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Supreme Court of California
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No. S263734
Court of Appeal
2 CIVIL No. B295181
c/w B295315

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HILL RHF HOUSING PARTNERS, L.P., et al.,

Petitioners and Appellants,

vs.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

MESA RHF PARTNERS, L.P.,

Petitioner and Appellant,

vs.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

Los Angeles County Superior Court Case Nos.
BS170127 and BS170352
Hon. Mitchell L. Beckloff, Department 86
Judge of the Superior Court

PETITIONERS' ANSWER TO BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, ET AL.

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I.

INTRODUCTION

The question before this Court is whether a property owner – who has submitted a protest ballot in compliance with the procedures articulated in Article XIII D, section 4 of the California Constitution and its related legislation – must also articulate the specific reasons for its opposition (either orally or in writing) at the City's noticed public hearing in order to exhaust administrative remedies. The Brief of *Amicus Curiae* filed by the League of California Cities *et al.* (the "League"), like the Answer Brief filed by the Respondent City of Los Angeles, *et al.* ("Respondents"), distracts from this question by generally extolling the virtues of the doctrine of administrative exhaustion. However, the goals advanced by the administrative exhaustion doctrine simply are not the same as the objectives of Proposition 218, which explicitly sought to make it more difficult for local government agencies to impose assessments and to defend challenges to those assessments in court.

Moreover, the instances cited by the League in which courts required a challenger to a government agency's decision to state the

reasons for his objection at a noticed public hearing prior to raising the challenge in court are simply inapposite. Unlike in a noticed public hearing required by the California Environmental Quality Act ("CEQA"), for example, a local agency is not required to *do* anything in response to an objection raised at a Proposition 218 hearing – except, of course, to tabulate the ballots for and against the proposed assessment to determine whether a majority protest exists. In any case, Proposition 218 expressly did away with the deference traditionally afforded to agency decisions in the case of special assessments on property.

In sum, the League advances an argument for upholding the exhaustion requirement newly inferred by the Court of Appeal based on policy objectives that are simply inapplicable to Proposition 218. Furthermore, the League argues for the newly-inferred requirement by improperly analogizing Proposition 218 hearings to those associated with other legislative regimes – such as CEQA – in which an agency is required to substantively rule on an objection. The League's brief fails to refute Petitioners' argument that the newly-inferred exhaustion requirement is contrary to the fundamental

purpose of Proposition 218 and does not advance the interests of the administrative exhaustion doctrine.

II.

ARGUMENT

The League, like Respondents, mischaracterizes or ignores the stated goals of Proposition 218. The League extolls the virtues of the administrative exhaustion doctrine, which it contends "fosters better-informed administrative decisions," "promotes administrative autonomy," and "reduces unnecessary litigation." (*Amicus Curiae* Brief by League of California Cities ("LCC Br.") at 14-17.) Respondents provided a similar laundry list of interests advanced by the exhaustion doctrine in their Answer Brief. (*See* An. Br. at 47-52.) However, these discussions are irrelevant to the issue at hand because the goals of the administrative exhaustion doctrine simply are not the goals of Proposition 218.

A. The Purpose Of Proposition 218 Is To Empower Property Owners To Veto A Proposed Assessment For Any Reason, Not To Allow Local Agencies To Adjudicate Challenges To An Assessment's Constitutionality.

Although Petitioners have cited the objectives of Proposition 218 in prior briefing, those objectives bear repeating here. As articulated by this Court:

> Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent.

(*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ("*Silicon Valley*").) As discussed below, the administrative exhaustion requirement newly inferred by the Court of Appeal is directly at odds with Proposition 218's objectives.

