Case No. S226036

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

City of San Buenaventura,

Plaintiff, Respondent, and Cross-Appellant,

vs.

United Water Conservation District and Board of Directors Of the United Water Conservation District,

Defendants, Appellants, and Cross-Respondents.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF SANTA CLARA VALLEY WATER DISTRICT IN SUPPORT OF RESPONDENTS

Review Of A Published Decision By the Court of Appeal
Second Appellate District, Division Six, 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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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF SANTA CLARA VALLEY WATER DISTRICT IN SUPPORT OF RESPONDENTS

Pursuant to Rule 8.520(f), California Rules of Court, Santa Clara Valley Water District requests permission to file the attached Amicus Curiae Brief in this case, *City of San Buenaventura v. United Water Conservation District, et al*, California Supreme Court No. S226036.

INTEREST OF APPLICANT

Applicant Santa Clara Valley Water District is a party to a case pending in the Sixth District Court of Appeal, *Great Oaks Water Company v. Santa Clara Valley Water District*, No. H035260 (Super. Ct. No. CV053 142) ("*Great Oaks Water Company v. Santa Clara Valley Water District*") that raises many of the same issues raised by this case as both cases involve questions regarding whether fees on groundwater extraction fall within Proposition 218. After filing its first published decision, the Sixth District Court of Appeal granted both parties' petitions for rehearing and reissued its original opinion with only minor changes.

Santa Clara Valley Water District began preparing a petition for review to this Court of the reissued Sixth District opinion, but on September 10, 2015, the Sixth District granted a second petition for rehearing filed by Great Oaks Water Company, and has not issued a revised opinion as of yet, having ordered the case resubmitted on October 2, 2015.

Santa Clara Valley Water District focuses this brief on showing that this Court's decision in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 remains vital, well-reasoned

precedent, that the Court of Appeal here properly applied it to hold that a fee on the extraction of groundwater for resale falls outside Proposition 218, a result seconded by *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, and that this Court should reject and disapprove the Sixth District cases holding to the contrary on that issue. Applicant respectfully submits that its specific focus on the leading cases on the issues raised in this case will be able to aid this Court by exploring that in greater detail than the parties may be able to do given their need to address multiple issues in this case.

CONCLUSION

For all the foregoing reasons, Santa Clara Valley Water District respectfully requests permission to file the attached *amicus curiae* brief.

Respectfully submitted:

Dated: November 30, 2015

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CERTIFICATE OF AUTHORSHIP

In accordance with Rule 8.520(f)(4), the undersigned hereby states that the proposed *amicus* brief was authored solely by counsel for Santa Clara Valley Water District and no person or entity outside of Santa Clara Valley Water District made any monetary contribution to assist its preparation.

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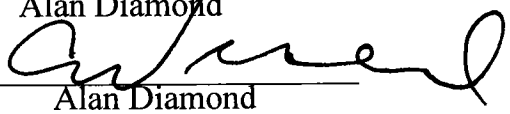
By: 
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BRIEF OF AMICUS CURIAE SANTA CLARA VALLEY WATER DISTRICT IN SUPPORT OF RESPONDENTS

INTRODUCTORY STATEMENT

This Court should affirm the ruling of the Court of Appeal in this case as it falls squarely within this Court's seminal holding in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 ("*Apartment Association*"). Notwithstanding language to the contrary in Sixth District cases, *Apartment Association* remains controlling precedent on the issue of whether fees imposed on a landowner by virtue of engaging in a voluntary activity beyond the normal ownership and use of property—here, the activity of extracting groundwater for commercial resale—fall outside Proposition 218, as embodied in Article 13D of the California Constitution.

