No. S243360

IN THE
SUPREME COURT OF CALIFORNIA

EUGENE G. PLANTIER
AS TRUSTEE OF THE PLANTIER FAMILY TRUST et al.,
Plaintiffs and Appellants,

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

After a Published Decision by the Court of Appeal of the State of California
Fourth Appellate District, Division One
Case No. D069798

On Appeal from the Superior Court of the County of San Diego
The Honorable Timothy B. Taylor, Judge
Case No. 37-2014-00083195-CU-BT-CTL

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

The issue before the Court is whether section 6, subdivision (a) of article XIII D of the California Constitution, which was added by the voters through Proposition 218 in 1996, creates an administrative remedy that must be exhausted by a fee-payor seeking to challenge the methodology of an existing property-related fee under section 6, subdivision (b) of article XIII D.

It does not.

Article XIII D "sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges." (Cal. Const., art. XIII D.) Plaintiffs' claims implicate a single subdivision of section 6 of article XIII D: subdivision (b), which sets substantive limitations for existing and new property-related fees. The District here asks the Court to establish a new rule that would require any fee-payor challenging a fee under subdivision (b) to first lodge a protest to an increase to the fee under a separate provision, section 6, subdivision (a). In the 22 years since Proposition 2018 was adopted by California voters, neither this Court nor any court of appeal has interpreted Proposition 218 as the District advocates.

Subdivisions (a) and (b) contain their own voter-approved headings that were not added by West's or Deering's. They are part of the California Constitution. The heading for section 6, subdivision (a), reads: "Procedures for New or Increased Fees and Charges." (Emphasis added.) Subdivision (a) requires agencies seeking to impose a new fee, or increase an existing fee, to provide notice with specific information about the new

or increased fee, the opportunity to submit written protests, and a hearing to tabulate protests to determine whether a majority protest exists.

The heading for section 6, subdivision (b) reads: "Requirements for Existing, New or Increased Fees and Charges." (Emphasis added.) Subdivision (b) applies to fees, like the District's sewer service charge, that were in effect at the time of Proposition 218's passage, as well as new and increased fees. Under subdivision (b), property-related fees cannot exceed the cost of providing service, cannot be for some purpose other than providing service, and must be proportional to a parcel's use of the service.

The notice and hearing procedure of section 6, subdivision (a) only applies when an agency seeks to impose a new, or increase an existing, property-related fee. Section 6, subdivision (a) does not create an administrative remedy that must be exhausted in order to challenge whether an existing property-related fee meets the substantive requirements of section 6, subdivision (b). That is apparent from the plain language of section 6.

This plain language interpretation is confirmed by the incongruous results that flow from attempting to graft a purported exhaustion requirement from subdivision (a) onto a challenge under subdivision (b). If a fee-payor must participate in a subdivision (a) hearing in order to challenge compliance with subdivision (b), a government agency can avoid or defer challenges under subdivision (b) by simply not triggering the requirement for a hearing under subdivision (a). That is antithetical to Proposition 218, which was designed to increase voter power and control over local agencies' attempts to impose new, or increase existing, property-related fees.

Moreover, section 6, subdivision (a) does not create an administrative remedy because it does not include a mechanism for the submission, evaluation, or resolution of property owner protests. At most, subdivision (a) provides property owners a veto right over any new or increased property-related fees, but only if a majority threshold is met. Although an agency is required to "consider" a protest, this means nothing more than counting the number of protests to determine whether they meet the majority threshold.

The District's claim that Plaintiffs' failure to participate in its rate increase hearings deprived the District of the opportunity to review, evaluate and consider Plaintiffs' position before this dispute reached the courts, (*e.g.*, Pet. Brief at p. 14, is false. The District's Legislative Code sets forth an administrative remedy that must be exhausted before challenging any provision in the Legislative Code, including the provision that establishes the sewer service charge at issue here. It is undisputed that Plaintiffs exhausted this administrative remedy by submitting a pre-filing administrative claim outlining the factual and legal bases for their claims. The District's Engineer fully reviewed and analyzed this administrative claim before the District denied it, leading to this lawsuit.

To the extent the Court finds that subdivision (a) creates an administrative remedy that must be exhausted before pursuing a claim under subdivision (b), the case should still be remanded for a decision on the merits of Plaintiffs' claims. Plaintiffs' failure to serve a protest or appear at the District's rate increase hearings is excused under the futility doctrine, and Plaintiffs are entitled to rely on the actions of other class members

who did protest the rate increases.

Plaintiffs respectfully request that this Court reject the District's attempt to transform Proposition 218 from an initiative designed to empower voters to a tool for government agencies to avoid judicial scrutiny of property-related fees and charges. The Court of Appeal's opinion should be affirmed.

II. STATEMENT OF THE FACTS AND PROCEDURAL BACKGROUND

A. Proposition 218

California voters adopted Proposition 218, the "Right to Vote on Taxes Act, in November 1996. In adopting this measure, the people found and declared that:

> [L]ocal governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of the voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

(*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 647, 640 [119 Cal.Rptr.2d 91], citations omitted.) Proposition 218 added articles XIII C and D to the California Constitution.

Article XIII D "sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges." (Cal. Const., art. XIII D.) Plaintiffs' claims arise under subdivision (b) of section 6 of article XIII D. Section 6 of article XIII D applies to fees and charges for property-related services like the District's sewer service charge, which is at issue here. Article XIII D shifts the burden

of proving the validity of any property-related fee or charge to the government agency. (Cal. Const., art. XIII D, § 6, subd. (b)(5).)

