allegations. The following section proposes a standard of review for such assessments which is consistent with California courts' review of similar decisions of local governmental bodies.

### *A. Special Benefit*

The courts have yet to define precisely the term special benefit. Early courts determined the existence and amount of benefit by the effect of the improvement on the market value of the property assessed.[63] More recent decisions have refined this early test for special benefit by looking to the enhancement of the land's market value in relation to its reasonable potential uses as well as its present use.[64] Probably the best indication of "enhancement" is a potential increase in the market value of the property.[65]

Courts have said the project size is not decisive of the question of special benefit.[66] For example, local bodies may finance street lights throughout a city or a large recreation park by means of a special assessment. Similarly, courts have stated that the size of the assessment district is equally insignificant.[67] Thus, the entire city may comprise an assessment district and all the owners of private lots therein may pay assessments to finance the improvement.

The absence of special benefit renders an assessment constitutionally invalid. In *Spring Street Company v. City of Los Angeles*,[68] the

61. *See* text accompanying notes 61 *supra* and 63-71 *infra*.
62. *See* text accompanying notes 51 *supra* and 63-71 *infra*.
63. Federal Construction Co. v. Ensign, 59 Cal. App. 200, 212, 210 P. 536, 541 (2d Dist. 1922). (The improvement was enlargement of a city's sewage disposal plant.)
64. Auburn Lumber Co. v. City of Auburn, 258 Cal. App. 2d 732, 737-38, 66 Cal. Rptr. 58, 62 (3d Dist. 1968); Jeffery v. City of Salinas, 232 Cal. App. 2d 29, 36, 42 Cal. Rptr. 486, 492 (1st Dist. 1965); Howard Park Co. v. City of Los Angeles, 119 Cal. App. 2d 515, 522, 529 P.2d 977, 981-82 (2d Dist. 1953).
65. *Id.*
66. *See, e.g.*, Federal Construction Co. v. Ensign, 59 Cal. App. 200, 215, 210 P. 536, 542 (2d Dist. 1922). (The project was the enlargement of the city's sewage disposal system.)
67. *Id.*
68. 170 Cal. 24, 148 P. 217 (1915). The *Spring* court does not articulate the

California Supreme Court held that state and local legislatures can only establish special assessment districts after a determination, on a lot-by-lot basis, that special benefit will inure to the assessed property. Otherwise, the *Spring* court reasoned, the assessment would be an unjust tax upon a minority of property owners that could not be justified by the "general benefit" inuring to the public as a whole.[69] The *Spring* court concluded that "the compensating benefit to the property owner is the warrant, and the sole warrant for the legislature to impose the burdens of the special assessments."[70] Both the 1911 and the 1913 Acts reflect the *Spring* court's holding by defining the "assessment district" as the "district of land to be benefited by the improvement and to be specially assessed to pay the costs and expenses of the improvement."[71]

Assume that in the initial hypothetical, Adams owns property adjacent to Chestnut Street. His backyard borders on Chestnut, and his house is connected to an existing sewage line in front of his house. Adams' neighbors facing Chestnut have been relying on septic tanks. When Adams received notice that the town had levied the assessment on his property, he filed a complaint in superior court. In it he stated that his house was already connected to a relatively new sewer line on the street in front of his property. He alleged that his property, therefore, could not receive enhancement as a result of its connection to a second sewer line.

Adams should be able to show that, in light of the present use made of his property or any foreseeable reasonable use that might evolve, his property would not receive any special benefit from connection to an additional sewer line. In other words, his property value would not increase from his property's connection to a second sewer line. Furthermore, Adams would not receive any special benefit from his

constitutional basis on which the right to special benefit rests. Later courts have cited *Spring* for the proposition that assessment without benefit violates the Due Process Clause. *See, e.g.*, City of Plymouth v. Superior Court of Amador County, 8 Cal. App. 3d 454, 464, 86 Cal. Rptr. 535, 541, 87 Cal. Rptr. 240 (3d Dist. 1970). There is United States Supreme Court authority in Norwood v. Baker, 172 U.S. 269 (1898) for the proposition that assessment without special benefit violates the Due Process Clause of the United States Constitution. *See* note 51 *supra*.

69. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 30, 148 P. 217, 219 (1915). *Accord*, Roberts v. City of Los Angeles, 7 Cal. 2d 477, 491, 61 P.2d 323, 329 (1936) and Lloyd v. City of Redondo Beach, 124 Cal. App. 541, 546-47, 12 P. 2d 1087, 1090 (1st Dist. 1932).

70. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 30, 148 P. 217, 219-20 (1915). *See also*; San Diego Gas & Elec. Co. v. Sinclair, 214 Cal. App. 2d 778, 783, 29 Cal. Rptr. 769, 772 (4th Dist. 1963) and Safeway Stores, Inc. v. City of Burlingame, 170 Cal. App. 2d 637, 645, 339 P.2d 933, 938 (1st Dist. 1959). In contrast, where a general *ad valorem* tax is imposed upon property within a special taxing district, a special benefit need not accrue to such property by reason of its inclusion within the district. The only benefit required for such a tax for compliance with due process is the advantage conferred upon all lands within the district, People v. City of Palm Springs, 51 Cal. 2d 38, 47-48, 331 P.2d 4, 9-10 (1958); Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 216, 183 P. 809, 811 (1919).

71. CAL. STS. & HY CODE §§ 5343, 10008 (West 1969).

neighbors' connection to the new sewer line; his property would receive only the same general benefit received by other members of the neighborhood. As previously noted, such a benefit cannot justify a special assessment. Consequently, Adams has valid grounds for attacking the assessment. His relief, however, will depend on the standard of review the court uses to evaluate his assessment.

### *B. Standard of Review*

When ruling on the validity of a local body decision, California courts have employed varying standards of review, depending upon whether they deemed the decision reached by the local entity legislative or quasi-judicial. A legislative decision constitutes a declaration of public purpose and makes provision for the ways and means to accomplish it.[72] A quasi-judicial decision involves the exercise of judicial discretion by a local body[73] in determining an individual's legal rights based on specific facts.[74] Courts have found that the adoption of a general plan by a local body is a legislative decision.[75] According to this definition, the court has characterized as legislative the decision to adopt a zoning ordinance.[76] By analogy, a local body's decision to construct a public improvement and create an assessment district is legislative in nature.[77] On the other hand, courts have characterized the decisions to grant or deny a zoning variance[78] or a conditional use permit[79] as quasi-judicial.[80] In making these determinations, the local

72. Mefford v. City of Tulare, 102 Cal. App. 2d 919, 925-26, 228 P.2d 847, 851 (4th Dist. 1951), quoting from McKevitt v. Sacramento, 55 Cal. App. 117, 124, 203 P. 132, 135-36 (1st Dist. 1921).

73. BLACK'S LAW DICTIONARY 1411 (rev. 4th ed. 1968).

74. Wulzen v. Board of Supervisors, 101 Cal. 15, 24, 35 P. 353, 356 (1894); Smith v. Strother, 68 Cal. 194, 196-98, 8 P. 852, 853-54 (1885); Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 729, 135 Cal. Rptr. 588, 590 (4th Dist. 1977).

75. Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 728, 135 Cal. Rptr. 588, 590 (4th Dist. 1977).

76. *Id.* citing CAL. GOV'T CODE §§ 65300, 65850 (West 1966).

77. *See* Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 17, 120 P. 780, 782 (1912).

78. A master zoning ordinance establishes the basic uses permitted within the particular zoned area. The ordinance also enumerates certain other uses known as "exceptions" which do not comply with the ordinance but which may nonetheless be permitted upon application and hearing. One type of use exception is a variance. The essential requirement of the variance is a showing that strict enforcement of the zoning limitations would cause unnecessary hardship. Tustin Heights Ass'n v. Orange County, 170 Cal. App. 2d 619, 626-27, 339 P.2d 914, 919 (4th Dist. 1959).

