No Fees per Gov. Code § 6103

S243360

IN THE SUPREME COURT OF CALIFORNIA

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

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

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

OPENING BRIEF ON THE MERITS

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RAMONA MUNICIPAL WATER DISTRICT

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ISSUE PRESENTED

Must a fee-payor exhaust administrative remedies by participating in the public hearing required by California Constitution, Article XIII D, section 6 before challenging the propriety of a proposed property-related fee or charge?

INTRODUCTION

Proposition 218 requires public agencies to conduct a noticed public hearing prior to imposing or increasing any property-related fee or charge. The enactment of Proposition 218 gave fee-payors significant power over local revenue-raising measures and specifically

the ability to prevent the imposition of a fee or charge if a majority of property owners file written protests. In the absence of a majority protest, all protests against a proposed fee or charge must be considered. The voters likewise shifted the burden to the District to establish its rates comply with Proposition 218's substantive requirements. The voters demanded and received the right to participate in the decision-making process before any new or increased fee or charge goes into effect and have an obligation to exercise that right before seeking a judicial remedy. The mandatory public hearing process enacted by the voters is a two-way street. Public agencies cannot consider a protest that is never made.

Plaintiffs Eugene Plantier, Progressive Properties Incorporated and Premium Development LLC are all commercial property owners and lead plaintiffs in a class action lawsuit filed against Defendant Ramona Municipal Water District (the "District") challenging the methodology used by the District to set its sewer service rates in 2012, 2013 and 2014 under Proposition 218. The District conducted noticed public hearings prior to setting rates in each of those years, but did not receive a single written or oral protest objecting to its rate-setting methodology or asserting a failure to comply with Proposition 218. The lead plaintiffs uniformly testified they chose not to participate because

they believed the Proposition 218 protest and public hearing process was a "waste of time."

The trial court determined Plaintiffs' failure to challenge the District's rate-setting methodology in connection with the 2012-2014 Proposition 218 public hearings barred the class action lawsuit for failure to exhaust administrative remedies. Exhaustion of the Proposition 218 public hearing process serves the very purpose of Proposition 218 in facilitating communication between government and the people it serves and enhancing public consent.

The Court of Appeal reversed and found there was no duty to exhaust with regard to a challenge to the methodology used by the District in setting its rates and that the administrative remedies provided by Proposition 218 were inadequate. The decision of the Court of Appeal draws an artificial distinction between a rate increase and the methodology used to set rates that is carried forward and subsumed within an increase each time a new fee is adopted. It also unnecessarily minimizes the voters' directive that elected officials conduct a noticed public hearing and "consider all protests," in finding participating in the hearing is unnecessary to exhaust fee-payors' remedies.

There is a duty to exhaust when the law provides for notice, an opportunity to protest and a hearing. The voters are presumed to be aware of the law when enacting a constitutional initiative. Plaintiffs' class action lawsuit affects every fee payor in the District, yet Plaintiffs denied the District and the public an opportunity to consider their claims. Participation in the Proposition 218 process would have permitted the District to address factual issues, apply the expertise of experts, allowed the community as a whole to consider and weigh in on the merit of Plaintiffs' claims, and permitted the creation of a record to facilitate judicial review.[1] The Court of Appeal's determination that no duty to exhaust exists, based on speculation a majority protest was unlikely, applied an incorrect criterion focused on "winning" rather than furthering the policy reasons behind requiring exhaustion.

The District had the authority to revise rates and to take the necessary steps to change its rate-setting methodology following its Proposition 218 hearings if determined to be appropriate. Plaintiffs' failure to participate in the Proposition 218 public hearings denied the District the opportunity to consider Plaintiffs' challenge to its

[1] The parties stipulated at trial to the submission of a joint administrative record.

methodology prior to approving sewer service rates and setting the District's final budgets over a period of several years.

STATEMENT OF CASE

A. Proposition 218.

In November 1996, California voters approved the enactment of a constitutional initiative commonly known as Proposition 218 ("Right to Vote on Taxes Act"), one of a series of voter initiatives imposing certain limits on state and local governments' taxing authority. (See *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 258-260.) Proposition 218 added articles XIII C and XIII D to our Constitution to impose new limitations on local government taxes, assessments, and a newly defined class of "property related fees." These new limitations allocate power between elected governing bodies of local agencies and voters, tax and fee-payors and impose new procedural and substantive restrictions on local governments. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220 ("*Bighorn*").) Among these restrictions, and at issue here, are the requirements of article XIII D, section 6 ("Section 6") regarding new and increased property-related fees.

