S252915

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LESLIE T. WILDE,
Plaintiff and Appellant,

v.

CITY OF DUNSMUIR, et al.
Defendants and Respondents.

After a Published Opinion by the Court of Appeal of the State of California
Third Appellate District, Case No. C082664
Appeal from Superior Court of the State of California, County of Siskiyou
The Honorable Anne Bouliane, Judge Presiding
Civil Case No. SC CV PT 16-549

PETITION FOR REVIEW

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I. QUESTION PRESENTED FOR REVIEW

Are property related fees under California Constitution, article XIII D, section 6 and other fees which fund essential government services subject to referendum notwithstanding article II, section 9 of the California Constitution?

II. INTRODUCTION

This Petition for Review involves a published Opinion that misconstrues California Constitution, article II, section 9[1] and articles XIII C and XIII D, adopted by 1996's Proposition 218. The Opinion, which is inconsistent with precedent interpreting article II, section 9, applies the disruptive referendum power to essential government revenues despite the contrary intent evidenced in that section. It does so despite Proposition 218's express limitation on that section only as to the initiative and its concomitant silent affirmation of earlier precedent under that section 9. Still further, it conflicts with the role afforded registered voters, property owners and other fee payors under article XIII D, section 6, subdivisions (a) and (e) creating disharmony among these provisions which may be easily harmonized by maintaining earlier law.

Moreover, the Opinion will disrupt and impair public finance — the State's as well as local governments' — and make it more difficult, and most costly, to fund such essential government services as water supply. The significance of the Opinion is demonstrated by the requests for depublication filed by all five local government associations in our State — the Association of California Water Agencies, the California State Association of Counties, the California Association of Sanitary Agencies, the California Special Districts Association, and the League of California Cities. It is also demonstrated by the opposition to those requests filed by

[1] Unspecified references to "articles" are to the California Constitution.

the Howard Jarvis Taxpayers Association. Those requests demonstrate the issue has arisen in this and at least three other recent cases in Orange, Amador and Monterey Counties. The question merits review.

III. SUMMARY OF ARGUMENT

In November 1996, California voters adopted Proposition 218, adding articles XIII C and XIII D to our Constitution. Proposition 218 is intended to fill a gap contained in Proposition 13 that allowed property assessments to be imposed without a vote. To that end, Proposition 218 expressly limits the force of article II, sections 8 and 9, but only as to the power of initiative as applied to proposals to repeal or reduce taxes. (Cal. Const., art. XIII C, section 3.) Article II, section 9 reserves to the People the referendum power — as to the State and local governments alike — and, in so doing, identifies essential government legislation which cannot be suspended by a referendum petition as ordinary legislation can:

> Sec. 9. (a) The referendum is the power of the electors to approve or reject statutes or parts of statutes **except** urgency statutes, statutes calling elections, and **statutes providing for tax levies or appropriations for usual current expenses of the State**.

(Cal. Const. art. II, § 9, subd. (a); e.g., *Yesson v. San Francisco Municipal Transportation Agency* (2014) 224 Cal.App.4th 212, 219 & fn. 3 [art. II, § 9 reserves the referendum power for local and state voters alike].) Precedent interprets "statutes providing for tax levies or appropriations" to reach beyond taxes to fees and other revenue measure that fund essential government services. (E.g., *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864.) The Opinion erodes article II, section 9 and treats *Dare v. Lakeport* as "abrogated" by *Rossi v. Brown* (1995) 9 Cal.4th 688 *(Rossi)*. *Rossi*, however, cites *Dare v. Lakeport* only twice (at pp. 705, 708),

distinguishing it at the second citation as involving legislative power delegated to the city council alone, applying the rule of *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491 [statute may preclude referenda and initiatives by delegated power to legislate to local legislators alone].

Article XIII C, section 3 provides for the voters' right to initiative powers for such challenges notwithstanding prior interpretations of article II, section 9 which had treated such as initiatives an unauthorized end-runs around the referendum ban:

> Sec. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, **the initiative power** shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The **power of initiative** to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

(Cal. Const., art. XIII C, § 3, emphasis added.) By specifying that local revenue measures shall not be immune from "the initiative power," the voters who approved Proposition 218 are understood to maintain the earlier prohibition on such referenda under the canon of construction known as *expressio unius est exclusio alterius*. (E.g., *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105.)

As *Rossi* explains, unlike the immediate impact of a referendum — which immediately suspends legislation pending subsequent voter approval

— a local government has months to plan for the impact of a fiscal initiative. (*Rossi, supra*, 9 Cal.4th at p. 703–704.)

Allowing referenda to challenge revenue required for essential government services will impede the government's ability to perform essential functions, such as here with providing water service. Moreover, as this Court explained in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217–220, Proposition 218 itself describes the manner of voter involvement in the adoption — or not — of property related fees such as the water fees in issue here. Article XIII D, section 6, subdivision (a) provides for a majority protest procedure by which a majority of affected rate-payers may bar the adoption of a water, sewer or trash rate. Subdivision (c) of that same section requires an election — a majority of property owners or two-thirds of registered voters — to approve new properly related fees, **except** those for water, sewer and refuse collection services. Thus, the Opinion mistakes precedent to give voters the power to disrupt local government finance that the voters who approved article II, section 9 did not intend and that the voters who approved Proposition 218 confirmed. It is error worthy of this Court's review.

IV. THE QUESTION MERITS REVIEW BECAUSE LOCAL GOVERNMENT'S ABILITY TO FUND ESSENTIAL SERVICES IS IN ISSUE

The question presented is of great importance because it affects the power of the State Legislature and every California local government to fund essential services. Review is necessary both to secure uniformity of decision (the Opinion treats *Dare* as abrogated but fails to persuade this is so) and to settle this important question of law.

Review will secure uniform statewide application of article II, section 9 as to referenda to suspect enactment of measures to fund essential

government services and the relationship of that section to article XIII C, section 3 (reserving the initiative power as to revenue measures) and article XIII D, section 6, subdivision (c) (exempting water, sewer and trash fees from election requirements applicable to other property related fees).

As *Rossi* explained some two decades ago (*Rossi, supra*, 9 Cal.4th at p. 703–704), governments can plan for the fiscal impact of a future change by way of initiative whereas referenda immediately disrupt service funding. For example, the bail bond industry's current referendum against the recent repeal of bail statutes immediately suspends that measure, stymying efforts to plan for that major change in the operation of our criminal courts until voters pass on the measure — in 2020 unless the Legislature calls a special election at great expense. An initiative to restore a bail system, by contrast, would have no impact on our laws unless and until voters approve it, providing perhaps two years lead time to plan for the change.