79. Another exception to the master zoning ordinance is a conditional use permit. A conditional use may be permitted if it is shown that its use is essential or desirable to the public convenience or welfare and at the same time it will not impair the integrity and character of the zoned district. It must also be shown that it is not detrimental to public health, public morals, or public welfare. *Id.* at 626, 339 P.2d at 919.

80. *See* San Diego Building Contractors Ass'n v. City Council, 13 Cal. 3d 205, 212-13 n.5, 529 P.2d 570, 574 n.5, 118 Cal. Rptr. 146, 150 n.5 (1974); Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 512, 522 P.2d 12, 15, 113 Cal. Rptr. 836, 839 (1974).

body must consider an individual's rights according to specific circumstances and apply the law in light of particular facts such as size, location, and surroundings.[81] When a local body levies an assessment, it must make a specific finding that an individual's property receives a special benefit.[82] This finding decides the individual property owner's rights under the general plan to create a special assessment district. This decision is therefore quasi-judicial in nature and quite different from the local body's decision generally to form an assessment district which is a legislative one.

The characterization of a particular decision is crucial. If the decision made by the board was legislative, then the court must test the decision by the narrow "arbitrary and capricious" standard set forth in the Code of Civil Procedure section 1085.[83] Under this standard, in order to receive relief, a plaintiff must demonstrate by clear and convincing evidence that the local body abused its discretion.[84] If the decision was quasi-judicial in nature, however, the standard is either the independent judgment rule or the substantial evidence test set forth in the Code of Civil Procedure section 1094.5.[85] Since the decision as to whether a particular property owner receives a special benefit is quasi-judicial in nature,[86] it should be subject to review under one of the two tests set forth in the Code of Civil Procedure section 1094.5.[87]

The two standards of review set forth in the Code of Civil Procedure section 1094.5 are the independent judgment rule and the substantial evidence test. When the independent judgment rule applies, the trial court reweighs the evidence in a trial *de novo*; the appellate court decides if there is substantial evidence to support the trial

81. CAL. GOV'T CODE § 65906 (West 1969).

82. *See* text accompanying notes 58-73 *supra*.

83. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 34 n.2, 520 P.2d 29, 33 n.2, 112 Cal. Rptr. 805, 809 n.2 (1974).

84. *See* Centinela Valley Secondary Teachers Ass'n v. Centinela Valley Union High School Dist., 37 Cal. App. 3d 35, 112 Cal. Rptr. 27 (2d Dist. 1974). In order to clearly establish abuse of discretion, a plaintiff must show that discretion has been exercised to an end or purpose not justified by and clearly against reason. Crummer v. Beeler, 185 Cal. App. 2d 851, 858, 8 Cal. Rptr. 698, 702 (1st Dist. 1960).

85. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 44-45, 520 P.2d 29, 40, 112 Cal. Rptr. 805, 816 (1974).

86. *See* text accompanying notes 78-82 *supra*.

87. California Code of Civil Procedure section 1094.5 specifies that decisions ". . . made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the . . . board" are to be reviewed under one of its two tests. CAL. CIV. PROC. CODE § 1094.5 (West Cum. Supp. 1977). The Municipal Acts, which set forth the procedures for accomplishing the work of a local improvement and for levying the assessment to pay for such work, require that notice be given and a hearing held in which property owners have an opportunity to voice their complaints. *See, e.g.*, CAL. STS. & HY. CODE §§ 5132, 10301 (West 1969). Thus, "by law", a hearing is required in assessment proceedings. Therefore, under the terms of § 1094.5, the decision to assess a particular piece of property qualifies for review under one of the tests set forth in § 1094.5.

court's findings.[88] On the other hand, if the substantial evidence test applies, both the trial and appellate courts limit their review to whether substantial evidence supports the agency's findings.[89]

