S226036

No. S_____

Service on Attorney General required by Rule 8.29(c)(1)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Exempt from Filing Fees
Government Code § 6103

City of San Buenaventura
Plaintiff and Respondent / Cross-Appellant.

vs.

United Water Conservation District and Board of Directors
of United Water Conservation District
Defendants and Appellants / Cross-Respondents

SUPREME COURT
FILED
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RESPONDENT AND CROSS-APPELLANT'S PETITION FOR REVIEW

of a Published Decision of the
Second Appellate District, Division 6, Case No. B251810

Reversing a Judgment of the Superior Court of the State of California
County of Santa Barbara, Case Nos. VENCI 00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

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To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The City of San Buenaventura respectfully petitions for review of a published opinion of the Court of Appeal.

QUESTIONS FOR REVIEW

1. What standard of appellate review applies to questions of constitutional fact arising under California Constitution, articles XIII C and XIII D[1] when a case is tried on an administrative record?
2. If the substantial evidence standard applies at all, is it limited to factual questions determined on extra-record evidence admitted despite the rule of *Western States Petroleum Association v. Superior Court*?[2]
3. Are groundwater augmentation service charges subject to Proposition 218[3] or Proposition 26?[4]

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[1] Unspecified article and section references are to the California Constitution.

[2] (1995) 9 Cal.4th 559 (judicial review of agency action generally confined to administrative record).

[3] Cal. Const., art. XIII D, § 6.

[4] Cal. Const., art. XIII C, § 1, subd. (e).

4. Does the regulatory fee analysis of *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*[5] apply to fees for property related services?

5. Does the test established in *Sinclair Paint Co. v. State Bd. of Equalization*[6] to distinguish regulatory fees from taxes survive Proposition 26?[7]

6. Does Water Code section 75594's requirement for at least a 3:1 ratio of fees on non-agricultural use of groundwater to such fees on agricultural use survive the adoption of articles XIII C and XIII D?[8]

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[5] (2001) 24 Cal.4th 830 (fee on landlords to fund Housing Code enforcement not property related fee within Cal. Const., art. XIII D, § 6).

[6] (1997) 15 Cal.4th 866 (fee on paint manufacturer to remediate health impacts of environmental lead contamination not tax under Proposition 13).

[7] This question is also presented by the petition for review in *Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925, review filed Apr. 7, 2015, No. S225589. Accordingly, it may be appropriate to grant both petitions and to hold briefing in one case or the other under California Rules of Court, rule 8.512, subd. (d).

[8] Similar questions regarding Proposition 26's cost-of-service limitation on service and regulatory fees (art. XIII C, § 1, subd. (e)) are pending in *Citizens for Fair REU Rates v. City of Redding* (2015) 233

INTRODUCTION

This case allows this Court to resolve a square conflict between two published opinions:

- the instant case, upholding a 3:1 ratio of groundwater fees on non-agricultural groundwater users to fees on farmers by applying a very lenient view of 2010's Proposition 26; and,
- *Pajaro Valley Water Management Agency v. AmRhein* (2007) 150 Cal.App.4th 1364 (*AmRhein*), concluding such fees are subject to Proposition 218.[9]

United Water Conservation District (the "District") imposes charges on groundwater pumping which require the City of San

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Cal.App.4th 402, review filed Mar. 3, 2015, No. S224779. Accordingly, it may be appropriate to grant both petitions and hold briefing in one case or the other under California Rules of Court, rule 8.512(d).

[9] The Sixth District amplified its analysis in *Great Oaks Water Co. v. Santa Clara Valley Water District* (Mar. 26, 2015) 235 Cal.App.4th 523. Decided eight days after the instant case, *Great Oaks* did not cite it. Perhaps for that reason, the Sixth District granted rehearing April 24, 2015. Although the case may be cited under California Rules of Court, rule 8.1115, this Court may wish to note the pending appeal as it seems likely to produce relevant published authority while the present petition is pending.

Buenaventura ("the City") and other non-agricultural groundwater users to shoulder a disproportionate share of the cost of the District's services. It does so in two ways. First, it requires users in one groundwater basin to pay costs incurred to benefit those in others. Second, it requires non-agricultural groundwater users to pay three times what farmers pay — not because it costs the District more to serve such users, but because a 1965 statute so requires. Of course, California voters have since amended our Constitution three times to limit such fees to cost. This case tests whether our Constitution permits disproportionate charges not shown to be based on cost of service.

The published opinion of which review is sought here ("Opinion") makes a tortured effort to avoid Propositions 218 and 26, purporting to distinguish *AmRhein*. The Opinion conflicts with at least two other published opinions, as well.

Accordingly, review is appropriate under California Rules of Court, rule 8.500, subdivision (b)(1) to secure uniformity of decision and to resolve important questions regarding the application of articles XIII C and XIII D.

STATEMENT OF FACTS

The District was formed under the Water Conservation District Law of 1931 (Wat. Code, § 74000 et seq.) to manage groundwater use in eight basins along the Santa Clara River in Ventura County and to provide imported water and other water

services (AR1, Tab 22, at p. 36; AR2, Tab 106, at p. 21 [same]).[10] Its charges are imposed on all who pump groundwater in the District, including retailers, farmers, and rural residents. (AR1, Tab 62, at pp. 30 [list of 10 largest customers], 38 [nursery and residential customers]; AR2, Tab 53, at pp. 30, 38 [same].)

The City's water utility is among these. (AR1, Tab 62, at p. 30; AR2, Tab 53, at p. 30 [same].) It serves some 30,000 customers using wells in four basins. (AR1, Tab 78, at pp. 1, 8, 13; AR2, Tab 165, at p. 1, 21.)

The District imposes fees in a District-wide Zone A and a smaller Zone B, which recovers the cost of the Freeman Diversion Dam. It also distinguishes agricultural from other users of groundwater, charging agricultural users much less for the same service.

I. THE EIGHT BASINS

Although interconnected to some degree, the eight basins are distinguished by geologic features such as earthquake faults. (See, e.g., AR2, Tab 165, at p. 21.) Accordingly, the District's recharge

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[10] This appeal is from consolidated challenges to the District's rates for fiscal years 2011–2012 and 2012–2013. "AR1" refers to the 2011–2012 administrative record and "AR2" to the 2012–2013 record. Citations are in this form: AR[1 or 2], Tab [#] at pp. [#–#]. AR2 cites to identical documents in a preceding AR1 cite are marked "[same]".

efforts benefit some basins more than others. (AR1, Tab 16, at p. 122; AR1, Tab 28, at pp. 62–63.) According to the District's 1998 Surface and Groundwater Conditions Report, "The groundwater basins within the District vary in their water production and ability to be recharged rapidly. The hydraulic connection between basins also varies across the District." (AR1, Tab 28, at p. 16; AR2, Tab 177, at p. 16 [same].)

The most significant overdraft occurs in agricultural areas of the southeast Oxnard Plain and Pleasant Valley basins — from which the City does not pump. (AR1, Tab 62, at p. 34; AR2, Tab 53, at p. 34 [same]; see also AR2, Tab 165, at p. 21.)

The District nevertheless imposes uniform rates throughout Zone A, regardless of the basin from which a user pumps. (AR1, Tab 62, at p. 30, citing Wat. Code, § 75592; AR2, Tab 53, at p. 30 [same]). In its 2012–2013 rate-making —conducted after the City filed the first of two suits at bar — the District disclosed newfound "evidence" suggesting eight basins it and the State Department of Water Resources have distinguished for decades actually function as a "common pool." (AR2, Tab 54, at pp. 4–5 [Update to 2011 Water Rate Study].) This evidence dates from the 1950s, and was subsequently abandoned for half a century in light of the more accurate and recent studies cited above. (See AR1, Tab 10, at p. 19.)

The District ignores its common pool theory, however, to distinguish those who benefit from the Freeman Diversion Dam

(who pay Zone B and Zone A charges) from others who pay only Zone A charges. (AR1, Tab 72, at p. 3; AR2, Tab 149, at p. 3 [same].) If the entire District is a "common pool," how can this be? While the District defends its Zone A charge on its new-found "common pool" theory, its maintenance of a smaller Zone B indicts its own theory. The District has never explained this inconsistency and the Opinion makes no mention of it.

II. CUSTOMER CLASSES

The District distinguishes non-agricultural groundwater users from farmers. Agricultural use includes that for production of crops, livestock and aquaculture. Non-agricultural use includes most other uses, including outdoor irrigation and retail water service. Although farmers and others pump from groundwater basins in common and receive the same service, non-farm users pay three times what agricultural users pay. (AR1, Tab 72, at p. 4; AR2, Tab 149, at p. 4 [same]; see also AR1, Tab 62, at p. 32 [discussing Wat. Code § 75594]; AR2, Tab 53, at p. 32 [same].) This reflects the 1965 mandate of Water Code section 75594.

The District applies the 3:1 ratio to both District-wide Zone A and Freeman Diversion Zone B charges. (AR1, Tab 22, at p. 78 [FY 2011–2012 budget]; AR2, Tab 106, at p. 67 [FY 2012–2013 budget].)

III. THE CHALLENGED RATES

On June 8, 2011, the District adopted FY 2011–2012 charges, leaving Zone B rates unchanged. (AR1, Tab 65; AR1, p. 1; AR 1, Tab 72, p. 4.) It increased Zone A charges 46 percent from $58.50 to $85.50 per acre-foot for non-farm users and from $19.50 to $28.50 for agriculture. (AR1, Tab 65, at p. 1.)

In doing so, the District complied with Proposition 218's notice and hearing procedures for new or increased property related fees under article XIII D, section 6. (AR1, Tab 64; AR1, Tab 65 at p. 1; see also AR1, Tab 73, at pp. 11–12.) The City timely protested. (AR1 Tabs 78, 79.) When its protest went unheeded, it sued. (1 JA, Tab 1.)[11]

On June 13, 2012, the District increased Zone A charges another 39 percent — more than doubling the charges in two years. (See AR2, Tab 142, at p. 1.) The new rates were $29.75 per acre-foot for farmers and $119.50 for others. (*Ibid.*) It maintained the Zone B charges, including the 3:1 ratio benefiting agriculture. (AR2, Tab 149 at p. 4.)

As in 2011, the District employed Proposition 218's hearing procedures. (AR2, Tab 142, at p. 2.) The City again protested unsuccessfully and sought judicial review. (4 JA, Tab 33, at p. 690.)

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[11] Citations to the Joint Appendix are in the form: [Volume] JA, [Tab #], at p. [#].

PROCEDURAL HISTORY

On August 5, 2011 the City filed a Petition for Writ of Traditional Mandate (Code of Civ. Proc. § 1085), a Petition for Administrative Mandate (Code of Civ. Proc. § 1094.5), a Complaint for Declaratory Relief, and a Complaint for Determination of Invalidity under Code of Civil Procedure section 863. (1 JA, Tab 1, at p. 1.) The City alleged the FY 2011–2012 rates violated Propositions 218, 13, and 26, the common law of ratemaking, and Government Code section 54999.7. (1 JA, Tab 1, at p. 1.) The City filed in Ventura and moved for neutral venue pursuant to Code of Civil Procedure section 394; the case was transferred to Santa Barbara. (2 JA, Tab 336).

On August 7, 2012, the City challenged the FY 2012–2013 charges, mirroring the first case. (4 JA, Tab 33, at p. 690.) The City related the cases. (4 JA, Tab 39, at p. 795; 4 JA, Tab 40, at p. 800.) The City again filed in Ventura, but the parties stipulated to Santa Barbara venue.

The District lodged administrative records for the two cases, which the Court consolidated for trial. (4 JA, Tab 41, at p. 804 [Notice of Lodging of AR1]; 9 JA, Tab 73, at p. 1768 [Certification of AR2]; 5 JA, Tab 55, at p. 980 [Case Mgmt. Order (10/23/12) § 7(A)].)

