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

S226036

[Exempt From Filing Fee Government Code § 6103]

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN BUENAVENTURA,
Respondent and Cross-Appellant,

vs.

UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT,
Appellants and Cross-Respondents,

On Appeal of Published Decision of the

Second Appellate District, Division Six, Case No. B251810

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

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

In this historic fourth year of drought, the distinctive vocabulary of groundwater conservation has become an unwelcome guest to our daily lexicon: Overdraft, aquifers, basins, pumping, recharge, seawater intrusion. These are not the familiar words of municipal water delivery. Rather, they are the once-esoteric language of a different breed of regulatory agency, like the District, whose mission is to protect our groundwater.

Against the backdrop of critical groundwater conservation, this case presents the Court with an opportunity to address the respective scopes of Article XIII D (Proposition 218) and Article XIII C (Proposition 26) of the California Constitution. Their separate reaches and interplay have become muddled by an array of disparate appellate opinions, some issued prior to the refinements added by Proposition 26 and others that seem to overlook the significance of this subsequent voter initiative. This Court can provide the necessary clarification and guidance to the local government agencies, courts, and practitioners attempting to navigate these constitutional provisions.

The Court of Appeal in this case correctly determined the groundwater pumping charge levied by the United Water Conservation District (the "District") is not imposed on landowners as the consequence of owning property, nor can it be reconciled with Proposition 218's other requirements. It is therefore not a property-related fee subject to Proposition 218. The Court also correctly determined the fee is a regulatory charge for a specific benefit or privilege that the District grants to payors – the right to pump scarce groundwater. As the fee did not exceed the District's reasonable groundwater protection costs, the Court concluded it was not a "tax" imposed in violation of Proposition 26.

Expressly aware of its obligation to avoid the implied repeal of preexisting legal mandates, the Court of Appeal properly harmonized Propositions 218 and 26 with the constitutional and statutory law under which

the District engages in rate-making: Article X, section 2 of the California Constitution and the Water Conservation Act of 1931, Water Code[1] sections 74000, *et seq.*, and, in particular, Water Code section 75594, which dictates no less than a 3:1 ratio between the rates imposed on non-agricultural versus agricultural pumpers of groundwater.

The Court of Appeal's Opinion should be affirmed on the record of these consolidated proceedings. The Court properly distinguished *Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 (*Pajaro I*), a Proposition 218 case decided three years before the adoption of Proposition 26. Although the Sixth Appellate District recently reaffirmed *Pajaro I* in *Great Oaks Water Co. v. Santa Clara Valley Water Dist.*, 2015 WL 4750746 (Cal. Ct. App. Aug. 12, 2015), rehearing was again granted on September 11, 2015 and that opinion has been vacated.[2]

Although *Pajaro I* is distinguishable on its administrative record, it is nonetheless advisable for the Court to confirm that, in cases such as this, where the record reflects (i) a local government agency has imposed a fee for a valid regulatory purpose; and (ii) the fee is not imposed on a property owner to pay for the costs of providing a service to a parcel of property, the fee does not fall within the scope of Proposition 218, but is instead subject to analysis under Proposition 26. Without such clarification, *Pajaro I* and the Court of

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[1] All statutory references will be to the Water Code unless otherwise noted.

[2] The District submits that, in reaching to uphold challenged groundwater fees, the vacated *Great Oaks* Opinion erroneously extended *Pajaro I* by failing to consider the language and intent of Proposition 218 or to account for the meaningful guidance that Proposition 26, adopted after *Pajaro I*, now provides in interpreting the scope of Proposition 218. If a published *Great Oaks* Opinion issues while review of this case is pending, the District requests an opportunity to address that ruling.

Appeal's decision in this case foster confusion, adversely affect the ability of state and local government agencies to conform their conduct to the law, and invite conflicting judicial decision-making going forward.

Should, however, this Court adopt the contrary view urged by the City that the District's rates are subject to Proposition 218 and can only withstand scrutiny if the District can justify, based on cost of service, the rate differential between agricultural and non-agricultural users of groundwater mandated by Water Code section 75594, the District requests, as it did in the Court of Appeal, that the matter be remanded for the trial court to consider whether the District can produce cost of service evidence justifying its 3:1 ratio. The City's argument that the ratio can never be justified is simply *ipse dixit.* The District is entitled to an opportunity to provide support for the rate differential at a limited hearing, prior to a declaration of constitutional invalidity.

II. STATEMENT OF FACTS

A. The Creation of the District and Its Regulatory Authority to Impose Groundwater Pumping Charges

The District was formed and is invested with its powers under the Water Conservation District Law of 1931, §§ 74000, *et seq.* (the "Conservation Act") (Administrative Record ("AR"), Exhibit ("Ex.") 62-0008; AR2, Ex. 53-0008.)[3] The District is one of a handful of water conservation districts in California. (AR2, Ex. 106-0016.) The District's mission is to "manage, protect, conserve and enhance the water resources of the Santa Clara River, its tributaries and associated aquifers, in the most effective and environmentally balanced manner." (AR, Ex. 22-0039; AR2, Ex. 106-0021.)

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[3] AR refers to the Administrative Record in the 2011-2012 proceeding, while AR2 refers to the Administrative Record in the 2012-2013 proceeding.

The District's management focuses on long-term stewardship of water resources over the course of decades to preserve groundwater for future use.

The District's water protection efforts are guided by the California Constitution, Article X, § 2:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, *and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.* (Emphasis added.)

This regulatory mandate is repeated in the Conservation Act: "Groundwater charges levied pursuant to this part are declared to be in furtherance of district activities in the protection and augmentation of the water supplies for users within the district or a zone or zones thereof which are necessary for the public, health, welfare, and safety of the people of this state." (§ 75521.)

Among its many statutory powers, the District may survey and investigate water supply and resources (§ 74520); appropriate, acquire and conserve water and water rights for any useful purpose (§ 74521); and store, spread, and sink water and acquire or construct dams, dam sites, reservoirs and reservoir sites, canals, ditches and conduits, spreading basins, sinking wells, and sinking basins for such purposes (§ 74522). The Conservation Act is to be liberally construed in order to allow the District to carry out its purposes and intent. (§ 74001.)

According to the Conservation Act, *"[t]he groundwater charges are authorized to be levied upon the production of groundwater from all water-producing facilities, whether public or private, within the District* or a zone or zones thereof *for the benefit of all who rely directly or indirectly upon the groundwater supplies of a district or a zone or zones thereof and the water*

imported into the district or zone or zones thereof." (§ 75522, emphasis added.) The groundwater charge is levied "against all persons operating groundwater-producing facilities," including municipal entities, within the District. (§ 75591; § 75501.)

The District cannot levy groundwater extraction fees that produce revenue exceeding the amount "... deemed necessary by the district board to be used in furtherance of district purposes in the replenishment, augmentation, and the protection of water supplies for users within the district or zone or zones thereof." (§ 75596.) Section 75594 also mandates the District establish a fixed and uniform fee for each acre-foot of water, other than agricultural water, not less than three times nor more than five times the fixed and uniform rate established for agricultural water. (§ 75594.) Within a particular class of service, however, the rate must be uniform throughout each zone of the district. (§ 75593.)

B. The District's Groundwater Management Activities Benefit the City

1. Combatting Significant Overdraft Problems

A principal basin within the District, the Oxnard Plain Basin, has been the subject of long-term overdraft problems and seawater intrusion. (*See, e.g.*, AR 60-0013; AR2 50-0018; AR2 54-0004; AR2 94-0014; AR2 175-0064.)

Contrary to the City's claim (Opening Brief ("OB"), p. 12), a substantial majority of the City's groundwater supply is extracted from the Oxnard Plain Basin. The City's Urban Water Management Plan (AR2 95), reflects that, in calendar year 2010, *the City extracted approximately 69% of its groundwater (5,685 acre feet ("AF")) from its Oxnard Plain wells*; approximately 20% (1,642 AF) came from its Mound basin wells, and approximately 11% (887 AF) from its Santa Paula Basin wells. (AR2 95-0035; AR2 175-0056, emphasis added.). In calendar year 2011, *the City extracted*

66% of its groundwater (4,816 AF) from the Oxnard Plain; an additional 19% (1,424 AF) from the Mound Basin; 10% (733 AF) from the Santa Paula Basin; and 5% (339 AF) from its West Las Posas Basin wells. (AR2 96; Ex. B to City's Petition for Writ of Mandate filed August 5, 2011; Appellants' Reply Brief and Cross-Respondents' Brief, pp. 10-11, fn. 3.) For the City to assert "[t]he basins from which the City draws water are generally unaffected by overdraft and seawater intrusion" (OB, pp. 15-16) is simply untenable when the majority of City pumping is from the Oxnard Plain basin.

The City continues to dismiss the significance of its wells in the Oxnard Plain basin by asserting they are located in a "northwestern area" of the basin, while long-term overdraft and seawater intrusion occurs in the southeastern area of the basin. (OB, pp. 9-10, 11-12 and 16.) Groundwater extraction from the City's wells in the Oxnard Plain decreases the amount of water available to migrate to other areas of the Oxnard Plain (AR 60-0013; AR2 54-0005; AR2 94-0015; AR2 175-0089), thereby exacerbating the effects of overdraft and seawater intrusion. (AR2 53-0060.)

The trial court rejected the City's contention it does not benefit from the District's efforts to combat overdraft: "The City's conclusion, however, goes beyond the weight of the evidence in the administrative records. The reports in the record instead demonstrate that the overdraft in the southeastern Oxnard Plain basin is a complex problem, which is interrelated with activity in other parts of the Oxnard Plain basin and with activity occurring in other, interconnected basins." (Joint Appendix of Exhibits ("JAE"), Vol. 10, Ex. 88, p. 002130.)