Courts reserve the independent judgment test for those situations[90] where the decision of the local body affects any "fundamental, vested right" acquired by the plaintiffs.[91] In determining what is fundamental, the court considers not only the economic aspects involved but also "the effect . . . in human terms and the importance of it to the individual in the life situation."[92] The right must involve a right to property or livelihood before it can be considered legitimately acquired or "vested."[93]

Arguably, a property owner's constitutional right to be free from special assessment absent special benefit is a vested and fundamental right. This finding would rest on the recognition that special benefit is a constitutional requirement.[94] Persons assessed face more than a costly tax lien; they also risk the actual loss of their property, through foreclosure, if the assessment goes unpaid. When this loss is threatened because of a high assessment without compensating special benefit, the court should exercise independent judgment in a trial *de novo* on the existence of special benefits.

It is likely that a court will find that the decision to specially assess property does not affect a vested fundamental right, especially when the loss of the family home is not at issue.[95] In that event, the substantial evidence test would govern. The substantial evidence test gives an aggrieved property owner a much greater opportunity to overturn a local body's decision than the test currently used by the court. The California Supreme Court has recently broadened this

88. Moran v. State Board of Medical Examiners, 32 Cal. 2d 301, 308, 196 P.2d 20, 25 (1948).

89. Neely v. California State Personnel Bd., 237 Cal. App. 2d 487, 489, 47 Cal. Rptr. 64, 66 (1st Dist. 1965).

90. Bixby v. Pierno, 4 Cal. 3d 130, 144, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971).

91. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 32, 520 P.2d 29, 31, 112 Cal. Rptr. 805, 807 (The court found that the county employees' retirement board holding that decedent's death did not arise out of and in the course of his employment was a fundamental right.); Bisby v. Pierno, 4 Cal. 3d 130, 143-44, 481 P.2d 242, 251, 93 Cal. Rptr. 234, 243 (1971) (The court found the decision of the Commissioner of Corporations approving a recapitalization plan intended to insure continuity of ownership of family corporations and providing for creation of a new class of common stock to be exchanged for old common shares did not involve any fundamental right.)

92. Bixby v. Pierno, 4 Cal. 3d 130, 144, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971).

93. *Id.*

94. *See* text accompanying notes 68-69 *supra*.

95. In Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 510 n.1, 522 P.2d 12, 14 n.1, 113 Cal. Rptr. 836, 837 n.1 (1974), the court found that a local body's decision as to the granting of a zoning variance did not touch upon any fundamental vested right. The variance was for a 93-space mobile home part in an

substantial evidence standard to the benefit of aggrieved plaintiffs.[96] Before 1970, in substantial evidence test cases, courts generally upheld local findings if there was any substantial evidence, contradicted or uncontradicted, to support such findings.[97] In 1970, the California Supreme Court made it clear that the so-called "isolation" test[98] was outmoded. The court held that the substantial evidence test requires the trial court to review the entire evidentiary basis of a local body's decision.[99] This includes all relevant evidence in the record, including evidence that "fairly detracts" from the evidence supporting the local body's decision.[100] This involves some weighing of the evidence to make a fair estimate of the worth of the testimony. Under this test, a court may overturn the local decision if the evidence supporting the decision is not credible or, though credible, is overwhelmed by conflicting evidence.[101] Therefore, under the current substantial evidence rule, a local body has the burden of producing evidence in the record that, even in the face of all contradictory evidence, reasonably inspires confidence in the decision it reached. This standard of review gives an aggrieved property owner a much greater opportunity to overturn the local body's decision.