Subdivision (a) of section 6 establishes "Procedures for New or Increased Fees and Charges." When an agency seeks to either impose a new fee, or increase an existing fee, it must provide notice to property owners of the proposed fee or charge. The agency must conduct a public hearing after the notice. "At the public hearing, the agency shall consider all protests against the proposed fee or charge." (Cal. Const., art. XIII D, § 6, subd. (a)(2).) If a majority of property owners protest the new or increased fee, the agency cannot implement it.

Subdivision (b) establishes "Requirements for Existing, New or Increased Fees and Charges." This subdivision imposes substantive limitations on all property-related fees, including those in existence when the voters passed Proposition 218. Revenues from a property-related fee cannot exceed the funds required to provide the property-related service, and cannot be used for any other purpose than providing the service. The amount of a fee imposed on any parcel cannot exceed the proportional cost of providing service to that parcel. The service must be actually used by, or immediately available to, the parcel. (Cal. Const., art. XIII D, § 6, subd. (b).)

The Proposition 218 Omnibus Implementation Act, Government Code sections 53750 *et seq.*, specifies when an agency decision results in an "increase" to a property-related fee or charge that would trigger a hearing under section 6, subdivision (a). (Gov. Code § 53750, subd. (h).) An increase occurs when an agency 1) "increases the

applicable rate used to calculate" the fee or charge; or 2) revises the methodology for calculating the fee in a manner that "results in an increased amount being levied on any person or parcel." (Gov. Code § 53750, subd. (h)(1).) The Proposition 218 rate increase hearings that the District held during the relevant period here related to an increase to the applicable rate, and did not involve any change to the methodology for calculating the sewer service charge. (6 AA 1150; 7 AA 1342; 7 AA 1407.)

The District correctly noted in its Opening Brief that "Proposition 218 says nothing about procedural or jurisdictional prerequisites to suit, such as the exhaustion doctrine." (Pet. Brief at p. 18.) Although Proposition 218 expressly shifted the burden of proof of the validity of a fee to government agencies, it contains no language establishing any new or additional procedures that would constitute a jurisdictional prerequisite to filing a lawsuit.

B. Factual Background

1. The District's EDU-Based Sewer Service Charge

The District is a government agency subject to the requirements of article XIII D. (8 AA 1549.) The District provides water and sewer service to residents and businesses in the unincorporated area of Ramona, northeast of the City of San Diego. (8 AA 1549.) This lawsuit challenges the sewer service charge that the District imposes on parcels connected to its wastewater system. (8 AA 1558-59.)

The District's sewer service charges are based on an Equivalent Dwelling Unit ("EDU") system. (7 AA 1246-47.) The District defines an EDU as "a measure where one

unit is equivalent to two hundred gallons/day of sewage, with suspended solids of two hundred milligrams per liter, and BOD [biochemical oxygen demand] of two hundred milligrams per liter." (7 AA 1242; 7 AA 1263.) The District assigns each parcel connected to the system an EDU value, which forms the basis for calculating the sewer service charge for a property. (7 AA 1246; 7 AA 1267.) The EDU value is arbitrarily assigned in the District's Legislative Code based on the occupancy type of the establishment on the parcel. (7 AA 1246-49; 7 AA 1267-69.) Although purporting to be based on gallons/day of sewage, the EDU value assigned to a parcel has no relationship to the actual water or sewer usage of the parcel. For instance, a single-family residence is always assessed one EDU regardless of the number of occupants, size of the home, or whether the property is vacant for extended periods of time. (7 AA 1247; 7 AA 1268.)

2. Plaintiff Plantier's Objections to the District's EDU-Based System

In 2012, the District sent Plaintiff Plantier a letter out of the blue, seeking more than $100,000 in allegedly past due sewer service charges, connection fees, and mitigation fees. (6 AA 1064-66.) At that time, Mr. Plantier's property had been connected to the sewer and operated as a restaurant for more than two decades, and Mr. Plantier had timely paid sewer service charges for 2.0 EDUs, as assessed and billed by the District. (5 AA 1000-02.)

The District falsely claimed that Mr. Plantier had changed the use of his property. (8 AA 1468.) The District also claimed that Mr. Plantier should have been paying 6.8 EDUs for sewer service, rather than the 2.0 EDUs the District had charged him since

he purchased the property in 1998. (6 AA 1066.) The District then billed him for past sewer service charges based on its reassessment, even though its Legislative Code expressly prohibits this. (6 AA 1066-17; 7 AA 1269-70.)

Mr. Plantier objected to the District's EDU-based system on multiple occasions. On July 23, 2012, Mr. Plantier's counsel submitted a letter to the District listing Mr. Plantier's grievances. (8 AA 1468-69.) Mr. Plantier claimed that the District's assessment of EDUs based upon building square footage was "arbitrary and discriminatory" because no correlation existed between dwelling unit square footage and sewer usage. (8 AA 1468.) A few weeks later, on August 16, 2012, Mr. Plantier met with the District's general manager, David Barnum, its District Engineer, Michael Metts, and a member of the District's engineering staff, Ricardo Soto, and questioned the District's practice of assigning EDUs based on square footage rather than actual water use. (8 AA 1472-74.)

Mr. Plantier sent a letter to the District's Board President on August 22, 2012, requesting a formal hearing with its Board of Directors to challenge the District's reassessment of EDUs for his property. (8 AA 1470-71.) He also sent a letter to Mr. Barnum memorializing the issues discussed at the August 16 meeting, particularly his objection to the EDU methodology for setting sewer service charges. (8 AA 1472-74.)

On September 10, 2012, Mr. Barnum responded to Mr. Plantier's letter, agreeing to put his issue on the agenda for a future Board meeting. (8 AA 1475.) Two months later, on November 13, 2012, Mr. Plantier appeared at a District Board meeting to object

to the EDU system. (5 AA 1013-14; 6 AA 1139-43.) The meeting was continued to December 11, 2012, because Mr. Plantier was not notified about it until that morning. (5 AA 1013-14.)