"Proposition 218 passed for the stated purpose of "'limiting local government revenue and enhancing taxpayer consent.'" (*Jacks*, 3

Cal.5th at 267; citation omitted.) Prior to Proposition 218's enactment, locally elected governing bodies held most of the power over local revenue-raising measures. Proposition 218 shifted the power over taxation to residents and property owners and specifically gave them the power to prevent or reduce any local tax, assessment or fee. (See, e.g., *Understanding Proposition 218 Legislative Analyst's Office*, Dec. 1996, Chp. 1 ["Proposition 218 changes the governance roles and responsibilities of local residents and property owners, local government, and potentially, the state. . .Proposition 218 shifts most of the power over taxation from locally elected governing boards to residents and property owners."].)[2] This Court has observed that the notice and hearing requirements set forth in Section 6 subdivision (a) facilitate communication between local governments and those they serve, and the substantive restrictions on property-related charges in subdivision (b) should allay fee-payors' concerns that government service charges are too high. (*Bighorn,* 39 Cal.4th at 220.)

a. Procedural Requirements.

The enactment of Proposition 218 placed detailed procedural requirements on an agency seeking to impose or increase property-

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[2] See http://www.lao.ca.gov/1996/120196_prop218/understanding_prop218_1296.html.

related fees or charges to ensure voter participation. Pursuant to Section 6 (a)(1), an agency must: identify the parcels on which a fee is proposed; calculate the amount of the fee; and provide written notice by mail of the proposed fee to the record owner of each identified parcel. The written notice must provide the amount of the fee proposed upon each parcel, the basis upon which the proposed fee was calculated, the reason for the fee, and the date, time, and location of the public hearing on the proposed fee. (*Ibid.*)

Section 6(a)(2) also requires the agency to conduct a public hearing regarding the proposed fee:

> The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(§ 6(a)(2).) Thus, not only do fee-payors have the ability to prevent the imposition of a fee or charge with a majority protest, they also have created a process where "all" written and oral protests must be considered. The public hearing and protest requirement for Proposition 218 provides both the public agency and its fee-payors the opportunity

to address and investigate cost-of-service issues before costly litigation and furthers Proposition 218's goal of enhancing taxpayer consent. (*Bighorn*, 39 Cal.4th at 220 [The power sharing under Proposition 218 promotes decisions that are "mutually acceptable and both financially and legally sound."])

b. Substantive Limits.

Section 6 (b) provides a fee imposed on property owners shall not be extended, imposed, or increased by any agency unless certain substantive requirements are satisfied. Revenues derived from the fee cannot exceed the funds required to provide the property-related service. (§6(b)(1).) The funds arising from the fees may not be used for any purpose other than that for which the fee was imposed. (§6(b)(2).) The amount of the fee imposed on any parcel or person as an incident of property ownership cannot exceed the proportional cost of the service attributable to the parcel. (§6(b)(3).) No fee may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. (§6(b)(4).) A fee may not be imposed for general government services where the service is available to the public at large in substantially the same manner as it is to property owners. (§6(b)(5).)

Proposition 218 also altered litigation procedures for fee challenges. The last sentence of Section 6(b)(5) provides: "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." (§6(b)(5).) Similarly, Proposition 218 changed the standard of judicial review applicable to an agency's decision from deference to independent judgment. (*Silicon Valley Taxpayers Ass'n. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443-450; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912 [No deference given to District's determination of the constitutionality of its rate increases.].)

Equally as important as what Proposition 218 changed is what it left unchanged. Proposition 218 says nothing about procedural or jurisdictional prerequisites to suit, such as the exhaustion doctrine. Voters shifted the burden of proof and standard of review applicable to fee challenges, but not other rules of procedure. (*In re Byrce C.* (1995) 12 Cal.4th 226, 231 [expression of some things in a statute implies the exclusion of other things not expressed].)

B. The District's Annual Rate-Setting Process.

1. The District's Authority Over Sewer Service Rates.

The District, which is organized and operates as a municipal water district (Wat. Code §§71000 *et seq.*), provides sewer/wastewater,

water, fire protection, parks and recreation and other services to approximately 40,000 people living in Ramona, California (approximately 6,900 parcel owners). [Slip Opin., pp. 4, 17.] The District has authority to "prescribe, revise, and collect rates or other charges for the services and facilities furnished pursuant to Article 2 of the California Water Code." (Wat. Code §71670.)