When it decided *Apartment Association* in 2001, this Court could not have foreseen California's coming drought or its intractability. But by focusing as it did on what it repeatedly noted was the plain language of Proposition 218, this Court in *Apartment Association* confined the reach of that initiative to fees imposed solely by virtue of property ownership rather than to fees imposed on the use of land for business and other voluntary purposes—something the ballot materials for Proposition 218 fully support. This application of Proposition 218 thus makes it possible for water districts to continue to engage in the expensive but essential undertakings necessary to preserve groundwater for commercial, agricultural and residential use. Nothing in Proposition 218 or its ballot materials or drafter comments indicates that either the electorate or the drafters sought to put California water agencies in a financial and regulatory straightjacket that would

hamper their response to a crisis such as this state now faces. Indeed, as more fully discussed below, the Howard Jarvis Taxpayers Association, in commenting on a provision on developer fees, explicitly noted that "the focus of Proposition 218 is on those levies imposed simply by virtue of property ownership," and not those "imposed as an incident of the voluntary act of development." (Howard Jarvis Taxpayer Assn., Right to Vote on Taxes Act, Statement of Drafters' Intent, Jan. 1997, comment following 13D, § 1(b), p. 7.)

This Court should reaffirm the reach and vitality of *Apartment Association* by affirming the decision of the Court of Appeal in this case. Amicus also requests that this Court expressly reject the Sixth District cases that call *Apartment Association* into question.

I. THIS COURT SHOULD AFFIRM THAT (1) *APARTMENT ASSOCIATION* REMAINS BINDING PRECEDENT IN DETERMINING WHEN FEES ON PROPERTY OWNERS USING THEIR LAND FOR BUSINESS OR OTHER VOLUNTARY ACTIVITIES FALL OUTSIDE PROPOSITION 218; AND (2) THE SECOND DISTRICT IN THIS CASE CORRECTLY APPLIED *APARTMENT ASSOCIATION* IN HOLDING PROPOSITION 218 DOES NOT APPLY TO FEES BASED ON ENGAGING IN THE ACTIVITY OF GROUNDWATER EXTRACTION.

A. *Apartment Association* Provides The Definitive Interpretation And Application Of The Meaning And Reach Of Proposition 218.

Article 13D of the California Constitution, added in 1996 by the passage of Proposition 218, provides, as pertinent, 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." (Cal. Const., art. 13D, § 3, subd. (a)(4).) Proposition 218 defines "[f]ee" or "charge" as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency 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.*, § 2, subd. (e).) It also defines "[p]roperty-related service" as "a public service having a direct relationship to property ownership." (*Id.*, § 2, subd. (h).)

Proposition 218 did not, however, expressly define the phrase "imposed . . . upon a person as an incident of property ownership." This Court supplied the definition when it applied the phrase in *Apartment Association*. At issue there was an inspection fee imposed on the owners of residential rental properties. The trial court held that the fee fell outside Proposition 218 as the fee was imposed only on a subset of owners who rent apartments and the proceeds were used only to pay for regulating such rentals. (*Apartment Association, supra,* 24 Cal.4th at 834.) The appellate court reversed, holding that nothing in Proposition 218 exempts regulatory fees imposed on residential rental properties, and it "adds nothing to say . . . that the fees are not imposed upon property owners in general, but only those who voluntarily engage in the business of renting, generate the risks of slum housing, and specially benefit from regular inspections as they contribute to the overall reputability and safety of the housing provided." (*Ibid.*, internal quotation marks omitted.)

This Court reversed the Court of Appeal, holding that an inspection fee imposed on property owners renting out their residential properties was not subject to Proposition 218's strictures. It based its conclusion on the language in Proposition 218 defining a "[f]ee" or "charge" as one "imposed by an agency 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. 13D, § 2, subd. (e); see also *id.*, § 3.)

It held that this "definitive" and "plain" language "does not refer to fees imposed *on* an incident of property ownership, but on a parcel or a person *as* an incident of property ownership," and held that "the distinction is crucial." (*Apartment Association, supra*, 24 Cal. 4th at 840, 842, 844.) Thus, "taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The ordinance does

not do so: it imposes a fee on its subjects *by virtue of their ownership of a business—i.e.*, because they are landlords. What plaintiffs ask us to do is to alter the foregoing language—changing 'as an incident of property ownership' to 'on an incident of property ownership.' But to do so would be to ignore its plain meaning—namely, that it applies only to exactions levied *solely* by virtue of property ownership." (*Id.* at 842, emphasis added and in original, footnote omitted.) Thus, Proposition 218 "*only* restricts fees imposed *directly* on property owners *in their capacity as such*" and *not* "by virtue of [the] ownership of a business" or the use of the property for "business purposes." (*Id.* at 838, 840, 842 & fn. 5, 844, emphasis added.)