In advance of the rescheduled Board meeting, on December 7, 2012, a consumer advocacy group sent a letter on Mr. Plantier's behalf to the District's Board making the same arguments at issue in this litigation: the District's sewer service charge violates Proposition 218. (8 AA 1476-80.) Specifically, this letter claimed that "[b]illing customers for projected wastewater use that exceeds their actual wastewater use violates both Proposition 218's proportionality requirement and its prohibition on collecting revenues that exceed the cost of providing a property related service." (8 AA 1478.)

Days later, Mr. Plantier attended a regular meeting of the District's Board where he again protested the District's EDU system as a violation of Proposition 218. (6 AA 1144; 6 AA 1147-49.) Representatives from the consumer advocacy group also addressed the Board regarding the points raised in its letter. (6 AA 1148.)

Following that Board meeting, the District's counsel responded to the December 7 letter, and denied each of Mr. Plantier's claims. (8 AA 1542-54.) The letter stated that a memorandum addressing Mr. Plantier's specific concerns would be included in a future Board meeting agenda. (8 AA 1544.) Mr. Plantier never heard from the District about that future meeting. (5 AA 1019-20.)

On November 21, 2013, Mr. Plantier and Plaintiff Progressive Properties submitted an administrative claim to the District's Board in accordance with Water Code

section 71735, Government Code section 945.5, and the District's Legislative Code sections 7.52.170 and 7.54.170. (8 AA 1546-65.) Their written claim attached a draft complaint alleging that the District's EDU methodology violated Proposition 218, and that Plaintiffs and a class of fee-payors were entitled to a refund of unlawful sewer service charges. (8 AA 1547-65.)

The District's Engineer, Michael Metts, reviewed the administrative claim in detail and evaluated its merits by calculating whether the 6.82 EDU assignment for Mr. Plantier's restaurant bore a rational relationship to his actual water use. (5 AA 1047-51; 8 AA 1493-541.) Based on Mr. Plantier's water use from 2012 to 2013, Mr. Metts calculated an EDU value of 3.92, almost half of what the District was charging Mr. Plantier under the EDU schedule in its Legislative Code. (5 AA 1050-51; 8 AA 1494.) Nonetheless, the District rejected Plaintiffs' claim and allegations contained therein on January 6, 2014. (8 AA 1566.)

C. Procedural Background

Plaintiffs filed suit against the District, on behalf of themselves and all others similarly situated, alleging the same causes of action set forth in their administrative claim. (1 AA 0001-11.) Plaintiffs alleged that the District's sewer service charges did not meet the requirements of article XIII D, section 6, subdivision (b) of the California Constitution, because of the EDU methodology. (1 AA 0005-08.) Plaintiffs seek a declaratory judgment that the District's sewer service charge is unlawful, and a refund of all unlawfully collected charges. (1 AA 0007-08.)

Plaintiffs moved for class certification on January 30, 2015. (1 AA 0023-26.) In opposition to that motion, the District argued that Plaintiffs failed to exhaust administrative remedies because Plaintiffs did not submit a written protest or appear at any of the hearings that the District had held to approve increases to the sewer service charge pursuant to section 6(a) of Proposition 218. (1 AA 0197-98.)

The trial court granted class certification, finding that "Plaintiffs have shown they have exhausted their administrative remedies." (3 AA 0534.) The trial court certified the following class: "Ramona Municipal Water District customers who have paid a Sewer Service Charge on or after November 22, 2012." (3 AA 0532.)

On September 10, 2015, the District sought bifurcation of its affirmative defense of failure to exhaust administrative remedies, based on the same arguments it raised in opposition to the motion for class certification. (3 AA 0552-53.) Plaintiffs opposed bifurcation, pointing out that the trial court already decided this issue when it certified the class. (3 AA 0692-694.) Despite its prior ruling, the trial court granted the District's request, holding that whether Plaintiffs exhausted their administrative remedies was a threshold issue that bore upon the viability of their claims. (4 AA 0832.) The trial court ruled that the District's exhaustion defense would be tried first. (4 AA 0837.)

Phase I of a bench trial commenced on November 2, 2015, and lasted two days. (8 AA 1642.) The trial court published its tentative decision on November 3, 2015, finding 1) that article XIII D, § 4 of the California Constitution imposed an independent

exhaustion requirement,[1] and 2) Plaintiffs failed to satisfy that requirement. (8 AA 1635.) The trial court concluded that Plaintiffs' failure to submit written protests or appear at the District's rate increase hearings barred their suit. (8 AA 1653; 8 AA 1655.) The trial court entered judgment in favor of the District on December 1, 2015. (8 AA 1639-44.) On January 27, 2016, Plaintiffs filed a timely notice of appeal. (8 AA 1656-59.)

The Fourth District Court of Appeal reversed the trial court's judgment on June 13, 2017. The Court of Appeal correctly held that Plaintiffs' lawsuit is not barred for failure to exhaust because their "substantive challenge involving the method used by District to calculate its wastewater service fees or charges is outside the scope of the administrative remedies [of section 6, subdivision (a)], and because, under the facts of this case, those remedies are, in any event, inadequate." (*Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856, 859-60.)

III. STANDARD OF REVIEW

The doctrine of administrative remedies requires that "[w]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 [190 P.2d 942].) Under this rule, resort to the administrative forum is a jurisdictional prerequisite to judicial review. (*Id.* at p. 293.) Exhaustion of administrative remedies allows an administrative agency the opportunity to redress an

[1] As pointed out by the Court of Appeal, the trial court referred to the wrong provision of Proposition 218 in its Order. The Court of Appeal addressed this by basing its opinion on article XIII D, section 6, the correct provision.

alleged wrong, thereby rendering litigation unnecessary and promoting judicial economy. (*Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 482 [11 Cal.Rptr.3d 776].)