Revenues collected from service charges are used to pay operating and maintenance expenses. (*Id.* §71670.) The District is obligated to set rates sufficient to cover operating and maintenance expenses of its sewer service facilities. (*Id.* §72093 ["The board shall determine the amounts necessary to be raised by taxation during the fiscal year and shall fix the rate or rates of tax to be levied which will raise the amounts of money required by the district."]; see *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892 [Proposition 218 cannot be used to compel a district to "set water rates so low that they are inadequate to pay the costs listed in [Water Code section 31007]."].)

2. The District's EDU Methodology.

Providing safe and dependable sewer services to a community requires that the wastewater systems bring in sufficient, stable revenues to cover costs and meet future needs to maintain the facilities.

A system whose rates are too low not only struggles financially, but also compromises its ability to remain operational and to meet the users' needs for treating and disposing of its wastewater.

The District, like many other local agencies, sets the costs of sewer services based on each parcel's assigned Equivalent Dwelling Units ("EDUs"), which are determined by the estimated wastewater flow and strength from the type of use being conducted on the respective parcel. [7 AA 1246-1250.] The District's EDU schedule has over 20 category types with industry-accepted flow and strength estimates. A number of EDUs is assigned to each category of use taking into account numerous factors. [7 AA 1247-1248.]

The District determines its sewer service charge for the following fiscal year by dividing the total amount of projected revenues needed to cover annual budgeted costs by the total number of projected annual EDUs to be served, in order to calculate an annual fixed sewer service charge "per EDU" for each of its two sewer plant service areas. The sewer service charge for a given parcel is based on its use and assigned number of EDUs. [Slip Opin. p. 4.] Projected revenues needed and projected total EDUs for each sewer service area are based on the previous year's actual numbers and are adjusted to provide for

anticipated facility projects, growth and other variables. [5 AA 872-881.]

The District determines the total expected cost of the maintenance and operations for wastewater services for the upcoming year, and the projected revenues needed to provide those services, by engaging in a multi-month collaborative effort among its operations, finance, and engineering departments. [*Id.*] The EDU methodology ensures each parcel owner is responsible for paying his or her proportional share of the revenues needed for sewer services to be available to their property. [5 AA 894:1-8.] It also ensures the District collection systems, wastewater treatment and disposal are adequate based on the capacity required by each property. [5 AA 1053-1055.][3]

[3] Plaintiffs' complaint challenges whether the District's EDU methodology complies with the proportionality requirement of Section 6(b)(3) of Proposition 218. Plantier testified that his commercial property was being charged too much because it was vacant for a period of time. However, the District's collection systems, wastewater treatment and disposal had to be adequate to immediately handle the capacity of sewage that could be put into the District system from that property at any given moment. [5 AA 1053-1055.] Regardless, the merit of Plaintiffs' claim has not been adjudicated. [Slip Opin., p. 4, fn.4.]

3. The District's Notices of Hearing Regarding Proposed Increases of Wastewater Rates.

In 2012, 2013 and 2014, the District mailed thousands of notices each year notifying all parcel owners regarding the location and time of the Proposition 218 hearings, in addition to providing a summary of the reasons for the proposed rate and fee increases. [5 AA 880, 884-887; 6 AA 1074-1077, 1150-1153, 7 AA 1342-1345.] The notices, which were mailed out 45-days before the public hearings, listed the new, increased annual sewer fees to be considered at the meetings based on the anticipated cost of providing the service to fee-payors. [*Id.*]

In a section titled "PUBLIC HEARING," the notices provided written protests may be submitted by mail, in person, or at the public hearing, and instructed that protests must be received "prior to the close of the Public Hearing, which will occur when public testimony on the proposed rate increases is concluded." [5 AA 886-887; see, e.g., 6 AA 1076.] Fee-payors were explicitly notified that the District Board "will hear and consider all written and oral protests to the proposed rate increases at the Public Hearing," and that at the end of the hearing, the Board "will consider adoption of the proposed rate and fee increases." [6 AA 1077.] Finally, the notices provided that if written protests against the proposed rate or fees are not presented by a majority of property

owners or customers, the District Board "will be authorized to impose the respective rate and fee increases." [*Id.*]

4. The District's Annual Proposition 218 Public Hearing.

In compliance with Proposition 218, the District holds an annual public hearing to address the following year's anticipated sewer services fees in conjunction with approving the District's annual budget. [5 AA 877, 880-881, 899.] Agencies, such as the District, have a significant interest in ensuring the certainty of revenue so they can stabilize their finances and plan for and provide public services. The substantive limitations of Proposition 218 have led local government agencies to implement extensive procedures to support, explain and publicize their rate-setting methodologies and the need for services provided to the public.