B. *Apartment Association* Is Wholly Consistent With Proposition 218's Ballot And Drafter Materials.

The ballot materials suggest that the greatest concern of the drafters of Proposition 218 was the exploding number of local government projects that were being financed off the backs of property owners, in particular homeowners. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument in favor of Prop. 218, p. 76 ["Proposition 218 guarantees your right to vote on local tax increases—even when they called something else, like 'assessments' or 'fees' and imposed on homeowners"]; *Apartment Association, supra,* 24 Cal.4th at 839].) The entire thrust of the ballot materials is to bring fees and assessments under the control of Proposition 218 where the property owner is taxed for nothing more than the passive status of being a landowner, as opposed to engaging in a use of the property for commercial or other activities.

Thus, the kinds of veiled taxes explicitly identified by the Proposition 218 proponents as necessitating the passage of the proposed

initiative are all matters in which the property owner has no active involvement and is merely taxed as a landowner: e.g., an ocean view tax, an assessment for a scoreboard and equestrian center, a park 27 miles away from the taxed property and the refurbishment of a college football field. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument in favor of prop. 218, p. 76.)

The ballot materials thus make clear that Proposition 218 was intended to target only fees whose purpose was to raise revenue from landowners solely in their capacity as landowners. Its drafters believed Proposition 13 had put a stop to the idea of the property owner as an easily accessible cash machine. It hadn't, as "politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees.'" (*Ibid.*)

It was that mischief that Proposition 218 targeted. Nothing in the initiative or the ballot materials indicates that the drafters or the voters intended to sweep into Proposition 218 taxes on landowners using their land in capacities distinct from mere passive ownership.

Particularly telling is the Statement of Drafters' Intent prepared by the Howard Jarvis Taxpayers Association, dated January 1997, which annotates each provision of Proposition 218.[1] There, the primary sponsor of

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[1] It appears this document was not part of the ballot materials, as it is dated shortly after Proposition 218's passage. However, this Court appeared to list it among the evidence it considered relevant to understanding Proposition 218, stating: "Proposition 13 was directed at taxes imposed on property owners, in particular homeowners. The text of Proposition 218, the ballot arguments (both in favor and against), the Legislative Analysts analysis, and *the annotations of the Howard Jarvis Taxpayers Association, which drafted Proposition 218*, all focus on exactions, whether they are called taxes, fees, or charges, that are directly associated with property ownership." (*Apartment Association, supra*, 24

Proposition 218 makes it crystal clear that the initiative did not intend to apply to fees on a landlord's voluntary activities on his land, stating: "The purpose of this provision is to leave unaffected existing laws relating to the imposition of developer fees. Although there have been abuses in this area by local governments (resulting in substantially increased housing costs), *the focus of Proposition 218 is on those levies imposed simply by virtue of property ownership. Developer fees, in contrast, are imposed as an incident of the voluntary act of development.*" (Howard Jarvis, Taxpayer Assn., Right to Vote on Taxes Act, Statement of Drafters' Intent, Jan. 1997, comment following 13D, § 1(b), p. 7, emphasis added.)

C. Treating *Apartment Association* As Controlling, *Richmond v. Shasta Community Services Dist.* Exempts A Water Delivery Connection Fee From Proposition 218 Because It Was Not Imposed Simply By Virtue Of Property Ownership.

