No Fees per Gov. Code § 6103

S243360

IN THE SUPREME COURT OF CALIFORNIA

EUGENE G. PLANTIER, as Trustee, etc., et al.,
Plaintiffs and Appellants,

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE
CASE NO. D069798

REPLY BRIEF ON THE MERITS

PROCOPIO, CORY, HARGREAVES
& SAVITCH LLP
*KENDRA J. HALL (BAR NO. 166836)
GREGORY V. MOSER (BAR NO. 101137)
JOHN D. ALESSIO (BAR NO. 174900)
ADRIANA R. OCHOA (BAR NO. 256854)
525 B STREET, SUITE 2200
SAN DIEGO, CA 92101
TELEPHONE: 619.238.1900
FACSIMILE: 619.235.0398
kendra.hall@procopio.com
greg.moser@procopio.com
john.alessio@procopio.com
adriana.ochoa@procopio.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
RAMONA MUNICIPAL WATER DISTRICT

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greg.moser@procopio.com
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adriana.ochoa@procopio.com

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INTRODUCTION

The decision to share in power and hold agencies accountable for their decision-making is a two-way street. Voters created available remedies to control, among other things, the imposition of wastewater service fees by enacting California Constitution, Article XIII D, section 6 ("Section 6"). The District complied with the constitutional mandate and held noticed public hearings wherein it considered all written and oral protests before approving the fees for which Plaintiffs now seek class-wide refunds. Plaintiffs could have participated in the process by raising an oral and/or written objection to the methodology used by the District to set the challenged rates, but did not. The lead class representatives testified participation in the hearing process was viewed as a "waste of time."

Plaintiffs contend the District is using the remedies Plaintiffs failed to avail themselves of as a "hurdle" to prevent taxpayer control. The District did not impose the noticed hearing process on itself. Voters are presumed to be aware of the law when enacting an initiative. The decision to enact Section 6(a) created administrative remedies that must be exhausted.

Plaintiffs also argue the remedies provided by Section 6(a) are inadequate because the District was merely required to engage in a

counting exercise to determine the existence of a majority protest. However, the plain language of Section 6(a) requires agencies to do more—they must consider all written and oral protests before approving rates. Agencies also have the burden to justify those rates if later challenged. The notice, hearing, and right to have all protests considered by the District creates an adequate remedy.

Plaintiffs cannot avoid the duty to exhaust by characterizing their action as a methodological challenge instead of as a challenge to increased fees. The methodology used to determine a fee is subsumed within, and at issue with, the approval of any increase. Plaintiffs' class complaint challenges the fee increases approved in 2012-2014 and seeks a refund of excessive fund balances. Plaintiffs were not limited from raising a methodological challenge to the proposed fees at the Proposition 218 public hearings. Plaintiffs' attempt to limit the scope of a Proposition 218 challenge narrows, rather than liberally construes, the power provided to fee-payors.

Lead class representative Plantier's communications with the District regarding past due sewer permits, connection fees and past due service charges owed for his property did not satisfy Plaintiffs' duty to exhaust remedies provided by Proposition 218 regarding sewer rate increases. The communications did not occur in connection with the

Proposition 218 public hearing when experts were present, decision-makers were considering oral and written protests and the challenged rates were being approved. Neither Plantier, nor any represented class member, raised a methodological challenge to the District's sewer service rate-setting in the context of the Proposition 218 public hearings.

Plaintiffs' speculation that it would have been "futile" to participate in the Proposition 218 hearing process was therefore correctly rejected by the trial court. The District never positively declared what its decision would be if a supported methodological challenge was made to its rate-setting structure. The evidence established the District had in the past adjusted rates prior to adoption in response to public input. The trial court also believed witnesses who testified that a legally and factually supported objection to the District's 2012-2014 rates would have received careful consideration. The annual Proposition 218 public hearing was the appropriate time and place to raise objections (orally or submitted in writing) to the District's rate-setting methodology, but not a single plaintiff did so. The multiple excuses Plaintiffs offer to avoid the duty to exhaust should be rejected.