Agencies, such as the District, retain legal and financial advisors, including professional ratemaking consultants and cost-of-service experts. The trial court heard testimony that District's public hearings are heavily attended by property owners, members of the public, the press, engineers and experts involved with the calculation of sewer rates. Additionally, District staff members, including the General Manager, Chief Financial Officer, Department Managers associated

with water and wastewater, and the District Engineer attend. [5 AA 878-880; 8 AA 1647-1648.] The hearings include a presentation regarding rates and the impact on revenues and expenses. [*Id.*]

The hearings are open to verbal protests from the public and all written protests are formally received. [5 AA 891-892.] In the absence of a written majority protest, the District still considers all public protests at the hearings. [5 AA 921-922; 5 AA 881 ("The Board is always very interested in input that they get from the public, and is very sensitive to input from the public on rates and expenses.").] The District's EDU methodology is a part of the discussion at the Proposition 218 hearing because it necessarily impacts sewer rates. Any challenge to the District's EDU methodology may be raised at the Proposition 218 hearing. [5 AA 926-927 ("I think if any member of the public wanted to discuss that schedule that would be the appropriate forum for them to do that.").]

Participation in the Proposition 218 public hearing allows decision-makers to review the entire record, respond to residents' concerns, and apply their expertise before making a final decision. The trial court believed District employees who testified a challenge to the District's EDU methodology would have received careful consideration. [8 AA 1654.] After all of the input is received, the Board closes the

public hearing, considers the information and votes on what adjustments, if any, they wish to authorize. [5 AA 892.] Even when there has not been a majority protest, the Board has authorized an amount lower than a proposed rate on the notice following hearing. [5 AA 887-892.] Once the budget is approved, the County is notified regarding the parcels that are subject to the sewer charge and sends out the billing. [5 AA 922-923.]

C. Procedural Background.

1. Plantier's Dispute with the District and Class Action Lawsuit.

In March 2012, the District discovered significant amounts of grease were being deposited into the District's system from a restaurant located on commercial property owned by lead class representative Plantier. Investigation revealed the restaurant lacked an Industrial Waste Discharge Permit in violation of the District's legislative code and that the EDU capacity assigned to the property was incorrect. [5 AA 943-944; 6 AA 1064-1065.] Plantier was notified of the deficiencies, but refused to accept responsibility for dumping grease into the sewer system or paying for the sewer capacity required at his property. [*Id.*; 8 AA 1649.] Instead, Plantier enlisted the support of a consumer advocacy group to send letters to the District regarding the

District's deficiency notice and ultimately aligned himself with another commercial property owner as lead representatives in this class action lawsuit. [8 AA 1546-1565.] However, none of the actions undertaken by Plantier or his representatives were in connection with the Proposition 218 public protest and hearing process or provided the District an opportunity to consider Plantier's contentions at the time it was setting sewer service fees and its budgets.

Plaintiffs' lawsuit alleges the District's EDU billing system and wastewater fees violate the proportionality requirements set forth in Section 6(b)(3) and seeks a refund of alleged overcharges since November 2012, placing the fees charged by the District in 2012, 2013 and 2014 in issue. [1 AA 1-2, ¶1; 1 AA 8.] There is no dispute the challenged fees were for the purpose of funding the wastewater operations of the District and that the fees were adopted as specified in Section 6, subdivision (a). Therefore, if Plaintiffs were to prevail in establishing certain residents were overcharged, other residents would necessarily owe more to cover the District's cost of providing sewer services. [Slip Opin., p. 19.]

The lead Plaintiffs did not file a protest or written objection, nor did they present an oral protest at the Proposition 218 public hearings held by the District "in 2012, 2013, or 2014. Instead, they testified that

despite receiving the rate-setting notices, they did not attend or participate because they felt the public hearings were a "waste of time." [8 AA 1650-1651.] While a handful of written protests were received in 2012-2014, none of the protests challenged the District's methodology underlying its rate-setting or the District's compliance with Proposition 218's proportionality requirement contained in Section 6, subdivision (b)(3) that is the subject of this lawsuit. [8 AA 1648-1649.]