The impact of seawater intrusion on the City was recognized by the California Legislature fifty years ago when it made the finding that, in Ventura County, "...the problem of salt water intrusion which the entire [United Water Conservation] district is engaged in combating ... *is basically an urban problem.*" (§ 74450, Chapter 1836, Section 2, Statutes of 1965, emphasis

added) The City's contention to the contrary notwithstanding (OB, p. 10), the District's efforts to mitigate seawater intrusion primarily benefit urban users of groundwater, like the City.

2. Recharging Groundwater Throughout the District

The Oxnard Forebay maintains direct hydraulic connection with the confined aquifers of the Oxnard Plain Basin and is a main source of recharge to the Oxnard Plain Basin. (AR2 50-0058-0059; *see also* AR 8-0020-0021.) The District's recharge efforts, including its annual Santa Felicia conservation releases, recharge the Oxnard Plain Basin. (AR 28-0012, 0017; AR 73-0074-0077; AR 8-0021/AR2 9-0021; AR2 50-0042-0044, 0058-0059; AR2 51-0001, 0007; AR2 54-0005; AR2 106-0007-0008; AR2 175-0056, 0065, 0083-0085, 0089.) The District's El Rio and Saticoy recharge facilities also respectively recharge the Oxnard Forebay and Oxnard Plain Basins. (AR 28-0017; AR2 50-0015; AR2 106-0139-0140; AR 28-0020-0021; AR2 50-0016; AR2 164-0002.)

Contrary to the City's assertions, the administrative records demonstrate substantial hydrologic[4] connection between the Mound Basin, from which the City pumps, and its neighboring basins. (AR2 50-0054, 0057-0058, 0072, 0074; AR2 52-0018-0019, 0025; AR2 54-0002; AR2 164-0006; AR 2 175-0065, 0087; AR 34-0009/AR2 65-0009; AR 82-0009, 0013/AR2 23-0006,0010; AR2 66-0013; AR2 164-0005-0006; AR 83-0054-0055/AR2 15-0054-0055; AR 63-0001, 0004-0007/AR2 51-0001,0004-0007; AR2 52-0045 and AR2 113.) The Mound Basin benefits from recharge from the Santa Paula, Oxnard Forebay and Oxnard Plain Basins. (AR2 50-0054, 0057-0058,

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[4] The terms "hydraulic," "hydrologic," and "hydrogeological" are intended to be read synonymously.

0072, 0074.) The Mound Basin receives some underflow from the Santa Paula Basin. (AR 82-0009, 0013/AR2 23-0006, 0010; AR 34-0009/AR2 65-0009; AR 73-0074; AR2 50-0057-0058; AR2 52-0018; AR2 66-0013; AR2 164-0005-0006; AR2 175-0082-0083.)

Water from releases at Santa Felicia Dam is sent to the Santa Clara River and recharges the Piru and Fillmore basins, which in turn recharge the Santa Paula Basin primarily through underflow. (AR 28-0016-0017, 0019; AR 29-0017; AR 34-0009/AR2 65-0009; AR 62-0063/AR2 53-0063; AR2 50-0043-0045, 0054-0057; AR2 54-0003; AR2 66-0013; AR2 164-0003, 0005-0006; AR2 175-0065, 0087-0088; *see also,* charts in AR 22-0144; AR2 106-0152; AR2 136-0009; AR2 168-0150.) The City, as a Santa Paula Basin pumper, benefits from these releases.

The City pumps from wells in the West Las Posas Basin, which is hydrologically connected to the Oxnard Plain Basin. (AR 8-0027/AR2 9-0027; AR2-0060-0061.) The District's extensive recharge efforts in the Oxnard Forebay and Oxnard Plain basins recharge the West Las Posas Basin through the hydrological connection between these basins and help mitigate the effects of the City's pumping from these wells.(*Id.*)

The District's importation of State water also provides recharge to the basins from which the City extracts groundwater. The District funds its own annual State water importation costs through a voter-approved annual assessment. The City is incorrect in claiming that this effort is paid for by Zone A revenues. (AR 22-0026, 0071-0073; AR 62-0020, 0047/AR2 53-0020, 0047; AR2 106-0058-0059.) Neither the City nor its residents pay this assessment. (AR2 106-0058.)

3. Regulatory and Technical Compliance Efforts

The District expends extraordinary effort to comply with a myriad of federal regulatory requirements and environmental laws (principally the

federal Endangered Species Act). (*See, e.g.*, AR2 150-0001-0105.) Federal regulatory requirements related to groundwater flows have direct impact on the district-wide recharge efforts. (*See, e.g.*, AR2 138; AR2 50-0025-0026.) *It is infeasible to attribute the cost of these environmental compliance efforts to a specific parcel.* Nonetheless, the District has developed an environmental activity cost allocation policy to fairly and proportionately allocate these costs. (AR2 106-0043, 0207-0211; AR2 164-0002.)

The District also has primary responsibility for collecting and presenting basin monitoring data and preparation of annual reports to comply with a 1996 judgment governing management of the Santa Paula basin. (AR 96-15-16/AR2 156-0013-0014; AR2 54-003; AR2 106-0007; and AR 30 through 34 /AR2 60 through AR2 67.)

4. Capital Improvements Providing District-Wide Services

The District's long-term capital improvement programs allow the District to perform its district-wide services. The City insists that the District's improvement projects do not inure to its benefit, but only benefit agricultural users in the Oxnard Forebay, Oxnard Plain and Pleasant Valley Basins (OB, pp. 20-21). The City conveniently ignores that the substantial majority (over 60%) of the City's groundwater extractions are from its Oxnard Plain wells and rejects the hydrogeological connection among all the district's basins.

For example, the City complains about the future Ferro-Rose (Forebay) Recharge Project and the Noble Basin Reservoir. The Ferro-Rose Recharge Project will assist in recharging the Oxnard Forebay, thereby benefiting the City's wells in the Oxnard Plain. (AR 62-0046-0047/AR2 53-0046-0047; AR2 106-0105-0106; AR2 164-0002-0003; *see also,* AR 8-0020-0021; AR2 106-0119-0120; AR2 164-0002-0003 [security fence].) The District's Noble Basin

also is utilized to recharge the Oxnard Forebay and Oxnard Plain basins. (AR2 50-0016.)

III. PROCEDURAL HISTORY

A. The Trial Court's Judgment

In June 2011 and again in June 2012, the District adopted its groundwater pumping charges for the 2011-2012 and the 2012-2013 fiscal years respectively. (AR, Ex. 60, Ex. 71-0001; AR2, Ex. 94, Ex. 148-0001.) As the rates increased each year, out of an abundance of caution, the District published notices, held public hearings, and sought to satisfy the procedures of Proposition 218 and harmonize the requirements of that measure with the District's statutory obligation to maintain the 3:1 ratio set forth in section 75594. (AR, Ex. 74-0001; AR2, Ex. 104-00001.)

In each year, the City submitted written protests to the District's proposed fees. (AR, Ex. 78; 79; AR2, Ex. 165, 166.)

After the final hearings, the Board adopted resolutions fixing the groundwater fees for each zone and approving the Board's budgets for each fiscal year. (AR, Ex. 65,67, 69, 71 and 72; AR2, Ex. 142, 144, 146 and 148.)

The City filed its original Petition and Complaint on August 5, 2011, challenging the groundwater pumping charges imposed for the 2011-2012 fiscal year. (JAE, Vol. 1, Ex. 1.) The City filed a second Petition and Complaint on August 7, 2012, challenging the charges imposed for the 2012-2013 fiscal year. (JAE, Vol. 4, Ex. 33.) The two proceedings, making identical legal arguments, were transferred to Santa Barbara Superior Court and consolidated for trial.

The case was tried in three phases. After Phase 2, the trial court entered Judgment, ruling, *inter alia*, that (1) the District's groundwater extraction charges at issue were "fees" within the scope of Article XIII D, section 2, subd. (e) (Proposition 218); (2) section 75594 is not facially unconstitutional

as incompatible with Proposition 218; (3) the District failed to meet its burden of complying with Proposition 218 because the District failed to demonstrate the 3:1 rate differential between agricultural and non-agricultural water users did "not exceed the proportional costs of the service attributable to the parcel" as set forth in Article XIII D, section 6, subd. (b)(3). (JAE, Vol. 10, Ex. 88, p. 002123.)

During Phase 3, the District made a Request for Judicial Notice of the District's June 2013 rate proceedings showing a quantitative analysis the District had done to support the 3:1 ratio differential for water year 2013-2014 met the proportionality requirements that the trial court had ruled were required by Article XIII D. The District requested an opportunity on remand to meet the proportionality requirement held applicable by the trial court for the 2011-2012 and 2012-2013 water years. (JAE, Vol. 11, Ex. 95.) The trial court declined to take the requested judicial notice. (JAE, Vol. 12, Ex. 105, p.-002505.)

After Phase 3, the trial court ruled the proper remedy was a partial refund to the City of fees paid to the District in fiscal years 2011-2012 and 2012-2013. (JAE, Vol. 12, Ex. 105, pp. 002515-002517.) On September 6, 2013, the court entered a Corrected Revised Judgment awarding the City a refund of $548,296.22, plus 7% interest, for the 2011-2012 fees and $794,815.57, plus 7% interest, for the 2012-2013 fees. (JAE, Vol. 12, Ex. 110.)

B. The Court of Appeal's Decision Reversing the Judgment

1. The Court of Appeal Affirmed the Trial Court's Finding the Groundwater Basins Within The District Are Hydraulically Connected

The parties' competing evidence regarding the benefits derived from the District's groundwater conservation activities and the impact of the City's pumping on the groundwater within the district was presented to the trial

court. On review, the City is arguing against critical findings of facts determined by the trial court and affirmed by the Court of Appeal.

For example, the City continues to contend the District's groundwater recharge efforts across the district do not benefit the City because the District's records "do not show meaningful hydraulic connection between Mound [Basin] and neighboring basins[.]" (OB, pp. 11-16, esp. p. 12.) The City disputes the hydrological connection of the aquifers within the district, which the City continues to characterizes as the District's "newfound common pool" theory. (OB, pp. 16-17, 20-21.)