Moreover, that the question presented is worthy of this Court's review appears from the frequency the issue has arisen in recent years. In addition to this case arising in Siskiyou County, it has arisen in at least three other recent cases:

1. *Howard Jarvis Taxpayers Association et al. v. Amador Water Agency et al*, Third DCA Case No. C082079 (appeal filed May 20, 2016, fully brief November 3, 2016). (Motion for Judicial Notice filed herewith ("MJN"), Exh. A.) This case, now pending in the Court which rendered the Opinion, involves an effort to referend water rates imposed by the Amador Water Agency. Unlike *Wilde*, the case attracted amicus participation. It remains pending in the Court of Appeal. The pendency of this case may explain the Howard Jarvis Taxpayers Association's opposition to the local government associations' request to depublish the Opinion.

2. *Monterey Peninsula Taxpayers' Association et al. v. Board of Directors of the Monterey Peninsula Water Management District, et al.* Sixth DCA Case No. H042484. (MJN, Exh. B.) The unpublished opinion was filed April 11, 2018, affirming denial of a writ of mandate and declaratory relief to invalidate an ordinance that imposed a water supply charge and to place a referendum on the ballot. The reviewing court held that property-related fees for water service are exempt from voter approval under article XIII D, section 6 and the referendum was properly withheld from the ballot under the full-text rule of such cases as *Lin v. City of Pleasanton* (2009) 175 Cal.App.4th 1143. The Sixth District, therefore, did not reach whether article II, section 9 prohibits referenda to suspend water rates.

3. *Ebinger v. Yorba Linda Water District,* Orange County Superior Court Case No. 30-2016-00829548-CU-JR-CJC. (MJN, Exh. C.) This case filed January 12, 2016 sought a writ of mandate to either repeal an emergency water rate increase or to place a referendum on the ballot. The trial court denied the writ, finding repeal of the increase would have serious consequences in a drought. These included impairment of the respondent district's ability to provide adequate and reliable supplies of potable water to those it served. The case settled without appellate decision when the advocates of the rate repeal gained control of the district board, achieving by political means what they could not in court.

These four cases from every corner of our state — from Orange in the South to Siskiyou in the North, from Monterey on the Coast, to Amador at the Nevada line — indicate that the question presented has arisen repeatedly across our state in recent years. It merits review.

Moreover, this case is a good vehicle. The issues are squarely presented. Although the petitioner appears *pro per*, the trial court received

and considered an amicus letter from the Howard Jarvis Taxpayers Association below. Amicus participation is likely here on the merits if this Court grants review just as has been seen as to the request for depublication.

Noteworthy is the amicus letter by five associations that represent essentially all of California's local governments requesting depublication of the Opinion. The City anticipates these same organizations will provide a letter in support of review.

The Opinion has serious and detrimental effects on all governments in California — State and local, — can greatly impair public services, stymie fiscal planning and make it more difficult and more costly to provide such vital services as water, sewer and refuse removal services. At the very least, it will make it harder to issue debt to fund such services and make such debt more costly when lenders impose risk premiums.

For these reasons, the City of Dunsmuir respectfully urges this Court to grant review.

V. SUMMARY OF FACTS

Dunsmuir is a general law city of fewer than 1600 people on Interstate 5 in southern Siskiyou County that attracts many tourists to fish, hike, and otherwise enjoy the scenic beauty of the region. Many of the City's water mains and a water storage tank are over 100 years old and must be replaced to maintain a reliable potable water supply for the community. (CT 77.) These water system updates would ensure water delivery and pressure to residents and fire protection in major sections of the City — an urgent concern in light of recent disastrous fires in other communities at the urban-wildland interface. (CT 77.) An Ad Hoc Water Rate Committee, including two council members and three select citizen representatives, met in public session six times. (CT 77.) The Committee

recommended the City Council increase water rates to fund the restoration project. (CT 77.) The proposed rates, implementing a water master plan and supported by a form rate study, would raise approximately $15,000,000 over the five years permitted by Government Code section 53756, subdivision (a) [Prop. 218 Omnibus Implementation Act]. The rate structure was of two parts. First, base (fixed monthly) rates were proposed such that, at the end of a five-year period, the City could find the minimum local share needed for federal grants to support the rehabilitation project. (CT 78.) Second, consumption rates were set to meet funding requirements for the balance of the project. (CT 78.)

The City conducted the noticed hearing and protest proceeding required by Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (a)) yielding just 40 protest votes when approximately 800 were needed to bar the proposed rates. The City Council therefore unanimously adopted Resolution 2016-02 to impose the increased water rates increase. (CT 78, 81-84.)

Ms. Wilde then circulated a referendum to prevent the Resolution from taking effect. Given the small size of the City, few signatures were needed. (Elec. Code, § 9237 [lesser of 100 signatures or 25 percent of electorate in City with fewer than 1,000 voters sufficient to qualify a referendum].) Wilde obtained approximately 100 signatures, which the County Clerk-Registrar certified. The City took no action on the petition, interpreting article II, section 9 and article XIII C, section 3 to allow rate challenges by initiative but not referenda.

Wilde sought a writ of mandate. (CT 1–54.) The City opposed. (CT 55–87.) The Howard Jarvis Taxpayers Association submitted an amicus letter in support of the petition, which the trial court accepted. (CT 88–95).

While her writ was pending, Wilde circulated an initiative petition to reduce the City's water and sewer rates. (City's Motion in the Court of Appeal for Judicial Notice (City's DCA MJN), Declaration of John Sullivan Kenny, Exh. A.)[2] The City submitted the Initiative to the voters. (City's DCA MJN, Exh. B.) On November 8, 2016, the voters rejected the Initiative by a substantial margin. (City's DCA MJN, Exh. D.) Thus, Wilde had two opportunities to persuade her neighbors to defeat the rates — in the majority protest proceeding required by article XIII D, section 6, subdivision (a) and at the polls in November 2016. She sues here for a third bite at the apple.

VI. PROCEDURAL HISTORY

The trial court heard the writ on July 1, 2016. It denied the writ, concluding that Proposition 218 provides for initiative power, but not referendum, as to property related fees. (RT 2–11; CT 131–132.) Wilde appealed. (CT 133–134.)

The Third District reversed and remanded with instruction to issue a preemptory writ of mandate to compel an election on the referendum at the City's next election. The Opinion concluded Proposition 218 did not abridge what it concluded was voters' earlier-established right to referend local revenue measures. The Opinion also states that the government services exception does not apply because the referendum does not

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[2] The appellate court took judicial notice of petitioner's initiative (Measure W) (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis by the Legislative Analyst for Prop. 218); the ballot on which Measure W appeared; and the voters' rejection of Measure W. (Opin. at p. 2.) The City will separately move this Court for notice of those materials on request. The Motion for Judicial Notice filed with this petition is limited to materials not presented below.

undermine the City's ability to provide essential government services as it would not limit the City's future ability to study, plan and implement a new water rate master plan. This exception to the referendum power is developed in such cases as *Hunt v. Mayor and Council of City of Riverside* (1948) 31 Cal.2d 619.

The Court of Appeal filed the Opinion November 15, 2018. The City sought rehearing on November 29, 2018. The Court of Appeal denied the Petition on December 4, 2018.