1. Article XIII D Requires No "Justification" For A Protest Vote Or Any Additional Oral Or Written Objections.

The League contends that Proposition 218 was intended "not to hinder local governments' ability to impose lawful assessments, but to ensure they only impose justified assessments and secure property owner approval." (*See* LCC Br. at 19-21, emphasis added.) To the contrary, in passing Proposition 218, California voters understood that its purpose was to "'constrain local governments' ability to impose . . . assessments . . .' and to place 'extensive requirements on local governments charging assessments.'" (*Silicon Valley*, *supra*, 44 Cal.4th at 445, citing Ballot Pamp., Gen. Elec. (Nov. 5, 1996) analysis of Prop. 218 by Legis. Analyst, p. 73.)

The League is correct only insofar as it acknowledges that Proposition 218 was designed to secure property owner approval. Proposition 218 was known as the "Right to Vote on Taxes Act," and it gave taxpayers final authority over special assessments by requiring that an assessment be approved by a weighted majority of affected property owners via the assessment ballot process

articulated in Article XIII D, section 4, subdivisions (c) through (e). (See *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 380.)

Contrary to the League's contention, there is no requirement that any vote against a special assessment be "justified." Article XIII D does not require that a property owner have a specific reason for voting against an assessment at all, let alone limit property owners to objections that the proposed assessment is legally or constitutionally unjustified. Rather, if the ballots in opposition to the assessment outweigh the ballots in its favor, then a "majority protest" exists and the agency has no authority to levy the special assessment. (Art. XIII D, § 4(c); *see also* Gov. Code § 53753(e)(4)-(5).) Whether the protest votes are founded on a legally-cognizable objection or not is irrelevant. It is enough that the property owner simply feels that the services to be provided do not justify the cost of the assessment – or even that the property owner just doesn't want to pay more money to the government. Indeed, the policy behind Proposition 218 was expressed squarely in the name of the initiative – the "Right to Vote on Taxes Act." No justification for the vote is

required, just as a voter need not justify a decision to vote against a proposed tax in a general election.[1]

2. The Purpose Of The Public Hearing Is To Collect And Tabulate Property Owners' Ballots, Not To Allow The Public Agency To "Fix The Infirmity."

Relatedly, the League misstates the purpose of the assessment ballot and public hearing procedure set forth in Article XIII D, section 4 by claiming that its goal "is to have the public agency fix the infirmity, not for the property owners to withhold consent." (LCC Br. at 26-27.) Of course, as discussed above, there is no requirement that a property owner's objection be grounded in some legal or constitutional "infirmity." Tellingly, the League does not cite to a single case discussing this as a goal of Proposition 218. Rather, the League cites Article XIII D, section 4, subdivision (e), which requires local agencies at an assessment hearing "to consider all protests against the proposed assessment and tabulate the

[1] As discussed in further detail in Section II.B, *infra*, the policy underlying Proposition 218 sets it apart from other statutory schemes such as CEQA, where the articulation of specific concerns is fundamental to the administrative process established for the evaluation of environmental impact reports.

ballots." (Emphasis added.) This same language appears in Government Code section 53753, subd. (d), a key part of Proposition 218's implementing legislation.

The agency's obligation to "tabulate the ballots" is well-defined in both Article XIII D and the implementing legislation. For instance, the Government Code requires that the ballots be tabulated "at the conclusion of the public hearing" by "an impartial person […] who does not have a vested interest in the outcome of the proposed assessment[.]" (Gov. Code § 53753, subd. (e)(1).) The Code further requires that a city council keep a detailed public record of how the ballots were received and tabulated at the hearing. (Gov. Code § 53753, subd. (e)(2) ["During and after the tabulation, the assessment ballots and the information used to determine the weight of each ballot shall be treated as disclosable public records […] The ballots shall be preserved for a minimum of two years."].) By contrast, neither the Code nor Article XIII D contains any requirement that an agency keep a record of any determinations it may make about the merits of an objection, or even that the agency

record what those objections actually were.[2]

By contrast, an agency's obligation to "consider all objections or protests" is not defined at all. (Gov. Code § 53753, subd. (d).) Discussing Government Code section 53753, subdivision (d), this Court has stated that "nothing in Proposition 218 or the legislating implementing it defines what level of consideration must be given [to objections other than protest ballots]." (*Plantier*, *supra*, 7 Cal.5th at 386.) Even if an agency's obligation to "consider all objections or