Yet, the trial court found the administrative record "amply demonstrates that the basins are hydrogeologically connected." (JAE, Vol. 10, Ex. 89, p. 002138; *see also* p. 002148.) The Court of Appeal agreed: "[t]he record contains substantial evidentiary support for this finding." (Opn., p. 26.) This factual issue was properly decided against the City.

The California Department of Water Resources recognized such hydrologic continuity more than 30 years ago. (AR2 24-0039; AR2 94-0015-16.) Since then, the continuity of the basins has been confirmed by numerous studies. (AR2 94-00015; AR 60-0013-0014; AR 71-0003-0014; AR2 50-0054; AR 75-0001; AR2 94-0015; AR2 113; AR2 148-0003, 0014; AR2 152-0001; AR2 175-0065; AR2 9-0053; AR 28 0016-0018; AR 29 0016-0018.)

The term "common pool" as used by the District recognizes the complex hydrologic continuity between the basins and thus a common pool of groundwater within the district. (*See, e.g.*, AR2 52-0045 and AR2 113; AR2 110; AR2 138-0005.) When water is taken from one pool, less water is available in the next pool. Similarly, recharge to basins within the district occurs in several ways, including underflow from one basin to another. (*See*, e.g., AR 8-0021; AR 28-0016-0017; AR2 9-0021; AR2 50-0054, 0058; AR2 164-0006.)

The City's argument that it benefits little from the District's groundwater recharge efforts because of the lack of connectivity (OB, pp. 13-14) was rejected by the trial court. (JAE, Vol. 10, Ex. 88, p. 002147 ["the evidence shows that effect of the recharge is felt district-wide"].)

The City creates a straw argument that the condition in the basins, including the basins' responses to the District's recharge efforts, vary within the district. (OB, p. 17.) The District has never contended otherwise. (AR2 164-0006.) Rather, the District's position has been that every pumper within the district affects or is affected by every other pumper to *some* degree. (AR2 54-0004-0005; AR 62-0012, 0028-0029, 0060, 0063-0064; AR2 175-0065; AR2 9-0053.) Extraction of groundwater by upstream users affects downstream pumpers. (AR2 94-0015; AR2 175-0089-0090.)

The benefits of the District's water conservation measures across the district simply cannot be quantified on a parcel-by-parcel basis. The District cannot quantify how each molecule of water passes between the basins, to justify imposing different pumping charges on groundwater users within the district. (AR 62-0073; AR2 54-0005; AR2 106-0008; AR2 125-0003-0004; AR2 175-0054-0055, 0066-0067.) Rather, the focus is on how the District can reasonably allocate district-wide costs for district-wide efforts fairly, given the complex nature of the basins and the District's important regulatory mandates. The District has determined the only fair and reasonable method of allocation is to proportionally charge all of the pumpers equally for efforts that affect the entirety of the district. Indeed, the trial court agreed such an allocation must be constitutionally permissible because no other allocation is feasible:

> Conservation services rendered by [the District] throughout the district have qualitative positive effects in every part of the district. *The evidence also shows that the effects have not been, and at this time cannot reasonably be, quantitatively allocated to a particular parcel or particular parcels of a basin. Allocation on a district-wide basis for services which have*

district-wide effects, as here done by [the District] must therefore be constitutionally permissible because no more specific proration is feasible. (JAE, Vol. 10, Ex. 88. p. 002148, emphasis added.)

2. The Court of Appeal Reversed the Trial Court's Determination the District's Pumping Charges Violate Proposition 218

Notwithstanding the trial court's determination the groundwater extraction charges *in the aggregate* complied with the proportionality requirement of Proposition 218, the trial court nonetheless held the District's charges unconstitutional because the District failed to provide evidence of a quantitative justification for the difference in rates between agricultural and non-agricultural users. (*Id.*, at pp. 002156-002157.) While not declaring section 75594 facially unconstitutional, the trial court insisted the District attribute the costs of the services in which the District engages on a parcel by parcel basis, rather than in the aggregate: "The constitutionally neutral test requires that rates 'not exceed the proportional cost of the service attributable to the parcel.'" (*Id.*, at p. 002156.)

Quixotically, the trial court thus acknowledged, on the one hand, the District cannot reasonably be required to allocate the cost of district-wide services to a particular parcel or parcels of property within a basin because such "attribution would be a matter of mere speculation," but nonetheless insisted the District quantify the 3:1 differential between agricultural and non-agricultural users on a parcel by parcel basis when such quantification is equally infeasible and such costs of service cannot practically be allocated on a parcel by parcel basis.

The trial court relied upon *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926 to reach its finding the District's ratemaking was unconstitutional. Yet, the *City of Palmdale* case was a tiered water rate case

addressing rates for municipal water delivery. The District does not deliver water to the City.

In reversing the trial court's Judgment, the Court of Appeal determined Proposition 218 does not even apply to the District's groundwater pumping charges, distinguishing and refusing to apply the holding in *Pajaro I* on the record in this case. (Opn., pp. 14-23.) The Court of Appeal disagreed with *Pajaro I* and held the groundwater pumping fee is not a fee for property-related service and is not a "fee or charge imposed upon any parcel or person as an incident of property ownership" falling within the ambit of Proposition 218. (*Ibid.*, esp. pp. 20 and 23.)

3. The Court of Appeal Concluded the Pumping Charges Were Regulatory Fees and, Because They Were Not Excessive, They Were Not "Taxes" Imposed in Violation of Proposition 26

The Court of Appeal rejected the City's alternative constitutional argument that the pumping charges were "taxes" imposed in violation of Article XIII C (Proposition 26).

Recognizing the pumping fees are charged to those who extract groundwater from one of the District's managed basins and not on all property or parcels within the District, the Court concluded the pumping fees were regulatory fees falling within one of the stated exceptions to Proposition 26, namely, "[A] charge imposed for a specific benefit conferred or privilege granted to the payor . . . ." (Opn., p. 25.)

Relying upon *Cal. Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, this Court's earlier decision validating water charges imposed by a State agency as valid regulatory fees, the Court

concluded "[t]he District need only ensure that its charges *in the aggregate* do not exceed its regulatory costs." (Opn., p. 26, emphasis added.)[5]

Based on the record evidence, the Court determined, as the trial court had, that the District's pumping fees did not exceed the reasonable costs of managing the District's groundwater supply. (Opn., p. 27.) Thus, the fees are not taxes subject to voter approval under Proposition 26. (*Ibid.*)

The Court rejected the City's arguments, repeated before this Court, that the District uses funds for improper purposes, such as to treat and deliver surface water to recharge the over-drafted coastal areas, to purchase water from the State for delivery to other water customers, and to treat water delivered to the concessionaire at Lake Piru. (Opn. p. 27; *compare* the City's Respondent's Brief/Opening Brief on Cross-Appeal, pp. 88-89, 114-117 *with* OB, pp. 42,45, 47-49.)

IV. STANDARD OF REVIEW

This Court reviews de novo whether a statute is constitutional. (*U.D. Registry, Inc. v. State* (2006) 144 Cal.App.4th 405, 418.) Likewise, the Court reviews de novo whether a tax, fee or assessment by a local government agency is constitutional. (*See, Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448-450.)

If determination of the constitutional issue turns on underlying factual disputes in the trial court, neither the Court of Appeal nor the Supreme Court engages in fact-finding anew or re-deciding the disputed issues already decided by the trial court. (*Morgan v. Imperial Irrig. Dist.* (2014) 223

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[5] Although Proposition 26 had been enacted at the time of the *Farm Bureau* decision, it was not argued by the parties and was not discussed in that Opinion.

Cal.App.4th 892, 912.) Rather, both courts review the resolution of factual conflicts by the trial court under the substantial evidence standard, which is less deferential than the review applied to administrative agency findings, but nonetheless highly deferential. (*Id.* at p. 916.) "Under this standard, 'the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.'" (*Ibid.*; *see, Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1316.)

Thus, the underlying facts relating to the connectivity of the basins within the district, the common pool and recharge that result from this interconnectivity, the benefits provided by the District, especially those relating to its groundwater conservation efforts, the uses to which pumping fees were put by the District, and the "reasonableness" or "excessiveness" of those fees, which were all highly disputed factual issues decided in the District's favor in the trial court, should be reviewed under the substantial evidence standard of review.

Although the City previously asked the Court of Appeal, and now asks this Court, to engage in fresh fact-finding by reconsidering a host of hotly contested factual disputes between the parties presented in the trial court, this Court should decline to do so under well-settled principles of appellate review. The City's reliance on *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 and *Prof. Engineers in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1032, to argue for a de novo standard of review, is inapt. The trial courts' decisions in those cases did not turn on disputed facts.

The City's contention the trial court's findings of fact must be reviewed de novo because they are "constitutional facts" is without merit. *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842 is inapposite. This is not a First Amendment libel case or one involving "precious liberties established and ordained by the [United States] Constitution" (*Id.* at pp. 842, 846) that would

militate in favor of the Court's independent review of questions of fact resolved at trial on the basis of two extensive administrative records.

V. LEGAL DISCUSSION

A. Settled Principles of Constitutional Interpretation Apply to Construe the Voter Initiatives and to Avoid an Implied Repeal of The Conservation Act

The issues before the Court include whether the District's groundwater pumping charges violate Proposition 218 or Proposition 26, and whether the rate ratio mandated by section 75594 violates either Proposition.

When construing a constitutional provision brought about by a voter initiative, the same interpretative rules governing statutory construction apply. (*Prof. Engineers, supra,* 40 Cal.4th at p. 1037.) The Court's "paramount task is to ascertain the intent of those who enacted it." (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290.)

The Court must look first to the language of the constitutional provision as the best indicator of the voters' intent. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 265.) The words of the provision are to be given their ordinary meaning, in the context of the ballot measure as a whole and its overall scheme. (*Prof. Engineers, supra,* 40 Cal.4th at p. 1037.) "[T]he court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Ibid.*) " '[B]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.' " (*Ibid.*, quoting *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14.)