As shown, according to *Apartment Association*, a fee is outside Proposition 218, whatever its regulatory or business nature, if it is imposed for something in addition to basic property ownership, *i.e.*, *not* "solely by virtue of property ownership." (*Apartment Association, supra,* 24 Cal.4th at 838, 842.) Taking its lead from *Apartment Association*, in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 ("*Richmond*"), this Court held that "[a] fee for ongoing water service through an existing

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Cal.4th at 839, emphasis added.)

connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property," but that is not the case with "a fee for making a new connection to the system . . . because it results from the owner's voluntary decision to apply for the connection." (*Id.* at 427.) In so holding, *Richmond* used *Apartment Association's* very language, holding that "[a] connection fee is not imposed simply by virtue of property ownership." (*Id.* at 426.)

D. In *Pajaro Valley Water Mgmt. Agency v. Amrhein*, The Sixth District Initially Follows *Apartment Association* And Holds That A Fee On Groundwater Extraction For Residential Use Is Outside Proposition 218, Only To Mistakenly Reverse Course On The Erroneous Belief That This Court's Subsequent Decision In *Bighorn–Desert View Water Agency v. Verjil* Required It To Do So.

The Sixth District first addressed *Apartment Association* in *Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 ("*Pajaro I*"). In its initial Opinion, the court, relying primarily on the reasoning of *Apartment Association* and *Richmond*, held that a fee imposed on mostly residential groundwater extraction was not within Proposition 218, as, inter alia, (1) "the charge is not 'imposed . . . as an incident of property ownership' [citation] because it is imposed not on property owners as such, or even well owners as such, but on persons *extracting groundwater* from the basin"; and (2) the fee could be incurred "only through voluntary action, *i.e.*, the pumping of groundwater, and could be mitigated or avoided altogether by refraining from that activity." (*Id.* at 1385.)

In short, "the charge burdens those on whom it is imposed not as landowners but as water extractors." (*Id.* at 1385-1386.)

However, following a petition for rehearing, the Sixth District in *Pajaro I* abandoned its initial holding that a fee on residential groundwater extraction was not within Proposition 218 because it believed this Court's decision in *Bighorn–Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 ("*Bighorn*") compelled it to do so. The court reasoned that as *Bighorn* had not mentioned *Apartment Association* in its decision, the "omission raises questions about the reach, if not the vitality, of *Apartment Association*." (*Pajaro I, supra,* 150 Cal.App.4th at 1389.)

Pajaro I was incorrect: The absence of any citation to *Apartment Association* in *Bighorn* can in no way be considered as overruling the decision sub silentio. There was in fact no basis on which *Pajaro* I could legitimately draw that conclusion, as there was no reason for *Bighorn* to have cited *Apartment Association* in the first place. The fee at issue in *Bighorn* was a charge for *ongoing domestic* water *delivery*. (*Pajaro I, supra,* 150 Cal.App.4th at 1389.) As shown, *Richmond* had already held that "[a] fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property." (32 Cal.4th at 427.) *Bighorn* merely confirmed that as charges for ongoing water delivery are within the meaning of "fee" and "charge" in article 13D, as *Richmond* had held, so they are within the meaning of those terms as used in article 13C of the California Constitution. (*Bighorn, supra,* 39 Cal.4th at 216.)[2]

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[2] *Bighorn* also declined to distinguish between charges for water delivery calculated on consumption and charges for such delivery imposed as a fixed monthly fee—holding that both were"property-related services" within article 13D and article 13C. (39 Cal.4th at 217.) *Pajaro I* stated that

Richmond had understandably cited *Apartment Association* and employed its language and reasoning to hold that a connection charge was *outside* Proposition 218 since it was not imposed on a person simply by virtue of property ownership. But *Bighorn* was dealing with a fee on residential water delivery; it did not involve a voluntary activity outside the normal use of property or a use of property for commercial purposes, and thus *Apartment Association* was neither necessary nor relevant to its conclusion that the fee fell within Proposition 218.