After bench trial on the administrative records, the trial court determined:

- The District's charges are "property related fees" subject to Proposition 218. (10 JA, Tab 88, at p. 2123.)
- The District did not prove compliance with the proportional cost requirement of article XIII D, section 6, subdivision (b)(3) because it imposed different rates on farmers than on others. (*Ibid.*)
- The administrative records show the District based the charges on Water Code section 75594's mandate of a 3:1 ratio, not any demonstrated difference in the cost to serve farmers and others. (*Id.* at p. 2157.)
- The District satisfied the other constitutional, statutory and common law standards the City pleaded. (*Id.* at pp. 2140 [Prop. 13], 2150 [Prop. 26], 2151 [common law of utility ratemaking and Gov. Code § 54999.7].)

The trial court ordered a refund of charges in excess of what the City would have paid under uniform rates as well as pre-judgment interest. (12 JA, Tab 112, at p. 2578.)

The City gave notice of entry of judgment September 12, 2013 and the District timely appealed October 1, 2013. (12 JA, Tab 114, at p. 2590.) The City timely cross appealed October 21, 2013. (12 JA, Tab 116, at p. 2615.)

Following principal and amicus briefing, the Court of Appeal requested supplemental briefing on the impact of the Sustainable Groundwater Management Act adopted in 2014 (A.B. 1739,

S.B. 1168, and S.B. 1319). The Opinion issued March 17, 2015, concluding:

- The District's groundwater extraction charges are not subject to Proposition 218, but to Proposition 26, notwithstanding the contrary conclusions of *AmRhein* and *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 (*Griffith*); and
- The District's groundwater extraction charges survive Proposition 26 review because the fees did not exceed the District's service cost in toto and because substantial evidence in the appellate record supported the trial court's conclusion the rates are fair and reasonable.

The Opinion applies the first of two prongs of this Court's Proposition 13 analysis in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*) requiring a bona fide regulatory purpose, but overlooked (even upon rehearing) the second prong of that test, reflected in the last sentence of article XIII C, section 1, subdivision (e) requiring that each payor pay a fee in proportion to its benefits from or burdens on the service or regulatory program for which the fee is imposed. (Opn. at pp. 26–27).[12]

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[12] The Opinion does not cite *Sinclair Paint*, but instead misapplies *California Farm Bureau Federation v. State Water Resources Control Board*

The City requested rehearing March 31, 2015, calling attention to the Opinion's conflicts with published law, its failure to apply both prongs of *Sinclair Paint* and the other concerns raised here. The Court of Appeal denied rehearing on April 15, 2015, making minor changes in the Opinion.[13] The City now seeks review.

LEGAL ARGUMENT

I. REVIEW IS NECESSARY TO RESOLVE CONFLICTS IN THE APPELLATE CASES

As the trial court correctly concluded, *AmRhein* compels a finding the challenged groundwater charges are property related fees subject to Proposition 218. *Griffith* subsequently confirmed the point. Claiming to distinguish *AmRhein*, the Opinion clashes with three published cases, both recent and settled. Further, the Opinion's reasoning reaches every government fee, removing many from the reach of Proposition 218, construing Proposition 26 to require no more than Proposition 13, and applying *Sinclair Paint*'s construction of that earlier measure so leniently as to strip it of much of its

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(2011) 51 Cal.4th 421, which does. The Opinion overlooks this Court's direction in *Farm Bureau*, remanding the case for a determination of proper cost apportionment. (*Id.*, p. 442.)

[13] A copy of the Opinion and Order Modifying the Opinion are attached to this Petition. (California Rules of Court, rule 8.504, subd. (b)(4).)

intended effect. As one of the first cases to construe 2010's Proposition 26, its influence will be great. Accordingly, this case presents an opportunity to resolve conflicts in the law as well as to address constitutional issues of statewide importance.

A. The Opinion Conflicts with Two Opinions Holding Groundwater Extraction Fees Subject to Proposition 218

Two cases apply Proposition 218 to groundwater charges. *AmRhein* addressed groundwater augmentation charges imposed by the Pajaro Valley Water Management Agency. (150 Cal.App.4th at p. 1372.) Like the District's fees, the *AmRhein* fees were based on the volume of groundwater pumped. (*Id.*, at pp. 1385–1386; AR1 62-0036 to -0038.) The *AmRhein* court initially concluded the fees were exempt from Proposition 218 as "regulatory fees" under the rationale of *Apartment Association*. (*Id.*, at p. 1370) However, two days after it filed its decision, this Court decided *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*), finding metered charges for water service subject to Proposition 218 notwithstanding that the fees turned on voluntary choices to use water in particular amounts.

Accordingly, the Sixth District granted rehearing to consider the impact of *Bighorn*, which does not analyze *Apartment Association* at any length. Nor has any decision of this Court since, and the

tension between *Apartment Association*'s reasoning and subsequent Proposition 218 case law remains unresolved.

Struggling to harmonize *Apartment Association* and *Bighorn*, the Sixth District observed the *AmRhein* charge was:

> not actually predicated upon the use of water but on its extraction, an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water.

(*AmRhein, supra,* 150 Cal.App.4th at p. 1391; compare 10 JA, Tab 88 at pp. 2144–2145 [trial court ruling].) Accordingly, that court found such fees subject to Proposition 218. (*AmRhein, supra,* 150 Cal.App.4th at p. 1388, citing *Bighorn, supra,* 39 Cal.4th at p. 205.)

Six years later, the Sixth District reaffirmed this holding as to the same charges. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 595 [*Griffith*].)

On March 26, 2015, the Sixth District published *Great Oaks*. That since-depublished decision applies *AmRhein* and *Griffith* to facts indistinguishable from those here: a water retailer's Proposition 218 challenge to rates set under a statute requiring rates that require non-farm groundwater users to subsidize agriculture. (*Great Oaks, supra,* 2015 WL 1403340 at p. *1 [reversing trial court ruling that groundwater charges subject to election requirement of Cal. Const., article XIII D, § 6, subd. (c) but remanding challenge under proportional cost requirements of *id.*, subd. (b)(3)].) Santa

Clara Valley Water District ("SCVWD") charges petitioner Great Oaks Water Company a fee on groundwater production 10 times that on farmers. (*Ibid.*) The Sixth District concluded the groundwater charge was a fee for a "property related service" both because groundwater rights are property rights and because the voters who approved Proposition 218 understood it to apply to nearly all water service charges. (*Id.* at pp. *11–*12.)

The Petition for Rehearing informed the Second District of *Great Oaks* but the Court denied rehearing here without addressing the case.[14]

B. The Opinion Contradicts *AmRhein* by Distinguishing Residential and Commercial Water Use Under Proposition 218

The Opinion seeks to distinguish *AmRhein* on the basis of the end use of groundwater: "the fact that a large majority of pumpers [in *AmRhein*] were using the water for residential or domestic uses was dispositive." (Opn. at p. 17; see also Opn. at p. 19 ["[T]he City itself uses the water it pumps for commercial rather than residential purposes."] & p. 21.) However, *AmRhein* rejected this distinction:

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[14] The City does not cite *Great Oaks* as precedent here, but only to explain a basis for the petition for rehearing and the Second District's action on that petition.

> A charge may be imposed on a person because he owns land, or it may be imposed because he engages in certain activity on his land. A charge of the former type is manifestly imposed as an incident of property ownership. A charge of the latter may not be. This appears to be the distinction Justice Mosk sought to articulate for the court in *Apartment Association*. **We doubt that it is satisfactorily captured by a distinction between business and domestic uses or purposes.**

(*AmRhein, supra,* 150 Cal.App.4th at p. 1391, fn. 18, emphasis added.)

Moreover, long-established water rights law demonstrates that the right to use groundwater is itself a property right. (E.g., *Trask v. Moore* (1944) 24 Cal.2d 365, 370; see also *Garden Water Corp. v. Fambrough* (1966) 245 Cal.App.2d 324, 327 [trial court properly found water system for distribution to subdivision was real property]; *Harper v. Buckles* (1937) 19 Cal.App.2d 481, 484–485.) There is no meaningful distinction between the right to use water on the parcel from which it is drawn (overlying water right) and the right to distribute it (appropriative water right); both are appurtenant to the land on which the well is sited. (*Trask, supra,* 24 Cal.2d at p. 370.) Thus, a charge that burdens appropriative water rights is **necessarily** incidental to property ownership. The Opinion therefore not only contradicts *AmRhein* and *Griffith,* it is also inconsistent with 70 years of water rights law.

Moreover, the District's principal act obliges it to set "uniform rates." (See Wat. Code, § 74527.) Thus, if the rates in issue here are unlawful as to a rural residential groundwater user because of the unjustified 3:1 ratio of rates on agriculture to those on others, they are unlawful as to the City, too. The District must serve individual and collective domestic users "uniformly." The Opinion mistakes this point for an argument that the City may assert the rights of its residents. (Opn. at p. 19, fn. 18.) The Petition for Rehearing pointed out the Opinion's misapprehension, which remains uncorrected.

Further, Propositions 218 and 13 each require rational rate-making distinctions. If a rate-maker wishes to establish rates in separate proceedings, it may do so, but it may not employ logically inconsistent rationales in one rate-making. (*Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 909–910 [farmers not entitled to separate majority protest under art. XIII D, section 6(a) because agency must be able to allocate costs among affected rate-payers without reciprocal vetoes of all classes]; cf. *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438 [regulatory fees under Proposition 13 may be established on the basis of rationally drawn classes] (*Farm Bureau*).) Nothing in the text of Proposition 26 suggests its demand that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity" is any less subject to rationality review.

(Cal. Const., art. XIII A, section 3, subd. (b); art. XIII C, section 1, subd. (e) [final unnumbered para.])[15]

C. The Opinion Contradicts *Jacks* by Looking to the Legal, Rather Than the Economic, Incidence of Challenged Rates

The Opinion finds irrelevant that the City's customers are residential water users, as are rural residential customers who pay the District's charges directly rather than through a utility's service charges. (See Opn. at pp. 18–19.) Thus, the fees challenged here are lawful as to the City and its residents even though they would be unlawful if challenged by a rural resident. The Opinion is therefore inconsistent with yet another recent published appellate decision of Division Six of the Second District: *Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925, 932, reh'g denied (Mar. 27, 2015), pet. for review filed Apr. 7, 2015, No. S225589 (*Jacks*).

In *Jacks*, the Court of Appeal examined a 1% franchise fee included in electric rates paid by City residents. (*Id.* at p. 929.) Santa Barbara argued the electric utility was legally obligated to pay the franchise fee, not its customers, and Proposition 218 therefore did not apply. However, the Court of Appeal concluded the fee was imposed on customers as a "pass-along" fee and therefore a tax

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[15] Proposition 26 adopts nearly — but not entirely — identical provisions for state and local governments in the cited provisions.

requiring voter approval under that measure. (*Id.* at pp. 932, 934.) Thus, *Jacks* concludes a fee is imposed upon customers if they bear its economic incidence.

The Opinion holds the contrary: legal incidence is determinative. According to the Opinion, the City — not its residents — pays the District's charge, and Proposition 218 therefore does not apply. (Opn. at p. 19.)[16]

D. The Opinion Conflicts with *AmRhein* as to Proposition 218's Application to Regulatory Fees

The Opinion seizes on *AmRhein*'s dicta regarding a possible "regulatory fee" exception to Proposition 218. It concludes the District's groundwater extraction charges are neither property related fees nor taxes because they "serve the valid regulatory purpose of conserving water resources." (Opn. at p. 19.) The Opinion thus distinguishes *AmRhein*, which noted that it may be possible to argue a charge is not imposed as an incident of property

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[16] The issue of courts' power to rely on the economic, rather than the legal, incidence of a revenue measure is pending before this Court in *Wheatherford v. City of San Rafael*, Cal. S. Ct. Case No. S219567 (review granted Sept. 10, 2014). Accordingly, it may be appropriate for this Court to grant this petition and *Jacks* and hold briefing pending decision in *Wheatherford* under California Rules of Court, rule. 8.512, subdivision (d).

ownership if imposed for a "clearly established regulatory purpose, e.g. ... to conserve a supplied resource by structuring the fee in a manner intended to deter waste and encourage efficiency." (Opn. at p. 19, quoting *AmRhein, supra,* 150 Cal.App.4th at p. 1390.) The apparent logic is that because the District funds a regulatory function, its charges are "regulatory fees" exempt from Proposition 218. The Opinion thus ignores that the District uses its charges to fund water supply services and never explains how subsidizing groundwater service to agriculture conserves water. Indeed, given that groundwater levels remain dangerously low in the District decades after its formation suggests its rates have no such effect.