PLAINTIFFS' ARGUMENT REGARDING THE MERIT OF THE DISTRICT'S EDU METHODOLOGY IS IRRELEVANT

The merit of Plaintiffs' challenge has not been determined. [Slip Opin., p. 4, fn.4.] Their arguments attacking the EDU methodology used by the District, and multiple agencies around the state, are unsubstantiated. [Answer Brief ("AB"), pp. 13, 15.] There have likewise been no findings the District "falsely" claimed Plantier changed the use of his property (AB, p. 12) or billed Plantier in violation of its legislative code—issues which in any event are irrelevant to this appeal. [AB, p. 13.]

LEGAL DISCUSSION

A. Section 6(a) Provided a Remedy for Plaintiffs' Challenge Under Section 6(b).

1. Proposition 218 Could Have Been Drafted to Eliminate Exhaustion Requirements, But Was Not.

When construing initiatives, this Court generally presumes electors are aware of existing law. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 935.) California law provides a remedy exists if the law provides for notice, opportunity to protest and a hearing. (*Wallich's Ranch Co. v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878, 883 ("*Wallich's Ranch*").) The drafters of Proposition 218 could have explicitly provided Section 6(a) did not

create an exhaustion requirement, but did not. (See *Coastside Fishing Club v. California Fish and Game Commission* (2013) 215 Cal.App.4th 397 ("*Coastside*") [Administrative Procedure Act provides the "right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition..."].) Plaintiffs' argument that the drafters' failure to address exhaustion means no duty to exhaust exists (AB, p. 11) ignores these well-established principles. It was unnecessary for Proposition 218 to explicitly reaffirm a duty to exhaust existed because its provisions provide for notice, a hearing, and a requirement that all written and oral protests be considered. It also places the burden on an agency to justify its decision. (§ 6(b).) As a practical matter, Proposition 218 requires an agency to lay out its rationale for a new or increased rate before a decision is made.

The absence of authority addressing the duty to exhaust under Proposition 218 does not mean no duty to exhaust exists. The issue may not have been triggered by the facts in other cases or perhaps it did not occur to other litigants to raise the issue. Section 6(a) creates administrative remedies Plaintiffs were required to avail themselves of before resorting to judicial action. Absent participation there is no opportunity for a dialogue consistent with Proposition 218's goals. (See

Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 220 [power sharing under Proposition 218 promotes decisions that are "mutually acceptable and both financially and legally sound"]; see also *Morgan v. Imperial Irrigation Dist.* (2014) 233 Cal.App.4th 892, 911 [goals of Section 6 are to minimize rates and promote dialog between ratepayers and rate makers].)

2. Plaintiffs Cannot Avoid Section 6(a) By Re-Characterizing Their Lawsuit.

Plaintiffs' restatement of the issue presented for review and characterization of their complaint as raising a challenge to the methodology of "an existing property-related fee" does not remove their action from the exhaustion requirements of Section 6(a). [See AB, p. 6.] Plaintiffs seek refunds for fee increases approved in 2012-2014 and therefore this action falls squarely within Section 6(a). [1 AA 1-2, ¶1; 1 AA 8.] Plaintiffs' class complaint does not challenge the District's EDU-methodology in a vacuum, or even the EDU assignment as applied to a particular property. Instead, it states:

> This is a class action seeking declaratory and monetary relief for a class of Ramona Municipal Water District ("RMWD") wastewater customers. RMWD's wastewater fees are based on an Equivalent Dwelling Unit ("EDU") billing system. This system does not meet the requirements set forth in Article XIII D Section 6(b)(3) of the California Constitution ("Proposition 218"). Because

> the EDU system violates Proposition 218, RMWD's EDU-based Sewer Service Charge is unlawful and invalid.

[1 AA 1-2, ¶1.] In the prayer for relief, Plaintiffs seek "[d]amages in the form of the refund of all EDU-based Sewer Service Charges paid to RMWD on or after November 22, 2012." [1 AA 8.] Therefore, because Plaintiffs challenge the District's compliance with Proposition 218, they were required to first raise their challenge in the context of the annual Proposition 218 hearing before proceeding to court.