Application of the doctrine is generally a legal question. (*Coastside Fishing Club v. California Fish & Game Com.* (2013) 215 Cal.App.4th 397, 414 [155 Cal.Rptr.3d 426].) Where, as here, the facts are not in dispute, an appellate court reviews de novo whether an action is barred by a failure to exhaust administrative remedies. (*Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878, 883 [104 Cal.Rptr.2d 875], citing *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 [35 Cal.Rptr.2d 418, 883 P.2d 960] ["When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court. [Citations.]"].)

IV. THE COURT OF APPEAL'S HOLDING SHOULD BE AFFIRMED

A. The Plain Language of Article XIII D, Section 6 Supports the Court of Appeal's Holding

Proposition 218 was intended to limit local government revenue and enhance fee-payor consent for new or increased property-related fees. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 285 [109 Cal.Rptr.3d 620, 231 P.3d 350].) The provisions of Proposition 218 should be construed to effectuate that intent. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Comm.* (2012) 209 Cal.App.4th 1182, 1199 [147 Cal.Rptr.3d 696].) Courts follow principles of statutory construction in interpreting initiative measures. (*Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006, 1010 [96 Cal.Rptr.2d 246].) Like a

statute, the ordinary meaning of the words of an initiative measure govern a court's interpretation. (*Id.*)

The plain language of section 6 of article XIII D demonstrates that the voters did not intend for the procedure set forth in section 6, subdivision (a) to apply to a challenge to the method for calculating an existing fee under subdivision (b). Subdivision (a) only applies to new fees, or increases to existing fees. An increase is defined under Government Code section 53750(h)(1) as either an increase in the rate, or a change in methodology that results in an increase. The rate increase hearings that the District held in 2013, 2014, and 2015 sought approval only of an increase in the rate, not any change in methodology. (6 AA 1150; 7 AA 1342; 7 AA 1407.)

Article XIII D expressly shifts the burden of proving the validity of a fee to the agency, but does not say anything about adding to or changing existing administrative remedies. As the District noted in its Opening Brief, the fact that Proposition 218 explicitly changes the burden but is silent on jurisdictional prerequisites to challenging a fee indicates that the voters did not intend to change existing exhaustion requirements, such as Government Code section 945.4 and the District's own Legislative Code.

The public notices for the District's rate increase hearings confirm that the hearings were limited to consideration of the proposed increase. The notices state that the District will "consider adopting increases in rates and fees for water and wastewater." (6 AA 1150 [2013]; 7 AA 1342 [2014]; 7 AA 1407 [2015].) The notices state that property owners or tenants "may submit a written protest ***to the proposed increases***."

(6 AA 1152 [2013]; 7 AA 1344 [2014]; 7 AA 1407 [2015] [emphasis added].) The District only required that a fee-payor state the fact of a protest. It did not require any explanation of the reasons for the protest:

> Any written protest must: (1) state that the identified property owner or tenant is opposed to the proposed water rate and/or wastewater service fee increases; (2) provide the location of the identified parcel (by assessor's parcel number or street address); and (3) include the name and signature of the property owner or tenant submitting the protest.

(6 AA 1152 [2013]; 7 AA 1344-45 [2014]; 7 AA 1408 [2015].) None of these hearings sought public comment or input regarding the EDU methodology underlying the sewer service charge, or placed "the entirety of the fee structure" at issue, as the District claimed in its Opening Brief. The hearings had no relevance to Plaintiffs' claim that the sewer service charge fails to meet the substantive requirements of section 6, subdivision (b).

The District's reliance on *San Diego County Water Auth. v. Metropolitan Water Dist. of Southern Cal.* (2017) 12 Cal.App.5th 1123, 1142 [220 Cal.Rptr.3d 346], to argue that notice of a proposed increase to a fee gives notice that the underlying methodology of a fee is subject to challenge misses the mark. That case involved application of the statute of limitations, and held that whenever fees and water rates are reenacted, the statute of limitations for challenging the underlying rate structure begins to accrue again. (*Id.* at 1142.) It did not address whether a purported administrative remedy for protesting

an increase to a property-related fee applies to a challenge to the methodology for calculating the fee, or the specific language and structure of section 6, which demonstrates that the procedures of subdivision (a) do not act as a jurisdictional prerequisite to a challenge under subdivision (b).

B. The District's Interpretation of Article XIII D, Section 6 Would Thwart the Voter Intent of Proposition 218

The District's interpretation of section 6 not only ignores its plain language; it would thwart the voter's intent in passing Proposition 218. It would allow government agencies to control if, and when, a fee-payor could bring a substantive challenge to a fee under section 6, subdivision (b).

Proposition 218 does not require that an agency hold annual hearings. It mandates a noticed hearing and opportunity to protest only when an agency seeks to impose a new, or increase an existing, fee or charge. (Cal. Const. art. XIII D, § 6, subd. (a).) Agencies are not obligated to increase rates on an annual basis. In fact, Government Code section 53756 allows agencies like the District to adopt a five-year schedule of property-related fees with automatic adjustments to avoid seeking annual approval. The frequency of rate increases and resultant hearings under section 6, subdivision (a) is, as the District, acknowledges, a matter of "legislative line-drawing" and discretion for a government agency.

The net effect of this agency discretion is that an agency can control if and when its actions trigger a hearing under section 6, subdivision (a). Unless and until an agency

seeks to increase their fees or charges, there is no requirement to hold a hearing under subdivision (a).