Moreover, the Opinion ignores the logic of the *AmRhein* dicta. A regulatory fee deters waste. Merely funding regulatory activity is not itself regulation — to escape Proposition 218 a fee must itself achieve a regulatory effect, not just raise revenue. (Cf. *California Taxpayers' Ass'n v. Franchise Tax Bd.* (2013) 190 Cal.App.4th 1139 [penalty for late payment of corporate taxes not tax because intended to deter late payments rather than raise revenue].) The fee disputed in *AmRhein* and *Griffith* is indistinguishable from those here and was imposed under comparable statutory authority. Accordingly, the Opinion is patently inconsistent with both cases.

E. The Opinion Fails to Distinguish *AmRhein*

The Opinion attempts to distinguish *AmRhein,* citing extra-record facts. The Opinion states that, in *AmRhein,* "the vast majority of property owners ... obtained their water from wells, and ... alternative sources were not practically feasible." (Opn. at p. 18, citing *AmRhein, supra,* 150 Cal.App.4th at p. 1397 [conc. opn. of Bamattre-Manoukian, J].) It asserts the number of residential customers of the District who operate wells "is insubstantial relative to the number of residential customers receiving delivered water." (Opn. at p. 19.) However, as the Opinion itself acknowledges, there is no evidence in the record to support this claim. (See Opn. at p. 18.) The Opinion also fails to acknowledge the District's rural residential water users with no alternatives to wells. (AR1, Tab 62, p. 38.)

Even if this record could support it, distinction of urban and rural water users finds no support in the text of Proposition 218 and gives our Constitution less force in urban than in rural areas. How can a charge be lawful as to the City and its customers but unlawful as to rural, residential groundwater users who must pay the same "uniform" rates? The City sued, allowing its customers to use pooled resources to assert their rights. Rural residents can less easily do so, yet the Opinion's logic would require them to sue to give our Constitution force.

In sum, the Opinion is inconsistent with *AmRhein, Griffith* and *Jacks*. Its disagreements with those cases are fundamental and

muddle the law as to whether Proposition 218 applies to groundwater charges, whether a regulatory fee exception to Proposition 218 exists, and whether the use of groundwater to farm or otherwise is a distinction of constitutional significance.

II. REVIEW IS NECESSARY TO ADDRESS THE RELEVANCE OF *SINCLAIR PAINT* AND *FARM BUREAU* TO PROPOSITION 26

This case also presents an opportunity to address whether and to what extent *Sinclair Paint* survives Proposition 26. Article XIII A, section 3, subdivision (b)(2) and article XIII C, section 1, subdivision (e)(2) identically limit State and local fees to the "reasonable costs" of government services. No case yet interprets that standard.[17] Proposition 218 imposes an analogous burden on property related fees. (Cal. Const., art. XIII D, § 6, subds. (b)(1) & (b)(3).)

Proposition 26's "reasonable cost" requirement could be the same as *Sinclair Paint*'s Proposition 13 standard. That case and its progeny hold that a regulatory fee is not a special tax if:

- the measure is intended to regulate rather than primarily to raise revenue and

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[17] *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982 applies the similar cost-of-service limit of article, XIII C, section 1, subdivision (e)(3) for regulatory fees.

- a payor's obligation bears a fair and reasonable relationship to his or its burdens on or benefits from the regulated activity.

(*Sinclair Paint, supra,* 15 Cal.4th at p. 878, citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1145–1146.)

The few cases interpreting Proposition 26 to date note that article XIII A, section 3, subdivision (d) and the final, unnumbered paragraph of article XIII C, section 1, subdivision (e) paraphrase this aspect of *Sinclair Paint.* (E.g., *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326.) However, Proposition 26 was a reaction to *Sinclair Paint* and intended to alter its rule in some respects. (*Id.* at p. 1322; see also 1 CT 276 [Legislative Analyst's summary of Prop. 26].)

Referring to article XIII C, section 1, subdivision (e), *Griffith* explains:

> The concluding sentence of the newly added subdivision ... repeats nearly verbatim the language of prior cases assessing whether a purported regulatory fee was indeed a fee or a special tax.

(207 Cal.App.4th at p. 996.)

Whether the cost of service requirements of Propositions 26 and 218 demand more than *Sinclair Paint* has divided the Courts of Appeal. The dissent in *Citizens for Fair REU Rates v. City of Redding*

(2015) 233 Cal.App.4th 402 (petition for review filed Mar. 3, 2015, No. S224779) concludes that Redding's requirement its electric utility pay its City general fund what a private utility would pay in property taxes is necessarily "fair and reasonable" under Proposition 13 and is therefore not a tax under Proposition 26. (*Id.* at p. 426.) *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (Apr. 20, 2015, No. G048969) ____ Cal.App.4th___ (2015 WL 1798898]) (*Capistrano*) and *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926 (*Palmdale*) contradict the Opinion on this point. (*Capistrano*, 2015 WL 1798898, at pp. *13–*14; *Palmdale, supra,* 198 Cal.App.4th at p. 934 [tiered water rates must satisfy Prop. 218's proportional cost requirement].)

The Opinion applies the *Sinclair Paint* standard to Proposition 26, upholding the District's rates as bearing a fair and reasonable relationship to its regulatory costs **in toto**. (Opn. at p. 2.) However, *Sinclair Paint* distinguishes a regulatory fee from a tax under Proposition 13 only if it is fair in toto **and** as to each class of ratepayers. (*Sinclair Paint, supra,* 15 Cal.4th at p. 881.) Thus, that the District's rates do not exceed its costs in toto does not absolve it from also proving they do not also charge customers or customer classes disproportionately to their respective benefits from or burdens on its services. *Capistrano* is expressly on this point. (2015 WL 1798898, at p. *1.) The Opinion makes no effort to apply *Sinclair Paint*'s second prong (Opn. at pp. 26–27) and thus must be error. It is not credible to

interpret Proposition 26 to liberalize the *Sinclair Paint* standard. The measure was plainly intended to **reduce** government's rate-making authority. That measure states in its "Findings and Declaration of Purpose":

> This escalation in taxation [since Propositions 13 and 218] does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as "fees" in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. Fees couched as "regulatory" but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.

(Ballot Pamp., Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, subd. (f), p. 114.)

Farm Bureau maintains *Sinclair Paint*'s two-prong test. (51 Cal.4th at p. 442, citing *Sinclair Paint, supra,* 15 Cal.4th at p. 870; cf. Cal. Const., art. XIII C, § 1, subd. (e)(1)–(2) & final, unnumbered para. [Prop. 26] and art. XIII D, § 6, subds. (b)(1) & (3) [Prop. 218].) *Farm Bureau* noted the trial court made insufficient findings on the second prong and therefore remanded for findings whether the

"costs of the regulatory activity were reasonably related to the fees assessed on the payors." (51 Cal.4th at p. 442.) Thus, costs must be reasonably apportioned among fee payors under each of Propositions 13, 218, and 26. (See also *California Building Industry Association v. State Water Resources Control Board* (Apr. 20, 2015, No. A137680) ___ Cal.App.4th ___ [2015 WL 1842222 at pp. *9–*13] [applying two-prong test under Sinclair Paint and Farm Bureau to SWRCB fee on wastewater discharges] (*CBIA v. SWRCB*).) The Opinion's contrary conclusion is both error and worthy of review.

Proposition 13's cost-limitation and apportionment rules have been codified in Proposition 26's definition of "taxes" in XIII C, section 1, subdivision (e). Its final, unnumbered paragraph states:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that **the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.**

(Cal. Const., art. XIII C, § 1, emphasis added.)[18]

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[18] Article XIII A, section 3, subdivision (b) applies substantially this same language to State fees.

The Opinion misapplies *Farm Bureau* — and therefore the Constitution — by focusing on the total costs of the purported regulatory activity to the exclusion of the allocation of those costs among fee payors. (Opn. at p. 26.) The Opinion also found compliance with the total cost test by applying deferential substantial evidence review to trial court findings,[19] thus blessing a 3:1 ratio of non-farm to agricultural rates without serious consideration of our Constitution's demands for proportionality — whether under Propositions 13, 218 or 26. (See Opn. at pp. 26–27.) By contrast, *Farm Bureau,* which the Opinion purports to follow, remanded for further evaluation of *Sinclair Paint*'s second prong. Remand, of course, is unnecessary here because the record establishes no justification for the rate differential — as the trial court appropriately concluded. (See 10 JA, Tab 88, p. 2123; see also *CBIA v. SWRCB, supra,* 2010 WL 1842222 at p. *13 [declining remand where legal character of fee is clear as a matter of law].)

The City does not, of course, assert that proportionality should be analyzed customer-by-customer. Rather, the City argues that, if an agency distinguishes among customer classes, its rates must reflect different costs of service adequately evidenced by its rate-making record. (*Capistrano, supra,* 1015 WL 178898 at pp. *13–

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[19] The Opinion applies both substantial evidence and independent judgment review to this same issue. (Compare Opn. at p. 26 with *id.* at p. 27.)

*14.) Judge Anderle properly applied *Farm Bureau* here; the Court of Appeal did not. Review is therefore appropriate to address whether and how *Sinclair Paint* survives Proposition 26.

III. REVIEW IS NECESSARY TO CLARIFY THE STANDARD OF APPELLATE REVIEW OF PROPOSITION 218 AND 26 DISPUTES

The Opinion confusingly applies both de novo and substantial evidence review. (See Opn. at pp. 2, 12.) Indeed, it applies both to a single issue. (*Id.*, at pp. 26–27.) In *Morgan,* the respondent agency waived the protection of the *Western States* rule limiting the evidence on mandate review of legislative action to the administrative record and allowed the trial court to consider extra-record evidence, triggering substantial evidence review. (*Morgan, supra,* 223 Cal.App.4th at p. 915 [applying substantial evidence standard to challenger's attack on rate-making using extra-record data].) The instant case was appropriately tried on a closed administrative record. In a case in which the respondent agency does not forfeit the *Western States* rule, the question before trial and appellate courts is the same — does the agency's rate-making record allow it to bear its burden to sustain its rates under the Constitution?

As the City argued below (Respondent's and Cross-Appellant's Opening Brief at pp. 10–11), "constitutional facts" are reviewed de novo to ensure meaningful appellate review of facts on which constitutional rights depend. (Cf. *Silicon Valley Taxpayers*

Ass'n, Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448–449 [independent judgment review under Proposition 218] (*Silicon Valley*); *CBIA v. SWRCB, supra,* 215 WL 1842222 at p. *10 ("Whether the Board's imposition is a tax [under Prop. 13] or a fee is a question or law decided upon an independent review of the [administrative] record").) The City agrees that factual findings on conflicting evidence adduced at trial are properly reviewed under the substantial evidence standard. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894.) However, in mandate review on a closed administrative record, the trial and appellate judiciary have the same task and the same vantage point: "Although an appellate court defers to a trial court's factual determinations if supported by substantial evidence," where, as here, "the trial court's decision did not turn on any disputed facts," the trial court's decision "is subject to de novo review." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; see also *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032.) Here no facts are disputed. No one doubts the completeness or authenticity of the District's records — rather, the parties dispute the legal significance of the facts reflected there.

For example, the parties do not dispute the trial court's finding that the eight basins are interconnected; they dispute whether they are so interconnected as to justify common rates on groundwater production in all basins under the Zone A charge but

not under the Zone B charge which funds the Freeman Diversion Dam. If the District's basins constitute a "common pool" as it belatedly claims, why is the Freeman Diversion Dam not of District-wide benefit? The District has no answer to this question and the Opinion does not even entertain it — an omission identified in the petition for rehearing.