The fact that a component of the methodology used by the District has been in effect since the enactment of Proposition 218 did not prevent Plaintiffs from objecting to it. The entire methodology used to determine a fee is carried forward and put at issue each time a new or increased fee is imposed. The decision in *San Diego Water Authority v. Metropolitan Water District of Southern California* (2017) 12 Cal.App.5th 1124, correctly analyzed this issue and determined the methodology used to determine a rate is carried forward with the enactment of each new rate. Whether or not *San Diego Water Authority* involves distinguishable facts does not alter the legal principle to be taken from that case. It is illogical that voters would limit their ability to protest the methodology underlying a new or increased fee simply because a component may have been in place for a

period of years.

Plaintiffs likewise seek to prove too much when they argue "[t]he 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". [AB, p. 30, fn. 3.] There is no basis for limiting the reach of Proposition 218's substantive requirements contained in Section 6(b)(1)-(5) simply because the methodology pre-dates Proposition 218. Methodology is at issue with the enactment of each new or increased rate. If the proposed fees in 2012-2014 were believed to violate the requirements of Section 6(b) as Plaintiffs now assert, the objection should have been raised.

The Omnibus Implementation Act does not support an argument that a change in a rate's methodology must occur in order for a plaintiff to be required to exhaust available remedies under Section 6(a). The Act recognizes that a fee increase and its methodology are intertwined. (Government Code § 53750 (h)(1)(B).) The evidence at trial established a challenge to the District's rate-setting methodology could have been raised at the annual Proposition 218 public hearing and would have received careful consideration. [8 AA 1654.] A finding that fee-payors cannot object to the methodology underlying an increased fee limits voter power and control and hinders, rather than facilitates,

communication between local government and those they serve.

3. Plaintiffs Urge An Unsupported Heightened Notice Requirement.

Plaintiffs argue that because the notices detailed the mandatory information required for an objection to be counted in determining the existence of a written protest, the specific basis for a fee-payor's written objection could not be provided. Plaintiffs contend the District was required to demand an "explanation of the reasons for the protest" (AB, p. 19) and to "ask protestors to provide [] more information than the fact of their protest" (AB, p. 29) for an administrative remedy to exist. Plaintiffs cite no authority requiring the District to elicit the reason for a party's objection in order for an administrative remedy to exist.

In *Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, the notice provided the time and place of hearing and indicated that objections would be considered. (*Id.* at 683.) Likewise, in *Wallich's Ranch, supra,* notice of a budgetary hearing was deemed sufficient notice of the opportunity to challenge a pest control assessment. (87 Cal.App.4th at 880; see also *Drummey v. State Bd. Funeral Directors and Embalmers* (1939) 13 Cal.2d 75, 80-81 ["[d]ue process does not require any particular form of notice or method of procedure]; *County of Los Angeles v. Farmers Ins. Exchange* (1982) 132 Cal.App.3d 77 [duty

to exhaust regardless of whether the administrative remedy is couched in permissive language].) Plaintiffs have not distinguished these authorities or offered cases to the contrary.

Plaintiffs' suggestion that fee-payors were limited in the content they could include in an oral and/or written protest is likewise not accurate. [AB, p. 20.] The Notices advised of the minimum content for a written protest to be counted, but did not otherwise limit information that could be included in a written protest. [6 AA 1074-1077 (2012 Notice); 6 AA 1152 (2013 Notice); 5 AA 884-888.] The notices also advised all written and oral protests would be considered. [*Id.*] The protests received by the District evidenced the property owners did not feel limited by the notices and in fact did provide reasons for their objections. [See 8 AA 1409-1414, 1420-1428, 1434-1452, 1454-1467.] Plaintiffs were not limited in raising a methodological challenge either orally and/or in writing in connection with the Proposition 218 public hearings. [5 AA 926-927 (Any challenge to the District's EDU methodology may be raised at the Proposition 218 hearing.).][1]

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[1] Two written protests submitted in 2015 objected to proposed fee increases based on the District's EDU methodology. It was unnecessary for the trial court to address whether the duty to exhaust was satisfied as a result of these submissions because the class complaint was filed in January 2014. [8 AA 1645, 1655.]

B. The Mandate for a Noticed Hearing, Along With the Duty to Consider All Oral and Written Protests, Provides an Adequate Remedy.