Four of the local government associations sought depublication on December 5, 2018. A fifth filed a separate request on December 13, 2018. On December 14, 2018, the Howard Jarvis Taxpayers Association filed a letter opposing the earlier request. The request remains pending as this Petition is filed.

VII. ARGUMENT

A. Article II, Section 9 Prohibits Referenda as to Local Government Fees

Article II, section 9 reserves the voters' power to approve or reject statutes by referendum, but that power has limits. Section 9 prohibits referenda of "urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const., art. II, § 9.) The power — and its exception — apply to local legislation. *Rossi*, *supra*, 9 Cal.4th at p. 703.

The prohibition of referenda on "tax levies or appropriations" stabilizes government finances and prevents the abrupt disruption of government operations and finances a referendum would cause. *Rossi*, *supra*, 9 Cal.4th at p. 703. Allowing referenda that immediately suspend a government from collecting revenue to fund essential services defeats the purpose of section 9's exclusions.

Voters adopted Proposition 218 to add article XIII C, section 3 to our Constitution to allow initiatives to reduce or repeal fiscal measures, effectively codifying *Rossi*. As noted above, its reference to initiatives and its silence as to referenda must be treated as intentional and meaningful. (Cf. *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191 [Prop. 218 did not impliedly repeal statutes allowing city annexations, citing Sherlock Holmes' "dog that did not bark"].)

Article XIII C, section 3 distinguishes the initiative from the referendum: "Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, **the initiative power** shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." (Emphasis added.) Applying the common canon of construction cited above, this provision allows initiatives, might have allowed referenda and as it did not expressly do so, must be read not to do so. (*Le Francois, supra* [expressio unius rule].)

The referendum does not extend to "tax levies or appropriations" because a contrary rule would disrupt government finance. (*Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832, 839–840.) As *Rossi* explains, a referendum immediately suspends legislation upon certification of petition signatures (here, just 100 in a town of 1,600) and is therefore more disruptive of fiscal administration than a prospective reduction in revenue by initiative:

> [I]f a tax measure were subject to referendum, the county's ability to adopt a balanced budget and raise funds for current operating expenses ... would be delayed and might be impossible. As a result, the county would be unable to comply

> with the law or to provide essential services to residents of the county... . If essential government functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended.

(*Rossi*, *supra*, 9 Cal.4th at p. 703.)

Rossi makes clear that the **impact** is the decisive factor under article II, section 9, not whether a revenue source is a "tax" as later defined in article XIII C, section 1, subdivision (e) [2010's Proposition 26] or a "fee" as later defined by article XIII D, section 2, subdivision (e) (1996's Proposition 218). These definitions are not to be interchanged with "tax levies or appropriations" used in article II, section 9 — which dates from the establishment of the direct democracy powers in 1911. These modern definitions do not apply outside of articles XIII C and XIII D and in particular they do not apply to article II, section 9. (*Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th at p. 213.)

Precedent broadly construes "tax levies or appropriations" as used in article II, section 9 to avoid the disruptions of which *Geiger* warns and includes revenues that fund essential government services, no matter the revenue source. (*Dare*, *supra*, 12 Cal.App.3d at p. 868.) *Dare* found the imposition and collection of fees for the Lakeport Municipal Sewer District a "tax" within the meaning of article II, section 9. (*Ibid.*) While it is true that *Rossi* later characterized *Dare* as an application of the direct-delegation rule of *Committee of Seven Thousand*, that is not the most obvious reading of *Dare*. While *Dare* is the crispest statement of the rule that "tax levies or appropriations" as used in article II, section 9 reaches other government revenues, it is not alone. *Fenton v. City of Delano* (1984) 162 Cal.App.3d

400, 405 barred referendum of a utility users tax that city had denominated a "fee."

In *Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th 205, this Court considered whether article XIII C, section 3 authorizes local voters to adopt an initiative to reduce the water agency's service charges and to require voter approval of future rate increases in. *Bighorn-Desert* concluded that although article XIII C, section 3 grants local voters the initiative power to reduce the water rates, it did not grant them a "right to impose a voter-approval requirement on all future adjustments of water delivery charges, and that the proposed initiative at issue here was properly withheld from the ballot because it included a provision to impose such a requirement." (*Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th 205 39 Cal.4th at p.209.) Thus, the logic of *Bighorn-Desert* prohibits referenda to suspend water rates and other property related fees subject to article XIII D, section 6.

Bighorn-Desert instructs that "article XIII C, section 3 is not limited to local special and general taxes but applies also to assessments, fees, and charges." (*Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th at p. 212.) The Legislative Analyst described how Proposition 218 would affect initiative powers: "'The measure states that Californians have the power to repeal or reduce any local tax, assessment, or fee through the initiative process.' (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 74.) The Legislative Analyst makes no mention of the referendum power because Proposition 218 does not.

"Thus, the Legislative Analyst appears to have also read section 3 of article XIII C as applying to fees as well as to special and general taxes and so described it to the voters who enacted it." (*Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th at p. 212–213.)

The Opinion correctly states: "*Bighorn-Desert* and *Rossi* teach that voters cannot throw government finances into chaos by vitiating the regularly budgeted expenditures for essential government services." (Opinion at p. 20.) But the Opinion erred to state: "[t]he fact that Resolution 2016-02 includes a financial component does not insulate it from challenge by voter referendum." (*Ibid.*) The issue that the Opinion overlooks is whether the water rate revenues disputed here are "tax levies or appropriations" under article II, section 9. The Opinion misconstrues the right of initiative power regarding local taxes, assessment, fees or charges provided in article XIII C, section 3 by disregarding the language of the article and broadening that right by the use of referendum power, which is forbidden by article II, section 9. (Opinion at pp. 12–13.)

B. Proposition 218 Specifies the Role of Voters and Rate-Payers in Adoption of Property Related Fees, and Makes No Mention of Referenda

Article XIII D, section 6, subdivision (c) expressly exempts water, sewer, and refuse service fees from the voter approval requirement imposed on all other fees and charges:

> (c) Voter Approval for New or Increased Fees and Charges. **Except for fees or charges for sewer, water, and refuse collection services**, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject the fee or charge or, at the option of the agency, by a two-thirds vote of the elected residing in the affected area."

(Cal. Const. art. XIII D, section 6, subd. (c), emphasis added.)

Having preserved the initiative power as to revenue measures in article XIII C, section 3 and provided for elections on nearly all fees in article XIII D, section 6, subdivision (c) — and precluded them for "charges for sewer, water, and refuse collection services," it is plain the voters who approved Proposition 218 did not intend to allow referenda on such charges. At least, they did not intend to disturb earlier law, including *Dare*.

Voters reasonably deemed the referendum power unnecessary and disruptive in this context. The protest hearing required by article XIII D, section 6, subdivision (a) allows rate-payers to prevent undesired rate increases. (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 921.) Voters chose not to impose an election requirement for water rate increases. (*Bighorn-Desert View Water Agency*, *supra*, 39 Cal.4th 205.) Thus, article XIII C, section 3 must be understood as purposively limited to the initiative power. Wilde exercised her rights of initiative under article XIII C, section 3 — but could not persuade her neighbors not to fund essential repairs to their water system. The Opinion's contrary conclusion defeats article XIII D, section 6, section (c)'s exception from its election requirement for property related fees for water, sewer, and refuse collection. It also undermines the intended effect of article II, section 9. It misstates the law.