Characterization of a fee under article XIII D presents "'a question of law for the appellate courts to decide on independent review of the facts.' " (*Apartment Ass'n , supra,* 24 Cal.4th at p. 836 quoting *Sinclair Paint, supra,* 15 Cal.4th at p. 874; *Farm Bureau, supra,* 51 Cal.4th at p. 436; *CBIA v. SWRCB, supra,* 2015 WL 1842222 at p. *10.)

Moreover, these are questions of "constitutional fact" reviewed de novo. (See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 138 [reviewing court must exercise its independent judgment upon "constitutional facts"]; see also *id.* at p. 138, fn. 4 [summarizing academic debate of doctrine].) There, this Court concluded:

> By carefully scrutinizing administrative decisions which substantially affect vested, fundamental rights, the courts of California have undertaken to protect such rights, and particularly the right to practice one's trade or profession, from untoward intrusions by the massive apparatus of government. If the decision of an administrative agency will substantially affect such a

> right, the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo.
>
> If the administrative decision does not involve, or substantially affect, any fundamental vested right, the trial court must still review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law, but the trial court need not look beyond that whole record of the administrative proceedings.

(*Id.* at pp. 143–144). The independent judgment review mandated by Propositions 218 (Cal. Const., art. XIII D, § 6, subd. (b)(5)) and 26 (art. XIII C, § 1, subd. (e) [final unnumbered para.]) require this same level of judicial oversight, as this Court concluded in *Silicon Valley*.

Otherwise, the meaning of our Constitution will vary from trial court to trial court and no statewide standard can be established. Rate-making always turns on detailed facts — indeed, a rate-maker is **obliged** to compile a detailed record to justify its rates. (E.g., *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235–236 (*Beaumont Investors*) [government bears burden to produce record to justify fees]; *CBIA v. SWRCB, supra,* 2015 WL 1842222 at p. *10 ["The plaintiff challenging a fee bears the

burden of proof to establish a prima facie case showing that the fee is invalid. ... [O]nce plaintiffs have made their prima facie case, the state bears the burden of production ..." [quoting *Farm Bureau,* supra, 51 Cal.4th at pp. 436–437].)

Moreover, established law involving mandamus review of legislative or administrative action shows the question presented here is legal — the sufficiency of the evidence in the District's administrative records to support its claim that domestic use of groundwater (as in backyard vegetable gardens) is three times as costly to serve — or regulate — as use of the same water in the same place to grow commercial crops. Under the Opinion's reasoning, the District's service cost turns not on a crop or its size, but the commercial motive of a grower.

Appellate courts review de novo trial courts' legal conclusions that there is sufficient record evidence to justify rates. (E.g., *Kolender v. San Diego County Civil Service Com'n* (2005) 132 Cal.App.4th 716, 721 [scope of review in administrative mandate identical in trial and appellate courts]; *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 745 [same as to traditional mandate]; *Silicon Valley, supra,* 44 Cal.4th at pp. 448–449 [independent judgment review under Prop. 218]; *CBIA v. SWRCB, supra,* 215 WL 1842222 at p. *10 [same under Prop. 13].) As this Court recently stated:

> An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, **as in other mandamus cases**, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo.

(*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2009) 40 Cal.4th 412, 426–427 [citations omitted, emphasis added].)

The Opinion also mistakenly defers to the trial court on mixed questions of law and fact, determining that the interconnection of the eight groundwater basins in the District is sufficient to support a legal conclusion that all receive common benefit sufficient to justify the District-wide Zone A rates under Proposition 26. (Opn. at pp. 26–27.) That Zone B charges are not collected District-wide avoids the Opinion's notice.

Moreover, the usual policy reasons for deference to the trial court are absent here. First, this case was tried on a cold record. The trial court heard no live testimony and examined no physical evidence; it reviewed the same administrative records now presented here. Further, the very size and technical complexity of those records suggests deference to the trial court is unwarranted. Many trial courts try writs on law and motion calendars, allowing but a few minutes' argument. They lack the resources of staff and time to review large, factually intense rate-making records and it

would therefore be unwise to insulate from appellate review their conclusions on such records as to application of the cost-of-service principles of our Constitution.

Finally, the record does not support the Opinion's conclusions, based as they are on deferential substantial evidence review. The record demonstrates the District uses proceeds of disputed groundwater charges to fund programs unrelated to groundwater management. For example, it funds recreation at Lake Piru using both concession revenue and groundwater extraction charges. As its FY 2011–2012 budget demonstrates, the District's revenue from the Recreational and Ranger operation is $70,530 but expenditures are $551,076. (AR Tab 22, p. 63.) The "General Fund" — in which groundwater charges and property taxes are both accounted — pays the difference. The District offers no accounting of its property taxes which might support the Opinion's conclusion those funds alone cover the balance of its recreation costs. (Opn. at p. 27.) This evidentiary void should be fatal to the District, as it must produce a record to justify its rates and bears the burden of persuasion, too. (*Beaumont Investors, supra,* 165 Cal.App.3d at pp. 235–236; Cal. Const., art. XIII C, § 1, subd. (e) [final unnumbered para.] (Prop. 26); art. XIII D, § 6, subd. (b)(5) (Prop. 218); *CBIA v. SWRCB, supra,* 2015 WL 1842222 at p. *10 (Prop. 13).)

Similarly, the Opinion concluded that a special property tax assessment — rather than groundwater rates — funds the District's

cost of State water it pipes to farmers. (See Opn. at p. 27; cf. X-Resp. Brief, at p. 18, citing AR2, Tab 106, pp. 58–59 [2012–2013 Budget].) Again, however, the record shows the property tax covers approximately half the District's costs of State water. (AR2, Tab 106, p. 59.) The same page also shows a shortfall of $557,380 for the State Water Import Fund to be funded otherwise. (*Ibid.*) Despite the absence of record evidence to show how the District funds half the cost of its State water imports, the Opinion concludes this expenditure is "paid for primarily" by the assessment. (Opn. at p. 27.) This is not independent judgment review. It does not satisfy our Constitution.

Because the respondent agency allowed extra-record evidence at trial in *Morgan,* that case obscures the appropriate standard of review. The Opinion applied the wrong standard to reach a result the voters who adopted Propositions 218 and 26 did not intend.

IV. THESE ISSUES ARE PENDING IN MANY LOWER COURTS

A. Whether Groundwater Fees are Governed by Proposition 218 or 26 is Pending in Several Lower Courts

Not only the Courts of Appeal grapple with challenges to groundwater charges under Propositions 218 and 26; many trial

courts do, too. In addition to this case and *Great Oaks*, two others warrant notice:

- *San Joaquin Water Conservation District v. All Persons Interested in the Matter of the Resolution Imposing Groundwater Charge* (Super. Ct. San Joaquin County, No. SV-266837) (MJN, Exh. A at pp. 4–11 [Statement of Decision]);[20] and
- *City of Cerritos, et al., v. Water Replenishment District of Southern California* (Super. Ct. L.A. County, No. BS128136) (MJN, Exh. B at ¶¶ 66–69).[21]

Each trial court will look to the conflicting directives of the cases discussed above to resolve similar issues.

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[20] The Third District dismissed this appeal as mooted by repeal of the disputed charge.

[21] This latter case has produced a welter of litigation between the Water Replenishment District and retailers which pay its replenishment assessments. The volume (in several senses) of that prolonged and multiplicious litigation is demonstrated by *Water Replenishment Dist. of Southern Cal. v. City of Cerritos* (2012) 202 Cal.App.4th 1063 (enforcing pay-first-litigate-later rule during prolonged litigation of WRD's compliance with Proposition 218).

B. The Cost-of-Service Requirements of Propositions 218 and 26 are Also Pending in Several Lower Courts

Beyond groundwater litigation, the meaning of Propositions 218's and 26's similar, but perhaps not identical, cost-of-service requirements is also pending in several lower courts. In addition to the freshly decided *Capistrano,* these include:

- *Glendale Coalition for Better Government v. City of Glendale* (Super. Ct. L.A. County, No. BS153253 [challenging tiered water rates under Prop. 218]) (MJN, Exh. C at ¶¶ 46–53);
- *Sweetwater Authority Ratepayers Association, Inc. v. Sweetwater Authority* (Super. Ct. San Diego County, No. 37-2014-00029611-CM-MC-CTL [same]) (MJN, Exh. D at ¶¶ 39–44); and
- *Plata v. City of San Jose* (Super. Ct. Sta. Clara County, No. 1-14-CV-258879 [class action Prop. 218 challenge to water rates]) (MJN, Exh. E at ¶¶ 11–14, 33–37).

C. Whether the Legal Character of a Revenue Measure is Controlled by Its Legal or Economic Incidence is Also Pending in Several Lower Courts

In addition, lower courts need guidance whether economic or legal incidence controls legal characterization of a revenue measure.

(See *Jacks, supra,* 234 Cal.App.4th at p. 934.) At least four pending or recently-resolved cases present this question:

- *San Diegans for Open Government v. Downtown San Diego Partnership, Inc.* (Super. Ct. San Diego County, No. 37-2013-00062382-CU-MC-CTL [challenge to business improvement district]) (MJN, Exh. F at pp. 2–6);
- *San Diegans for Open Government v. City of San Diego* (Super. Ct. San Diego County, No. 37-2012-00088065-MC-CU-CTL [challenge to tourism marketing district]) (MJN, Exh. G at p. 3);
- *San Diegans for Open Government v. City of San Diego* (Super. Ct. San Diego County, No. 37-2013-00052721-CU-MC-CTL [challenge to 18 business improvement districts]) (MJN, Exh. H at pp. 5–7); and
- *San Diegans for Open Government v. City of San Diego* (4th Dist. Ct. of App., D065929 [challenge to 57 maintenance assessment districts]) (MJN, Exh. I at pp. 26–30).[22]

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[22] The question is also pending in *The Inland Oversight Committee v. City of Ontario,* Fourth DCA Case No. E060022, a challenge to a tourism marketing district. Division Two of the Fourth District issued a tentative opinion on April 14, 2015, concluding the challenged assessment complied with Proposition 26 because the assessment was legally incident on hoteliers rather than their guests. It has yet to schedule argument on that tentative opinion.

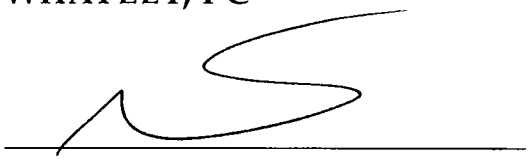
All these trial and appellate courts and litigants must contend with these conflicting published opinions. Review here is therefore appropriate to settle important questions of law.

CONCLUSION

The Opinion contradicts at least three published cases — two involving fees indistinguishable from those here. This Petition also presents opportunity to resolve significant legal questions pending in trial and appellate courts. The City respectfully submits this Court should grant review to provide guidance to lower courts, litigants, and governmental agencies from the smallest water districts to the State itself.

DATED: April 27, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATION OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.504, SUBD. (D)

Pursuant to rule 8.504, subdivision (d) of the California Rules of Court, the foregoing Petition for Review contains 8,385 words (including footnotes, but excluding the tables and this Certification) and is within the 8,400 word limit set by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word 2010.

DATED: April 27, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC

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Cross-Appellant
CITY OF SAN BUENAVENTURA

OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CITY OF SAN BUENAVENTURA,

Plaintiff, Cross-defendant and Appellant,

v.

UNITED WATER CONSERVATION DISTRICT et al.,

Defendants, Cross-complainants and Appellants.

2d Civil No. B251810
(Super. Ct. Nos. VENCI 00401714, VENCI 1414739)
(Santa Barbara County)

COURT OF APPEAL – SECOND DIST.
FILED
Mar 17, 2015
JOSEPH A. LANE, Clerk
gbents Deputy Clerk

Appellants United Water Conservation District and its board of directors (collectively, District) manage the groundwater resources in central Ventura County. Appellant City of San Buenaventura (City) pumps groundwater from District territory and sells it to residential customers. The District collects a fee from groundwater pumpers, including the City, based on the volume of water they pump. The Water Code authorizes this fee (Wat. Code, §§ 74508, 75522)[1] and requires the District to set different rates for different uses. Groundwater extracted for non-agricultural purposes must be charged at three to five times the rate applicable to water used for agricultural purposes. (§ 75594.)