The California Supreme Court in *Dawson v. Town of Los Altos Hills*[102] recently failed to take into account the modern development in California law with respect to reviewing local decisions.[103] The *Dawson* court stated that the scope of judicial review with respect to special assessment districts is "quite narrow".[104] It then formulated the scope of review in language traditionally reserved for the review of

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area zoned for light agriculture and single family residence. The *Topanga* court used the substantial evidence test in reviewing the local decision. The decision to specially assess an individual's property is more like the decision to grant or deny a zoning variance than the types of decisions which courts have found affect a fundamental vested right. *See, e.g.*, Rigsby v. Civil Serv. Comm'n, 39 Cal. App. 3d 696, 115 Cal. Rptr 490 (2d Dist. 1974) (dismissal of county employee subject to independent judgment test); Brush v. City of Los Angeles, 45 Cal. App. 3d 120, 119 Cal. Rptr. 366 (2d Dist. 1975) and Salyer v. County of Los Angeles, 42 Cal. App. 3d 866, 116 Cal. Rptr. 27 (2d Dist. 1974) (there is a vested fundamental right to continued public employment).

96. *See* Bixby v. Pierno, 4 Cal. 3d 130, 149, 481 P.2d 242, 255-56, 93 Cal. Rptr., 234, 247-48 (1971).

97. *See, e.g.*, Thompson v. City of Long Beach, 41 Cal. 2d 235, 259 P.2d 649 (1953).

98. The isolation test involves isolating the evidence that supports the agency's findings and disregarding any conflicting relevant evidence in the record.

99. LeVesque v. Workmen's Compensation Appeals Bd., 1 Cal. 3d 627, 637, 463 P.2d 432, 438-39, 83 Cal. Rptr. 208, 214-15 (1970), interpreting LAB. CODE § 5952, a provision similar to its counterpart in CAL. CIV. PROC. CODE § 1094.5 [c].

100. This was the holding in Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-90 (1951) which was cited with approval in Bixby v. Pierno, 4 Cal. 3d 130, 149 n.22, 481 P.2d 242, 255-56 n.22, 93 Cal. Rptr. 234, 247-48 n.22 (1971).

101. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

102. 16 Cal. 3d 676, 547 P.2d 1377, 129 Cal. Rptr. 97 (1976).

103. *See* text accompanying notes 83-93 *supra*.

104. 16 Cal. 3d 676, 683-84, 547 P.2d 1377, 1381-82, 129 Cal. Rptr. 97, 101-02 (1976).

legislative decisions, and suggested that this was the appropriate scope of review for all local decisions regarding special assessment districts. First the *Dawson* court stated that the local body is the "ultimate authority" to determine special benefits.[105] Then the court set forth the following narrow scope of review test:

> [A] court will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment as finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed.[106]

This test, first announced in 1887,[107] does not consider subsequent developments allowing broader review of local decisions. With the enactment of section 1094.5 in 1945 and its subsequent interpretation,[108] the standard for judicial review of local board and agency decisions changed substantially.[109] The local body is no longer, as the *Dawson* court asserted, the "ultimate authority" in determining the adequacy and existence of special benefits. The decision as to the existence of individual special benefits is quasi-judicial in nature[110] and courts therefore should review these decisions under one of the two tests set forth in section 1094.5.[111]

In setting forth its narrow scope of review, the California Supreme Court in *Dawson v. Town of Los Altos Hills*[112] purported to follow *Harrison v. Board of Supervisors*.[113] In so doing, the *Dawson* court failed to recognize that the *Harrison* court used the substantial evidence test to consider and weigh contradictory evidence in the record. It also failed to note that the *Harrison* court, in accordance with section 1094.5, placed the burden of proof on the local body.[114] The outdated scope of review test used in *Dawson* places the burden of

105. *Id.* at 684, 547 P.2d at 1382, 129 Cal. Rptr. at 102, citing Duncan v. Ramish, 142 Cal. 686, 691, 76 P. 661, 663 (1904).

106. 16 Cal. 3d at 685, 547 P.2d at 1382-83, 129 Cal. Rptr. at 102-03.

107. Lent v. Tillson, 72 Cal. 404, 429, 14 P. 71, 81 (1887).

108. *See* Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 32, 520 P.2d 29, 31, 112 Cal. Rptr. 805, 807 (1974); Bixby v. Pierno, 4 Cal. 3d 130, 143-44, 481 P.2d 242, 251, 93 Cal. Rptr. 234, 243 (1971).