The District's proposed rule, which prohibits any challenge to a fee under subdivision (b) unless a protest is lodged at a hearing under subdivision (a), creates a perverse incentive for agencies to game the timing of increases (or simply avoid them) to minimize liability for unlawful fees. The statute of limitations for a fee refund is one year, so an agency could let the clock run on refund claims by spacing out increases to fees. (Gov. Code § 911.2.) This puts the agency in the driver's seat, and subverts the intent of Proposition 218 to enhance ***taxpayer*** control over new and increased property-related fees.

Consider this hypothetical. A sewer district imposes a sewer service charge prior to Proposition 218 that is based on a percentage of a customer's net worth, rather than use of the sewer system. Under the District's interpretation, a fee-payor cannot challenge the substantive constitutionality of the existing fee under section 6, subdivision (b), until the sewer district seeks to increase the fee, because the notice and hearing requirements of section 6, subdivision (a) are not triggered until an increase is proposed. The fee-payor could wait years (or forever) for that to occur, and it may never happen given that the fee is based on a percentage of net worth, not a fixed sum. In the meantime, the one-year statute of limitations for a refund under Government Code section 911.2 runs against the fee-payor, who is prohibited from seeking a refund until he has appeared at a section 6, subdivision (a) hearing that may never happen.

Or consider this hypothetical. A sewer district adopts a five-year schedule of sewer service charge pursuant to Government Code section 53756, following section 6, subdivision (a)'s notice and hearing procedures. The sewer service charge is a flat rate for all customers and is not based on usage. A new resident moves in the district shortly after the schedule is adopted. The sewer district will not hold another hearing under section 6, subdivision (a) for at least five years, because it has an approved five-year schedule of increases. Under the District's interpretation, the fee-payor cannot challenge the substantive constitutionality of the charge under section 6, subdivision (b) for at least five years, assuming that the sewer district will seek to increase the fees at that time. Again, the one-year statute of limitations under Government Code section 911.2 runs against the fee-payor, preventing her from seeking a refund because she has not appeared at a section 6, subdivision (a) hearing.

The District failed to address either of these hypotheticals in the proceedings before the Court of Appeal, and again sidesteps them in its Opening Brief. These hypotheticals cannot be dismissed as conjecture or speculation by the District. They demonstrate the absurd results that follow from the District's interpretation of section 6, which flies in the face of the voters' intent in passing Proposition 218.

The purpose of Proposition 218's protest and hearing procedure was not to create a procedural hurdle for taxpayers who want to challenge the proportionality of a fee or charge, but rather to give them a simple opportunity to veto any new or increased fees. (*Silicon Valley Taxpayers' Assn. Inc. v. Santa Clara County Open Space Auth.* (2008) 44

Cal.4th 431, 438 [79 Cal.Rptr.3d 312, 187 P.3d 37].) The Court's task here is to interpret Proposition 218 to effectuate that purpose. (*Citizens Assn. of Sunset Beach, supra,* 209 Cal.App.4th 1182, at p. 1199.) The District's interpretation should be rejected.

C. *Wallich's Ranch* Does Not Hold That Section 6(a) of Proposition 218 Creates an Administrative Remedy

The Court of Appeal correctly rejected the District's reliance on *Wallich's Ranch* as authority for finding a mandatory administrative remedy in section 6(a) of Proposition 218. The plaintiff in *Wallich's Ranch* challenged a pest control assessment under Proposition 218, Proposition 62, and article XI, section 11, subdivision (a) of the California Constitution. (*Wallich's Ranch, supra*, 87 Cal.App.4th at p. 880.)[2] But *Wallich's Ranch* followed the administrative remedy set forth in the Citrus Pest Control District Law, not any remedy found in the language of Proposition 218. A comparison of the administrative procedures required by the Pest Control law to Proposition 218's requirement that agencies "consider all protests to the proposed fee or charge" underscores that Proposition 218 does not establish an administrative remedy requiring exhaustion.

Under the Pest Control Law, a Pest Control District must adopt a preliminary budget every year. (Food & Agric. Code §§ 8559, 8568.) After adopting the preliminary budget, the district must set a time for a budget hearing. (*Id.* §§ 8560, 8568.) The district must publish notice of the hearing that includes a summary of the budget and instructions

[2] Protests to assessments are governed by a different provision of Proposition 218, article XIII D, section 4. They are not governed by article XIII D, section 6.

for how interested persons may appear and object to the budget. (*Id.* §§ 8563, 8568.) Affected property owners can submit written protests against the budget. (*Id.* § 8564.) At the hearing, the district must "hear and pass upon all protests so made" and make a decision on the protests. (*Id.* § 8656.) The district's decision on the protests "shall be final and conclusive." (*Id.*) The *Wallich's Ranch* court concluded that the appellant was required to challenge the budget through this administrative process, found in the Pest Control Law, in order to litigate the validity of the assessment in court. (*Wallich's Ranch, supra,* 87 Cal.App.4th at p. 885.)

The District tries to extend *Wallich's Ranch* beyond its bounds by conflating the administrative budget procedures in the Pest Control Law with the District's budgetary process. In the relevant years – 2013, 2014, 2015 – the District held rate increase hearings contemporaneously with its annual budget process. The District is essentially arguing the Plaintiffs, like the plaintiff in *Wallich's Ranch,* should have participated in the District's budgetary process before bringing their claim. But even though the District may adopt its budget at the same board meeting as a Proposition 218 rate increase hearing, that does not make the District's budgetary process an administrative remedy.

Wallich's Ranch does not recognize an administrative remedy under Proposition 218, and is not a basis for reversing the Court of Appeal's opinion.