[1] All statutory references are to the Water Code unless otherwise stated.

Article XIII D of the California Constitution governs fees "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Cal. Const., art. XIII D, §§ 1, 2, subd. (e).) The City contends that the fees it pays the District violate article XIII D because they "exceed the proportional cost of the service attributable to the parcel[s]" of land from which the City pumps its water. (*Id.* § 6, subd. (b)(3).)

The threshold question before us is whether the District's groundwater extraction charges are property-related and thus subject to article XIII D. The trial court, relying on *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 (*Pajaro*), concluded that they are. It found that the District's pumping charges violated article XIII D because, pursuant to section 75594, the District charged the City three times the rate it charged pumpers who extracted water for agricultural purposes. The court calculated the amount of overcharges in two separate years and issued writs of mandate requiring the District to refund these amounts to the City. The District appeals this decision, and the City cross-appeals, seeking declaratory relief that the trial court denied.

We conclude that the pumping fees paid by the City are not property-related and that *Pajaro* is distinguishable. We reject the City's alternative arguments. The pumping fees are not taxes subject to the requirements of article XIII C. In addition, substantial evidence supports the trial court's finding that the charges are valid regulatory fees because they are fair and reasonable, and do not exceed the District's resource management costs. Therefore, we reverse the judgment awarding relief to the City and direct the trial court to vacate its writs of mandate. Otherwise, we affirm.

BACKGROUND

I.

Factual and Statutory Background

The District is organized and operated pursuant to the Water Conservation District Law of 1931 (codified as amended in § 74000 et seq.). Its stated purpose is to "manage, protect, conserve and enhance the water resources of the Santa Clara River, its

tributaries and associated aquifers, in the most cost effective and environmentally balanced manner." To this end, the Water Code authorizes the District to conduct water resource investigations (§ 74520), acquire water and water rights (§ 74521), build facilities to store and recharge water (§ 74522), construct wells and pipelines for water deliveries (§ 74525), commence actions involving water rights and water use (§ 74641), prevent interference with or diminution of stream and river flows and their associated natural subterranean supply of water (§ 74642), and acquire and operate recreational facilities associated with dams and reservoirs (§ 74540).

The District covers approximately 214,000 acres in central Ventura County along the lower Santa Clara River valley and the Oxnard Plain. It comprises portions of several groundwater basins.[2] Along the Santa Clara River, from upstream to downstream, the District includes most or all of the Piru, Fillmore, Santa Paula, Oxnard Forebay, Oxnard Plain, and Mound basins. To the east of the Oxnard Plain basin, the District includes the West Las Posas basin and part of the Pleasant Valley basin.

Groundwater recharge in these basins occurs naturally from rainfall as well as from river and stream flow infiltration and percolation. Heavy demand for groundwater throughout the District from both agricultural and urban users causes overdraft, the amount by which extractions exceed natural water recharge. (See § 75506.) Artificial recharge is critical to minimize the overdraft. The District replenishes the groundwater supply directly by spreading diverted river water over grounds at the northern part of the Oxnard Plain. In addition, the District augments groundwater indirectly by delivering water through pipelines to users near the coast who would otherwise attempt to meet their water needs by pumping it from the ground. Despite these mitigation efforts, pumping in the District has exceeded recharge, both natural and artificial, by an average of 20,400 acre-feet per year over the past decade.

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[2] A groundwater basin is "[a]n alluvial aquifer or a stacked series of alluvial aquifers with reasonably well-defined boundaries in a lateral direction and having a definable bottom." (Department of Water Resources, Bulletin 118-03, at p. 216.) An aquifer is "[a] body of rock or sediment that is sufficiently porous and permeable to store, transmit, and yield significant or economic quantities of groundwater to wells and springs." (*Id.* at p. 214.)

This has led to problems of subsidence and salt water intrusion into aquifers along the coast.

The District's water management activities and ongoing operating expenses require a means of funding. The District currently generates revenue from three main sources: property taxes (§ 75370), water delivery charges (§ 74592), and, at issue here, pump charges (§ 75522). Historically, the District relied solely on property taxes and water delivery charges. In 1979, after it had become clear that these two sources were insufficient to support the District's activities, particularly the reversal of overdraft and saline intrusion on the Oxnard Plain basin, the District began levying a charge on groundwater produced within its territory—i.e., pump charges.

The Water Code authorizes districts to impose pump charges in one or more zones within the district "for the benefit of all who rely directly or indirectly upon the ground water supplies." (§ 75522.) Zones may overlap and include the entire district (§ 75540), as does the District's Zone A, from which revenues are applied to a "general" fund used for District-wide conservation efforts. Although the rates charged may vary from zone to zone, the rate within each zone must be "fixed and uniform" for each of two classes of use—water used for agricultural purposes and water used for all other purposes. (§ 75594.) Subject to exceptions not at issue here, section 75594 prohibits a district from equalizing the rates charged for the two types of use.[3] Instead, the rate for non-agricultural use must be between three and five times that charged for agricultural use. The District has always set rates at the minimum 3:1 ratio.

In the 1980s and early 1990s, the District planned and constructed the Freeman Diversion project (Freeman), a major improvement to its surface water diversion facilities along the Santa Clara River near Saticoy. Freeman permanently diverted water from the Santa Clara River to recharge groundwater in the Oxnard Plain

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[3] Section 75594 provides in relevant part that "any ground water charge in any year shall be established at a fixed and uniform rate for each acre-foot for water other than agricultural water which is not less than three times nor more than five times the fixed and uniform rate established for agricultural water." The Water Code defines "agricultural water" to mean "water first used on lands in the production of plant crops or livestock for market." (§ 75508.)

basin in order to mitigate declining water levels and seawater intrusion. To help finance Freeman, the District imposed groundwater pumping charges in the area that it determined received the recharge benefit from Freeman. This area, designated as Zone B, currently comprises the basins south of the Santa Clara River's north bank, which include the Oxnard Plain basin, the Oxnard Forebay basin, the Pleasant Valley basin, and a portion of the West Las Posas basin.

The City overlies nearly the entire Mound basin. At the time the District implemented the pumping charges to fund Freeman, there was a lack of technical agreement as to the degree pumpers in the Mound basin benefited from District's activities. The City maintained that its wells would not benefit from Freeman and filed several lawsuits seeking to invalidate both the new Freeman-related charges and the District's general pump charges as they applied to City. The parties reached a settlement in 1987. The agreement provided that the Mound basin would be excluded from the Freeman-related charges and a separate billing zone (Zone C) would be established covering the area of the Oxnard Plain basin north of the Santa Clara River. Within Zone C, municipal pumping rates for Freeman were to equal agricultural rates on the Oxnard Plain south of the Santa Clara River. This was accomplished by setting the rates for Zone C equal to a third of the rates for Zone B.

The settlement agreement expired at the end of the 2010-2011 water year when the District paid off its construction loan for Freeman. Beginning in the 2011-2012 water year, Zone C was abolished and incorporated into Zone B, resulting in substantially higher pumping rates for groundwater extractors in the former Zone C. It is this increase in rates to which the City objects.

II.

The Constitutional Overlay

Proposition 13 was adopted by the electorate in 1978. It added article XIII A to the California Constitution, "imposing important limitations upon the assessment and taxing powers of state and local governments." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 218.) Its

principal provisions set maximum rates for ad valorem property taxes and for increases in a property's assessed valuation. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681.) Crucially, Proposition 13 restricted cities, counties, and special districts from imposing "special taxes" except by a two-thirds vote of the district's qualified electors. (Cal. Const., art. XIII A, § 4.) A "special tax" is a tax "imposed for specific purposes," as opposed to a "general tax," which is "imposed for general governmental purposes." (Gov. Code, § 53721; accord, Cal. Const., art. XIII C, § 1, subd. (d).) A local government's use of certain types of special taxes—"ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property"—was prohibited by Proposition 13 altogether. (Cal. Const., art. XIII A, § 4.)

A series of judicial decisions diminished Proposition 13's import by allowing local governments to generate revenue without a two-thirds vote. (See *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317-1319 [discussing several such cases].) The watershed case was *Knox v. City of Orland* (1992) 4 Cal.4th 132, in which the California Supreme Court upheld, as a "special assessment" rather than a "special tax," a city's levy on real property to fund park maintenance. A special assessment under *Knox* did not require voter approval at all. It was a """compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein . . . .'" . . .'" (*Id.* at pp. 141-142.) A special tax, while also levied for a specific purpose, differed from a special assessment in that it need not "confer a special benefit upon the property assessed beyond that conferred generally." (*Id.* at p. 142, fn. omitted.) The result was that Proposition 13's directive of limiting the taxes imposed on property owners, and in particular homeowners, was circumvented through an ever increasing proliferation of special assessments and other property-related fees and charges that were not deemed "taxes." (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839 (*Apartment Association*).)

In response, the voters in 1996 approved Proposition 218, which added articles XIII C and XIII D to the state Constitution. (See *Howard Jarvis Taxpayers Assn.*

v. City of Riverside, *supra*, 73 Cal.App.4th at p. 682.) Proposition 218's intent was "to prohibit unratified exactions imposed on property owners as such." (*Apartment Association*, *supra*, 24 Cal.4th at p. 838.) It restricted local governments attempting to raise funds from property owners to four methods: (1) an ad valorem property tax, (2) a special tax, (3) an assessment, and (4) a "fee" or "charge" (the terms are interchangeable) for property-related services. (Cal. Const., art. XIII D, § 3; *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 918.) Proposition 218 extended Proposition 13's limitations on ad valorem property taxes and special taxes by placing similar restrictions on assessments and property-related fees and charges, including the two-thirds vote requirement. (*Howard Jarvis v. City of Riverside, supra,* at p. 682.)

While Proposition 218 sharply limited local governments' ability to raise revenue from property owners without their consent, it did little to limit the imposition of regulatory fees imposed on a basis other than property ownership. Fees classified as something other than "taxes" were not subject to Proposition 13. For example, in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, the Supreme Court considered certain "fees" imposed on manufacturers that contributed to environmental lead contamination. *Sinclair Paint* concluded that the fees funding services for potential child victims of lead poisoning constituted "bona fide regulatory fees, not taxes, because the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers' operations, and [by law] the amount of the fees must bear a reasonable relationship to those adverse effects." (*Id.* at p. 870.)

Largely in response to the *Sinclair Paint* decision, California voters approved Proposition 26 in 2010 to close the perceived loopholes in Propositions 13 and 218 that had allowed "a proliferation of regulatory fees imposed by the state without a two-thirds vote of the Legislature or imposed by local governments without the voters' approval." (*Schmeer v. County of Los Angeles*, *supra*, 213 Cal.App.4th at pp. 1322, 1326.) Proposition 26 broadened the constitutional definition of "'tax' to include 'any levy, charge, or exaction of any kind imposed by' the state or a local government, with specified exceptions." (*Id.* at p. 1326, citing Cal. Const., art. XIII C, § 1; see Prop. 26,

§ 1, subd. (f) ["[T]his measure . . . defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent the[] restrictions [in Props. 13 and 218] on increasing taxes by simply defining new or expanded taxes as 'fees'"].)

Taken together, Propositions 13, 218, and 26 create a classification system for revenue-generating measures promulgated by local government entities. Any such measure is presumptively a tax. If the revenue is collected for a payor-specific benefit or service (see Cal. Const., art. XIII C, § 1, subds. (e)(1) & (e)(2)), certain regulatory costs (see *id.* subd. (e)(3)), the use, lease, or purchase of government property (see *id.* subd. (e)(4)), judicial fines or penalties (see *id.* subd. (e)(5)), or property development charges (see *id.* subd. (e)(6)), it is not a tax. In addition, a measure is not a tax if under article XIII D it constitutes an assessment on real property or a property-related "fee" or "charge." (See *id.* subd. (e)(7).) A fee or charge is "any levy other than an ad valorem tax, a special tax, or an assessment, imposed . . . upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (*Id.* subd. (e).)