VIII. CONCLUSION

This case raises a review-worthy question as to the interplay of article II, section 9 and Proposition 218. The Opinion imposes extraordinary uncertainty on the State and its local governments, stripping them of the ability to plan their finances to ensure essential services are adequately funded and defeats the intent of article II, section 9, article XIII C, section 3, and article XIII D, section 6, subdivision (c). At the very least,

it has generated significant concern among local governments and taxpayer advocates to warrant review in this Court.

Respectfully submitted,

Dated: December 21, 2018

KENNY & NORINE

JOHN SULLIVAN KENNY
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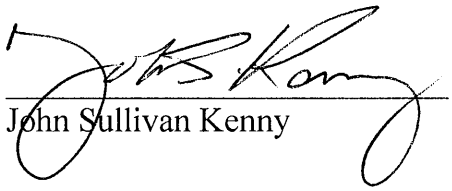
Attorneys for Respondents
CITY OF DUNSMUIR, et al.

CERTIFICATE OF WORD COUNT

The foregoing Respondents' Petition for Review contains 4371 words (including footnotes, but excluding the tables and this Certificate) and is thus within the limit of 8,400 words established by California Rules of Court, rule 8.504(d)(1). In preparing this Certificate, I relied on the word count generated by Microsoft Word version 2010 word-processing program used to generate this Petition.

Dated: December 21, 2018

KENNY & NORINE



John Sullivan Kenny

RE: *Wilde v. City of Dunsmuir, et al.*
Siskiyou County Superior Court Case No. SCCVPT 16-549
Court of Appeal Case No. C082664
Supreme Court Case No. _____

PROOF OF SERVICE

I am employed in the County of Shasta, State of California, I am over the age of eighteen years and not a party to the foregoing action, my business address is 1923 Court Street, Redding, California 96001. On the date set forth below, I served the within **RESPONDENTS' PETITION FOR REVIEW** on all parties in said action in the manner and/or manners described below and addressed as follows:

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Yreka, CA 96097

__X__ BY MAIL: By placing a true copy thereof enclosed in a sealed envelope and causing such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am familiar with this firm's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in a U.S. mail box after the close of the day's business.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 21, 2018, at Redding, California.

Tamara Warren
TAMARA WARREN

Appendix A

Filed 11/15/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

LESLIE T. WILDE, Plaintiff and Appellant, v. CITY OF DUNSMUIR et al., Defendants and Respondents.	C082664 (Super. Ct. No. SCCVPT16549)

APPEAL from a judgment of the Superior Court of Siskiyou County, Anne Bouliane, Judge. (Assigned by the Chairperson of the Judicial Council pursuant to art. VI, § 6 of the Cal. Const.) Reversed with directions.

Leslie T. Wilde, in pro. per., for Plaintiff and Appellant.

KENNY, SNOWDEN & NORINE, John Sullivan Kenny, Linda R. Schaap and Rob J. Taylor for Defendants and Respondents.

In 1996, California voters adopted Proposition 218 (as approved by voters Gen. Elec. Nov. 5, 1996, eff. Nov. 6, 1996 <https://elections.cdn.sos.ca.gov/sov/1996-general/official-declaration.pdf> [as of Nov. 14, 2018], archived at <https://perma.cc/PZ9U-ABQ6>) (Proposition 218) to add article XIII C to the California Constitution by which they expressly reserved their right to challenge local taxes, assessments, fees, and charges by initiative. (See generally *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 208-209 (*Bighorn-Desert*).) This case presents the question of whether section 3 of article XIII C to the California Constitution silently repealed voters' right to challenge by referendum the same local levies for which they expressly preserved their power of initiative.

Here, the City of Dunsmuir (City) rejected a referendum measure submitted by one its residents, Leslie T. Wilde. The City rejected the referendum even though there is no dispute Wilde gathered sufficient voter signatures to qualify the referendum for the ballot to repeal Resolution 2016-02 that established a new water rate master plan. The City's rejection was based on its view that its resolution establishing new water rates is not subject to referendum, but only voter initiative. Wilde filed a petition for a writ of mandate in superior court to place the referendum on the ballot. At the same time, Wilde gathered sufficient voter signatures to place an initiative on the ballot to establish a different water rate plan.[1] The trial court denied Wilde's petition, and the City's voters rejected Wilde's initiative, Measure W.

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[1] We grant the City's request for judicial notice of (1) Wilde's initiative (Measure W) (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis by the Legislative Analyst for Prop. 218) to amend the City's water and sewer rate structure, (2) the ballot on which Measure W appeared (Ballot Pamp., Gen. Elec. (Nov. 5, 1996)), and (3) the voters' rejection of the Measure. (Evid. Code, §§ 452, subds. (d) & (h), 459.) We reject the request for judicial notice of a newspaper article entitled, "Town hall talk about Measure W in Dunsmuir." (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064 [rejecting judicial notice of newspaper article because "the truth of its contents is not

On appeal, Wilde contends the trial court erred in refusing to order the City to place her referendum on the ballot. The City counters that the voters' rejection of her initiative measure moots the current appeal.

We conclude this appeal is not moot. The voters' rejection of Wilde's initiative water rate plan does not establish that the voters would necessarily have rejected Wilde's referendum on the City's water rate plan. Voters might be dissatisfied with both water rate plans and therefore reject the initiative and pass the referendum. On the merits, we conclude the voters' adoption of Proposition 218 did not abridge voters' right to challenge local resolutions and ordinances by referendum. We further conclude the trial court erred in finding the City's water rate plan was an administrative decision not subject to voter referendum. The resolution adopting an extensive water upgrade project funded by a new water rate plan was legislative in nature and therefore subject to voter referendum.

Accordingly, we reverse with directions to issue a peremptory writ of mandate ordering the voter registrar to place Wilde's referendum on the ballot.

FACTUAL AND PROCEDURAL HISTORY

Resolution 2016-02

In January 2015, the City formed an ad hoc water rate committee (Committee). The Committee held public meetings and a two-hour town hall meeting during which it assessed the City's water infrastructure needs, considered a study on the City's water rates, and proposed a six-year tiered increase in water rates. The increase was intended to fund the replacement of a 105-year-old water storage tank and a significant number of similarly aged water main sections.

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judicially noticeable"], overruled on another point in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

In March 2016, the city council passed Resolution 2016-02 by which it raised water rates according to a table that lists consumption charges according to type of residential unit served and the diameter of the water supply pipe. The new water rate structure reflects "an ascending base rate" formulated so that, "at the end of the five year period, the City would have its rates at a level that would give it the minimum local share needed to meet federal grant requirements" and to "meet funding requirements for overall projects." Resolution 2016-02 sets forth a five-year plan for a $15 million upgrade to the City's water storage and delivery infrastructure.