"It is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the constitution bearing on the same subject. The goal, of course is to harmonize all related provisions if it is reasonably possible to do so

without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole." (*Fields v. Eu* (1976) 18 Cal.3d 322, 328.)

"[I]t is a settled rule that all statutes which relate to the same general subject matter – briefly called statutes in *pari materia* – must be read and construed together, as one act, each referring to and supplementing the other, though they were passed at different times." (*In re Wright's Estate* (1929) 98 Cal.App. 633, 635; *see also, Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 387.)

Further, the implied repeal of existing legislation is strongly disfavored. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 807; *St. Cyr v. Cal. FAIR Plan Assn.* (2014), 223 Cal.App.4th 786, 799.) "A repeal by implication 'will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both [provisions] if they may stand together. [Citations.]'" (*Medical Bd. of Cal. v. Superior Court* (2001) 88 Cal.App.4th 1001, 1018. "Absent an express declaration of legislative intent, we will find an implied repeal 'only when there is no rational basis for harmonizing the two potentially conflicting [provisions], and . . . [they] are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 477.) This rule against implied repeal has been held to apply equally to Proposition 218. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 817.)

"In considering the constitutionality of a legislative act [this Court] must presume its validity, resolving all doubts in its favor of the Act. Unless conflict with a provision of the state . . . Constitution is clear and unquestionable, we must uphold the Act." (*Cal. Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594; *see also, Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1252.)

B. The History, Intent and Text of Propositions 218 and 26, Taken as a Whole, Must Guide This Court

The City's challenge to the District's pumping charges must be decided with reference to the successful ballot measures known as Propositions 218 and 26. Both initiatives respond to perceived shortcomings in Proposition 13, which was passed in 1978, adding Article XIII A to the California Constitution. Article XIII A required 2/3 voter approval of all "special taxes" imposed by local governments and prohibited local governments from imposing an *ad valorem* tax on real property or a sales tax on the sale of real property.

A series of judicial decisions interpreting Article XIII A diminished the reach of Proposition 13. The culminating case, *Knox v. City of Orland* (1992) 4 Cal.4th 132, concluded that "special assessments" against real property were not "special taxes" that required Proposition 13's voter approval. This holding led to a proliferation of property-related "special assessments." (*See, Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839.)

1. Proposition 218 Governs Property-Related Fees

The electorate replied to the profusion of property assessments with Proposition 218. This initiative, sponsored by the Howard Jarvis Taxpayers Association and approved by the voters in 1996, added Articles XIII C and XIII D to the California Constitution.

Proposition 218 closed the special property assessment loophole by restricting local governments to four methods for raising revenue from property owners: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a "fee" or "charge" (the terms are interchangeable) for property-related services. (Cal. Const., Art. XIII D, § 3; *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App. 4th 914, 918). These

revenue raising devices could not be imposed on property owners without satisfying the procedural and substantive requirements set forth in the initiative. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 682.)

This Court has determined the intent of Proposition 218 was "to prohibit unratified exactions imposed on property owners as such." (*Apartment Assn.*, *supra*, 24 Cal.4th at p. 838.) Regarding the proper manner for construing the initiative, this Court explained:

> Proposition 218 is Proposition 13's progeny. Accordingly, it must be construed in that context. . . . Proposition 13 was directed at taxes imposed on property owners, *in particular homeowners*. The text of Proposition 218, the ballot arguments (both in favor and against), the Legislative Analyst's analysis, and the annotations of the Howard Jarvis Taxpayers Association, which drafted Proposition 218, all focus on exactions, whether they are called taxes, fees, or charges, *that are directly associated with property ownership.* (*Id.*at p. 839, emphasis added.)

The text of Proposition 218 belies application of the measure to the District's groundwater fees. As relevant here, Proposition 218 pertains to: "(4) Fees or charges for property related services as provided by this Article..." It defines "property-related service" as "a public service having a direct relationship to property ownership." To impose such a fee, each parcel to be charged must be identified in advance, the charges calculated, and the charges limited to the proportional cost of providing service to each parcel. (Art. XIII D, sec. 6, subds. (a) and (b).)

The written materials advocating the adoption of Proposition 218 demonstrated a singular focus on charges for services, imposed on a parcel-by-parcel basis, as a direct result of property ownership. For example, the Ballot measure stated that all local property-related fees must comply with the following restrictions:

- No property owner's fee may be more than the cost to provide service to that property owner's land.

. . .

- No fee revenue may be used for any purpose other than providing the property-related service.

- Fees may only be charged for services immediately available to property owners. (JAE, Vol. 10, Ex. 86, p. 002070.)

The Argument in favor of Proposition 218 stated:

. . .

Proposition 218 guarantees your right to vote on local tax increases even when they are called something else, like "assessments" or "fees" and imposed on homeowners.

Proposition 218 guarantees your right to vote on taxes imposed on your water, gas, electric and telephone bills.

. . .

Non-voted taxes on electricity, gas, water and telephone services hit renters and homeowners hard.

And, retired homeowners get hit doubly hard!

To confirm the impact of fees and assessments on you, look at your property tax bill. You will see a growing list of assessments imposed without your approval. . . .(JAE 002073.)

2. By Contrast, Proposition 26 Governs Regulatory Fees

In 2010, the third in the trilogy of tax initiatives was approved by the California electorate. Again, the ballot measure was an outgrowth of decisional law limiting the reach of Proposition 13. Specifically, in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 870, this Court had held "regulatory fees" levied to mitigate the adverse environmental effects of a business's operations were not "taxes" subject to Proposition 13, relying

upon the long-established "police power" of State and local government to promote public policy goals.

In response, Proposition 26, the "Stop Hidden Taxes Initiative," was intended to prevent the escalation in these newly disguised "taxes." Proposition 26 modified the version of Article XIII C that Proposition 218 had added to the California Constitution. With respect to local government agencies, Proposition 26 expanded the definition of "tax," created seven express exceptions, and shifted to the agencies the burden of proving a fee is not a tax.

The text of Proposition 26 does not evaluate the reasonableness of a fee or charge for a payor-specific benefit or privilege on a parcel basis. That "per parcel" rubric, required for property-related fees under Proposition 218, is absent. Instead, Proposition 26 requires that the cost allocation bear a fair relationship to the payor's burdens on or benefits from government. (Art. XIII C, §1, subd. (e).)

The Official Ballot Summary for Proposition 26, citing *Sinclair Paint*, distinguished between three "broad categories of fees and charges:" user fees, regulatory fees, and property charges. User fees "such as state park entrance fees and garbage fees" require the user to pay "for the cost of a specific service or program." (JAE, Vol. 10, Ex. 86, p. 002076, emphasis added.) "*Regulatory fees* pay for programs that *place requirements on the activities of businesses* or people to achieve particular public goals *or help offset the public or environmental impact of certain activities*." (*Ibid.*)[6] By contrast, "Property

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[6] This precisely captures the focus of the District's long-term water resource stewardship activities, including combating the effects of overdraft and seawater intrusion which, as the Legislature previously declared, is basically an urban problem.

charges" were described "as charges imposed on property developers to improve roads leading to new subdivisions and assessments that pay for improvements and services that benefit the property owner." (*Ibid.*, emphasis added.)

Thus, the authors of Proposition 26, which included Proposition 218 author the Howard Jarvis Taxpayers Association, acknowledged that regulatory fees on activities designed to achieve environmental goals are different from property-related charges that pay for services provided to a property owner. The proponents also expressly noted, in all capital letters, that Proposition 26 was not intended to displace or invalidate environmental or consumer regulations:

> PROPOSITION 26 PROTECTS ENVIRONMENTAL AND CONSUMER REGULATIONS AND FEES.
>
> *Don't be misled by opponents of Proposition 26.* California has some of the strongest environmental and consumer protection laws in the country. Proposition 26 preserves those laws and PROTECTS LEGITIMATE FEES SUCH AS THOSE TO CLEAN UP ENVIRONMENTAL OR OCEAN DAMAGE, FUND NECESSARY CONSUMER REGULATIONS, OR PUNISH WRONGDOING, and for licenses for professional certification or driving. *(Ibid.)*

C. The Court of Appeal Correctly Determined the District's Pumping Charges Are Not Property-Related Fees Subject to Proposition 218

1. The Pumping Charges Are Not Imposed "As an Incident of Property Ownership"

The City contends the District's groundwater pumping charges fall within Proposition 218 because they are "imposed by an agency upon a parcel or upon a person as an incident of property ownership." (OB, p. 27.) The City is wrong. It ignores the two controlling opinions of this Court that provide the correct analytical framework.

In *Apartment Assn., supra,* 24 Cal.4th 830, this Court concluded a city ordinance imposing an annual housing inspection fee on landlords was not a property-related fee within the meaning of Proposition 218. The Court declined to rewrite Article XIII D to extend it to fees imposed ***on*** an incident of property ownership. This Court confined the reach of Proposition 218 to its plain language: charges levied "on a parcel or a person ***as*** an incident of property ownership." Reviewing the constitutional text, Justice Mosk, writing for the majority, explained:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., *in its capacity as property owner* - unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.
>
> The contrary reasoning of the Court of Appeal, and of plaintiffs, stems from a reliance on the word "incident," leaving aside that the constitutional provision does not refer to fees imposed *on* an incident of property ownership, but on a parcel or a person *as* an incident of property ownership. As amicus curiae for the city persuasively argue, the distinction is crucial.
>
> Were the principal words *parcel* and *person* missing, and were replaced *as* with *on*, so that Article XIII D restricted the city's ability to impose fees "on an incident of property ownership," plaintiffs' argument might have merit. (*Id.* at pp. 839-840.)