1. The Plain Language of Section 6(a) Creates More Than a Veto Right.

Plaintiffs argue Proposition 218 should be interpreted as giving taxpayers "a simple opportunity to veto" and that it is "[t]he Court's task here [] to interpret Proposition 218 to effectuate that purpose." [AB, pp. 23-24.] Plaintiffs' proffered interpretation contravenes the plain language of Section 6(a)(2), which permits oral and written protests to be submitted and further requires that "[a]t the public hearing, the agency shall consider all protests against the proposed fee or charge." (§ 6(a)(2).) Plaintiffs' authorities do not support the argument that Proposition 218 merely provides a veto right.

2. "Consider" Means More Than "Tabulate" or "Count."

The mandated Proposition 218 hearings are not a mechanism for the District "to tabulate protests to determine whether a majority protest exists." [AB, p. 7] The District is required to consider oral protests that are not included in determining the existence of a majority protest. Only written protests are taken into account for determining a majority protest. (§6(a)(2) ["If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge."].)

Section 6(a) does not provide the agency "shall count" all protests; instead, the District is required to consider all of them. The duty of the District to do more than count protests is also consistent with the burden the people placed on agencies to support their charges, including establishing a fee based on actual use or services that are actually available to the property. (See *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1501-02; compare *Carlton Santee Corp. v. Padre Dam Mun. Water District* (1981) 120 Cal.App. 3d 14, 18-19 [In light of the quasi-legislative nature of the district's actions in setting sewer service charge, review is limited to whether district's actions were "arbitrary, capricious or entirely lacking evidentiary support" or whether it failed to follow procedure and give notices required by law].) The District's duty to support its charges in the hearing notice, and to make its analysis available for public review prior to and at the hearing, reflects an expectation that fee-payors may attack the justification offered as insufficient, factually flawed or inconsistent with the substantive requirements imposed by Proposition 218 in connection with the hearing. (§6(b).)

The evidence established the annual Proposition 218 hearing is the "most comprehensive" hearing in the District of the year. [5 AA

921-922.] Months of preparation occurs beforehand so that information can be shared with the public and the District can ensure its proposed rates comply with the substantive requirements of Proposition 218. The District Board is provided copies of written protests so that the content can be reviewed and considered in advance of the hearing. [5 AA 891-892.] At the hearing the Board receives and considers all written and oral input from the public. It has previously adjusted proposed rates in response to the input received. [5 AA 877-881, 887-892, 921-922; 6 AA 1076, 1078.] The District's EDU-methodology is a part of the discussion to the extent it impacts the sewer charge. [5 AA 926.]

If only counting or tabulating was involved at the Proposition 218 hearing, the drafters could have said so as they do elsewhere in Proposition 218. (See, e.g., Article XIII D, section 4, subdivision (e) [the agency shall "tabulate the ballots."] The District would also be able to avoid the considerable time and expense in having experts prepare and be present, along with other officials, during the hearing. [5 AA 877-881; 8 AA 1647-1648.] "Consider" does not mean the same thing as "tabulate" or "count." A finding to the contrary necessarily renders the District's duty to consider all protests a purely mechanical exercise.

For the same reasons, and in addition to the reasons addressed in the District's Opening Brief on the Merits (see pp. 48-50), the authorities cited by Plaintiffs finding various differing remedies in differing contexts to be inadequate are distinguishable. Proposition 218's procedural and substantive provisions create a framework for more than simply an opportunity for public comment. The action the District could have taken is likewise not limited to supervision and investigation. The District had the power to change the methodology underlying its proposed increased fees if warranted. Proposition 218 provides a procedure for the submission and evaluation of protests and places the burden on the District to consider and provide evidentiary support for proposed fees and charges. Plaintiffs have failed to establish Section 6 provides an inadequate remedy.