[2] The PBID Law requires that, following the public hearing, an agency that decides to proceed with establishing a BID adopt a resolution of formation of a BID including "A determination regarding any protests received." (Sts. & Hy. Code § 36625, subd. (a)(4).) However, it appears that an agency is not actually required to determine anything beyond whether a majority protest was received. In any case, that was the only determination made by Respondents here in their "resolutions of adoption," which did not even record the content of a single protest or objection raised at or before the hearing. As the Howard Jarvis Taxpayers' Association ("HJTA") points out in its Brief of *Amicus Curiae*, "If the City insists on a full 'administrative' record (for what it calls a legislative act), it is inconsistent behavior to not be making the record it insists it desires. Should one of the parties who made such an in-person comment bring a challenge to the assessment, the record would be no greater than it is here." (HJTA Br. at 11.) Given the absence of any obligation to create a meaningful record beyond ballot tabulation, the League's contention that its proposed exhaustion requirement "will foster development of better records" is simply unfounded. (LCC Br. at 30-33.)

protests" requires it to do more than simply count the ballots, its duty to "consider" hardly rises to an obligation to resolve legal challenges to the proposed assessment – or as the League characterizes it, to "fix infirmities." In fact, this Court has acknowledged that there is no obligation on the agency to conduct a hearing that would be adequate to meaningfully address each objection: "While an agency may continue a hearing to allow additional time for consideration (see Gov. Code § 53753, subd. (d)), nothing compels the agency to do so." (*Ibid.*)

Article XIII D and its implementing legislation provides definitive, detailed obligations to collect and tabulate ballots at the noticed public hearing, and an undefined obligation to "consider" all objections and protests. As the HJTA points out in its Brief of Amicus Curiae, "nothing compels the district to '*do* anything in response to' a comment or protest, and there is no '*clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties*.'" (HJTA Br. at 13, quoting *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 236, emphasis in original.) Article XIII D provides a

"clearly defined machinery" for the collection and tabulation of assessment ballots, not for the resolution of a proposed assessment's "infirmities." The League's claim that requiring property owners to articulate the reason for their objections prior to bringing suit "will ensure […] that the local government examines the legal objection, including the bases therefore, so that it may seek to fix the potential infirmity" is clearly unsupported by the legislative scheme. (LCC Br. at 24.) This argument assumes obligations on the City that exist nowhere in Article XIII D or the related implementing legislation. And, in any case, there is no evidence that Respondents here did anything more than tabulate the protest ballots at the public hearing.

Finally, as argued at length in Petitioners' Briefs and in the HJTA Brief, while the agency may be required to *consider* objections beyond the protest ballots, objectors are invited, but not required, to make such objections. (*See* Op. Br. at 36-40; Reply Br. at 18-25; HJTA Br. at 19-20 ["The dictates of Article XIII D, section 4 […] are requirements on the district, not the property owner."].) The Government Code states that "[a]t the public hearing, *the agency*

shall consider all objections or protests" and "any person shall be *permitted* to present written or oral testimony." (Gov. Code § 53753, subd. (d), emphases added.)[3] While the agency "shall" consider all protests, the submission of "written or oral testimony" is only "permitted." (Gov. Code § 53753, subd. (d).)[4] This reading of the plain language of the statute is clearly consistent with Proposition 218's purpose to "place extensive requirements on local governments charging assessments" and to "make it easier for taxpayers to win lawsuits." (*Silicon Valley*, *supra*, 44 Cal.4th at 448.) Contrary to the League's contention, there is no reason that the opportunity for a property owner to submit a protest beyond the assessment ballot would "trigger[] the obligation to exhaust if an

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[3] The PBID Law similarly allows that any person is "*permitted* to present written or oral testimony," which the agency "*shall* consider." (Sts. & Hwy. Code § 36623, subd. (b), emphases added.)