This one-word distinction was and remains pivotal. The hallmark of Article XIII D is that it "applies only to exactions levied solely by virtue of property ownership." (*Id.* at p. 842.) For this reason, the inspection fee, while levied on residential property owners, did not fall within the ambit of Proposition 218. The fee was "not imposed solely because a person owns property." It was imposed "on those landowners who choose to engage in the

residential rental business, and only while they are operating the business." The fee "ceases along with the business operation, whether or not ownership remains in the same hands." (*Id.* at p. 838.) This Court noted a different result might have obtained if Article XIII D used the phrase "on an incident of property ownership" because then the provision would have extended to other "incidents" of estate in the land, such as timber or easement rights. (*Id.* at p. 840-841, esp. fn. 2.)

This Court embraced its *Apartment Assn.* analysis three years later in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, and held a water connection fee charged to homeowners was not subject to Proposition 218. (*Id.* at p. 428.) The Court confirmed that supplying water to residences through a pipeline is a "property-related service" within the meaning of Article XIII D, but rejected the broader argument "that *all water service charges are necessarily subject to the restrictions that Article XIII D imposes on fees and charges*." (*Id.* at pp. 426-427, emphasis added.) The Court distinguished an ongoing domestic water delivery fee from "a fee for making a new connection to the system." (*Id.* at p. 427.) The former "requires nothing other than normal ownership and use of property" whereas the latter "results from the owner's voluntary decision to apply for the connection." (*Ibid.*) The charge on the voluntary decision to seek a service connection was not subject to Proposition 218. (*Id.* at p. 428.) The City does not discuss *Richmond* in its Opening Brief.

The Court of Appeal's Opinion here correctly followed the directives of *Apartment Assn.* and *Richmond*. It also correctly drew from an analogous result reached in *Orange County Water Dist. v. Farnsworth* (1956) 138 Cal.App.2d 518. In *Farnsworth*, a validation action, the challenger asserted a pumping fee was a tax because "the water which underlies real property is a part of the property itself and that the charge in question is, in effect, a tax levied by reason of ownership of the property . . . ." (*Id.* at pp. 529-530.) The

Farnsworth Court concluded the pumping fee was more in the nature of an excise tax levied upon the activity of producing groundwater by pumping operations than a tax levied by reason of property ownership. (*Id.* at p. 530.) Citing *Farnsworth* and applying *Apartment Assn.*, our Court of Appeal agreed: "a pump fee is better characterized as a charge on the activity of pumping than a charge imposed by reason of property ownership." (Opn., at p. 20.)

As in *Apartment Assn.*, the District's fees are not imposed solely because a person owns property; they are not assessed "as an incident of property ownership." The fees begin with the operation of a groundwater-producing facility and end with the cessation of pumping activities at that facility. Such fees fall outside the ambit of Proposition 218.

2. The Pumping Charges Are Not Fees For "Services" Provided To a "Parcel"

The *Richmond* decision contains a second line of reasoning that also applies to this matter. In determining what constitutes an assessment under Proposition 218, the Court stated that it was ". . . necessary to consider not only Article XIII D's definition of assessment, but also the requirements and procedures that XIII D imposes on assessments." (*Richmond, supra,* 32 Cal.4th at p. 418.) Looking at the constitutional text, the Court pointed out that the procedures required that the agency imposing an assessment identify all parcels that will have a special benefit conferred upon them and upon which an assessment will be imposed. The water district in that case could not reasonably identify the parcels subject to the fee, and could not thereafter provide for the obligatory majority protest. Rather than ignore, rewrite or reinterpret the common sense meaning of the requirements of Proposition 218, Justice Kennard's unanimous opinion stated:

> We agree with the Court of Appeal that the proper conclusion to be drawn from this impossibility of compliance is that an assessment within the meaning of Article XIII D must not only

> confer a special benefit on real property, but also be imposed on identifiable parcels of real property. Because the District does not impose the capacity charge on identifiable parcels, but only on individuals who request a new service connection, the capacity charge is not an assessment within the meaning of Article XIII D. (*Id.* at p. 419.)

The lesson from *Richmond*, consistent with settled rules of constitutional interpretation, is that the requirements of Proposition 218 must be read practically and in a manner that avoids not only impossibility, but also "absurd, arbitrary, or unintended results." (*Ibid.*)

The Court of Appeal here complied with *Richmond's* guidance. The Court concluded the text of Proposition 218 requires the fee at issue must correspond to the cost of a "service" attributable to a "parcel," and remarked that any other construction of the constitutional text would be "untenable," "particularly taken in context":

> Article XIII D provides that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the *service* attributable to the parcel." (Cal. Const., Art. XIII D, § 6, subd. (b)(3), italics added.) Plainly, this refers to a service fee, albeit one imposed as "an incident of property ownership." (*Id.* at subd. (b)(3).) Most of the other substantive requirements imposed in section 6, subdivision (b) also explicitly apply to fees and charges for government services. For example, subdivision (b)(1) prohibits revenues from the fee or charge from "exceed[ing] the funds required to provide the property related service." Subdivision (b)(4) states that "[n]o fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." It also forecloses "[f]ees or charges based on potential or future use of a service." (*Ibid.*) Subdivision (b)(5) proscribes charges for "general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." These provisions refer to property-related *services*. (Opn., at pp. 21, 22.)

The Court of Appeal correctly refused to characterize the District's pumping charges as Proposition 218 property-related fees because it was unable to identify a "service" provided by the District and "attributable" to a "parcel" to satisfy this most basic Proposition 218 requirement. Contrasting the tasks performed by the District with the delivery of water through pipes to residences, the Court of Appeal concluded that charging for pumping groundwater is not a similar provision of "service" to property owners. (*Id.* at p. 22.) Rebuffing the notion that the District's "service" could be construed as "securing the water supply for everyone in the basin," the Opinion found a "fundamental conflict" between a pump fee's classification as a property-related "service" and its validity under Article XIII D:

> . . . such a service cannot meet the requirement that it be "actually used by, or immediately available to, the owner of the property in question." (Cal. Const., Art. XIII D, § 6, subd. (b)(4).) Moreover, it would fall within the realm of prohibited "[f]ees or charges based on potential or future use of a service." (*Ibid.*) Worse still, such a service is "available to the public at large in substantially the same manner as it is to property owners." (*Id.* at subd. (b)(5).)

The Court of Appeal's construction of Proposition 218 – as only applying to a fee for "services" where the cost is "attributable" to the charged parcel – is grounded in the unequivocal text of Article XIII D. This reading is further supported by the Ballot arguments in favor of the measure. Article XIII D and the Official Ballot Summary refer over and over again to "service," "services," "property-related service," "property owners" and "parcels. To read these words out of the statute as mere surplusage violates established canons of constitutional construction.

Reviewing the text of Article XIII D as a whole, and considering the Ballot Summaries of Proposition 218 if necessary, the intent of the initiative was to address fees and charges attributable on a parcel basis for services local agencies provide to property owners. The words of Proposition 218 are

fundamentally incompatible with fees imposed by a local agency tasked with regulatory functions for the benefit of the general public welfare, such as long-term conservation of groundwater resources, where the agency is not providing services to specific parcels or property owners. The Court here refused to force a square peg into a round hole. It correctly determined that Proposition 218 does not apply to the groundwater pumping charges levied by the District.

3. The *Pajaro I* Decision is Distinguishable

Ignoring the two controlling Proposition 218 decisions of this Court, *Apartment Assn.* and *Richmond*, the City relies on the Sixth District Court of Appeal's ruling in *Pajaro I* to argue that: (1) all groundwater charges are subject to Proposition 218 and *Pajaro I* leaves no room to argue otherwise; (2) there is no basis to distinguish the groundwater charges at issue in *Pajaro I* from the charges at issue in this case; and (3) the City must be treated like the well owners in *Pajaro I*. All three arguments lack merit.

Pajaro I did not announce that all groundwater charges fall within Proposition 218:

> A charge may be imposed on a person because he owns land, or it may be imposed because he engages in certain activity on his land. A charge of the former type is manifestly imposed as an incident of property ownership. A charge of the latter type may not be. (*Pajaro I*, *supra*, 150 Cal.App.4th at p. 1391, fn. 18, emphasis added.)

Notably, the *Pajaro I* court wrote two opinions. In its initial ruling on whether the groundwater extraction fee was for a property-related service subject to Proposition 218, *Pajaro I* followed the rationales underpinning the Court of Appeal's decision in this case. *Pajaro I* applied *Apartment Assn.* and *Richmond,* holding that the groundwater augmentation charge was not imposed as an incident or property ownership because: (1) it was incurred

only through voluntary action, *i.e.*, the pumping of groundwater, and could be mitigated or avoided altogether by refraining from that activity; (2) it would never be possible for the agency to comply with Article XIII D's requirement that it calculate in advance the amount to be charged on a given well; and (3) the charge burdens those on whom it imposed not as landowners, but as water extractors. (*Id.* at pp. 1385-1386.)

The Sixth District abandoned its original analysis following publication of this Court's ruling in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. *Bighorn* concerned whether certain charges by a water agency were subject to the initiative power guaranteed by Article XIII C. This Court reasoned that charges falling within Article XIII D necessarily come within Article XIII C. The Court then cited *Richmond* for the proposition that a public water agency's charges for ongoing residential water delivery through pipes are charges within the meaning of Article XIII D. Taking *Richmond* to the next logical step, *Bighorn* held the residential water delivery charges before it were also fees within Article XIII C – adding, in *dicta*, that this remains true whether the charges are calculated on the basis of consumption or imposed as a fixed monthly fee. (*Id.* at pp. 215-217.)

Pointing to *Bighorn's* remark that consumption-based fees for residential water delivery fall within Proposition 218, and stating that it had assumed in its original ruling that *Richmond's* connection fee exception to Article XIII D only applied to "flat fees," the Sixth District reversed course. (*Pajaro I, supra*, 150 Cal. App. 4th at p. 1387). In its revised opinion, the court oddly questioned the vitality of *Apartment Assn.* because it was not relied upon in *Bighorn*, which concerned the squarely different and firmly decided issue of water delivery charges. From these seeds of misunderstanding, *Pajaro I* declared: "the only question left for us by *Bighorn* is whether the charge on groundwater extraction at issue here differs

materially, for purposes of Article 13D's restrictions on fees and charges, from a charge on delivered water." (*Id.* at pp. 1388, 1389.)