3. Plaintiffs' Speculation and Hypotheticals Are Factually Unsupported and Legally Irrelevant.

Plaintiffs' arguments and hypotheticals hinge on facts and assumptions that do not exist. The trial court properly rejected conjecture the District might not hold an annual Proposition 218 public hearing. [8 AA 1622-1623.] For the same reason, Plaintiffs' argument that this Court should reject the 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" (AB, p. 9) is misplaced. The District held informative public hearings before setting the very rates at issue in Plaintiffs' class suit. The lead class representatives testified they choose not to avail themselves of the administrative remedies available because it was a "waste of time." [8 AA 1650-1651.] Had the facts established no public hearings were held, perhaps Plaintiffs would then have an argument establishing an exception to the duty to exhaust based on irreparable injury.[2] However, the facts established the District's Proposition 218 hearing occurred annually and was directly tied to the adoption of the District's fiscal operating budget.[3] The ability of a district to pass through rate increases for a period of five years—which did not occur here—does not affect the availability of an adequate administrative remedy in this case.

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[2] For example, court will excuse the failure to exhaust administrative remedies upon a compelling showing that plaintiff would suffer irreparable injury if judicial review were delayed or denied. (*Abelleira v. District Court of Appeal, Third District* (1941) 17 Cal.2d 280, 296-300.)

[3] The District does not contend the adoption of its budget creates an administrative remedy. [AB, p. 25.] However, the reality is whether or not mandated annually, the District's Proposition 218 hearing is necessarily tied to the setting of its budget every year so that the District can ensure compliance with Section 6(b)'s substantive standards.

Plaintiffs' citation to isolated testimony regarding the District's procedure to determine a majority protest (pp. 28-29) does not establish the District did not otherwise consider the substance of the oral and written protests they received. Other testimony established the District had lowered rates in response to objections even absent a majority protest and further that the Proposition 218 hearing was the time and the place to raise a methodological challenge to the District's rate setting. The trial court specifically found the District would have given careful consideration to a legally and factually supported challenge—had one been made. [8 AA 1654.]

Plaintiffs claim incongruous results will occur if Proposition 218 provides an administrative remedy. They focus on the "power" and "control" voters intended to impose over agencies with the enactment of Proposition 218 (AB, p. 7), but ignore that by requiring participation in the public hearing protest process, communication is fostered and required information is shared so that the exercise of "power" and "control" by fee-payors is informed. It also gives agencies the ability to apply their expertise before being faced with litigation that raises significant issues affecting the whole community.

The interpretation of Proposition 218 urged by Plaintiffs threatens the viability of public agencies trying to comply with

Proposition 218. It also imposes a tremendous burden on agencies to prepare for and conduct public hearings, but denies an agency the opportunity to consider objections to its rate-setting methodology so that it may apply its expertise prior to setting its rates and approving its budget. If Plaintiffs are correct and there is no duty to exhaust so that a substantive challenge based on Proposition 218 can be brought at any time, agencies will be prevented from stabilizing their finances and ensuring the systems needed to remain operational are not compromised.

C. Proposition 218 Provides a Remedy Distinct From the Remedy Available Under the District's Legislative Code.

1. Plaintiffs Fail to Counter Authorities Requiring Exhaustion of Multiple Remedies.

If multiple remedies exist, they must be exhausted. (*Acme Fill Corp. v. San Francisco Bay Conservation etc. Com.* (1986) 187 Cal.App.3d 1056, 1064 [when multiple remedies are available, all must be exhausted before judicial review is available]; *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447-1448 [exhaustion required under Government Code and Fairfax Tax Code].) Plaintiffs fail to counter this authority.

Plaintiffs instead cite to *Coastside*, *supra*, for the proposition that the District's legislative code provides the exclusive remedy for their

Proposition 218 claim. [AB, p. 29] However, the decision in *Coastside* confirms that under the exhaustion of administrative remedies rule, "an administrative remedy is exhausted only upon "termination of all available, nonduplicative administrative review procedures." (*Coastside*, 215 Cal.App.4th at 413-414, citations omitted). Article XIII D, section 1 provides: "[n]otwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority." Therefore, Proposition 218 provides the administrative procedure by which the District imposed the challenged service charges. To the extent *Coastside, supra,* addresses the alternative judicial remedy exception to the duty to exhaust, it is distinguishable because the statute in that case specifically stated the right to seek judicial relief was not affected by the failure to raise a challenge during the pre-adoption public comment period. (*Id.* at 416).