Had *Pajaro I* taken these distinctions into account it could not have concluded that *Bighorn* had essentially overruled *Apartment Association.* Curiously, *Pajaro I* called attention to one such distinction as a "possible" limitation on its own decision. Noting that "[i]n *Richmond* and *Bighorn* the court was clearly concerned only with charges for water for 'domestic' use," *Pajaro I* held that "[t]his leaves open the possibility that *delivery* of water for irrigation or other *nonresidential* purposes is not a property-based service, and that charges for it are not incidental to the ownership of property" (*Pajaro I, supra,* 150 Cal.App.4th at 1389-1390, footnote

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this holding also played a role in its abandoning its initial decision as it had assumed that a consumption-based fee should have been treated the same as a connection fee—*i.e.*, one that fell outside article 13D. (150 Cal.App.4th at 1387-1388.) This issue is unrelated to the question of *Apartment Association's* vitality, and *Pajaro I* does not suggest otherwise. As *Pajaro I* stated, "a given fee does not become incidental to property ownership merely because it is based on consumption. . . . *Bighorn* held only that if a fee is otherwise incidental to ownership, its assessment based on consumption does not ipso facto take it outside of Article 13D." (*Id.* at 1390, fn. 17.)

omitted, emphases added), "assuming," the court cautioned, "*Apartment Association's* capacity-based analysis retains vitality" (*id.* at 1390).[3]

The fact that *Pajaro I* treats an issue clearly settled in *Apartment Association* as a mere "possibility" shows the confusion sowed by its assertion that *Bighorn* effectively neutered *Apartment Association.* So, too, does its refusal (see *id.* at 1388-1389, 1391) to distinguish between imposing a fee on the passive receipt of water service through a water connection for domestic purposes—a normal use of property, as *Richmond* held—and imposing a fee on the activity of groundwater extraction—a voluntary activity under *Apartment Association's* rationale, beyond the normal use of property. Indeed, the *Pajaro I* court itself conceded that there is a difference between the use of delivered water and the activity of extracting groundwater (*id.* at 1391) and, similarly, a "far from frivolous" distinction between a charge imposed on a person because he owns land and a charge imposed because he engages in an activity on that land, which is "the distinction Justice Mosk sought to articulate for the court in *Apartment Association.*" (*Id.* at 1391, fn. 18.) Nonetheless, *Pajaro I* effectively held that in light of *Bighorn*, the legal significance of that crucial distinction falls along with *Apartment Association.* (*Id.* at 1388-1391).

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[3] The *Pajaro I* court held that that analysis cannot "validate the augmentation charge here," because the charge "is imposed not only on persons using water in a business capacity but also on those using water for purely domestic purposes." (150 Cal.App.4th at 1390.) Indeed, *Pajaro I* involved a highly unusual situation where the vast majority of property owners in the Pajaro Valley obtained their water from wells for domestic purposes, and had no alternative sources to draw upon. (*Id.* at 1390, 1397 (conc. opn. of Barmattre-Manoukian, J).) The court also stated that a finding that a fee on water for nonresidential purposes was not within Proposition 218 "might be further supported by a clearly established regulatory purpose," which in dicta it suggested could not be found unless usage was metered. (*Id.* at 1390.)

There is a strong clue in *Pajaro I* as to why it erred in deciding matters as it did. In its initial decision holding that the charge on groundwater extraction was outside Proposition 218, the court "adopted the view that one who incurred the [water delivery] charge did so not in the capacity of landowner, but in that of water user," because "it might have been argued under *Apartment Association* that affected persons incurred delivery charges not as owners but as voluntary consumers of water." (*Id.* at 1391.)

Apartment Association does not support any such argument. Its "capacity-based analysis," as *Pajaro I* calls it (150 Cal.App.4th at 1390), was never presented as a license to separate a property owner's use of his land into multiple micro capacities on the basis of which a fee or charge could be argued to be independent of the owner's capacity as a landowner. *Apartment Association* involved a truly distinct capacity: the fee fell on the landowner in his capacity as a landlord or the owner of a business. A fee on a landowner's extraction of groundwater for resale falls squarely within that capacity-based rationale, as does such an activity even without the profit motive. (See *Apartment Association, supra,* 24 Cal.4th at 842, fn. 5.) But a property owner's passive use of delivered water for domestic purposes does not change his capacity as a property owner. Indeed, such a result would be inconsistent with Proposition 218, which provides for certain exemptions for water services (see Art. 13D, § 6, subd. (c)), but that issue would never arise if *Apartment Association* could be read as holding that fees on water delivery were not fees imposed as an incident of property ownership.[4]

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[4] This exemption issue arose in the subsequent case of *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594 ("*Pajaro II*"). There, citing *Pajaro I*, the court held that the augmentation charge on groundwater extraction does not differ materially from a charge

Nonetheless, if *Pajaro I* actually believed *Apartment Association* could be applied so extravagantly, that might explain why it came to believe *Bighorn* overruled *Apartment Association sub silentio*.