Consistent with the requirements of Proposition 218, the City provided notice of the public hearing on water rate adjustments and protest ballots with which residents could file an objection. The City received only 40 protest votes at a time when 800 were required for a successful protest. Thus, Resolution 2016-02 went into effect.

Wilde's Petition for Writ of Mandate

After the resolution's adoption, Wilde gathered 145 voter signatures calling for a referendum to repeal the resolution. These signatures were verified. There is no dispute the number of voter signatures gathered by Wilde sufficed for a referendum. Nonetheless, the City's attorney informed Wilde the City refused to place the referendum on the ballot, stating: "The setting of Prop. 218 rates is an administrative act not subject to the referendum process. Also, Proposition 218 provides for initiatives ([Cal.Const. art.] XIII C, sec. 3), but not referenda."

In May 2016, Wilde filed a petition for writ of mandate to place her referendum on the ballot. The City opposed the petition. In July 2016, the trial court denied the writ petition. The trial court agreed with the City that the setting of new water rates constituted an administrative act that was not subject to referendum.

Defeat of Initiative Measure W

While Wilde's writ petition was pending in superior court, she gathered a sufficient number of signatures for an initiative to amend the City's water and sewer rate structure. The City placed Wilde's initiative on the November 8, 2016 ballot as Measure W. Measure W would have implemented a different water and sewer rate structure than that adopted by Resolution 2016-02. Measure W was rejected by the voters.

DISCUSSION

I

Mootness

As this court has previously noted, "An appeal is moot when a decision of 'the reviewing court "can have no practical impact or provide the parties effectual relief." ' (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.) We have the duty to avoid deciding a moot appeal. ' " '[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' (*California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457, 1484.)" (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 848-849.) Consequently, we are compelled to dismiss when it is impossible for this court to grant any effective relief. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 120.)

Here, the City argues this appeal is moot. The City reasons the voters' rejection of Wilde's initiative renders it impossible for us to grant Wilde any relief regarding her referendum. The City reasons the defeat of Wilde's initiative signaled the voters' endorsement of the water rates set by Resolution 2016-02. We disagree based on the differences between Wilde's initiative and her referendum.

Article II, sections 8 and 9, of the California Constitution contain express reservations of the voters' initiative and referendum powers. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 581 (*Pala*).) Article II, section 8, subdivision (a), declares: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." And article II, section 9, subdivision (a), states: "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." The fundamental difference between the voter powers in Article II, sections 8 and 9 is that " '[r]eferenda do not enact law. . . .' (*Referendum Committee v. City of Hermosa Beach* [(1986)] 184 Cal.App.3d 152, 157.) That is the function of the initiative." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 242.) Another key difference is that "tax measures are exempt from referendum. (See *Rossi v. Brown* (1995) 9 Cal.4th 688, 697 [(*Rossi*)].) But the state Constitution imposes no similar limitation on the initiative. (See *id.* at pp. 699-705.)" (*Bighorn-Desert, supra*, 39 Cal.4th at p. 212, fn. 3.)

We reject the City's mootness argument because of the different aims of Wilde's referendum and her initiative. Wilde's initiative sought to replace the City's water rate system with a different set of water rates for Dunsmuir's residents. By contrast, Wilde's referendum did not seek to replace the water rates implemented by the City's adoption of Resolution 2016-02 but instead to repeal the resolution. This means City voters could have rejected Wilde's initiative based on their dislike of the proposed new rates *and* could also be willing to vote for Wilde's referendum based on a concurrent dislike of the water rates established by Resolution 2016-02.

Assuming for the sake of this mootness issue that the water rates adopted by Resolution 2016-02 are subject to challenge by referendum, this court would have the

ability to grant effective relief by ordering Wilde's referendum to be placed on a future ballot. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565 (*Yost*).) In *Yost*, the California Supreme Court ordered that a referendum be placed on the ballot three years after the challenged resolutions were adopted by the city council. (*Id.* at p. 565, 574.) Here, the City does not contend Resolution 2016-02 has been repealed or is no longer effective. Instead, the record shows the water rate adopted by the resolution continues to increase until 2021 in order to upgrade the City's water infrastructure. Consequently, the appeal is not moot because this court has the power to grant effective relief in the form of a disposition that places Wilde's referendum on a future ballot.

II

Referendum

Wilde contends the trial court erred in concluding that Resolution 2016-02 was not subject to voter referendum. The contention has merit.

A.

Principles of Review

In construing sections of the California Constitution, we follow well-settled principles of statutory interpretation. "Our primary objective is to ascertain the legislative intent. In so doing, we first examine the particular words used, keeping in mind that words should be interpreted in the context of the relevant constitutional provisions as a whole. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055; *Schmidt v. Retirement Board* (1995) 37 Cal.App.4th 1204, 1210.) If there is no ambiguity, the constitutional provision should be interpreted according to its plain meaning. (*Mutual Life Ins. Co. v. City of Los Angeles, supra,* 50 Cal.3d at p. 407.) Where an ambiguity exists, we may resort to extrinsic evidence to determine the intent of the Legislature or of the voters. (*Ibid.*)" (*Pala, supra,* 54 Cal.App.4th at pp. 579-580.) In considering the scope of the referendum power, we also heed the tenet

of constitutional interpretation that "[o]ur review of this appeal is also strictly circumscribed by the long-established rule of according extraordinarily broad deference to the electorate's power to enact laws by initiative." (*Id.* at pp. 573-574.)

As the California Supreme Court has emphasized, constitutional "provisions must be construed liberally in favor of the people's right to exercise the reserved powers of initiative and referendum. The initiative and referendum are not rights 'granted the people, but . . . power[s] reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." ' (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, fn. omitted; see also *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241.)" (*Rossi, supra,* 9 Cal.4th at p. 695.)

In conducting our review of the constitutional issue in this case, we apply the de novo standard of review because the facts are not in dispute and the issue is one of law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

B.

Referendum Power

This case turns on the effect, if any, that Proposition 218 might have had on voters' referendum powers. Consequently, we begin by delving into the context of Proposition 218. "Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. 'The purpose of Proposition 13 was to cut local property taxes. [Citation.]' (*County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1451.) Its principal provisions limited ad valorem

property taxes to one percent of a property's assessed valuation and limited increases in the assessed valuation to two percent per year unless and until the property changed hands. (Cal. Const., art. XIII A, §§ 1, 2.) [¶] To prevent local government from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4; *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 6–7.) It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141, and cases cited.) Accordingly, a special assessment could be imposed without a two-thirds vote. [¶] In November 1996, in part to change this rule, the electorate adopted Proposition 218, which added Articles XIII C and XIII D to the California Constitution." (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681–682.)