The drafters of Proposition 218 provided no such limitation. Plaintiffs' bare compliance with the District's legislative code exhaustion requirements does not vitiate their separate obligation to exhaust available remedies under Proposition 218.[4]

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[4] Plaintiffs imply the trial court changed its mind from its ruling on their class certification motion regarding whether they exhausted their

2. The District's Rate Setting Methodology Was Not Challenged in Connection with the Proposition 218 Public Hearings.

Timing is of critical importance for agencies engaged in rate setting and in determining whether the specific remedies provided by Proposition 218 have been exhausted. Exhaustion also requires objections be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 [rejecting methodological challenge to reports by city's financial expert because plaintiffs did not present competing financial analysis]. Objections must also be received so that they may be considered in an agency's decision-making process. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123,1143.)

The District held its Proposition 218 public hearing on June 26, 2012. There were no challenges to the District's rate-setting methodology. [5 AA 995-997; 985:3-25; 1033-1035.] Following the hearing, the District's 2012-2013 Operating Budget was approved. [6 AA 1080-1085, 1086-1138, 6 AA 1080-1085.] The letter sent by class

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administrative remedies. [AB, p. 16.] The trial court's interim ruling addressed Plaintiffs' exhaustion under the legislative code. The ruling which was subject to change, also did not specifically address a duty to exhaust under Proposition 218. [4 AA 818-830.]

representative Plantier's counsel nearly one (1) month after the hearing baldly asserting the District's EDU methodology as applied to Plantier's parcel was "arbitrary and capricious," not only lacked specificity, it was provided to the District too late. Sewer service rates for 2012-2013 had already been approved. [8 AA 1468, ¶ 2.] The same is true for communications Plantier, and later the public interest group Plantier enlisted, sent to the District in August 2012 (2 months after approval) and December 2012 (6 months after approval). [8 AA 1472; 5 AA 946-949.][5]

The District held its next annual Proposition 218 meeting on June 25, 2013. [5 AA 995-997; 985:3-25; 1033-1035; 7 AA 1156-1159.] Again, rather than filing a written protest or appearing in person, Plantier waited until five (5) months after the District set its 2013-2014 rates and approved its Operating Budget to file an administrative claim. [5 AA 950-951; 8 AA 1546-1566.] The trial court was correct that

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[5] Plantier did not "object to the EDU system" at the November 2012 board meeting. [5 AA 1013-1014; see also 6 AA 1142 (district considering "grease accumulation in the sewer line and the EDU designation" related to Plantier's discharge permit fees).] Moreover, the trial court did not find Plantier's trial testimony to be credible. [8 AA 1650-1651 ("The witness had an agenda of things he wanted to say, some of which seemed scripted."); see also 1654 ¶ 7 [testimony of the District more persuasive than plaintiffs' testimony].) "Plantier clearly had an axe to grind given his dispute regarding the grease discharge, and his contempt for RMWD was palpable."] [*Ibid.*]

allowing Plaintiffs to bypass the public hearing process set up by Proposition 218 to bring a judicial action raising a Section 6(b) challenge and seeking a refund of "excessive fund balances" turns Proposition 218 "on its head." [8 AA 1655.]

3. The Doctrine of General Exhaustion Has Not Been Met.

Plaintiffs' discussion of the general duty to exhaust is misplaced and does not avoid the duty to exhaust multiple remedies when they exist. Plantier's communications with the District involved multiple issues involving his individual property, including Plantier's objection to obtaining a discharge permit, connection fees he owed based on the EDU determination by the District for his property, and paying past sewer service charges under the District's legislative code. [6 AA 1064-1066, 1468-1469.][6] The communications did not occur in connection with the Proposition 218 hearings—the time when the District could meaningfully respond. The communications also did not involve the specific rates for which Plaintiffs now seek a refund or the calculation of annual service charges District-wide.

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[6] Connection fee charges are not subject to challenge under Proposition 218. (*Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 424.)