The *Pajaro I* court did not announce that all groundwater charges fall within Proposition 218. Instead, it concluded that its groundwater extraction charges were just like *Bighorn's* residential water delivery charges – for property-related services. The ruling was profoundly influenced and limited by its record of primarily residential, rather than business, customers who were charged for groundwater augmentation. What appeared dispositive to the court were the approximately 3,000 residential wells used for domestic purposes, contrasted with 660 non-residential wells used for farming. (*Pajaro I, supra,* 150 Cal.App.4th at pp. 1374, 1390.) As Justice Bamattre-Manoukian explained in her concurrence:

> It appeared from the record here that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible. In these circumstances, I was concerned whether the continued use of this water should be characterized as part of the "normal ownership and use of property." (*Id.* at p. 1397.)

Pajaro I expressly acknowledged the possibility of a correct, but contrary, conclusion under different facts: "if not for the prohibitive cost of metering smaller wells, which necessitates charging those extractors on the basis of estimated usage, *the fee might well be justified on regulatory grounds*." (*Id.* at p. 1381, emphasis added.) The court also recognized "that delivery of water for irrigation or other nonresidential purposes is not a property-based service, and that charges for it are not incidental to the ownership of property." (*Id.* at p. 1389.)

The contrasting facts anticipated by *Pajaro I* are precisely the facts in this case, as the Court of Appeal recognized. Here, there exist at most 840 parcels with wells in the District. The number of residential customers within the District receiving water from wells is "insubstantial," compared to the

number of residential customers receiving delivered water. (Opn. at pp. 18-19.) The District's charges are not imposed for the District's delivery of water to consumers, but on the extraction of groundwater by predominantly commercial users, like the City.[7] Finally, the District's groundwater pumping fees here serve the proven regulatory purposes of conserving and augmenting groundwater – a finding that was lacking in *Pajaro I*. (Opn. at p. 19.)

As this Court of Appeal explained, *Pajaro I* acknowledged the possibility that a pumping fee may not be imposed as an incident of property ownership, where "supported by a clearly established regulatory purpose, e.g., to internalize the costs of the burdened activity[8] or to conserve a suppled resource by structuring the fee in a manner intended to deter waste and encourage efficiency." (*Ibid.*, citing *Pajaro I*, *supra*, 150 Cal.App.4th at pp. 1389-1390, fn. omitted.) The District's pumping fees internalize the costs of burdened activity, groundwater pumping, and serve conservation goals. The Court of Appeal properly distinguished *Pajaro I*.

4. The *Pajaro I* Decision Was Wrongly Decided

If this Court cannot square the Court of Appeal's ruling below and *Pajaro I* based on their factual differences, the District submits *Pajaro I* must

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[7] The City voluntarily pumps from wells located in the District to commercially produce and sell water to over 30,000 residential users. This is far from the "normal use of property" that Proposition 218 targeted. The City does not stand in the same shoes as the residential well-users that predominated in *Pajaro I*.

[8] Significantly, the trial court found that the District's revenues are for the regulatory purpose set forth in Art. X, Sec. 2 of the Constitution and Sections 75521 and 75522; the District's budgets complied with Section 75523 on a district-wide basis; and the District's charges complied with Article XIII D in the aggregate. (JAE, Vol. 10, Ex. 88, pp. 002139, 002149.)

be rejected as controlling. *Pajaro I* fails to properly apply controlling precedent, overlooks the text of Proposition 218, and is erroneously narrow in its discussion of groundwater extraction charges as regulatory fees.

As the Court of Appeal correctly recognized, *Pajaro I* misread this Court's trilogy of Proposition 218 cases, *Apartment Assn., Richmond* and *Bighorn,* in deciding the groundwater extraction fees in that case were imposed as an incident of property ownership. (Opn., pp. 20-21.) *Pajaro I* was wrong to dismiss *Apartment Assn.* as not instructive simply because the case was inapplicable to this Court's determination of the issue in *Bighorn.* (*Pajaro I, supra,* 150 Cal.App.4th at p. 1389.) *Apartment Assn.* dictates that fees and charges imposed for the exercise of activities only incidental to property ownership – as opposed to those imposed on property ownership *qua* property ownership – are not within Proposition 218's reach.

The Court of Appeal properly questioned the reasoning of *Pajaro I*: "Even if there were no factual record regarding the relative number of residential versus commercial well owners and a clear regulatory purpose, we would still conclude that a charge on groundwater extraction is not imposed as an incident of property ownership." (Opn. at p. 20, citing *Farnsworth, supra,* 138 Cal.App.2d at pp. 529-530 [holding a pump fee is more in the nature of a levy on the activity of producing groundwater than by reason of property ownership].) "Nor do we think it overly important that pumping may not always be a `business operation.' " (Opn. at p. 21.) With respect to the few households that pump water, this Court of Appeal further offered: "Voluntarily generating one's own utilities arguably is not a normal use of property" and is, in any event, a "business operation" that affects the demand for municipal services. (*Ibid.*, citing *Richmond.*)

At bottom, the Court of Appeal in *Pajaro I* made a conceptual error in equating the water delivery charges at issue in *Bighorn* with water extraction charges. Not every parcel or owner of a parcel of property in the District is

assessed a groundwater pumping fee. The fee is only imposed upon operators of groundwater extraction facilities within the District. Sometimes it is the landowner and other times it is an authorized lessee. (*See, e.g.*, AR2 103-0002, AR2 122.) The fee is not imposed for *any "service" afforded by the District to the pumper as a property owner.* Rather, the fee is imposed on the pumper *for its activities* that affect the groundwater within the District in order to fund the District's mandates, including conservation of the groundwater for future use.

Compounding its conceptual error, *Pajaro I* also mishandled the application of the words of Proposition 218. This Court of Appeal highlighted *Pajaro I's* "untenable construction of the constitutional text, particularly taken in context," and the conclusion "that the groundwater extraction charge need not constitute a fee for 'service' provided by the District in order to fall within Article XIII D's scope." (Opn. at 21.) As the Court here noted, Article XIII D, Sec. 6 subd. (b)(4) only allows imposition of a fee for a "service . . . actually used by, or immediately available to, the owner of the property in question." Yet, groundwater pumping fees fund conservation efforts to maintain and restore the groundwater in the District's basins *for future available use.*

Finally, *Pajaro I* unduly limits the universe of valid regulatory charges. Relying upon *Pajaro I's* narrow construction of a permissible regulatory fee, the City argues that the groundwater pumping charges here do not serve proper regulatory purposes because the rates are uniform across classes of use, not graduated, and there is a 3:1 ratio between non-agricultural and agricultural users. This argument and *Pajaro I* ignore the broad power exercised by the State to dictate how the State's water resources shall be regulated and developed for the greatest public benefit.

Article X, section 2 makes clear groundwater conservation is beneficial to the public welfare. All the waters of the State, including groundwater, are owned by the State. (§ 102.) The Legislature has declared that protection of

the public interest in the development of the water resources of the State is of vital concern the people of the State and the State "shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit." (§105.)

Section 75521 declares the Legislature's regulatory purposes in authorizing the groundwater pumping charges to pay for the augmentation and protection of the State's groundwater for the public benefit. (§ 75521.) The Legislature specifically requires the uniform rates within classes (§ 75593) and the minimum 3:1 ratio (§ 75594), taking any discretion away from the District in those two respects.[9] The enactment of these statutory provisions was within the police power of the Legislature. (*See, e.g., Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 702 ["the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of the state to protect its cities and provide for the safety, good order and well-being of society."].)

As this Supreme Court long ago recognized, the Legislature has the power to ". . . abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, *and all at the expense of those who are to be chiefly and more immediately benefited by the improvement.*" (*Hagar v. Board of Supervisors of Yolo County* (1874) 47 Cal. 222, 233 [affirming power of Legislature to

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[9] With respect to section 75594, the Legislature clearly intended that, along with public policy favoring groundwater conservation, the availability of groundwater for agricultural use is a statewide economic priority and the District's ratemaking in favor of conservation can never be allowed to harm the State's agricultural economy. Barring an explicit voter repeal, that was the Legislature's absolute prerogative.

create water reclamation district, emphasis added]; *see also*, *In re Madera Irrig. Dist.* (1892) 92 Cal. 296, 309-310 [if there is any doubt, the Legislature's declaration that an act is for a public purpose must prevail, and the Legislature's express declaration that an expenditure of funds is for the benefit of a state or a district may not be disregarded by the courts].)

Unlike *Pajaro I*, the Court of Appeal followed the controlling decisional law of this Court and accepted rules of constitutional interpretation. Had the *Pajaro I* court reached its decision after the passage of Proposition 26, the District submits, a different result would have obtained. To paraphrase this Court in *Apartment Assn.*, because Proposition 26 is Proposition 218's progeny, Proposition 218 must be viewed in that context and the two constitutional provisions construed *in pari materia.*

5. The Court of Appeal's Determination that the District's Groundwater Pumping Charges Do Not Fall Within the Scope of Proposition 218 Properly Reconciles Proposition 218 With Both Article X, § 2 of the Constitution and the Conservation Act

The Court of Appeal properly reconciled competing constitutional provisions and statutes enacted long before Proposition 218, to avoid finding either an implied repeal of the state statutes under which the District is authorized to act or a finding that section 75594 is unconstitutional. The Court of Appeal's analysis is correct.