D. Section 6, Subdivision (a)'s Hearing Procedure Is Not an Administrative Remedy

Exhaustion of administrative remedies is required only when an adequate administrative remedy is available. (*Unfair Fire Tax Com. v. City of Oakland* (2006) 136

Cal.App.4th 1424, 1430 [39 Cal.Rptr.3d 701].) A statute or regulation provides an adequate remedy when it establishes "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Id.* at p. 1429.)

In *Unfair Fire Tax*, property owners challenged the creation of a fire suppression assessment district by the City of Oakland. The City demurred to the plaintiffs' first and second complaints, arguing that they failed to exhaust administrative remedies in a city ordinance that provided that "[t]he exclusive remedy of any person affected or aggrieved [by the creation of a special assessment district] shall be by appeal to the City Council." (*Id.* at p. 1428.) The court held that the ordinance did not create an administrative remedy because it failed to provide "any procedural mechanism for submission, evaluation, and resolution" of an appeal. (*Id.* at p. 1430.) The ordinance did not specify "when an appeal must be filed, when it must be heard by the city council, what standard the city council should [apply] in reconsidering the decision to establish the district, what right the appellant may have to present evidence, or when the city council must resolve the appeal." (*Id.*) The plaintiffs were not, therefore, required to pursue an appeal under the ordinance before filing suit. (*Id.*)

Merely holding a public hearing and affording the opportunity to comment is insufficient to create an administrative remedy. In *City of Coachella*, the city claimed that a local airport land use commission's plan violated certain provisions of the State Aeronautic Act. (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1281-82 [258 Cal.Rptr. 795].) The commission adopted its plan

after two public hearings. (*Id.* at p. 1282.) Although the city received notice of the hearings concerning adoption of the plan, it chose not to participate or submit written objections at either hearing. (*Id.*) The commission argued the city's failure to participate in the hearing process barred its suit for failure to exhaust administrative remedies. (*Id.* at p. 1287.)

The court disagreed, finding that the exhaustion doctrine was inapplicable "in those situations where no specific administrative remedies are available to the plaintiff." (*Id.*, citing *Rosenfeld v. Malcolm* (1967) 65 Cal.2d 559, 566 [55 Cal.Rptr. 505, 421 P.2d 697].) The opportunity to appear at a hearing and submit relevant information beforehand was not an administrative remedy because it "did not require that the commission do anything in response to the submissions or testimony received by it incident to those hearings." (*Id.*) The hearing process was thus insufficient "to call the [exhaustion] doctrine into play." (*Id.*)

Subdivision (a)'s hearing procedure does not provide any clearly defined machinery for the submission, evaluation, or resolution of protests. Subdivision (a) only requires that the District "consider all protests against the proposed fee or charge" at the public hearing. This merely requires that the District count the protests to determine if they constitute a majority. Subdivision (a) does not provide any guidance regarding what is required to protest, other than to state the fact of protest itself. It does not contain any provision for the submission of evidence to support a protest. It does not require that the District actually resolve the protest or make findings in response to the protest. And it

does not state anywhere that participation in the protest is a jurisdictional prerequisite to challenging the substantive compliance of a fee or charge under section 6, subdivision (b).

The District's conduct of its rate increase hearings confirms that these hearings are not an administrative remedy. The District's hearing notices only require fee-payors to confirm the fact that they protest ***the proposed increase***, provide the location of the affected parcel, and sign the protest. (6 AA 1152 [2013]; 7 AA 1344-45]2014]; 7 AA 1408 [2015].) The District does not ask fee-payors to state any reasons for their protest. (*Id.*)

The District's Chief Financial Officer confirmed at trial that the District "considers" the protests by simply counting them:

> Q. Okay. Now, if you go back to page four [of Exhibit 142], just very quickly. It says that, "The board of directors will hear and consider all protests." Do you see that?
>
> A. Yes.
>
> Q. Has the District ever since you've been employed there ever contacted any protester to find out more about their protest?
>
> A. I don't know.
>
> Q. There's not a policy to do that, correct?
>
> A. I'm not aware of a policy to do that.
>
> Q. And [the] Board doesn't have to respond to the protest, correct?
>
> A. No, I don't believe there's any requirement to respond.
>
> Q. The Board doesn't have to resolve the protest, correct?
>
> A. Correct.
>
> Q. The Board doesn't have to make any findings regarding the protest, correct?

A. I believe the Board has to take notice of the number of protests.

Q. They count them up and see if they have a majority, correct?

A. Yes, I believe that's a requirement.

(5 AA 936:20-937:16.)

The District does not ask protesters to provide any more information than the fact of their protest. The District does not resolve any protests. The District does not respond to any protests. As demonstrated by the District's own conduct, the section 6, subdivision (a) protest procedure is not an administrative remedy.

E. RMWD's Legislative Code Provides the Sole Administrative Remedy to Challenge its EDU-Based Sewer Service Charges

"In cases applying the exhaustion doctrine, the administrative procedure in question generally is provided by the statute or statutory scheme under which the administrative agency is exercising the regulatory authority challenged in the judicial action. (*Coastside, supra,* 215 Cal.App.4th at p. 415.) The District is governed by the Ramona Municipal Water District Legislative Code ("District Code"). Under this statutory scheme, the District is authorized to levy and assess upon each parcel an annual sewer service charge per EDU as established by the Board of Directors. (7AA 1246; 7 AA 1267.) The District assigns each parcel an EDU value based on the occupancy type of the establishment as set for in a "Schedule of EDUs for Occupancy Types," found at sections 7.52.050(B) and 7.54.050(B) of the District Code. (7 AA 1247-49; 7 AA 1268-69.)