A measure's classification determines the requirements to which it is subject. Taxes cannot be levied by a special purpose district (such as the District) for general revenue purposes. (Cal. Const., art. XIII C, § 2, subd. (a).) A special purpose district can levy a tax for a specific purpose only with the approval of a majority of voters. (*Id.* subd. (b).)

In order to levy a property-related fee or charge, a number of procedural and substantive requirements must be met. As relevant here, the fee must not "exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) Although property-related fees generally require approval by either a majority of the affected property owners or two-thirds of the voters in the affected area, a property-related fee for water service does not. (*Id.* subd. (c).)

A fee or charge for a payor-specific benefit or service that is neither property-related nor a tax must "not exceed the reasonable costs to the local government of conferring the benefit[,] granting the privilege," or "providing the service or product."

(Cal. Const., art. XIII C, § 1, subds. (e)(1) & (e)(2).) "[T]he manner in which those costs are allocated to a payor [must] bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (*Id.* subd. (e)(7).) Such a fee or charge normally does not require voter approval.

III.

Procedural Background

After Freeman was paid off and the terms of the 1987 settlement were no longer in force, the District proposed to eliminate Zone C and merge it with Zone B, effectively tripling the City's rate per acre-foot of water. In addition, in both the 2011-2012 and 2012-2013 water years, the District proposed increasing the rate charged District-wide (Zone A). The District notified well owners of the proposed changes and invited them to comment. Only a minority of the well owners, including the City, submitted protest letters. Over the City's objections, the District eliminated Zone C and adopted the proposed rates.

The City filed two lawsuits, which were consolidated. It sought to overturn the District's rate decisions through a writ of mandate (Code Civ. Proc., § 1085), an administrative mandate (*id.* § 1094.5), declaratory relief (*id.* § 1060), and a reverse validation action (*id.* § 860 et seq.). The California Federation of Farm Bureaus, the Ventura County Farm Bureau, and the Pleasant Valley County Water District answered the validation cause of action and intervened in the others.[4] The District filed a cross-complaint seeking declaratory relief upholding its rate determinations in water year 2011-2012.

The City challenged the rates on two fronts. First, it asserted that the statutorily-mandated 3:1 ratio between groundwater extraction rates for non-agricultural and agricultural uses constituted an illegal subsidy for agricultural users at the expense of

[4] These parties were not named defendants or respondents except insofar as the City's validation cause of action named as defendants "all persons interested in the validity of the rates adopted by the United Water Conservation District." They are not parties to the appeal. The California Federation of Farm Bureaus filed an amicus brief in support of the District.

other users. Second, the City questioned the propriety of including in the District-wide Zone A rates certain of the District's expenses that the City contended either did not benefit it at all or benefitted it less than other groundwater users. The City maintained that these practices violated Propositions 13, 218, and 26, the common law of ratemaking, and section 54999.7, subdivision (a), of the Government Code (*San Marcos* legislation).[5]

The trial court concluded that the groundwater extraction charges (1) bore a reasonable relationship to the City's burdens on and benefits from the regulatory activity and thus were valid regulatory fees rather than special taxes subject to Proposition 13; (2) were property related fees and charges subject to article XIII D (Prop. 218); and (3) were not, as property related fees, taxes under Proposition 26. The court did not determine whether the *San Marcos* legislation or the common law of utility rate-making applied to the extraction charges but found that, if they did, the charges did not exceed the reasonable cost to the District of providing the service and were reasonable, fair, and equitable.

Analyzing the extraction charges under article XIII D, the trial court similarly found that the charges in the aggregate were reasonably proportional to the District's costs and comported with Proposition 218. However, it found that the 3:1 ratio between rates for non-agricultural and agricultural water use mandated by section 75594 was unconstitutional under Proposition 218 for the water years in question because the District failed to present evidence that the rate differential reflected a cost differential. The court found that the City was entitled to a partial refund in the amount it paid in excess of a rate based upon the District's average cost for all types of water usage. It

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[5] *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154 held that, absent legislative authorization, a public entity's constitutional exemption from special assessments prohibited a local water district from imposing a capacity fee for funding capital improvements to the water system. (See *Regents of University of California v. East Bay Municipal Utility Dist.* (2005) 130 Cal.App.4th 1361, 1366.) The *San Marcos* legislation granted that express authorization, subject to certain substantive and procedural requirements.

issued writs of mandate awarding the City a partial refund of $548,296.22 for 2011-2012 and $794,815.57 for 2012-2013, plus pre-judgment interest.[6]

The District appeals the trial court's conclusion that Proposition 218 applies to its groundwater extraction charges. In the alternative, it appeals the court's ruling that to satisfy Proposition 218, the District must present quantitative evidence justifying the 3:1 rate disparity rather than pointing to qualitative differences between agricultural and other water users that impact the relative cost of conservation services. The District also appeals the court's decision to award a partial refund rather than to remand to the District so that it can conduct further proceedings to determine whether the 3:1 ratio is justified under article XIII D. Finally, the District contends that the court's refund calculation is incorrect.

The City cross-appeals, seeking declaratory relief. First, it asks us to hold that section 75594's rate ratio is facially unconstitutional. It also requests a declaration that the District must limit its groundwater extraction charges to the cost of providing services that have a demonstrated relationship to groundwater use. In addition, the City seeks a declaration that the District's rate structure must take into account the scientific evidence regarding how different groundwater basins respond to specific recharge efforts rather than charging all groundwater users a uniform rate for District-wide conservation efforts. The City does not challenge the trial court's findings that the groundwater extraction charges were not "special taxes" under Proposition 13 and did not violate the common law of utility ratemaking.

We conclude that the pump charges paid by the City are neither property-related fees nor taxes, that they do not exceed the District's reasonable costs of maintaining the groundwater supply, and that the District allocates those costs in a fair or reasonable relationship to the City's burdens on this resource. Accordingly, we reverse the judgment in favor of the City and direct the trial court to vacate its writs of mandate.

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[6] The trial court, finding that a writ of mandate and declaratory judgment were the only appropriate forms of relief, denied the petition for writ of administrative mandate and the reverse validation complaint. Neither party contests this aspect of the court's judgment.

DISCUSSION

I.

Standard of Review

We review de novo a trial court's determinations whether taxes, fees, and assessments imposed by a local governmental entity are constitutional, exercising our independent judgment. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448-450.) In the trial court, the governmental entity has the burden of showing, by reference to the face of the record before it, that its charges satisfy the Constitution. (See Cal. Const., arts. XIII A, § 3, subd. (d), XIII C, § 1, subd. (e), XIII D, § 6, subd. (b)(5); see also *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436-437.) On appeal, as in any case, the appealing party has the responsibility of affirmatively demonstrating error. (*Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 913.)

"[W]e exercise our independent judgment in reviewing the record," but "we do not take new evidence or decide disputed issues of fact." (*Morgan v. Imperial Irrigation District*, *supra*, 223 Cal.App.4th at p. 912.) Instead, we review the resolution of factual conflicts by the trial court under the substantial evidence standard. (*Id.* at p. 916.) "Under this standard, 'the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.' [Citation.]"[7] (*Ibid.*; see *Schmeer v. County of Los Angeles*, *supra*, 213 Cal.App.4th at p. 1316.)

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[7] The City asserts that our "[r]eview of factual issues is de novo" because we are "equally well placed" as the trial court to review the "cold" administrative record. Not so. While the City is correct that in a mandamus action the scope of review can be identical in the trial and appellate courts (see, e.g., *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 745), that is because courts at each level normally give great deference to an agency's factual findings made in support of its action. (*McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1786.) Here, the factual findings under review were made by the trial court, not the District, so we apply the less but still highly deferential "substantial evidence" standard.

II.

Construction of a Voter Initiative

When construing a provision of the state Constitution brought about by voter initiative, we apply the same interpretive principles governing statutory construction. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) "[O]ur paramount task is to ascertain the intent of those who enacted it." (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290.) We look first to the provision's language as the best indicator of the voters' intent (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 265), giving words their ordinary meaning and construing them in the context of the measure as a whole and its overall scheme. (*Professional Engineers*, at p. 1037.) "'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure . . . and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.' [Citation.] Where there is ambiguity in the language of the measure, '[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.' [Citation.]" (*Ibid.*)

Proposition 218 instructs courts to liberally construe its provisions "to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5.) At the same time, repeal of existing legislation by implication is strongly disfavored. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 807; *St. Cyr v. California FAIR Plan Association* (2014) 223 Cal.App.4th 786, 799.) We presume the validity of a legislative act, resolving all doubts in its favor, and must uphold it unless a "'. . . conflict with a provision of the state or federal Constitution is clear and unquestionable . . . .'" (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1252.)

III.

The Pump Fees Are Not Property-Related Fees or Charges

The trial court determined that it was constrained by *Pajaro* and, as a result, concluded that the pump fees at issue constituted property-related fees or charges. Before explaining why *Pajaro* is distinguishable, we must discuss the trio of Supreme Court cases underlying its holding: *Apartment Association*; *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 (*Richmond*); and *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*).

A.

Supreme Court Authority Regarding "Property-Related Fees and Charges"

Apartment Association involved a municipal housing code provision that imposed an annual $12 fee on residential rental property owners to finance the city's cost of inspection and enforcement. (*Apartment Association*, *supra*, 24 Cal.4th at p. 833.) The Supreme Court held that the fee was not subject to Proposition 218 because it was "imposed on landlords not in their capacity as landowners, but in their capacity as business owners." (*Id.* at p. 840.) It thus was "more in the nature of a fee for a business license than a charge against property." (*Ibid.*)

The Court explained that regulatory fees and property-related fees are not mutually exclusive. (*Apartment Association*, *supra*, 24 Cal.4th at p. 838 ["[T]he mere fact that a levy is regulatory . . . or touches on business activities . . . is not enough, by itself, to remove it from article XIII D's scope"].) The hallmark of a property-related fee is that "it applies only to exactions levied solely by virtue of property ownership." (*Id.* at p. 842.) In other words, Proposition 218 applies to "exactions . . . that are *directly* associated with property ownership" and that "burden landowners *as landowners*" rather than on "levies linked more indirectly to property ownership." (*Id.* at pp. 839, 842, first italics added.)

Richmond again considered the scope of a property-related fee or charge. The district that supplied water to residential and commercial users imposed a connection fee for new water service, one component of which was a fire suppression charge used to

purchase equipment for the volunteer fire department. (*Id.* at pp. 415-416, 425.) A group of real property owners challenged the ordinance as levying an illegal property-related fee. (*Id.* at p. 416.)

While agreeing with the plaintiffs' contention "that supplying water is a 'property-related service' within the meaning of article XIII D's definition of a fee or charge," *Richmond* rejected their broader argument "that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges." (*Richmond, supra*, 32 Cal.4th at pp. 426-427.) The Supreme Court distinguished "[a] fee for ongoing water service through an existing connection" from "a fee for making a new connection to the system." (*Id.* at p. 427.) The former "requires nothing other than normal ownership and use of property" whereas the latter "results from the owner's voluntary decision to apply for the connection." (*Ibid.*) Because the charge on the owner's voluntary decision to apply for a service connection was not a charge on the property-related service itself, it was not subject to Proposition 218. (*Id.* at p. 428.)

Finally, in *Bighorn*, a case that *Pajaro* ultimately found dispositive, the Supreme Court reiterated that rates and other charges for water delivery were "property-related" within the meaning of Proposition 218. *Bighorn* involved a local agency that provided domestic water service to residents within its special district. A resident in the district sought to place an initiative on the ballot that would have limited the agency's rates and other water delivery charges. (*Bighorn, supra*, 39 Cal.4th at pp. 209-210.) The Court of Appeal held that article XIII C, section 3 of the California Constitution, which vests local voters with the power to "reduc[e] or repeal[] *any local tax, assessment, fee or charge*" by initiative, did not apply to the fees and charges at issue. (See *Bighorn*, at pp. 211-212, fn. omitted.)