2. The Trial Court Finds a Failure to Exhaust.

Following a bifurcated bench trial, the trial court dismissed Plaintiffs' lawsuit based on their failure to exhaust administrative remedies. [8 AA 1639-1655, 1653, ¶4 (participation in the public hearing is the center piece of the process set up by Proposition 218).] The trial court rejected Plaintiffs' claim that letters sent after the Proposition 218 public hearings were concluded and rates were set satisfied the duty to exhaust: "[t]he time to protest the EDU regime was in the context of the annual Proposition 218/budget process, when the District was considering rates and revenue requirements for the coming year." [8 AA 1655, ¶1.] As found by the trial court, allowing Plaintiffs to bypass the public hearing process set up by Proposition 218 and to sue for refunds "may very well threaten the viability of [the District]." [*Id.*]

3. The Court of Appeal Reverses.

The Court of Appeal found Plaintiffs' class action lawsuit was not barred by the failure to exhaust the administrative remedies set forth in Section 6, reasoning (1) the substantive challenge involving the method used by the District to calculate its wastewater service fee is outside the scope of administrative remedies; and (2) under the facts of this case those remedies are inadequate. [Slip Opin., p. 3.] Based on this logic, Plaintiffs were "not required to exhaust the administrative remedies in subdivision (a)(2) of section 6 either by objecting in writing beforehand to the annual increase in wastewater service fees District sought to impose in 2012, 2013 and 2014 and/or by appearing at the hearings in those years to challenge publicly such increases." [Slip Opin., p. 26.]

STANDARD OF REVIEW

An appellate court employs a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.) Questions regarding the meaning of Proposition 218 are also reviewed de novo. (*Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 287.)

LEGAL DISCUSSION

A. Plaintiffs' Action is Barred for Failure to Exhaust Administrative Remedies.

1. Plaintiffs Were Required to Exhaust All Available Remedies.

It is well-settled that when remedies before an administrative forum are available, a party must in general exhaust them before seeking judicial relief. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080; see *Acme Fill Corp. v. San Francisco Bay Conservation etc. Com.* (1986) 187 Cal.App.3d 1056, 1064 [when multiple remedies are available, all must be exhausted before judicial review is available]; *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447-1448 [exhaustion required under Government Code and Fairfax Tax Code].) A remedy exists if the law provides for notice, opportunity to protest and a hearing. (*Wallich's Ranch Co. v. Kern County Pest Control District* (2001) 87 Cal.App.4th 878, 883 ("*Wallich's Ranch*").) An administrative remedy, even if not comprehensive or detailed, must be exhausted. (See *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 734 [registering a protest and submitting a written objection challenging the manner of financing a business improvement district

satisfied the aggrieved owner's obligation to exhaust administrative remedies].)

There is a duty to exhaust regardless of whether the administrative remedy is couched in permissive language. (*County of Los Angeles v. Farmers Ins. Exchange* (1982) 132 Cal.App.3d 77.) Even if the intent regarding exhaustion of administrative remedies is not entirely clear, courts may require it when "the administrative agency possesses a specialized and specific body of expertise in a field that particularly equips it to handle the subject matter of the dispute." (*Jonathan Neil & Assocs., Inc. v. Jones* (2004) 33 Cal.4th 917, 930, quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 87.) This Court has held that "[d]ue process does not require any particular form of notice or method of procedure. If the statute provides for reasonable notice and a reasonable opportunity to be heard, that is all that is required. [Citations.]" (*Drummey v. State Bd. Funeral Directors and Embalmers* (1939) 13 Cal.2d 75, 80-81 [superseded by statute on other grounds].)

Exhaustion requires objections be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 [rejecting methodological challenge to reports by city's financial expert because plaintiffs did not

present competing financial analysis]; *Evans,* 128 Cal.App.4th at 1144 [failure to exhaust absent specific objections to data gathering, compiling methods, or to analysis in report].) Objections must also be received so that they may be considered in an agency's decision-making process. (*Id.* at 1143 [detailed letter submitted a month after agency decision too late].)

Exhaustion of remedies applies whether or not it may afford complete relief and even if the unexhausted administrative remedy is no longer available. (*Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 657.) "[E]ven where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief." (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687, quoting *U.S. v. Superior Court* (1941) 19 Cal.2d 189, 195; *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 93 [exhaustion applies to constitutional challenge to zoning ordinance].) "The exhaustion doctrine applies generally whenever judicial relief is sought where a remedy is available at the administrative level. It applies to *any* action for judicial relief, whether it be a writ or not...." (*Lopez v. Civil Service Com.* (1991) 232 Cal.App.3d 307, 315; emphasis original.)