This action challenges the District's EDU methodology under section 6, subdivision (b) of Proposition 218, because the District's arbitrary classification of customers into "occupancy types" does not reflect the proportional cost of providing wastewater service to a particular parcel. Because Plaintiffs are challenging the District's EDU methodology, which is set forth in the District Code, the Code itself provides the sole administrative remedy.[3] According to the District Code:

> Any person desiring to challenge any provision of this chapter must submit the grounds for challenge with supporting authority in writing, to the Board of Directors of the District for consideration. ***Failure to do so shall be grounds to bar any subsequent suit on the grounds of failure to exhaust administrative remedies.***

(7 AA 1259; 7 AA 1280 [emphasis added].) If a claim is insufficient, the District "must notify the claimant in writing within 20 days of presentation that the claim is insufficient and state the particulars, or the public entity waives the insufficiency and cannot claim insufficiency as a defense." (8 AA 1573.)

There is no dispute that Plaintiffs have exhausted this remedy. (8 AA 1594; 8 AA 1653.) On November 21, 2013, Plaintiffs submitted a written letter and draft complaint to Mr. Darrell Beck, President of the District's Board of Directors, stating the factual allegations and legal bases for their lawsuit. (8 AA 1546-65.) On January 6, 2014, the District's counsel notified Plaintiffs that the District rejected their administrative claim. (8 AA 1566.) The District did not identify any deficiencies in Plaintiffs' administrative

[3] The EDU methodology was in place before Proposition 218 was passed in 1996, so Proposition 218 cannot be the source of the administrative remedy for challenging it.

claim. (8 AA 1566.) The District conceded at trial that this satisfied Plaintiffs' exhaustion obligations under the Legislative Code. (8 AA 1594; 8 AA 1653.)

The District tries to argue around this concession by claiming that sections 7.52.170 and 7.54.170 of its Legislative Code are limited to "correcting errors in individualized application of the current rate structure." (Pet. Brief at p. 56.) But the provisions themselves belie this argument: "Any person desiring to challenge ***any provision*** of this chapter must submit the grounds for challenge with supporting authority in writing to the Board of Directors ... for consideration." (7 AA 1259; 7 AA 1280 [emphasis added].) These provisions clearly provide the only remedy that Plaintiffs were obligated to exhaust before filing this action.

F. Plaintiffs Satisfied the General Principle of Exhaustion

Plaintiffs also satisfied the general principle of exhaustion. When a statute does not expressly provide an administrative remedy, and public policy favors the expeditious resolution of disputes, the general principle of exhaustion applies. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 641 [92 Cal.Rptr.2d 115].) Under this rule, "[a]dministrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum." (*Id.*, citing *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501 [87 Cal.Rptr.2d 701, 981 P.2d 543]; *Wallich's Ranch Co., supra,* 87 Cal.App.4th at p. 884.)

Plaintiffs do not dispute that they were required to exhaust administrative remedies so that the District would have an opportunity to reach a reasoned and final conclusion on the constitutionality of the District's EDU methodology. Plaintiffs fulfilled this requirement by following the explicit instructions set forth in District Code §§ 7.52.170 and 7.54.170. (7 AA 1259; 7 AA 1280) Plaintiffs submitted an administrative claim on November 21, 2013. (8 AA 1546-65.) Their claim attached a draft complaint alleging in detail that the District's methodology for calculating its sewer service charges violated Proposition 218 because it did not take into account actual water or wastewater use. (8 AA 1553; 8 AA 1558-59.) The District, through its Engineer Michael Metts, reviewed Plaintiffs' claim in detail, made notes, conducted research, and analyzed water usage data. (5 AA 1047-51; 8 AA 1493-1541.) After his analysis, the District rejected Plaintiffs' administrative claim. (8 AA 1566.) The District had a full opportunity to reach a reasoned and final conclusion on Plaintiffs' claims before they filed this lawsuit.

By allowing the District "the opportunity to receive and respond to articulated factual issues and legal theories before its actions [were] subjected to judicial review, Plaintiffs fulfilled the letter and spirit of the exhaustion doctrine. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 [200 Cal.Rptr. 855].)

G. Alternatively, any Exhaustion Requirement in Proposition 218 Was Satisfied by Class Members' Numerous Written Protests

The District's Proposition 218 hearing notices did not require that property owners explain or state any grounds for their protest. According to its notices for the 2012-2013

and 2013-2014 fiscal years, "[a]ny written protest must: (1) state that the identified property owner or tenant is opposed to the proposed water rate and/or wastewater service fee increases; (2) provide the location of the identified parcel ..., and (3) include the name and signature of the property owner or tenant submitting the protest." (6 AA 1076; 6 AA 1152; 7 AA 1344-34.) Protest letters submitted in 2012, 2013, and 2014 include the exact information that the District required: (1) the fact of opposition to the fee increase; (2) the property's address; and (3) the owner's name and signature. (8 AA 1409-14; 8 AA 1415-28; 8 AA 1429-47.)

If protesting at the District's rate increase hearings is a separate and additional administrative remedy that must be exhausted, then any of the 26 protest letters submitted by class members since 2012 satisfied this exhaustion requirement. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 268. [104 Cal.Rptr. 761, 502 P.2d 1049] [finding that named plaintiffs were not required to exhaust administrative remedies if putative class members have already done so].) Those protests provided all the information that the District required in its notice of hearing. The District cannot now claim they are too vague or insufficient to satisfy any purported exhaustion requirement stemming from the District's notices. Plaintiffs are entitled to rely on the written protests of unnamed class members. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 878 [50 Cal.Rptr.3d 636].)