The drafters of Propositions 218 never mentioned the Conservation Act or section 75594. Even so, the City demands that the District's fees and section 75594 should be declared unconstitutional because they do not meet the requirements of Article XIII D, § 6, subs. (b)(1)-(3) and (5). This radical result, the implied repeal of law or a finding of its unconstitutionality, is predicated on a careless analysis of Article XIII D that ignores the actual wording of the provision and the drafters' intent, and an abject failure to identify how the District's fee is for a "public service having a direct

relationship to property ownership" rendering Proposition 218 applicable in the first instance (Article XIII D, § 2, sub. (h)). Because the District's fees are not fees for "services" provided by the District that fit within the rubric of Proposition 218, they are not governed by the voter-approved requirements of that constitutional provision.

Article XIII D, § 6 (b)(3) mandates any fee "shall not exceed the proportional cost of the service *attributable to the parcel.*" Yet, as the trial court acknowledged, due to the complexities of the hydrogeology within the District, the benefits derived from the District's groundwater pumping fees cannot feasibly be allocated on a per parcel basis, but would be a matter of speculation. (JAE, Vol. 10, Ex. 88, pp. 002109, 002148-002149.) The trial court nonetheless improperly concluded that the District failed to meet its burden of demonstrating compliance with Proposition 218 without a quantitative justification of the 3:1 ratio and the higher rates on non-agricultural users, relying upon the tiered water rate *City of Palmdale* case. (*Id.*, at pp. 002155-002157.)

Ironically, the Court in *Griffith v. Pajaro Valley Water Management Agency* (2014) 220 Cal.App.4th 586 (*Pajaro II*), actually rejected the ratepayer's challenge to the groundwater extraction fee under *City of Palmdale* and concluded an individual parcel-by-parcel proportionality analysis was *not required under Proposition 218*, but that "defendant's method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service." (*Pajaro II, supra*, 220 Cal.App.4th at 601.) Relying upon *Cal. Farm Bureau, which was not a Proposition 218 case because it addressed a charge imposed by a State agency, not a local government*, the Court in *Pajaro II* held: "Proposition 218 does not require a more finely calibrated apportion. [sic]" (*Ibid.*). Rather than acknowledge the obvious mismatch between the literal application of the requirements of section 6, subd. (b)(1)-(5) of Proposition

218 and a groundwater pumping fee designed to fund a water district's regulatory conservation activities, the *Pajaro II* court failed to impose those literal requirements and held that Proposition 218 does not require what its language specifically requires.

Yet, this imprecise fit between the apportionment requirements of Article XIII D to the nature of the disputed fees was one of the critical reasons this Court in *Richmond* concluded the water connection fee in that case did not fall within Proposition 218. (*Richmond*, *supra*, 32 Cal.4th at p. 419.). Here, like in *Richmond*, the groundwater pumping fees cannot be precisely calibrated to any cost of service apportioned on a parcel by parcel basis. As the District explained in the Court of Appeal (AOB, pp. 27-29), because of the district-wide and long-term nature of its conservation services, the District has little practical ability to determine whether the ultimate fee paid by a user, as measured by the amount of water pumped, is proportional to the costs of services provided to the parcel of property upon which a particular well is located. The fees decided upon in the District's annual budget are based on projections or estimates of how much water will be pumped based on 11 year historical averages, while the actual amount of pumping will depend on the amount of rainfall in any given year and pumpers' water use activities. (Ex. 127-0003.) Moreover, the fees must comply with the 3:1 ratio imposed by section 75594, reflecting a balance mandated by the Legislature.

If Proposition 218 applies and the District cannot in any given year meet its burden under the cost of service provision to show proportionality of the fees to the services provided to a particular property owner, the District's groundwater pumping fees will be deemed unconstitutional and the District will be required to refund the fees it has collected. If multiple producers

challenge the rates, multiple refunds will be required. Faced with inadequate revenue from groundwater pumping fees, the District would then be forced to operate at a deficit,[10] or slash its operations such as its recharge projects, and abandon any long-term capital improvement projects. The District's only alternative to constant "cost of service" battles would be to secure the approval of two-thirds of the electorate to impose a "special tax" for purposes of groundwater management and sustainability in any year that the District determined an increase was necessary. (Article XIII C, sec. 2(a) and (d).)

A finding that the District's regulatory fees are not governed by the inapt language of Proposition 218 is the appropriate and sensible legal analysis that allows the District to meet its constitutional and statutory obligations and serve its regulatory mandate on a going forward basis. The Court must reconcile Article XIII D with Article X, section 2's requirement that the State shall conserve the waters of this State for the beneficial interest of the people and the public welfare. The Court must similarly reconcile Article XIII D to render the Conservation Act and section 75594 constitutional and to avoid an interpretation of Article XIII D that results in their implied repeal.

D. This Court Should Reject *Pajaro I* as Controlling and Clarify The Law for the Benefit of The Lower Courts and Litigants

The City urges this Court to reject this Court of Appeal's well-reasoned Opinion in favor of the Sixth Appellate District's decision in *Pajaro I* on the grounds that it has been the law for over eight years and other courts have followed its incomplete reasoning. (OB, p. 35.) The Court should decline the City's invitation.

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[10] The District is precluded from charging extraction fees that produce revenue exceeding the amount necessary to fund its annual groundwater conservation efforts. (§ 75596.)

While the Court of Appeal in *Pajaro II* felt compelled to follow *Pajaro I*, that is no reason for this Court to approve either opinion as correctly decided or, for that matter, as controlling precedent on the question of whether groundwater extraction charges more properly fall within the scope of Proposition 26, an issue which neither *Pajaro* ruling addressed.

Not all Proposition 218 and groundwater fee cases are alike. The nature of the agency, municipality or water district responsible for imposing the charge in a given case may warrant a different analysis and different outcome. The purpose for which the fee is imposed, the conduct on which the fee is imposed, the manner in which the fee is imposed, and whether the costs of service or benefits provided can be allocated by the agency on a parcel-by-parcel basis, will all be outcome determinative of any Proposition 218 issue.

Proposition 218 cases turn on their unique facts. Water delivery charges for services provided to property owners by municipalities or water agencies acting as purveyors of water are far different creatures than water extraction fees payable for exercise of the privilege to pump groundwater and benefit from the District's regulatory conservation and replenishment efforts. "Cost of service" cases involving municipal entities or publicly owned water agencies that are purveyors of waters to residential and business customers are inapposite here. Recently decided *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (Apr. 20, 2015) 235 Cal.App.4th 1493, involving tiered water rates, was just such a "cost of service" case governed by the holding in *City of Palmdale , supra,* 198 Cal.App.4th 926. Those cases analyze the very type of fees that the authors and text of Proposition 218 clearly intended to bring within the power of property owners to control.

Finally, the nature of the underlying administrative proceeding and evidence in the record may very well dictate different results in the trial court based on the standard of review applicable to administrative decision-making, and hence different results on appeal.

For each of these reasons, most notably that *Pajaro I* did not consider Proposition 26, it should not be endorsed by this Court as controlling in future groundwater extraction fee cases. Rather than accept the City's invitation to extend *Pajaro I,* the Court should take this timely opportunity to clarify the reach of Proposition 218, in light of Proposition 26, for the benefit of the lower courts, the parties involved in extant disputes over "water rates," and to prevent future litigation based on inconsistent appellate case law.

E. If This Court Concludes The District's Pumping Charges Fall Within Proposition 218, Remand Should Be Ordered

The trial court erred in determining "[t]he record provides no factual support for making the quantitative distinction made by the [District] between agricultural water and non-agricultural water" and finding that the [District] failed to meet its burden under Article XIII D, section 6, subdivision (b)(3). (JAE Vol. 10, Ex. 88, p. 002157.) Relying upon *Cal. Farm Bureau,* the Court of Appeal disagreed, concluding that proportionality for purposes of Proposition 218 did not require a showing on an individual parcel or rate payer basis but is " 'measured collectively considering all rate payers.'" (220 Cal.App.4th at 600.)

Thus, the Opinion did not address the District's contention that the trial court erred by (1) refusing to consider evidence proffered by the District to show that evidence could be had to justify the 3:1 fee differential and demonstrating proportionality; and (2) refusing to remand to allow introduction of additional cost of service calculations justifying its rate-making. such as the study prepared by the District for the 2013-2104 rate proceedings. (AOB, pp. 40-47.)

Should this Court disagree with the Court of Appeal, the Court should remand for reconsideration of all the evidence justifying the rate differential before making a judicial determination that the District violated Proposition

218 or that section 75594 is unconstitutional. (*See, Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, 532.)

F. The Court of Appeal Correctly Applied Proposition 26 To Determine the District's Pumping Charges Are Not Taxes

1. The Pumping Fees Are For Payor Specific Benefits

Article III C, as amended by Proposition 26, prohibits any local government from imposing or increasing a general tax without a two-third majority of voter approval. Article III C, § 1, subd. (e) defines the term "tax:"

> any levy, charge or exaction of any kind imposed by a local government, *except the following*:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payer that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

The Court of Appeal correctly determined the District's pumping fees are charges imposed for the benefit of pumping groundwater from the District's basins. (Opn., pp 24-25.)

2. The Pumping Charges Are Not Excessive, But Are Reasonably Related to the Costs of the District's Regulatory Activities

(a) Proposition 26 Does Not Require a Direct Correlation of the Fee to the Individual Payor's Benefits

The Court of Appeal correctly relied upon *Sinclair Paint, supra,* 15 Cal.4th 866, and *Farm Bureau , supra,* 51 Cal.4th 421, to determine the District's groundwater pumping charge satisfied one of the tax exceptions outlined in Proposition 26. Although neither *Sinclair Paint* nor *Farm Bureau* directly addresses Proposition 26, which was not adopted by the voters until November 2010, Proposition 26 turned a passage excerpted from *Sinclair*

Paint into the present constitutional mandate. (Cal. Const., Arts. XIII A, § 3 and XIII C, § 1; *Sinclair Paint, supra,* 15 Cal.4th at p. 878, citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1145-1146; *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996.)