The rule of exhaustion is not a matter of judicial discretion, but rather is a jurisdictional prerequisite to resort to the courts. (*Roth,* 53 Cal.App.3d at 687 [lawsuit barred because plaintiffs failed to object at the City Council hearing to an assessment on their property].)

2. Policies Underlying the Exhaustion Doctrine.

The "'essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.'" (*Evans,* 128 Cal.App.4th at 1137, quoting *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198; emphasis original.) "[E]xhaustion of administrative remedies furthers a number of important societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; (3) mitigating damages; and (4) promoting judicial economy." (*Rojo,* 52 Cal.3d at 72). "Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' [Citation.] It can serve as a preliminary administrative sifting process

[citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]'" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874–875; citations omitted.) Requiring exhaustion of remedies also furthers the separation of powers and gives agencies the opportunity to defuse disputes without litigation and to apply their expertise to facilitate judicial review when litigation cannot be avoided. (Cal. Const., Art. III §3; *Jonathan Neil & Associates, Inc.,* 33 Cal.4th at 930.)

B. Proposition 218 Provides Administrative Remedies for a Methodological Challenge to the District's Rate Setting.

1. Rules of Construction.

Similar rules apply when construing constitutional provisions and statutes, including those enacted through voter initiative. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933.) This Court has stated: "When interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the intent of those who enacted the constitutional provision at issue.' [Citation.] When, as here, the voters enacted the provision, their intent governs. [Citation.] To determine the voters' intent, 'we begin by examining the constitutional text, giving the words their ordinary meanings.' [Citation.]" (*Bighorn,* 39 Cal.4th at 212; citations omitted.) '"When

statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.' [Citations.]" (*People v. Benson* (1998) 18 Cal.4th 24, 30, citations omitted.) "If 'the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.' [Citation.]" (*People v. Hazelton* (1996) 14 Cal.4th 101, 105 citations omitted.)

When construing initiatives, this Court generally presumes electors are aware of existing law. (*California Cannabis Coalition,* 3 Cal.5th at 935.) When interpreting a provision of the state Constitution, courts are supposed to "adopt a construction 'that will effectuate the voters' intent giv[ing] meaning to each word and phrase, and avoid absurd results. [Citations.]" (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 409 (quoting *People v. Stringham* (1988) 206 Cal.App.3d 184, 196-197).) An interpretation of Proposition 218 to exclude challenge of an agency's methodology underlying a proposed increased fee from the detailed notice and hearing requirements of Section 6(a) fails to apply these well-established principles and vitiates Proposition 218's stated purpose of limiting local government revenue and enhancing taxpayer consent. (See Art. XIII D, §5; see also *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747,

759 [the interpretation of a statute should be practical, not technical, and should result in wise policy rather than mischief or absurdity."].)

2. Section 6, Subdivision (a) and Subdivision (b) Inform Each Other and Should be Construed Together.

The Court of Appeal's decision incorrectly concludes the administrative remedies under Proposition 218 are inapplicable to a "substantive challenging involving the method used by the District to calculate its wastewater service fees." [Slip Opin., pp. 3, 13-16.] The decision also suggests a fee can be subject to Section 6(b) without also being subject to Section 6(a), but does not provide any explanation or rationale for why voters who adopted Proposition 218 might have intended such a distinction. [Slip Opin., p. 16 ("...the administrative remedy in subdivision (a)(2) of section 6 is limited to a protest over the imposition of, or increase in, rates for water and wastewater service fees, as opposed to protests over whether District complied with the substantive requirements of subdivision (b) of this section").]

The detailed notice and hearing requirements imposed by the voters in Section 6 must be read in tandem with the substantive limits placed on decision-makers as they plainly inform one another. Subdivision (a)(1) requires notice "of the basis upon which the amount of the proposed fee or charge was calculated" and "the reason for the fee

or charge." Subdivision (a)(2) requires "the agency shall consider all protests against the proposed fee or charge." Subdivision (b) provides substantive rules for the "calculation" of the property related fee and the "reasons" for which they may be imposed. Plaintiffs' class action lawsuit alleges fees may not exceed the proportionate cost to serve any parcel. (§6(b)(3).) The voters intended that these provisions be enforced together and that a substantive challenge to a proposed fee based on subdivision (b) be made at the majority protest hearing provided by subdivision (a).