At the time when voters were presented with Proposition 218, several published decisions had limited the reach of voter initiatives to challenge local tax measures. The first, *Myers v. City Council of City of Pismo Beach* (1966) 241 Cal.App.2d 237 (*Myers*) held that because taxes are not subject to challenge by referendum they are also not subject to challenge by an initiative that is the functional equivalent of a referendum. (*Id.* at p. 243 ["A proposed initiative ordinance cannot be used as an indirect or backhanded technique to invoke the referendum process against a tax ordinance of a general law city . . ."].) *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864 (*Dare*) further limited the initiative power by holding that " 'the Initiative process does not lie with respect to statutes and ordinances 'providing for tax levies." ' " (*Id.* at p. 867.) And *City of Woodlake v. Logan* (1991) 230 Cal.App.3d 1058 (*City of Woodlake*) reiterated the holdings of *Myers* and *Dare* by stating that "[i]t is . . . not permissible to achieve a prohibited purpose by disguising as an initiative a referendum addressing exempted matters." (*Woodlake* at p. 1063.)

In *Rossi, supra*, 9 Cal.4th 688 the California Supreme Court addressed the scope of initiative power shortly before the voters decided on Proposition 218. *Rossi* abrogated *Myers*, *Dare*, and *City of Woodlake* by holding that "the referendum provisions expressly preclude a referendum on statutes and ordinances which impose a tax, no such limitation is imposed on the people's exercise of their reserved initiative power." (*Id.* at p. 693.) The *Rossi* court explained that the "obligation to jealously guard the people's reserved right of initiative precludes the restriction on its exercise suggested by the *Myers* court" and therefore rejected the approach of *Myers* and its progeny. (*Id.* at p. 711.) Even so, *Rossi* based its decision on provisions of both the City and County of San Francisco's charter and article II, section 9, of the California Constitution. (*Id.* at p. 694.)

For purposes of this appeal, the common denominator of the cases *Myers* to *Rossi* was the focus on the extent to which *initiatives* could be used to challenge local tax resolutions and ordinances. From *Myers* through *Rossi*, there was no dispute that tax measures were not subject to *referendum*. (See *Myers, supra,* 241 Cal.App.2d at p. 243; *Dare, supra,* 12 Cal.App.3d at p. 867; *City of Woodlake, supra,* 230 Cal.App.3d at p. 1063; *Rossi, supra,* 9 Cal.4th at p. 693.) The context within which the voters adopted Proposition 218 is important because voters are "presumed to be aware of existing laws and judicial construction thereof." (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11 (*Lance W.*); accord *People v. Valencia* (2017) 3 Cal.5th 347, 369.) And it is with the background of *Myers*, *Dare*, *City of Woodlake*, and *Rossi* that California voters considered Proposition 218 in November 2006.

Proposition 218 is titled the "Right to Vote on Taxes Act." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 1, p. 108.) In its findings and declarations section, Proposition 218 states: "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected

taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (*Ibid.*) Section 5 of the text of Proposition 218 declares, "The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue *and enhancing taxpayer consent.*" (*Id.* § 5, at p. 109, italics added.)

The language added by Proposition 218 to the California Constitution as article XIII C, section 3, states: "Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives."

The language of section 3 is declarative of voters' prerogative to decide on local taxes, assessments, and fees by initiative. In the context of the decision in *Myers, supra,* 241 Cal.App.2d 237 and its progeny, section 3's purpose and function concern the preservation of voters' initiative powers. The language of section 3 is positive in that it confirms voter initiative rights and contains no negative language that limits any power of the voters. Section 3 cannot be read to repeal California voters' referendum power to challenge local resolutions and ordinances. " 'We cannot presume that . . . the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot

pamphlet.' " (*People v. Valencia* (2017) 3 Cal.5th 347, 364, quoting *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857-858.)

Our conclusion that Proposition 218 did not negatively impact voters' referendum power is bolstered by the text, analysis, and arguments for Proposition 218 that were presented to the voters in the ballot pamphlet. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis by the Legislative Analyst for Prop. 218, p. 74.) The summary of Proposition 218 provided by the Legislative analyst in the ballot pamphlet noted that among other things, "The measure states that Californians have the power to repeal or reduce any local tax, assessment, or fee through the initiative process. This provision broadens the existing initiative powers available under the State Constitution and local charters." This summary was echoed in the ballot argument made by proponents of Proposition 218 where they stated: "Proposition 218 expands your voting rights. It CONSTITUTIONALLY GUARANTEES your right to vote on taxes." (*Id.* at p. 77 [rebuttal to argument against Proposition 218], original emphasis.)[2]

Proposition 218's focus on preserving initiative rights on tax levies did not require any focus on the referendum power because taxes have never been subject to referendum. (*Bighorn-Desert*, *supra*, 39 Cal.4th at p. 212.) Insofar as Proposition 218 affected voters' rights, the initiative several times reiterated the goal of increasing voters' rights to vote on local legislation. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 1, p. 108-109.) Section 5 declared the purpose of Proposition 218 was to enhance local taxpayers' consent. (*Id.* at p. 109.) Conspicuously absent from the text of Proposition 218 is any language that limits voter rights. (See *id.* at pp. 108-109.) For this reason, the Legislative Analyst informed voters Proposition 218 "broadens the existing initiative

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[2] We consider these statements because "[b]allot summaries and arguments are accepted sources from which to ascertain the voters' intent and understanding of initiative measures." (*Lance W., supra*, 37 Cal.3d at p. 888, fn. 8.)

powers" of voters. (*Id.* at p. 74.) No mention is made of the referendum power or any proposed limitations on voter power in general.

Proposition 218 was not required to reinvigorate the referendum power for two reasons. First, section 9 is self-executing and does not require implementing legislation at the state or local level. (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 777 (*Midway Orchards*).) Second, the holdings in *Myers*, *Dare*, and *City of Woodlake* addressed only the limits of the voters' initiative powers to challenge local ordinances. (*Myers, supra,* 241 Cal.App.2d at p. 243; *Dare, supra,* 12 Cal.App.3d at p. 867; *City of Woodlake, supra,* 230 Cal.App.3d at p. 1063.) For this reason, the proponents of Proposition 218 had no reason to mention the referendum power when seeking to preserve voter powers. In short, the context, language, and analysis of Proposition 218 all point to expanded initiative powers without any effect on the voters' ability to challenge local legislation by referendum.

Having concluded Proposition 218 did not curtail the voters' referendum powers, we turn to the question of whether the resolution at issue in this case is legislative or administrative in nature.[3]

B.

Whether Resolution 2016-02 Set Water Rates in an Administrative Manner

Wilde contends the trial court erred in finding Resolution 2016-02 is not subject to voter referendum because it represents an administrative action. We agree.

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[3] Wilde and the City agree Resolution 2016-02's water rate charges are fees rather than taxes. Based on the parties' agreement, we assume without deciding that water service charge is a fee under article XIII D when it is imposed, as here, as an incident of property ownership. (See *Bighorn-Desert, supra,* 39 Cal.4th at p. 215.) Consequently, the prohibition on the use of referenda to challenge tax measures does not apply here. (*Id.* at p. 215.)