In *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, the trial court determined that a property owner, who had filed an action against the City of San Jose and its redevelopment agency challenging the validity of a redevelopment plan, "failed to exhaust her administrative remedies by not raising her detailed and specific challenges to the evidence underlying the [redevelopment plan] during the administrative process, so that the Agency could evaluate and respond to her objections." (*Id.* at 1135–1136.) The Court of Appeal recognized: "The purposes of the [exhaustion] doctrine are not satisfied if the objections are not sufficiently specific so as to allow the Agency the opportunity to evaluate and respond to them." (*Id.*, quoting *Park Area Neighbors,* 29 Cal.App.4th at 1447.) Therefore, even though the plaintiff in *Evans* attended public hearings and had signed a petition against a proposed project, she was found to have failed to exhaust her administrative remedies. (*Id.*; see also *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 ["The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review."]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020 [all legitimate issues must be presented to the agency "to preserve the

integrity" of the proceedings and "to endow them with a dignity beyond that of a mere shadow-play"].)

In *San Franciscans Upholding the Downtown Plan, supra*, the plaintiffs challenged the City's use of two expert analyses of financial issues to support the City's approval of a project that would impact a historic building. Plaintiffs asserted that the methodology used in those studies was "inadequate, untrustworthy and insufficient to support the City's Project approval." (102 Cal.App.4th at 683.) The Court of Appeal rejected that claim because the plaintiffs had not presented a contrary financial analysis during the administrative process. The court held if a party "wishes to make a particular methodological challenge to a given study relied upon in planning decisions, the challenge must be raised in the course of the administrative proceedings. Otherwise, it cannot be raised in any subsequent judicial proceedings." (*Id.* at 686; see also *Park Area Neighbors,* 29 Cal.App.4th 1442 [failure to challenge methodology used by agency constitutes a waiver and bars a challenge on judicial review]; *Wallich's Ranch,* 87 Cal.App.4th at 885 ["circulation of petitions to dissolve the District and a February 1997 letter to counsel for the District contending the District was required to comply with

Proposition 218" did not provide a "challenge to the District's budget for the fiscal years at issue."].)

The District was never provided with an outline of the basis for Plaintiffs' methodological challenge. Instead, the trial court found Plantier's letters "were long summary pronouncements and bald assertions, and backup for these allegations was not provided" even though the District offered to receive supporting information and authority. [8 AA 1654, ¶2.] The letters sent by, or on behalf of, Plantier contained vague claims that the District's EDU methodology was "arbitrary and discriminatory and constitutes an abuse of official authority." [6 AA 1468-1469.] And, although Plantier claimed Proposition 218 was being violated, he provided no legal authority or analysis establishing why. [5 AA 105:21-28, 968:21-970:23; 8 AA 1542-1545.] The District specifically advised Plantier, "[s]hould you wish to present any additional authority in support of your position, please forward same to my attention immediately so the Board may consider all relevant authority." However, Plantier never did so. [8 AA 1542-1545, 1654, ¶¶3-6.] The trial court was correct in finding Plaintiffs failed to meaningfully set forth the basis for their disagreement with the District's EDU methodology.

4. The Trial Court's Rejection of Plaintiffs' Futility Defense Was Support by Substantial Evidence.

Whether it would have been futile for plaintiffs to pursue an administrative remedy is a question of fact that is reviewed for substantial evidence. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1431.) Plaintiffs ask this Court to determine the issue de novo; however, the underlying facts were disputed.

"Futility is a narrow exception to the general rule." (*Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 683.) The duty to exhaust a statutory remedy is required unless Plaintiffs can positively state that the District has declared what its ruling will be in a particular case. (See *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418 [requiring it be absolutely clear exhausting administrative remedies would be of no use whatever]; see also *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 691 [collecting cases illustrating the unusual circumstances required for the futility doctrine to apply].) The futility exception does not apply simply because favorable agency action is unlikely or even if the agency has previously rejected the desired outcome in similar cases. If courts excused exhaustion on this ground, the exhaustion requirements would practically disappear, since

litigants normally go to court without having exhausted remedies precisely because they believe favorable agency action is unlikely. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313-1314 [cannot infer from position county took in subsequent court action that county assessment appeals board would have rejected plaintiff's claim in this action].) In short, the futility exception recognizes that litigants must pursue administrative remedies that will probably fail but need not pursue those that will certainly fail.