109. CAL. CIV. PROC. CODE § 1094.5 (West 1969). The decision of a local body to initiate and levy an assessment is an administrative decision within the meaning of § 1094.5 and *Bixby* and *Strumsky*. *See* Harrison v. Board of Supervisors, 44 Cal. App. 3d 852, 858, 118 Cal. Rptr. 828, 831 (1st Dist. 1975). Also, according to 2 CAL. JUR. 3d *Administrative Law* § 2 (1973), the local body's decision and activities in imposing or equalizing assessment are administrative in nature.

110. *See* text accompanying notes 78-82 *supra*.

111. CAL. CIV. PROC. CODE § 1094.5 (West 1969).

112. 16 Cal. 3d 676, 547 P.2d 1377, 129 Cal. Rptr. 97 (1976).

113. 44 Cal. App. 3d 852, 118 Cal. Rptr. 828 (1st Dist. 1975).

114. *See* Topanga Ass'n for a Scenic Community v. Los Angeles County, 11 Cal. 3d 506, 514, 522 P.2d 12, 16, 113 Cal. Rptr. 836, 840 (1974). Indeed, had the *Harrison* court used the outdated test of review, the assessment would have been upheld. The evidence in the record the Harrison court found convincing enough to cause it to invalidate the assessments was the testimony of property owners. In cases decided by courts using the old test of review, the testimony of the property owners had been

proof on the property owners to show that they received no special benefit.[115]

In *Harrison v. Board of Supervisors*,[116] the court reviewed the record of the assessment proceedings to determine whether any special benefit would accrue from the proposed drainage system improvement. The draining system was purportedly to prevent street flooding during the rainy season when water drained from adjacent property.[117] In examining the evidence, the *Harrison* court took note that the record contained testimony from people who claimed that there was no excess water problem in their immediate vicinity.[118] In considering this testimony, the *Harrison* court concluded that even if special benefit existed as to some property owners,[119] "they would hardly warrant assessment of all properties in the area regardless of whether they were benefited."[120] In reviewing the local decision, the court weighed the local body's evidence, consisting of the engineer's report, with the contradictory testimony in the record. In so doing, the court found that the board had not supported, with substantial evidence in the record, its finding of a special benefit to all the properties assessed. In other words, the court found that, in light of the persuasive contradictory evidence, the local body's evidence did not reasonably inspire confidence in the decision it reached.

The court should follow the *Harrison* court's example and review an alleged defect of constitutional dimension, such as no special benefit, under either the independent judgment test or the substantial evidence test. Constitutional rights are too important to relegate to local authority. As the consequences of lack of review become more onerous, judicial intervention becomes increasingly warranted. If a court failed adequately to review a local decision on special benefit, a local body may assess property owners in violation of their constitutional rights. Therefore, a court should be more willing to review an assessment when allegations concern special benefit than it would be to review an alleged defect not involving the deprivation of a constitutional right.

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insufficient to convince courts that they could "plainly see" that the assessment was not levied with respect to special benefit. *See, e.g.*, Cutting v. Vaughn, 182 Cal. 151, 187 P. 19 (1920); Jeffrey v. City of Salinas, 232 Cal. App. 2d 29, 42 Cal. Rptr. 486 (1st Dist. 1965).

115. *See* text accompanying notes 63-71 *supra*.

116. 44 Cal. App. 3d 852, 118 Cal. Rptr. 828 (1st Dist. 1975).

117. *Id.* at 858, 118 Cal. Rptr. at 831.

118. *Id.*

119. The *Harrison* court noted that there was no evidence in the record of floodings on the private properties themselves. In light of this lack of evidence, the court stated that under the special benefit rule, the fact that the flooding was cause by the property from which the rainwaters drain was not a sufficient basis for levying a special assessment. However, the court went on to state that it was possible that a special benefit would accrue from the draining in that there would be increased facilitation of ingress and egress from the property. *Id.* at 858, 118 Cal. Rptr. at 831-32.