At any rate, there is no basis to assume this Court in *Bighorn*, much less elsewhere, intended to consign *Apartment Association* to an early grave or to hide its reasoning in doing so under cover of silence.

E. The Opinion Affirms *Apartment Association* As Binding Precedent And Correctly Applies It To Hold That The Groundwater Extraction Fees At Issue Here Are Outside Proposition 218.

In the case before this Court, the City of Buenaventura (the "City") pumped groundwater for resale to residential customers and United Water Conservation District (the "District") collected fees based on the amount of water pumped. The City contended that the fees were governed by Proposition 218 as set out in article 13D and that the District had violated that article in that it charged the City three to five times more for the groundwater it extracted than the rate applicable to groundwater extracted for agricultural purposes. (Opn. 1, 2.)

Believing itself "constrained" to follow *Pajaro I*, the trial court held that groundwater extraction fees were property-related and thus subject to article 13D. (Opn. 2, 10, 14.) The court of appeal reversed, finding multiple grounds on which to distinguish *Pajaro I*'s holding that a

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on delivered water. (*Id.* at 595.) However, the court held that the charge was exempted from Proposition 218's voting requirements as it came within the exemption for sewer, water and refuse collection services in Article 13D, section 6, subdivision (c). (*Id.* at 596.) *Pajaro II* did not revisit *Pajaro I's* decision or mention *Apartment Association*.

groundwater extraction was imposed as an incident of property ownership and thus within Proposition 218. (Opn. 2, 11, 17-19.) First, the Opinion stressed the "unique set of facts" in *Pajaro I*, where the vast majority of property owners obtained their water from wells and had no feasible alternative sources, in contrast to the District, where the number of residents who pump water for domestic use "is insubstantial relative to the number of residential customers receiving delivered water." (Opn. 18-19.)

Second, the Opinion noted that *Pajaro I* "found it significant that the agency's pump charge did not serve a regulatory purpose," whereas in this case the trial court found that "the groundwater extraction fees serve the valid regulatory purpose of conserving water resources." (Opn. 19.) Third, according to the Opinion, *Pajaro I* itself had construed *Bighorn* as leaving '"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."' (*Ibid.*) In contrast to *Pajaro I*, the City pumped water to sell to residential customers, *i.e.*, extracted water for a business purpose. (Opn. 21.) These facts clearly distinguish the Opinion from *Pajaro I*, while at the same time they squarely bring it within *Apartment Association's* holding that an inspection fee imposed on residential rental property owners "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.'" (Opn. 14.)

The Opinion expressly stated that its facts were "not materially different from those in *Apartment Association*" in that the pump fee could be characterized "as a charge on the activity of pumping [rather] than a charge imposed by reason of property ownership." (Opn. 20.) Borrowing *Apartment Association's* language and applying it to its own facts, the Opinion held that "'[t]he [pump] fee is not imposed solely because a person

owns property,'" but "'because the property is being [used to extract groundwater],'" which activity "'ceases along with the business operation.'" (Opn. 20.)