3. The Methodology Underlying a Proposed Fee is Subject to Challenge Each Time a Fee is Imposed or Increased.

The decision of the Court of Appeal draws an artificial distinction between challenges to increased rates and the methodology used to set those rates. The Proposition 218 Omnibus Implementation Act, specifically Government Code section 53750 (h)(1)(B), treats agency action proposing a rate increase and the methodology underlying that rate as intertwined. Government Code section 53750 defines an increased fee, in pertinent part, as follows:

> For purposes of Article XIII C and Article XIII D of the California Constitution and this article:
>
> * * *

> (h)(1) "Increased," when applied to a tax, assessment, or property-related fee or charge, means a decision by an agency that does either of the following:
>
> (A) Increases any applicable rate used to calculate the tax, assessment, fee or charge.
>
> (B) Revises the methodology by which the tax, assessment, fee, or charge is calculated, if that revision results in an increased amount being levied on any person or parcel.

(Gov. Code §53750 (h)(1)(A) and (B); see also *AB Cellular LA, LLC*, 150 Cal.App.4th at 761 [city's decision to implement federal law and expand cell tax to cover all airtime was revision of methodology requiring voter approval under Proposition 218].)

A crucial issue in any rate-setting hearing is the manner in which "the proportional cost of the service is attributed to the parcel," including the manner in which an agency chooses to attribute costs, whether based on customary average usage (e.g. the EDU method) or metered usage or something else. For the same reason, the notices required by Proposition 218 must include information regarding the amount of the proposed fee and the basis upon which the amount of the fee is calculated. (§6(a)(1).) Once Proposition 218 is triggered by an agency imposing a new or increased rate, the entirety of the fee structure is placed in issue and the agency bears the burden to support it.

There is nothing in the language of Proposition 218 or the notices sent by the District that limited a property owner from challenging the methodology used to set the increased fees proposed in 2012-2014. To interpret Section 6 as imposing such a limitation constrains, rather than furthers, the communications between local governments and those they serve and the ability of fee-payors to protest property-related fees believed to be too high. (See *Bighorn*, 39 Cal.4th at 220-221.) It also imposes a tremendous burden on agencies to prepare for and conduct public hearings, but denies an agency the opportunity to consider objections to its rate-setting methodology so that it may apply its expertise prior to setting its rates and approving its budget.

In *San Diego Water Authority v. Metropolitan Water District of Southern California* (2017) 12 Cal.App.5th 1124, the Court of Appeal for the First District analyzed whether a challenge to the defendant agency's rates was untimely because the complaint challenged the water rate structure adopted nearly a decade prior to the specific fees and rates subject to attack. (*Id.* at 1142.) In rejecting the distinction urged by the defendant between a challenge to rate *structure* and specific annually adopted *rates*, the Court of Appeal found the argument untenable:

> Metropolitan concedes 'that the opportunity to challenge the *amount* of Metropolitan's rates renews with each rate-setting' but argues that the Water Authority's 2010 and 2012 lawsuits are untimely because they challenge the water rate structure adopted in 2002. The argument is untenable. Metropolitan first adopted its water rate structure in 2002 but it has readopted that structure in subsequent years when setting rates founded on it. Metropolitan's reenactment and extension of that rate structure to subsequent years, not its initial adoption, is the action being contested.

(*Id.,* emphasis in original.) The Court of Appeal further noted that "'[w]ere all subsequent reenactments...immune to judicial challenge or review,' 'there would be no effective enforcement mechanism to ensure that local agencies' base rates on cost of service." (*Id.*, quoting *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 702-703.)

The distinction drawn in the Court of Appeal's decision between challenges to the method used by the District to calculate its sewer service charges and challenges to the increase in a proposed fee or charge is equally untenable. The District's rate structure was subsumed within its proposed rates for 2012-2104. The procedure provided by Proposition 218 to challenge new or increased fees necessarily includes any challenge to the rate-setting structure applied to determine those fees. During each of the years for which Plaintiffs seek a refund, the District increased sewer service fees using its EDU

methodology so as to ensure the costs recovered were sufficient to operate and maintain the District's collection systems, wastewater treatment and disposal. Allowing a party to bypass the Proposition 218 public hearing process disserves Section 6 and threatens the viability of public agencies that may be faced with requests for refunds years after the challenged rates were approved.

4. *Wallich's Ranch* Correctly Determined Exhaustion of Administrative Remedies in the Context of a Proposition 218 Challenge Was Required.