[4] Agencies, just like the private entities under their authority, are subject to the doctrine of administrative remedies. (See *City of Oakland v. Hotels.com* (9th Cir. 2009) 572 F.3d 958, 960-962 [requirements that the tax administrator "'shall […] assess […] the tax'" and "'shall give notice of the amount to be assessed'" […] imposes an obligation on the City to exhaust administrative remedies; rejecting the City's position that "the administrative remedies apply only to the [hotel] operators, not the taxing authority."].)

objector seeks to file suit." (LCC Br. at 27-29.) The obligation "to consider" any protests in excess of a negative assessment ballot imposes a one-way obligation on local agencies; there is no corresponding obligation on property owners.

3. The Proposed Exhaustion Requirement Is Inconsistent With Proposition 218's Objective To Abrogate Local Agency Authority.

This Court has acknowledged that voters enacted Proposition 218 in part to "curtail the deference that had been traditionally accorded legislative enactments on fees, assessments, and charges" and to "shift the burden of demonstrating assessments' legality to local government[] mak[ing] it easier for taxpayers to win lawsuits." (*Silicon Valley*, *supra*, 44 Cal.4th at 448.) Indeed, Article XIII D, section 4, subsection (f) provides that, in any legal challenge to a special assessment, the agency bears the burden of demonstrating that the assessment meets the special benefit and proportionality requirements. This burden-shifting provision means that "*courts should exercise their independent judgment* in reviewing local agency decisions" regarding the validity of special

assessments, effectively abrogating traditional deference to agency decisions. (*Ibid.*, emphasis added.) Additionally, "after Proposition 218 passed, an assessment's validity […] is now a constitutional question." (*Ibid.*) Local agencies have no authority to exercise discretion in a way that undermines the Constitution, and courts, not local agencies, are charged with the obligation of enforcing the provisions of the Constitution as to effectuate its purpose. (*Ibid.*)

The League repeatedly refers to the benefits of "facilitating public agencies' ability to resolve disputes" and claims that "courts will benefit from the agency's expertise[.]" (LCC Br. at 15.) However, this position ignores the fact that Proposition 218 expressly did away with deference to a local agency's decisions regarding special assessments. Under Proposition 218, a local agency is entitled to no deference regarding the legality of a proposed assessment, which in any event, is a constitutional question subject to *de novo* review in the courts. This is consistent with the fact, discussed above, that a local agency is not required to adjudicate the legality of proposed assessment at all under Article XIII D and its related statutes.

B. Proposition 218's Structure Is Materially Different From Other Legislative Schemes, Such As CEQA, Which Place The Burden Of Proof On The Challenger To An Agency Action.

As Benink & Slavens, LLP ("Benink") points out in its Brief of *Amicus Curiae*, "[a] Proposition 218 action is unlike most challenges to government action. Typically, agency action comes to the court with a presumption of validity." (Benink Br. at 8, citing *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 389.) However, in a Proposition 218 case, the burden is on the local agency to prove the constitutionality of its proposed assessments and fees. (See Cal. Const., art. XIII D, § 4, subd. (f) [special assessments] and § 6, subd. (b)(5) [property-related fees].) For this reason, the League's attempts to analogize Proposition 218 to cases in which the exhaustion doctrine has required participation in a public hearing are unpersuasive, and the cases it cites are inapposite. (LCC Br. at 13-15, 29-30.)

For example, the League cites a number of cases arising under the California Environmental Quality Act, California Public

Resources Code section 21000 *et seq.* ("CEQA") for the proposition that "the objector" to an agency's proposed action "bears the burden to address the 'exact issue' [citations], and to provide non-conclusory evidence […] where warranted." (LCC Br. at 14.) What the League fails to mention is that administrative exhaustion under CEQA differs substantially from the assessment ballot process in Article XIII D and its implementing legislation. In the first place, as discussed in Petitioners' Reply Brief, the requirement that an objecting party present the "grounds" for its objection to the relevant agency is clearly stated in the CEQA statute. The relevant provision of CEQA provides that "No action or proceeding may be brought […] unless the alleged grounds were presented to the public agency orally or in writing by any person during the public comment period provided[.]" (Cal. Pub. Res. Code § 21177, subd. (a), emphasis added.) No such requirement is spelled out in Article XIII D or its related statutes, which require only that an objecting property owner submit a protest ballot.[5]