Because it found that *Apartment Association* remained vital, binding precedent, the Opinion correctly concluded that the groundwater extraction charges were not property-related and thus outside Proposition 218. (Opn. 18, 20, 23.) The Opinion acknowledged that *Pajaro I* had reached the contrary conclusion, holding that *Bighorn's* failure to cite *Apartment Association* "signal[ed] that case's implicit overruling." (Opn. 21.) But the Opinion correctly showed that *Pajaro I* was wrong on that point, that in fact *Apartment Association* was only "marginally relevant" to *Bighorn* and that it was thus "unsurprising" that *Bighorn* chose not to cite *Apartment Association.*" (Opn. 20-21.)[5]

Having reaffirmed the vitality of *Apartment Association* in relation to the facts before it, the Opinion went on to confirm its reach beyond those facts, clarifying that *Apartment Association* applied so as to exempt a fee from Proposition 218 "[e]ven if there were no factual record regarding the relative number of residential versus commercial well owners and a clear regulatory purpose." (Opn. 20.)

F. In Addition To Affirming The Opinion, This Court Should Expressly Disapprove *Pajaro I.*

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[5] If anything, *Richmond* was far more relevant to the water extraction issue involved in *Pajaro I.* The Opinion explained that *Bighorn* primarily dealt with an issue that *Richmond* had already decided, confirming that "'a public water agency's charges for ongoing [domestic] water delivery'" were property related and within Proposition 218, so that *Bighorn* "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.'" (Opn. 20.)

There was never a basis for *Pajaro I* to have concluded that this Court had cast doubt on *Apartment Association*'s precedential status. Its reasoning is fundamental to every case dealing with Proposition 218; for example, *Richmond*'s holding that "[a] fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property" (32 Cal.4th at 427) reflects the essence of *Apartment Association*.

Pajaro I was mistaken about *Apartment Association*, and its holding conflicts with even *Richmond*, as the Opinion correctly recognized when it stated that "[v]oluntarily 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." (Opn. 21.)

As long as *Pajaro I* is the law, it must be followed by trial courts throughout the state. Moreover, as Great Oaks Water Company confirms in its Application For Leave To File Amicus Curiae Brief, *Pajaro I* will continue to influence appellate proceedings in the Sixth District, if not elsewhere. In *Great Oaks Water Company v. Santa Clara Valley Water District*, the Sixth District has issued two decisions extending *Pajaro I* from the domestic arena to the extraction of groundwater for commercial purposes, both withdrawn after the court granted petitions for rehearing. The latter petition by Great Oaks raises issues unrelated to whether Proposition 218 applies to fees on ground water extraction. The court resubmitted the case as of October 2, 2015, and it seems likely that it will again invoke the erroneous reasoning of *Pajaro I.* In any event, unless and until this Court expressly disapproves *Pajaro I*, it's erroneous reasoning will continue to cause confusion and spawn error throughout the trial and appellate courts of this state.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Santa Clara Valley Water District requests that this Court (1) affirm the Judgment of the Second District Court of Appeal; (2) confirm that *Apartment Association* has not been overruled or confined to its facts or otherwise limited in its reach or vitality but remains binding precedent on the question of whether a fee on a landowner for groundwater extraction falls within Proposition 218; and (3) expressly disapprove *Pajaro I.*

Dated: November 30, 2015

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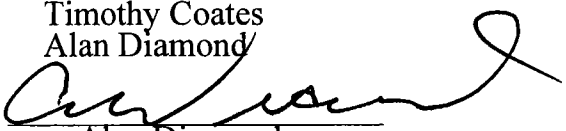
By: 
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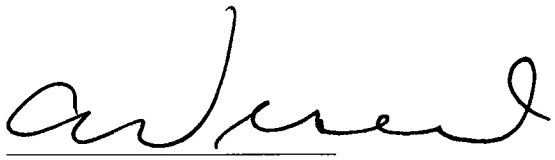
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Amicus Curiae Brief is produced using 13-point Roman type including footnotes and contains approximately 5084 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 30, 2015



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On November 30, 2015, I served the foregoing document described as:

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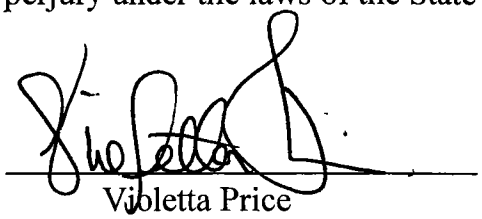

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SERVICE LIST

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