120. *Id.* at 858, 118 Cal. Rptr. at 832.

It is possible to limit the *Dawson* court's holding as to the appropriate standard of review in special assessment cases to its rather unique facts. Because of this unique factual situation, the court itself noted that it was reviewing a "peculiarly legislative" decision.[121] In *Dawson*, the town council executed a contract in 1968 to acquire water rights in another town's water system. When the town council found it could not meet its monetary obligation under the contract, it formed a sewer assessment district to finance the contract obligation.[122] Plaintiff property owners challenged the sewer assessment district as a whole and not the individual assessments.[123] In fact, the property owners conceded that they received special benefits from the sewer,[124] but contended that their special benefits inured when the town council executed the agreement acquiring the rights in 1968—not in 1971 when the town council levied the assessments as a means of meetings its obligation under the earlier agreement. In short, the property owners alleged that the assessment was improper because no new benefits inured to their properties with the formation of the assessment district.[125] The issue of the existence of special benefits for particular property owners was not before the court; the *Dawson* court was reviewing only the legislative decision of the town council to establish the assessment district. Therefore, *Dawson* is distinguishable from the case where a property owner is seeking to exempt himself from an assessment because he received no special benefit. *Dawson* was, in fact, a legislative decision properly reviewed under the arbitrary and capricious test. It should not control, however, when individuals challenge assessments for lack of special benefit.

In the future, when a property owner alleges lack of special benefit, the court should recognize that the local body's decision with respect to individual special benefits is quasi-judicial. At that juncture, the court must decide whether the independent judgment or substantial evidence test applies. If the court finds that a property owner has a fundamental vested right to have his property free from special assessment unless he receives special benefit, it will make independent findings in a trial *de novo*. On the other hand, if the court applies the substantial evidence test, it will limit its review to whether the local body's decision is supported by substantial evidence in light of the whole record. In either event, the code mandates that the court place

121. 16 Cal. 3d 676, 685, 547 P.2d 1377, 1382, 129 Cal. Rptr. 97, 102 (1976).

122. General principles of equity and fair play might not condone such "after the fact action" on the part of the town council. Moreover, there is California and out-of-state authority suggesting that the town council's conduct was unauthorized. *See In re* Market St., 49 Cal. 546, 549 (1875); Weld v. People, 149 Ill. 257, 36 N.E.1006, 1007 (1894); Appeal of Harper, 109 Pa. 9, 1 A.791, 793 (1885).

123. Brief for Appellants at 3, Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 547 P.2d 1377, 129 Cal. Rptr. 97 (1976).

124. 16 Cal. 3d at 688, 547 P.2d at 1384, 129 Cal. Rptr. at 104.

125. *Id.* The plaintiffs apparently conceded that they had received a special benefit in the nature of acquired capacity rights in another water system.

the burden on the local body to come forward with evidence of the existence of special benefit.

## IV. CONCLUSION

Traditionally, property owners have been unsuccessful in contesting special assessments levied on their property. In many cases, the courts' application of the waiver doctrine has barred plaintiffs from court review on the merits. In order to do justice to meritorious claims, the court should recognize that the local body must send more informative and timely notice of the assessment proceedings to the property owners to comply with constitutional due process requirements. Without constitutionally adequate notice, property owners have not had a meaningful opportunity to be heard and, thus, the waiver doctrine should not apply. Moreover, the courts should recognize that the Improvement Act of 1913 is silent on the waiver issue as to defects not raised by the property owner at the local hearing. With these modifications in the courts' treatment of complaints of dissatisfied property owners, many challenges to assessments based on constitutional defects will now receive court review.

When the court reviews an assessment where the property owner alleges lack of special benefit, the court should invalidate the assessment, unless the local body can show the existence of special benefit by substantial evidence in light of the whole record. This scope of review will protect a property owner's constitutional right to special benefit as justification for the levying of the assessment.

*Trena Hardin Burger*