The Supreme Court disagreed, finding it obvious that section 3 applied to "fees and charges." The only issue was whether the meaning of "fees and charges" in article XIII C, which does not define the phrase, is coextensive with its meaning in article XIII D, where it is limited to property-related fees and charges. (See Cal. Const., art. XIII D, § 2, subd. (e).) *Bighorn* did not resolve this question other than to conclude that

the "fees and charges" in article XIII C included the property-related fees and charges in article XIII D. Citing *Richmond* for the proposition that "a public water agency's charges for ongoing water delivery . . . are fees and charges within the meaning of article XIII D," the court held that such charges "are also fees within the meaning of section 3 of article XIII C." (*Bighorn*, *supra*, 39 Cal.4th at p. 216.)

Relying on dictum in *Apartment Association* that "it is unclear . . . whether a fee to provide gas or electricity service is the same as a fee imposed on the consumption of electricity or gas" (*Apartment Association*, *supra*, 24 Cal.4th at p. 844), the agency in *Bighorn* argued that its volumetric charges were based on consumption rather than property and were not subject to Proposition 218. In its view, only the fixed monthly charge that it imposed on all customers regardless of usage was property-related.

The court rejected this argument. Pointing out that article XIII D "'includ[es] a user fee or charge for a property related service'" (Cal. Const., art. XIII D, § 2, subd. (e)), *Bighorn* concluded that "[c]onsumption-based water delivery charges also fall within the definition of user fees, which are 'amounts charged to a person using a service where the amount of the charge is generally related to the value of the services provided.' [Citation.]" (*Bighorn*, *supra*, 39 Cal.4th at p. 217.)

B.

Pajaro

Like the District here, the Pajaro Valley Groundwater Basin faced problems of overdraft and seawater intrusion from decades of groundwater overuse. The Pajaro Valley Water Management Agency was created by special statute to combat these problems, in part by supplementing the area's water supply with sources other than groundwater. To that end, the agency was authorized to impose groundwater augmentation charges on the extraction of groundwater. (*Pajaro*, *supra*, 150 Cal.App.4th at pp. 1370-1372.)

The agency adopted a groundwater management plan that included the construction of a 23-mile pipeline to import water from a neighboring county. It planned to fund the project in part through higher groundwater augmentation charges against all

extractors of groundwater. The charges were levied at a set rate per acre-foot. Metered pumpers, many of which were large, agricultural users, paid based on their actual usage. Non-metered residential users paid a flat fee based on an estimated average rate of consumption per dwelling. (*Pajaro, supra,* 150 Cal.App.4th at pp. 1372-1374.)

The agency brought an action to validate the increased groundwater augmentation charges. The trial court declared the charges valid but the Court of Appeal reversed, holding that they constituted a charge incidental to property ownership. Because the agency had not complied with Proposition 218's procedural requirements for imposing such a charge, the augmentation charge was held invalid. (*Pajaro, supra,* 150 Cal.App.4th at pp. 1374-1375, 1393.)

The appellate court characterized the augmentation fee as being "charged in return for the benefit of ongoing groundwater extraction and the service of securing the water supply for everyone in the basin." (*Pajaro, supra,* 150 Cal.App.4th at p. 1381, fn. omitted.) Ultimately, though, *Pajaro* concluded that whether the agency's fee was for a "service" was immaterial because it was "imposed as an incident of property ownership." (*Id.* at p. 1389.) Water extraction, the court posited, is "an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water." (*Id.* at p. 1391.)

Pajaro recognized that the conceptually similar *Apartment Association* undermined its conclusion, insofar as that case held that "as an incident of" property ownership means "solely by virtue of" property ownership rather than "on an incident of" property ownership. (*Pajaro, supra,* 150 Cal.App.4th at p. 1389.) However, *Pajaro* dismissed *Apartment Association* as being of questionable vitality given that *Bighorn* "did not mention the case at all." (*Ibid.*) *Pajaro* found no material distinction, for article XIII D purposes, between a charge on groundwater extraction and a charge on delivered water. (*Id.* at pp. 1388-1389.) Although the court speculated that the extraction charge might survive scrutiny under *Bighorn* if it were imposed only on non-residential users, the fact that a large majority of pumpers were using the water for residential or domestic uses was dispositive. (*Id.* at p. 1390.)

C.

Analysis

The level of abstraction at which we should analyze the constitutional text is unclear. Do we determine whether groundwater extraction fees in general are imposed as an incident of property ownership? Or do we focus on the specific fee imposed by the District? And if the latter, do we consider the District's fee without regard to the payor at issue or do we consider the City's purpose in pumping groundwater?

The *Pajaro* court implied that the result could differ at least from district to district if not from user to user when it suggested that a charge on groundwater extracted for nonresidential purposes might fall within the rationale of *Apartment Association*. (*Pajaro*, *supra*, 150 Cal.App.4th at pp. 1389-1390.) But this is far from certain. Our Constitution applies statewide. It would be anomalous to assign its provisions different meanings in different locations. (See Cal. Const., art. IV, § 16, subd. (a) ["All laws of a general nature have uniform operation"]; *Ex parte Smith* (1869) 38 Cal. 702, 710 ["[G]eneral laws . . . shall operate uniformly, or in the same manner upon all persons who stand in the same category, that is to say, upon all persons who stand in the same relation to the law, in respect to the privileges and immunities conferred by it, or the acts which it prohibits"].) Similarly, the City questions how the District "can . . . apply a 'uniform' rate as required by . . . section 74527 that is lawful as to the City but unconstitutional as to rural residential groundwater users."

We need not resolve this issue. Whether we consider this specific pump fee or pump fees in general, we conclude that the fee is not property-related and that article XIII D does not apply.

Pajaro was based upon a unique set of facts—"that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible." (*Pajaro*, *supra*, 150 Cal.App.4th at p. 1397 (conc. opn. of Bamattre-Manoukian, J.).) That is far from the case here. While the record does not disclose the exact number of residential customers who pump water in lieu of connecting to an existing water delivery network, it is evident that this number is

insubstantial relative to the number of residential customers receiving delivered water. There are at most 840 parcels with wells in the District. The City, whose 11 parcels account for only about 6 percent of the water extracted from these wells, delivers water to approximately 30,000 residential dwelling units in the District. And of course the City itself uses the water it pumps for commercial rather than residential purposes.[8]

Pajaro also found it significant that the agency's pump charge did not serve a regulatory purpose. (See *Pajaro*, *supra*, 150 Cal.App.4th at p. 1381 [concluding that fee charged to smaller, unmetered wells based on estimated usage was not "justified on regulatory grounds" but that a regulatory purpose "might still be readily invoked with respect to metered extractions"].)[9] According to *Pajaro*, *Bighorn* "le[ft] open the possibility that delivery of water for . . . nonresidential purposes is not a property-based service, and that charges for it are not incidental to the ownership of property. A finding that such a fee is not imposed as an incident of property ownership might be further supported by a clearly established regulatory purpose, e.g., to internalize the costs of the burdened activity or to conserve a supplied resource by structuring the fee in a manner intended to deter waste and encourage efficiency." (*Id.* at pp. 1389-1390, fn. omitted.) Here, as the trial court found, the groundwater extraction fees serve the valid regulatory purpose of conserving water resources. (Cal. Const., art. X, § 2; §§ 75521, 75522.)

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[8] The City asserts that its "customers use the groundwater it delivers for residential purposes and it is entitled to speak for its customers." It is true that "a political subdivision of the state may challenge the constitutionality of a statute or regulation on behalf of its constituents where the constituents' rights under the challenged provision are 'inextricably bound up with' the subdivision's duties under its enabling statutes." (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 629.) But the City's residential water customers lack independent standing to sue the District because they have no rights at stake. Nothing requires the City to obtain its water by pumping, and the City's customers, who do not pay the fees, have only an indirect financial interest in the constitutionality of the District's rates. (Cf. *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1101, 1104, fn. omitted ["[W]e have permitted consumer intervention into the sales tax scheme in limited circumstances and only by means of a judicial proceeding to compel the retailer/taxpayer to seek a refund" since "[t]he *retailer* is the taxpayer, *not* the consumer"].)

[9] The City's wells are all metered. We do not necessarily agree with *Pajaro* that charging unmetered residential wells based on estimated usage is incompatible with a regulatory purpose, particularly in a district with large commercial pumpers and only a few residential ones. That issue is not before us.

Even if there were no factual record regarding the relative number of residential versus commercial well owners and a clear regulatory purpose, we would still conclude that a charge on groundwater extraction is not imposed as an incident of property ownership. In *Orange County Water Dist. v. Farnsworth* (1956) 138 Cal.App.2d 518, the Court of Appeal considered a similar pump fee. The charge was challenged, among other reasons, on the ground that "the water which underlies real property is a part of the property itself and that the charge in question is, in effect, a tax levied by reason of ownership of the property . . . ." (*Id.* at pp. 529-530.) The Court of Appeal summarily rejected this argument. It found that "[t]he charge in question is more in the nature of an excise tax levied upon the activity of producing ground water by pumping operations" than "a tax levied by reason of the ownership of property." (*Id.* at p. 530.)

We agree with *Farnsworth* that a pump fee is better characterized as a charge on the activity of pumping than a charge imposed by reason of property ownership. Given this characterization, the facts here are not materially different from those in *Apartment Association*. "The [pump] fee is not imposed solely because a person owns property. Rather, it is imposed because the property is being [used to extract groundwater]. It ceases along with the business operation, whether or not ownership remains in the same hands. For that reason, the [District] must prevail." (*Apartment Association, supra*, 24 Cal.4th at p. 838.)

That *Bighorn* did not cite *Apartment Association* is unsurprising. *Richmond* squarely stood for the proposition that charges for domestic water delivery service are property related, even though other charges less directly associated with the provision of water, namely connecting a property to the delivery system, are not. *Bighorn*, like *Richmond*, dealt with "a public water agency's charges for ongoing water delivery." (*Bighorn, supra*, 39 Cal.4th at p. 216.) It merely clarified that the charges for this service were subject to Proposition 218 whether they were volume-based "consumption" charges or flat-rate charges "imposed regardless of water usage." (*Id.* at pp. 216-217.) *Apartment Association* was far less relevant than *Richmond* to this issue.

The Supreme Court's failure to cite a marginally relevant case does not signal that case's implicit overruling. (See *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 995 [characterizing *Apartment Association* as "dispositive" of a Prop. 218 challenge].)

Nor do we think it overly important that pumping may not always be a "business operation." (See *Pajaro*, *supra*, 150 Cal.App.4th at p. 1391, fn. 18 [discussing the distinction set forth in *Apartment Association* between "[a] charge . . . imposed on a person because he *owns* land" and one "imposed because he *engages in certain activity* on his land" and doubting "that it is satisfactorily captured by a distinction between business and domestic uses or purposes"].) In the City's case, of course, it is. The City pumps water for the municipal supply, which it then sells to residential customers. (See *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593 ["In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only *quasi*-public capacity"].) But even with respect to the individual household that elects to pump water for its own consumption, the Supreme Court made clear in *Richmond* that residential business operations are not the only household activities exempt from article XIII D. That article applies only to charges on an activity that "requires nothing other than *normal* ownership and use of property." (*Richmond*, *supra*, 32 Cal.4th at p. 427, italics added.) Voluntarily generating one's own utilities arguably is not a normal use of property, and in any event, it is a "business operation" in the sense that it affects the demand for municipal services. (Cf. *Wickard v. Filburn* (1942) 317 U.S. 111.)

We also disagree with *Pajaro* that the groundwater extraction charge need not constitute a fee for "service" provided by the District in order to fall within article XIII D's scope. (See *Pajaro*, *supra*, 150 Cal.App.4th at p. 1389 ["The Agency contends that the charge is not a 'service fee,' but that proposition seems beside the point if the charge is imposed as an incident of property ownership"].) That is simply an untenable construction of the constitutional text, particularly taken in context.