1. Administrative Acts by Local Government

As the California Supreme Court has explained, "The powers of referendum and initiative apply only to legislative acts by a local governing body (*Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 516, fn. 6). Acts of a local governing body which, in a purely local context, would otherwise be legislative and subject to referendum may, however, become administrative 'in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state.' (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596, fn. 14; see *Housing Authority v. Superior Court* (1950) 35 Cal.2d 550)." (*Yost, supra,* 36 Cal.3d at pp. 569-570.) However, "[c]ourts are not 'to automatically infer that a statutory scheme restricts the power of initiative or referendum merely because some elements of statewide concern are present.' (*DeVita* [*v. County of Napa* (1995)] 9 Cal.4th [763,] 780-781.) '[I]t is erroneous to assume that a statute or statutory scheme that both asserts certain state interests and defers in other respects to local decision making implies a legislative intent to bar the right of initiative. Rather, courts must inquire concretely into the nature of the state's regulatory interests to determine if they are fundamentally incompatible with the exercise of the right of initiative or referendum, or otherwise reveal a legislative intent to exclusively delegate authority to the local governing body.' (*Id.*, at p. 781.)" (*Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826, 838 (*Totten*).)

Acts of a local governmental entity may also be administrative in nature when they merely carry out previously determined policies rather than constituting new legislative policy. "To determine whether an initiative enacts legislation, 'it is the substance, not the form that controls.' (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509.) The test to distinguish a legislative act from an executive or administrative one is well-established: ' " ' "The power to be exercised is legislative in

its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." ' " ' [Citation]; . . . 'Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.' [Citations.]" ' (*City of San Diego v. Dunkl* [(2001)] 86 Cal.App.4th [384,] 399-400, italics omitted.)" (*Park At Cross Creek, LLC v. City of Malibu* (2017) 12 Cal.App.5th 1196, 1203-1204.)

2. Resolution 2016-02

We proceed to consider whether Resolution 2016-02 prescribes a new policy or plan, or whether it administratively carries out previously determined legislative policies and plans.[4] We begin with the factual recitals articulated in Resolution 2016-02. These recitals are uncontested and establish the following about the 2015 Dunsmuir Water Master Plan:

The process of examining water rates and City infrastructure began when "the City commissioned an update to the 1994 Water Rate Master Plan which is designated the 2015 Dunsmuir Water Master Plan." To formulate the new water rate master plan, "the City Council appointed an Ad Hoc Committee of two council [] members and three community members to review, comment and provide recommendations regarding the Water Master Plan update and the Water Utility Rate study." "[T]he 2015 Water Utility

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[4] The City does not argue state law dictates the new water rate structure in Resolution 2016-02 so the City must administratively conform to statewide regulation. (See *Totten, supra,* 139 Cal.App.4th at p. 838.)

Rate Study . . . reported need to increase rates for water utility services to enable replacement of water mains and water storage tank." The ad hoc committee also identified "a significant number of water main sections that should have been replaced years ago, and [the] need to replace over 105 years old water storage tank . . . ." In the notice of public hearing on proposed water rates, the City reported that "the proposed rates are based on the Water Utility Rate study prepared by PACE Engineering . . . ." Ultimately, "the Ad Hoc Committee and the City Council have found that the proposed rates are equitable and fairly distribute the burden of system costs among the various classes of customers."

The new water rates adopted in Resolution 2016-02 are not an administrative adjustment of rates according to the previously established 1994 Water Rate Master plan. The new water rates are the product of a newly formulated set of policies that implemented a new set of choices: to replace a 105-year-old water storage tank as well as selected old water mains. In addition to these decisions to replace infrastructure, the 2015 Dunsmuir Water Master Plan also represents policy choices about how to allocate the new infrastructure costs.

The City's own briefing states that "the legislative decision here took the form of public hearings and the eventual adoption of a water master plan." At oral argument, the City's counsel confirmed the City's position that the water rate master plan is legislative in nature. We agree that the City's action is legislative in nature. " 'Legislative acts of a city which establish general policies and objectives, and the ways and means of accomplishing them, are subject to the referendum process.' " (*Worthington v. City Council of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1140, quoting *W.W. Dean & Associates v. City of South San Francisco* (1987) 190 Cal.App.3d 1368, 1374.) That the new water rate master plan was adopted by resolution, rather than ordinance, does not matter for our purposes because "the referendum may be invoked whether the [local]

measure is denominated an ordinance or resolution." (*Midway Orchards, supra,*220 Cal.App.3d at p. 777.)

Indeed, Resolution 2016-02 represents legislative policymaking in two separate respects. First, the resolution adopted a new water rate master plan that departed from continued maintenance of old water storage and transmission facilities in favor of a $15 million infrastructure upgrade plan. This plan may be sound policy, but it is new policy rather than administration of prior policy. Second, the resolution adjusted the allocation of rates to be charged to the various users of the City's water. This adjustment represented discretionary choices made in a new policy, rather than continuation of the policy of the 1994 water rate plan. Consequently, Resolution 2016-02 is subject to referendum because it is legislative, and not administrative, in nature.

C.

Whether Resolution 2016-02 is Not Subject to Referendum Because of the Essential Government Service Exemption

The City contends Resolution 2016-02 impinges on an essential government service that is not subject to referendum. Specifically, the City argues Wilde's "referendum proposal, relating to essential government services, is improper and would lead to uncertainty in the planning and fiscal administration of government budgets."[5] Wilde counters that "the water rate increases were intended to finance an

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[5] The City does not develop its argument by connecting the essential government service exception to the facts of this case. Indeed, the City's argument on this issue does not contain a single citation to the appellate record. This sort of undeveloped and unsupported argument generally warrants the argument being deemed forfeited. *(Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.) Due to the importance of this issue, however, we exercise our discretion to consider the City's contention. "[T]he application of the forfeiture rule is not automatic and we may excuse forfeiture in cases presenting 'an important legal issue.' " (*Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413, 434, quoting *In re S.B.* (2004) 32 Cal.4th 1287, 1293.) We note, however, the City does not argue Resolution 2016-02

improvement project, not support 'essential government services' . . . ." Wilde has the better argument.

1. Wilde's Referendum

Wilde's petition for a referendum on Resolution 2016-02 stated, "We request the text of Resolution Number 2016-02 be entirely repealed by the Dunsmuir City Council or be submitted to a vote of the people." The petition contained no restraint on the City Council that would have disallowed adoption of a different water rate master plan or revised rate allocation structure. The petition also provided the additional option of voter approval for the 2015 Dunsmuir Water Master Plan.

2. The Essential Government Service Exception

In assessing the City's attempt to invoke the essential government service exception to voters' referendum power, we begin with the California Supreme Court's guidance on this topic in four cases: *Hunt v. Mayor and Council of City of Riverside* (1948) 31 Cal.2d 619 (*Hunt*), *Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832 (*Geiger*), *Rossi, supra*, 9 Cal.4th 688, and *Bighorn-Desert, supra*, 39 Cal.4th 205.