The evidence established the annual Proposition 218 hearing is the time and place for members of the public to discuss the EDU schedule and the District's compliance with the Proposition 218 rate-setting regime. [5 AA 926-927.][7] While Plaintiffs point to testimony of an expert who confirmed the EDU designation assigned to Plantier's parcel was consistent with the sewer capacity needed to service it, there is no evidence the District positively declared what its ruling would have been if a written or oral challenge to its methodology was

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[7] *Hittle v. Santa Barbara County Employees Retirement Ass'n* (1985) 39 Cal.3d 374, cited by Plaintiffs, has no application here. Exhaustion was not required in that case because an employee, who repeatedly sought benefits, was never told an administrative remedy was available by which he could contest denial of benefits. (*Id.* at 384-385.) By contrast, Plaintiffs received the notices regarding the Proposition 218 public hearings, but simply chose not to participate.

raised at the time it was setting rates. [5 AA 1047-1055.] Plaintiffs' speculation that their participation in the Proposition 218 process would have been a "waste of time" was therefore properly rejected.

5. Plaintiffs' Argument That They Are Entitled To Rely on the Actions of Other Class Members is Misplaced.

Plaintiffs raise for the first time a claim that they are entitled to rely on the actions of other class members to establish exhaustion of remedies. In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, the duty to exhaust was satisfied even though the lead class members had not participated, because putative class members sufficiently raised an issue and gave the board an opportunity to act and to render litigation unnecessary. (*Id.* at 267.) Under those circumstances, the purposes underlying the exhaustion doctrine were satisfied. (*Id.* at 267–268.) Requiring the named plaintiffs to exhaust their remedies when others in the class had already done so, "would serve no additional useful purpose" because "[n]othing more could effectuate the policy of the exhaustion doctrine." (*Id.* at 268.)

The District does not dispute the existence of this rule, however, it has no applicability to the facts of this case. The District does not claim the "named" plaintiffs had to raise a specific challenge to its methodology. However, someone in the class needed to raise a

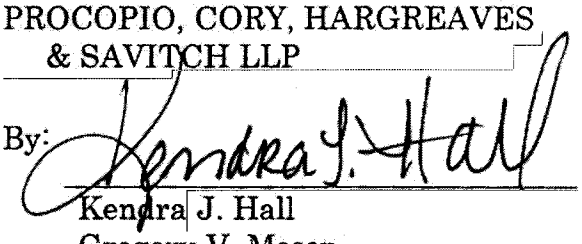
sufficient methodological challenge so that the District could consider it at the time it was setting the challenged rates. A challenge was never raised and therefore Plaintiffs' class lawsuit should be barred.

CONCLUSION

Based on the foregoing, it is respectfully requested that the decision of the Court of Appeal be reversed.

DATED: January 30, 2018

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

Kendra J. Hall
Gregory V. Moser
John D. Alessio
Adriana R. Ochoa
Attorneys for Defendant and Respondent RAMONA MUNICIPAL WATER DISTRICT

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.520(c)(1), I certify that this Reply Brief on the Merits is proportionately spaced, has a typeface of 13 points or more, and contains 5,812 words.

DATED: January 30, 2018

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: Kendra J. Hall

Kendra J. Hall
Gregory V. Moser
John D. Alessio
Adriana R. Ochoa
Attorneys for Defendant and Respondent RAMONA MUNICIPAL WATER DISTRICT

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On January 30, 2018, I served the within documents:

REPLY BRIEF ON THE MERITS

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

Executed on January 30, 2018, at San Diego, California.

Kristina Terlaga

SERVICE LIST

Attorney for Plaintiffs, Appellants and Respondents
James Richard Patterson
Allison Hughes Goddard
Patterson Law Group
402 West Broadway,
29th Floor
San Diego, CA 92101
Jim@pattersonlawgroup.com
Ali@pattersonlawgroup.com
jackie@pattersonlawgroup.com

[1 electronic copy]

Attorney for Plaintiffs, Appellants and Respondents
Todd D. Carpenter
Carlson Lynch Sweet Kilpela & Carpenter, LLP
1350 Columbia Street, Suite 603
San Diego, CA 92101
tcarpenter@carlsonlynch.com
bcasola@carlsonlynch.com

[1 courtesy electronic copy]

Superior Court
Clerk of the Superior Court
San Diego Superior Court
330 West Broadway
San Diego, CA 92101

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