[5] Contrary to what the League claims, an objector is not obligated "to plead and prove satisfaction of the exhaustion doctrine." (LCC Br. at 14, fn. 1.) The cases cited by the League

Moreover, as the cases cited by the League confirm, the actions of a government agency enjoy the presumption of validity so long as the agency complies with the procedural requirements of CEQA. "'[T]he heart of CEQA'" is the requirement that the government agency provide an Environmental Impact Report ("EIR") to the public "'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.'" (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 622, quoting *Laurel Heights Improvement Assn. v. Regents of*

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hold only that a defendant may properly demur to a complaint based on failure to adequately plead exhaustion. (See, e.g., *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal. App. 4th 149, 156 ["In order to withstand a demurrer for failure to allege exhaustion of available administrative remedies, the plaintiff must allege facts showing that he did exhaust administrative remedies or facts showing that he was not required to do so."].) However, failure to exhaust administrative remedies is treated as an affirmative defense that does not affect the fundamental subject matter jurisdiction of the court. (See *Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1347 ["'jurisdictional prerequisite' does not mean subject matter jurisdiction in the context of exhaustion of administrative remedies."].) As such, "'a defendant waives the defense by failing to timely assert it.'" (*Ibid.*, quoting *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 135.) Thus, the burden here was on Respondents to prove their affirmative defense of alleged failure to exhaust administrative remedies.

University of California (1988) 47 Cal.3d 376, 390.) "'If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly[.]'" (*Ibid.*)

Under Article XIII D, a court reviewing an agency's decision must independently review local agency decisions regarding the validity of special assessments. (*Silicon Valley*, *supra*, 44 Cal.4th at 448.) By contrast, in determining whether "an administrative body failed to comply with CEQA in making a quasi-legislative decision, the court may consider only 'whether there was a prejudicial abuse of discretion.'" (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 568-69.) Judicial review is then limited to whether the agency has provided an adequate justification for its response to the objection: "Abuse of discretion is established if the agency has not proceeded in a manner required by law or the determination or decision is not supported by substantial evidence." (*Ibid.*) By contrast, Article XIII D does not require the local agency to provide any reasoned assessment of an objection. In any case,

even if the agency did provide such justification for its decision, that decision would not be entitled to deference.

In short, CEQA requires that an objector "present the grounds" for his objection to the agency during the public comment period. In contrast, as articulated by Benink, "From the moment a local government initiates the formation of an assessment district, it is on notice that it will be its burden to prove compliance with section 4's mandates." (Benink Br. at 15-16.)

III.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the decision of the Court of Appeal requiring that a property owner must articulate the specific reasons for its opposition (either orally or in writing) to a proposed assessment at the noticed public hearing in order to exhaust administrative remedies prior to challenging the assessment in court.

DATED: May 3, 2021 REUBEN RAUCHER & BLUM

By: _____
Stephen L. Raucher
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CERTIFICATE OF COMPLIANCE

[Cal. Rule of Court 8.204(c)(1)]

The text of this brief consists of **3,622** words as counted by the Microsoft Word 2019 word-processing program used to generate the brief, not including the tables of contents and authorities, and caption page.

DATED: May 3, 2021 REUBEN RAUCHER & BLUM

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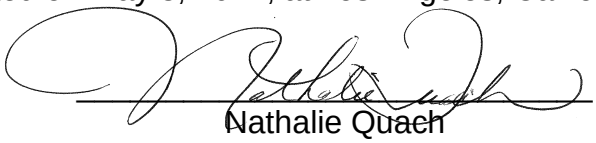

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STATE OF CALIFORNIA
Supreme Court of California

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/s/Nathalie Quach

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