H. Alternatively, the Exhaustion Doctrine Does Not Apply Because Plaintiffs' Participation in the Hearings Would Have Been Futile

Even if section 6, subdivision (a) of Proposition 218 is construed as an administrative remedy that applies to a challenge under subdivision (b), the judgment should be reversed because it would have been futile for Plaintiffs to protest or attend any of the District's rate increase hearings. "The failure to pursue administrative remedies does not bar judicial relief where the administrative remedy is inadequate or unavailable, or where it would be futile to pursue the remedy." (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1430 [109 Cal.Rptr.3d 647], citing *Jonathan Neil & Associates, Inc.* (2004) 33 Cal.4th 917, 936 [16 Cal.Rptr.3d 849, 94 P.3d 1055].) Thus, a "[p]laintiff need not exhaust administrative remedies provided by statute if the agency has already rejected the claim, announced its position on the claim or made it clear that it would not consider the plaintiff's evidence." (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1497 [96 Cal.Rptr.3d 900], citations omitted.)

Although the question of whether it would be futile to pursue additional administrative remedies may be factual, because the facts relevant to this appeal are undisputed, this Court can independently review whether Plaintiffs' participation in the District's rate increase hearings would have been futile. (*See Wallich's Ranch, supra,* 87 Cal.App.4th at p. 883; *Howard, supra,* 184 Cal.App.4th at p. 1431.) No deference should be given to the trial court's findings on futility. (*Wallich's Ranch,* 87 Cal.App.4th at p. 883.)

Here, futility was shown because the District had declared multiple times what its ruling would be regarding any Proposition 218 challenge to the EDU methodology. (*See Jonathan Neil & Associates, supra*, 33 Cal.4th at p. 936.) On December 13, 2012, the District advised a consumer advocacy group that had intervened on behalf of Respondent Plantier that it disputed any claim that its EDU methodology did not comply with Proposition 218. (8 AA 1542.)

Plaintiffs submitted an administrative claim and draft complaint to the District on November 21, 2013, pursuant to the District Code. (8 AA 1546-65.) The draft complaint alleged that the District's EDU methodology violates Proposition 218 because it does not take into account actual wastewater use, a property's proportional burden on the wastewater system, or the actual cost of providing a property with wastewater service. (8 AA 1553; 8 AA 1559.) On January 6, 2014, the District denied this administrative claim, after a plenary review and analysis by the District's Engineer. (8 AA 1566.)

The trial court rejected Plaintiffs' futility argument on the grounds that two District employees testified that "a legitimate, careful, and legally/factually supported challenge to the District's EDU regime in the context of the annual Prop. 218/budget hearing would have received careful attention." (8 AA 1654.) But this testimony was irrelevant, because the District had already applied its expertise and positively declared its decision regarding Plaintiffs' challenge to the EDU methodology prior to the 2014 and 2015 rate increase hearings. (8 AA 1566.) Futility was demonstrated by the District's correspondence asserting the constitutionality of its EDU methodology and its denial of

Plaintiffs' administrative claim. (8 AA 1542; 8 AA 1566.) The likelihood that the District would have reversed itself at a later rate increase hearing when presented with the same factual and legal arguments was nil. (*See Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 384 [216 Cal.Rptr. 733, 703 P.2d 73] [finding that futility exception applied where plaintiff repeatedly sought relief from administrative officials before filing suit, and was not informed of any additional administrative review procedure when the board formally rejected his claim]; *Doster v. County of San Diego* (1988) 203 Cal.App.3d 257, 262 [251 Cal.Rptr. 507] [excusing as futile plaintiff's failure to exhaust because there was no reasonable basis to believe that the final decisionmaker would have reversed his previous ruling when presented with the exact same evidence he has already considered].)

V. CONCLUSION

The District asks this Court to create a new rule establishing section 6, subdivision (a) as an administrative remedy for any challenge to a property-related fee under section 6, subdivision (b). In the 22 years since the voters passed Proposition 218, no appellate court has agreed that such a rule is appropriate. The District's interpretation sets subdivision (a) up as a barrier that will insulate government agencies from substantive challenges under subdivision (b). But the purpose of Proposition 218 was to enhance voter consent for new or increased taxes, not throw up additional obstacles to challenging the constitutionality of agency actions. The Court of Appeal's opinion should be affirmed.

Dated: January 11, 2018

Respectfully Submitted,

PATTERSON LAW GROUP

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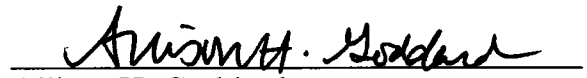

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BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.204 OF THE CALIFORNIA RULES OF COURT

Under Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has typeface of 13 points or more, Time New Roman type, and contains 8,055 words, as counted by Microsoft Word 2007 word processing program used to generate the brief.

Dated: January 11, 2018

Respectfully Submitted,

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PROOF OF SERVICE

I am a citizen of the United States and am employed in San Diego County. I am over the age of eighteen (18) years and not a party to this action; my business address is 1350 Columbia Street, Suite 603, San Diego, California 92101.

On January 11, 2018, I caused to be served the below named document by placing a true copy thereof enclosed in a sealed envelope and served in the manner and/or manners described below to each of the parties herein and addressed as follows:

ANSWER BRIEF ON THE MERITS

XX **BY U.S. MAIL – CCP §1013a(1).** I am personally and readily familiar with the business practice of Patterson Law Group, APC for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Diego, California.

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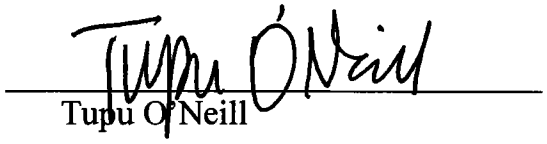
See Attached Service List

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

Executed at San Diego, California on January 11, 2018.



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