Article XIII D provides that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the

proportional cost of the *service* attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3), italics added.) Plainly, this refers to a service fee, albeit one imposed "as an incident of property ownership." (*Id.* at subd. (b)(3).) Most of the other substantive requirements imposed in section 6, subdivision (b) also explicitly apply to fees and charges for local government services. For example, subdivision (b)(1) prohibits revenues from the fee or charge from "exceed[ing] the funds required to provide the property related service." Subdivision (b)(4) states that "[n]o fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." It also forecloses "[f]ees or charges based on potential or future use of a service." (*Ibid.*) Subdivision (b)(5) proscribes charges for "general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." These provisions refer to property-related *services*.

California Constitution, article XIII D, section 3 confirms this interpretation. It provides in relevant part that "[n]o tax, assessment, fee, or charge shall be assessed . . . upon any parcel of property or upon any person as an incident of property ownership except . . . [f]ees or charges for property related services as provided by this article."[10]

We think it self-evident that in charging property owners for pumping groundwater, the District is not providing a "service" to property owners in the same way that the *Bighorn* agency provided a service by delivering water through pipes to residences. The conceptual difficulty with a contrary conclusion is apparent from *Pajaro*'s attempt to define what the "service" at issue is. In its view, the District's service is "securing the water supply for everyone in the basin." (*Pajaro*, *supra*, 150 Cal.App.4th

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[10] California Constitution, article XIII D, section 2 defines "property-related service" as "a public service having a direct relationship to property ownership." Section 6, subdivision (b)(5), notes that "a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article" is the agency's "[r]eliance . . . on any parcel map, including, but not limited to, an assessor's parcel map."

at p. 1381, fn. omitted.) But, if so, such a service cannot meet the requirement that it be "actually used by, or immediately available to, the owner of the property in question." (Cal. Const., art. XIII D, § 6, subd. (b)(4).) Moreover, it would fall within the realm of prohibited "[f]ees or charges based on potential or future use of a service." (*Ibid.*) Worse still, such a service is "available to the public at large in substantially the same manner as it is to property owners." (*Id.* at subd. (b)(5).) There is a fundamental conflict between a pump fee's classification as a property-related service and its validity under article XIII D.

The recently enacted Sustainable Groundwater Management Act (Stats. 2014, chs. 346, 347, 348) (SGMA) bolsters our conclusion that the groundwater extraction fees here are not subject to article XIII D. Although the SGMA's amendments to the Water Code do not apply to the District because it is not currently part of a groundwater sustainability agency, the SGMA's treatment of groundwater extraction fees is instructive. The Legislature authorized such fees in two separate sections. In section 10730.2, the Legislature expressly required that fees "to fund costs of groundwater management," including the "[s]upply, production, treatment, or distribution of water," be adopted in accordance with article XIII D. (§ 10730.2, subds. (a), (c).) Fees authorized pursuant to section 10730 "to fund the costs of a groundwater sustainability program" have no such requirement. (§ 10730, subd. (a).) That the Legislature required groundwater sustainability agencies to impose some but not all groundwater extraction fees in compliance with article XIII D suggests that, in its view, compliance is not constitutionally required. (See *In re Ethan C.* (2012) 54 Cal.4th 610, 638 ["When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful"].)

We thus conclude that groundwater extraction charges are not property-related charges or fees. Even if they were, however, we see no conflict between Proposition 218's substantive requirements and section 75594's required rate ratio. Proposition 218 mandates that the amount of the fee imposed on a parcel or a person as an incident of property ownership "not exceed the proportional cost of the service

attributable to the parcel." (Cal. Const., art. XIII, § 6, subd. (b)(3).) Section 75594 does not discriminate between persons or parcels. It discriminates between types of use. (Cf. *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926 [local agency rates for delivered water violated Proposition 218 where agency discriminated among types of *users* even though "residential" users could use water for agricultural purposes].) If the City chooses to use its groundwater for agricultural purposes, it too can benefit from the lower rates.

That the City's desired use for the water it pumps is subject to a higher regulatory fee than agricultural use is a policy decision made by the Legislature, not the District. Section 6 of article XIII D governs only property-related fees and charges imposed by *local* government agencies. It does not govern the Legislature's statewide regulatory policy, particularly a policy decision made decades before the passage of Proposition 218. We "are required to try to harmonize constitutional language with that of existing statutes if possible." (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1192.) Because "it is possible to reconcile the language of Proposition 218 with [section 75594's mandatory rate ratio] existing at the time of its passage, we must do so." (*Ibid.*)

IV.

The Pump Fees Are Not Taxes

The trial court found that the pump charges did not constitute "taxes" under Proposition 26's broader definition because they fell into the exception for property-related fees and charges under article XIII D. Since we hold otherwise, we must address the City's alternative contention that the pump charges are taxes that were imposed in violation of Proposition 26.

A.

The Pump Fees Are for Payor-Specific Benefits

Pursuant to Proposition 26's presumption that "any levy, charge, or exaction of any kind imposed by a local government" is a tax, the pump fees must be taxes unless

they fall into one of seven enumerated exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).) We only need consider two of these exceptions, which apply to varying extents.

The third exception contains an exhaustive list of regulatory activities for which a local government can recover its reasonable costs through fees: "issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." (Cal. Const., art. XIII C, § 1, subd. (e)(3).) Many of the costs associated with managing, protecting, conserving, and enhancing the District's water resources lie beyond the scope of this exception, but not all. In particular, the District is authorized to "make surveys and investigations" of its water supply and resources. (§ 74520.) These costs, to the extent they are included in the pump fees, are not taxes.

The District's strongest argument that the groundwater extraction fees are not taxes is that they fall within the first exception for payor-specific benefits and privileges. Pumpers receive an obvious benefit—they may extract groundwater from a managed basin.

The City complains that pumpers are merely exercising their existing property rights and that the District "does not grant the City a right or privilege to use groundwater any more than the County grants a homeowner the right to live in his or her home when collecting the property tax." This analogy is inapt. A pump fee is more like the entrance fee to a state or local park, which is not a tax (see Cal. Const., art. XIII C, § 1, subd. (e)(4); *id.* art. XIII A, § 3, subd. (b)(4)). Although citizens generally have the right to enter such public land, the government is entitled to charge them a fee for its efforts to maintain the land so that it can be enjoyed by all who use it. (See Pub. Resources Code, § 5010.) Without the District's resource management operations, groundwater would be depleted far faster and overdraft in the District would be far more severe. The District's conservation efforts thus constitute a specific benefit that accrues directly to those who use groundwater. Consequently, the pump fees are not taxes if, as the trial court found, they do not exceed the District's reasonable costs of groundwater management.

B.

The Pump Fees Do Not Exceed the District's Reasonable Costs

"A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. [Citation.] The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors. [Citation.] [¶] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax." (*California Farm Bureau Federation v. State Water Resources Control Bd.*, *supra*, 51 Cal.4th at p. 438; accord § 75596 [providing that groundwater charges "shall not produce funds for district purposes that would exceed such amount as is deemed necessary by the district board to be used in furtherance of district purposes in the replenishment, augmentation, and the protection of water supplies for users within the district"].)

The trial court found that "the basins within the [District's] boundaries are [hydrogeologically] interconnected in complex and incompletely explained ways." We agree. The record contains substantial evidentiary support for this finding.

The City does not dispute that the actions of one pumper in the District affects every other pumper to *some* degree; rather, it criticizes the District for "impos[ing] District-wide rates that assume an equal degree of service to pumpers throughout its basins and three times the service to [municipal and industrial users] as to agriculture." Yet, by imposing fees based upon the volume of water extracted, the District largely *does* charge individual pumpers in proportion to the benefit they receive from the District's conservation activities. The District ensures water availability District-wide. Large-scale users such as the City receive a far greater benefit from individual landowners who pump water for personal consumption. That is more than is required. The District need only ensure that its charges in the aggregate do not exceed its regulatory costs.

The City specifically challenges three expenditures allocated to the District-wide Zone A charges: the cost to treat and deliver surface water to overdrafted coastal areas; the cost of purchasing water from the State for delivery to water customers; and the "recreation activities subfund," which the City asserts includes the cost of potable water delivery to the concessionaire at Lake Piru. The City contends these costs are unrelated to groundwater augmentation and management.

Contrary to the City's assertion, the recreation activities subfund is actually supported by revenue from the concessionaire at Lake Piru and the ad valorem property taxes collected by the District. Likewise, the District pays for its State water allocation primarily from an annual voter-approved property assessment.

More generally, the City is incorrect that the District's costs associated with the acquisition, treatment, transport, and delivery of State and surface water are unrelated to its groundwater management goals. The District sells water to customers who use the delivered water in lieu of water pumped from the ground, particularly in coastal areas where the problem of seawater intrusion is most acute. Although the City's wells are not located in these critical areas, it pumps the majority of its water from wells in the Oxnard Plain basin, which contributes to the problem by removing water that would otherwise flow to the critical areas near the coast. In any event, providing pumpers with a substitute to groundwater use eases the overall burden on the resource in the District.

On independent review we conclude that the District's pump fees do not exceed the reasonable cost of regulating the District's groundwater supply. Accordingly, these regulatory fees are not taxes and are not subject to approval by the voters.

V.

San Marcos Litigation

We agree with the trial court that, insofar as the *San Marcos* legislation applies, the District complied with it. The *San Marcos* legislation requires that when a public agency provides a "public utility service" to another public agency, the service fee cannot "exceed the reasonable cost of providing the public utility service." (Gov. Code, § 54999.7, subd. (a).) As we have explained, the District does not provide a "service" to

groundwater pumpers, many if not most of whom are not "public agencies," and its fees are not excessive in light of its reasonable costs.

DISPOSITION

The judgment is reversed insofar as it granted mandamus and declaratory relief to the City. The matter is remanded to the superior court with directions to vacate its writs of mandate in case numbers VENCI 00401714 and VENCI 1414739. The judgment is affirmed in all other respects. The District shall recover its costs on appeal.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Ariel Pierre Calonne, former City Attorney, Keith Bauerle, Assistant City Attorney; Colantuono & Levin; Colantuono, Highsmith & Whatley, Michael G. Colantuono, David J. Ruderman, Michael R. Cobden, for Appellant City of San Buenaventura.

Musick, Peeler & Garrett, Anthony H. Trembley, Gregory J. Patterson, Cheryl A. Orr, for Appellants United Water Conservation District and Board of Directors of United Water Conservation District.

Nancy N. McDonough and Christian C. Scheuring for California Farm Bureau Federation as Amicus Curiae on behalf of Appellant United Water Conservation District.

ORDER MODIFYING OPINION

COURT OF APPEAL – SECOND DIST.
FILED
Apr 15, 2015
JOSEPH A. LANE, Clerk
gbents Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CITY OF SAN BUENAVENTURA,

Plaintiff, Cross-defendant and Appellant,

v.

UNITED WATER CONSERVATION DISTRICT et al.,

Defendants, Cross-complainants and Appellants.

2d Civil No. B251810
(Super. Ct. Nos. VENCI 00401714, VENCI 1414739)
(Santa Barbara County)

ORDER MODIFYING OPINION AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered the opinion filed on March 17, 2015, be modified as follows:

On page 6, in the last line of the first paragraph, the word "generally" is inserted before "prohibited by Proposition 13 altogether."

On page 8, in the last two lines of the second full paragraph, the word "two-thirds" is inserted before "majority of voters" and "subd. (b)" is replaced with "subd. (d)".

On page 26, in the fourth sentence of the last paragraph beginning with "Large-scale users such as the City receive a far greater benefit from individual landowners" the word "from" is replaced with "than".

[There is no change in the judgment.]

The City's petition for rehearing is denied.

PROOF OF SERVICE

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. _____
Court of Appeal, Second Appellate District, Division 6,
Case No. B251810

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 94946. On April 27, 2015, I served the document described as **RESPONDENT AND CROSS-APPELLANT'S PETITION FOR REVIEW** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

__X__ **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Penn Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on April 27, 2015, at Penn Valley, California.

Ashley A. Lloyd

SERVICE LIST

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. _____
Court of Appeal, Second Appellate District, Division 6,
Case No. B251810

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