We have already noted that "referendum provisions of the constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power." (*Hunt, supra,* 31 Cal.2d at p. 628.) Even so, "it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental

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implicates an essential government service due to the importance of water supply to residents, but only that Wilde's referendum is "disturbing to proper fiscal administration." Accordingly, we are called to consider only whether Wilde's referendum undermines the City's fiscal administration of its budget so that the trial court properly denied the writ petition.

power, the practical application of which is essential, and perhaps, as in the case of the power to compel the improvement of streets, indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers, and that they do not so apply.' " (*Id.* at pp. 628–629, quoting *Chase v. Kalber* (1915) 28 Cal.App. 561, 569-570.) In short, legislation is not subject to referendum if it precludes the functioning of essential government services. (*Ibid.*)

Geiger involved a county ordinance imposing a sales and use tax as authorized by the Legislature in the Bradley-Burns Act. (*Geiger, supra,* 48 Cal.2d at p. 832.) The *Geiger* court recognized the referendum power as reserved under the California Constitution does not allow for tax measures to be challenged by referendum. (*Id.* at p. 836.) Thus, the question in *Geiger* was whether the Legislature could *statutorily* confer the referendum power despite limitations on the *constitutional* power of referendum. (*Id.* at p. 837.) The *Geiger* court held the Legislature did not have "the power to extend or expend the scope of referendum." (*Ibid.*) The *Geiger* court further held the Legislature did not intend in the Bradley-Burns Act to make county sales and use tax ordinances subject to referendum. (*Ibid.*) In so holding, the *Geiger* court also noted the referendum power did not include local voters' ability to retroactively cripple budgeted spending consistent with statewide policy. As the Supreme Court explained this prohibition on referenda being available to challenge "tax levies or appropriations for the usual current expenses of the state is to prevent disruption of its operations by interference with the administration of its fiscal powers and policies." (*Id.* at p. 840.)

In *Rossi, supra*, 9 Cal.4th 688, the California Supreme Court again revisited the essential government services exception to the referendum power. The *Rossi* court reiterated that "if a tax measure were subject to referendum, the county's ability to adopt

a balanced budget and raise funds for current operating expenses through taxation would be delayed and might be impossible. As a result, the county would be unable to comply with the law or to provide essential services to residents of the county." (*Rossi*, *supra*, 9 Cal.4th at p. 703.)

In *Bighorn-Desert*, the California Supreme Court held "that section 3 of article XIII C grants local voters a right to use the initiative power to reduce the rate that a public water district charges for domestic water." (*Bighorn-Desert*, *supra*, 39 Cal.4th at p. 209.) Nonetheless, the high court cautioned that "this new constitutional provision does not grant local voters a right to impose a voter-approval requirement on all future adjustments of water delivery charges, and that the proposed initiative at issue here was properly withheld from the ballot because it included a provision to impose such a requirement." (*Ibid.*) Thus, *Bighorn-Desert* and *Rossi* teach that voters cannot throw government finances into chaos by vitiating the regularly budgeted expenditures for essential government services.

3. Whether the Exception Applies to Resolution 2016-02

On the facts of this case, we conclude the essential government services exception does not bar Wilde's referendum from the ballot. Wilde's referendum was not aimed at previously existing City water rates or water delivery services. Had Wilde's referendum been placed on the ballot and passed, it would have had the effect of reverting to the City's 1994 Water Rate Master Plan. Rather than invalidating the regular expenditure of previously budgeted funds for essential government services, Wilde's referendum would have prospectively cancelled the City's newly adopted master plan to spend $15 million on infrastructure and reallocation of water costs. In essence, Resolution 2016-02 constitutes policymaking legislation that is subject to referendum.

The fact that Resolution 2016-02 includes a financial component does not insulate it from challenge by voter referendum. The resolution does not represent the ordinary

working or budgeting of the City. As the City itself emphasizes in its briefing, the new water rate master plan was the product of an ad hoc group that studied the City's water infrastructure and billing rate structure. The Resolution represents policy choices and marks out a different approach to the City's water infrastructure and rates. For this reason, Wilde's referendum was not subject to the exception on voter referendum powers made for measures that will undermine ongoing and essential governmental services and budgeting.

We reject the City's reliance on *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311. *Citizens for Jobs* arose out of the voters' approval of an initiative that required future electorate ratification of certain land use projects prior to their effect – even if approved by the board of supervisors. (*Id.* at p. 1328.) *Citizens for Jobs* held the initiative was "clearly beyond the power of the electorate" for several reasons, one of which was that "[i]t interferes with the essential government functions of fiscal planning and land use planning." (*Id.* at p. 1324.) Wilde's referendum, however, contains no prohibition on the City's future ability to study, plan, or implement a new water rate plan in the event voters approve the referendum. Wilde's referendum seeks repeal of Resolution 2016-02 without constraining the City in its ability to formulate and implement a different water rate master plan.

For the same reason, we are not persuaded by the City's reliance on *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466. *City of Atascadero* involved a proposed initiative ordinance that "would have required the City to submit any revenue-raising measure to the voters for their approval before the measure could be implemented." (*Id.* at p. 468.) The proposed initiative was invalidated as a voter usurpation of the power to tax and as "an unlawful attempt to impair essential governmental functions through interference with the administration of the City's fiscal powers." (*Id.* at p. 470.) The continuing validity of this decision is questionable after the California Supreme Court in

Rossi mentioned *City of Atascadero* as one of the decisions in harmony with the overruled decisions in *Myers, supra,* 231 Cal.App.2d 237 and *Dare, supra,* 12 Cal.App.3d 864. (*Rossi, supra*, 9 Cal.4th at p. 705.) In any event, as we explained in our examination of *Citizens for Jobs, supra,* 94 Cal.App.4th 1311, Wilde's referendum proposes to repeal Resolution 2016-02 without limiting the City's future ability to study, plan, and implement a new water rate master plan.

Because Wilde's referendum does not undermine the City's ability to provide essential government services, she is entitled to have her referendum placed on the ballot.

DISPOSITION

The judgment of dismissal of Leslie T. Wilde's petition for a writ of mandate is reversed and the case is remanded to the trial court with directions to issue a peremptory writ of mandate ordering the voter registrar to place Wilde's referendum on the ballot for the next municipal election. Leslie T. Wilde shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
HOCH, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
MURRAY, J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Leslie T. Wilde v. City of Dunsmuir, et al**
Case Number: **TEMP-9W5WS59C**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Title(s) of papers e-served:

Filing Type	Document Title
PETITION FOR REVIEW	Petition for Review
REQUEST FOR JUDICIAL NOTICE	Motion for Judicial Notice
ADDITIONAL DOCUMENTS	Declaration of John Kenny -MTN for Judicial Review

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John Kenny Kenny & Norine 39206	jskenny@lawnorcal.com	e-Service	12/21/2018 9:12:31 AM
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/s/John Kenny
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Kenny, John (39206)
Last Name, First Name (PNum)

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