The question in *Farm Bureau* was whether the annual license and permits fees imposed by the State Water Resources Control Board were valid regulatory fees or illegal taxes. *Farm Bureau* analyzed the *Sinclair Paint* language the drafters of Proposition 26 later adopted. The Court of Appeal's decision in this case rested on *Farm Bureau's* guiding answer:

> A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. [Citation.] *The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.* [Citation.] [¶] *Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax.* (Opn. at p. 26, citing *Farm Bureau, supra,* 51 Cal.4th at p. 438, emphasis added.)

The Court of Appeal concluded substantial record evidence supported the interconnectivity of the District's basins and the impact of each pumper's activity on the others. (Opn, p. 26.) Thus, applying *Farm Bureau,* the Court determined the District established the reasonable proportionality of the District's fees *on a collective basis*:

> . . . by imposing fees based upon the volume of water extracted, the District largely does charge individual pumpers in proportion to the benefit they receive from the District's conservation activities. The District ensures water availability District-wide. Large-scale users such as the City receive a far greater benefit than individual landowners who pump water for

> personal consumption. That is more than is required. *The District need only ensure that its charges in the aggregate do not exceed its regulatory costs.* (*Ibid.*, emphasis added.)

The City does not address *Farm Bureau* in its discussion of Proposition 26 in its Opening Brief. Rather, the City continues to insist the cost of service requirements under Proposition 218 are identical to the proportionality requirements set forth in Proposition 26 and require a "direct" correlation between the fee charged and the benefits conferred on the payor. (OB, pp. 55-56, 57.) This is demonstrably false.

The language of Article XIII D, § 6, subd. (b), differs from the language of Article XIII C, § 1, subd. (e), in material ways. Proposition 218 states: "The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the *proportional cost of the service attributable to the parcel.*" (Art. XIII D, § 6, subd. (b)(3).) It therefore requires the cost of the property-related service to be traceable to a parcel. It prohibits the local government agency from collecting revenues in excess of the funds required to provide that parcel's service (Art. XIII D, § 6, subd. (b)(1)) or from using the funds for any purpose other than providing the specific service to the parcel (Art. XIII D, § 6, subd. (b)(2)). The fee must be charged for service actually used or immediately available to the property owner, not for any future benefit. (Art. XIII D, § 6, subd. (b)(4).)

In contrast, Proposition 26 charges may be "imposed for a specific benefit conferred or privilege granted directly to the payor . . . which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." (Article XIII C, § 1, subd. (e)(1).) The initiative imposes a preponderance of the evidence burden of proof on local government that the fee is "no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or

benefits received from, the governmental activity." (Art. XIII C, § 1, subd. (e).)[11] The word "parcel" or "property" is missing from this fee language. Why? Because the drafters intended the reach of Proposition 26 to extend, not to property-related fees previously addressed by Proposition 218, but to regulatory fees that were not imposed "as an incident of" property ownership, but to fund governmental activity. Hence, the wholesale exception provided in Proposition 26 for property-related fees. (Art. XIII C, § 1, subd. (e)(7).)

For these reasons, the Court of Appeal properly relied on *Farm Bureau* to reject the need under Proposition 26 for the cost of service showing on a parcel-by-parcel basis that the City continues to advocate. (Opn, p. 26.)

(b) There is Substantial Evidence the City Benefits From the District's Services

The City repeatedly contends the District's services, such as conservation and groundwater recharging efforts, do not provide any benefit to the City. Yet, these arguments were rejected by the Court of Appeal which determined the evidence supported the contrary conclusion. (Opn, p. 27.)

Of special significance was the evidence of the hydraulic connection between the basins within the District's boundaries. The trial court thoroughly reviewed the record evidence and, rejecting the City's arguments, determined

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[11] Although Proposition 218 only applies to local government agencies, the Proposition 26 issues have potentially significant implications for the State's inherent ability to fund its own regulatory programs for water resources management. The State must comply with the provisions of Article XIII A, § 3, which contains almost identical exemption language as contained in Article XIII C, relating to local governments. Thus, the construction which the City urges for interpretation of Proposition 26 could, if adopted by this Court, jeopardize the State's ability to impose regulatory fees without satisfying finely calibrated cost of service requirements under the similarly worded Article XIII A.

the basins within the District's boundaries are "[hydrogeologically] interconnected in complex and incompletely explained ways[.]" (JAE, Volume 10, Ex. 88 at p. 002126; *see also*, p. 002138 [the record "amply demonstrates that the basins are hydrogeologically connected"]; *Id.* at p. 002148 ["[T]he evidence shows that all of the basins are hydrogeologically connected."].) The Court of Appeal determined the record contains substantial evidentiary support for these findings of interconnectivity. (Opn. at p. 26.)

Just as significantly, the record also contains compelling evidence of the benefit of the District's activities to all of the District's basins, including the Santa Paula, Oxnard Plain, Mound and West Las Posas basins, from which the City produces groundwater. (Appellants' Reply Brief and Cross-Respondents' Brief at pp. 13-21; *see also,* JAE, Volume 9, Ex. 81 at pp. 001915-001923 and Appendix A thereto.) The trial court determined "the most significant services provided by the [District] are its efforts to provide recharge to the basins" (JAE, Volume 10, Ex. 88 at p. 002147) and "conservation services rendered by [the District] throughout the district have qualitative positive effects in every part of the district." (*Id.* at p. 002148.) Again, the Court of Appeal agreed the trial court's finding, that the City benefitted from the District-wide efforts, was supported by substantial evidence. "[T]he District ensures water availability District-wide." (Opn. at p. 26.)

The City is improperly asking this Court to reweigh the evidence and adopt the City's view that it receives no direct benefit from the District's activities for which it should be charged.

(c) The Groundwater Fees Are Not Used For Improper, Non-Regulatory Purposes

The Court of Appeal also rejected as unsupported by the evidence the City's contention the groundwater fees are excessive because they are expended for improper purposes, such as improperly funding recreational

users of Lake Piru or improperly making State water purchases with the funds collected from groundwater fees. (Opn, p. 27 [the Lake Piru concessionaire actually funds the District's activities at Lake Piru and the State water purchases are paid for by voter-approved property assessments, not by groundwater extraction charges].)

The District's recreation activities subfund is fully supported by concessionaire revenue and ad valorem property taxes collected by the District. (AR1, Ex. 22 at p. 0060 [the "District-wide Activities-001" budget shows $1,952,600 in ad valorem property taxes revenue, more than meeting any expenditure "shortfall" for recreation activities].) The District's State Water Project allocation funding is paid for by an annual voter-approved property assessment. (AR2, Ex. 106 at pp. 0058-60.)

The Court of Appeal's determination the fees were not used for improper purposes is supported by substantial evidence. The City may not seek redetermination of these factual disputes by this Court.

3. The Costs of Services Provided By the District Are Allocated Across Groundwater Pumpers in a Fair and Reasonable Manner

The administrative records clearly demonstrate that for each of the 2011-12 and 2012-13 budget years, estimated Zone A groundwater revenues were appreciably less than either projected Zone A total expenditures or revenues. (AR 22-0058; AR2 106-0047.) Use of the revenue was restricted to the District's water conservation, management and replenishment activities, as required by the District's enabling act. (AR 22 0056-0060; AR 71-0006; AR 72-0003-0004; AR2 106-0041-0045; § 75596; *see also,* Appellants' Reply Brief and Cross-Respondents' Brief, pp. 22-25.)

Contrary to the City's claims (OB, pp. 56-57), the use of funds from groundwater extraction fees imposed on producers in Zone A are limited to paying the costs of activities and services which benefit those within Zone A.

(AR2 175-0075.) The funds are used exclusively by the District for purposes authorized in its principal act and do not exceed the amounts needed for such purposes. (§§ 75522-75523.)

The District also utilizes several funds which provide services to the City and other users, but for which the City does not pay as part of its groundwater extraction fee. The State Water Import Fund is used to increase water recharge within the basins and is paid for by a voter approved property tax assessment that is approved annually. (AR 22-0071-73; AR2 106-0058-0060.)

The Freeman Diversion Fund contains all revenue generated in Zone B. (AR 22-0076; AR2 106-0063.) The City pays Zone B charges based on its pumping in the Oxnard and West Las Posas Basins. The Zone B fee was not increased in either the 2011/2012 or 2012/2013 water year and, other than the fee differential, was not at issue in the lower court.

All capital expenses are allocated among the District's different funds based on a percentage determination of how these facilities contribute to the services paid for by the various funds. (AR 22-0092-0104; AR2 106-0036, 0080-0091.)

In sum, the District's annual budget process and the development of the groundwater extraction charge reflect a detailed analysis of anticipated costs and a fair allocation of the fees necessary to fund the District's regulatory purposes.

The City's contrary contention that the District's fees exceed the costs of its regulatory services, conspicuously lacking a single citation to the record (OB, p. 58), has no evidentiary support whatsoever. The Court of Appeal below squarely rejected the City's contention. (Opn. at pp. 26-27) The City's Proposition 26 argument fails for that reason.

VI. CONCLUSION

The Court of Appeal's decision should be affirmed by this Court.

DATED: September 23, 2015 Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Jane Ellison Usher, hereby certify pursuant to rules 8.268(b)(2) and (3) and 8.204 of the California Rules of Court that this Answer Brief on the Merits was produced on a computer, and that it contains 15,068 words, exclusive of tables, the verification, this Certificate, and the proof of service, but including footnotes, as calculated by the word count of the computer program used to prepare this brief.

DATED: September 23 , 2015

MUSICK, PEELER & GARRETT LLP

By: _____
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, California 90017.

On September 23, 2015, I served true copies of the following document(s) described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address c.staley@mpglaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Musick, Peeler & Garrett LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 23, 2015, at Los Angeles, California.

Cindy L. Staley

SERVICE LIST

United Water Conservation District, et al. v. City of San Buenaventura
Santa Barbara County Superior Court
Case Nos. VENCI 00401714 and 1414739
Court of Appeal Case No. B251810

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