The decision in *Wallich's Ranch, supra,* involved a plaintiff's failure to exhaust administrative remedies under the Citrus Pest District Control Law (Food & Agric. Code §§ 5401 *et seq.*) prior to challenging the imposition of citrus pest control assessments, including on constitutional grounds under Propositions 62 and 218. (87 Cal.App.4th at 882.) Even though the Pest Control Law requires no notice to property owners of the proposed assessment or opportunity to protest, it does provide for notice, opportunity to protest, and a hearing on the question of the adoption of the proposed district budget in fixing the amount of the assessment. It allows written protests to be made by owners of citrus acreage "at any time not later than the hour set for hearing objections to the proposed budget" (Food & Agric. Code §8564), and requires the board at the hearing "to hear and pass upon all

protests so made" and states that the board's decision on the protests "shall be final and conclusive." (*Id.* at §8565.)[4]

Following the reasoning in *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 642, the Court of Appeal in *Wallich's Ranch* ruled that in order to challenge a citrus pest control assessment, one must first challenge the district budget, at which time the district has an opportunity to address the perceived problems and formulate a resolution. (*Id.* at 885.) The lack of specific notice regarding the right to protest the proposed assessment did not defeat the duty to exhaust. The *Wallich's Ranch* plaintiff's failure to "protest or provide any testimony in opposition to the District's budget for any of the fiscal years in question" barred its lawsuit challenging a pest control assessment. (*Id.*)

The decision of the Court of Appeal seeks to distinguish *Wallich's Ranch* by first noting the *Wallich's Ranch* trial court found the district in that case was exempt from Article XIII D. [Slip Opin., p. 23.]

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[4] While the protest procedures under the Pest Control Law and Proposition 218 are similar, Proposition 218 can be far more onerous to an agency's rate-setting ability because Proposition 218 provides a protest by a majority of property owners absolutely bars approval of a proposed new or increased fee. The administrative remedy provided by Proposition 218 is therefore an unusually powerful tool, and the need to exhaust its administrative remedies even more necessary.

However, the Court of Appeal in *Wallich's Ranch* made no such finding and the reason for the trial court's finding (§ 5, subdivision (a)), is not at issue in this case. The decision of the Court of Appeal likewise cites to the absence of a discussion in *Capistrano Taxpayers Ass'n v. City of San Jan Capistrano* (2010) 235 Cal.App.4th 1493, 1512, a case involving a Section 6(b)(3) challenge, regarding the duty to exhaust. [Slip Opin., p. 23.] However, *Capistrano Taxpayers Ass'n* is not authority for issues not considered. (See, e.g. *In re Chavez* (2003) 30 Cal.4th 643.)

As in *Wallich's Ranch*, the District's Proposition 218 annual public hearing was the required forum for challenges to the District's wastewater rate-setting structure by written protest and/or participation in the hearing. The District had the discretion to change its rates at that hearing, or to set a future noticed public hearing to accomplish a change in its rates or rate structure, had it been deemed appropriate.

5. The Label Attached to Government Action is Not Determinative of A Duty to Exhaust.

The decision of the Court of Appeal raises the issue of whether the "actions of the District in imposing or increasing any fee or charge" are legislative or administrative, but does not resolve the issue.

Nonetheless, the decision suggests the District's rate-setting is legislative and not subject to an exhaustion of remedies requirement at all. [Slip Opin., p. 11, fn.7.] The exhaustion doctrine is not limited in application to certain types of actions. Regardless of the label put on the District's actions in imposing or increasing fees, the critical issue is whether there exists an administrative procedure to challenge that action. As held by the Court of Appeal in *Redevelopment Agency v. Superior Court* (1991) 228 Cal.App.3d 1487:

> Determining which "label" to attach to such governmental action is not, however, crucial to resolving the issue before us. Whatever one wants to call an adoption of a redevelopment plan, the critical question is whether there exists an administrative procedure to challenge such an adoption. The exhaustion doctrine speaks to whether or not an administrative remedy for questionable governmental action exists, not to the character of the underlying governmental action itself.

(*Id.* at 1492.) An administrative remedy exists where the administrative body is required to accept, evaluate and resolve disputes. (*City of Coachella v. Riverside County Airport Land Use Comm* (1989) 210 Cal.App.3d 1277, 1287 [challenge to quasi-legislative land use plan adopted by airport land use commission].) Had the framers of Proposition 218, or the voters who approved it, intended to eliminate the duty to exhaust, they could have said so. They didn't. Proposition 218's public hearing cannot be disregarded by those who

would sue under it. The alternative is that hearings mandated by Proposition 218 will continue to place a tremendous burden on government agencies, but will be rendered a meaningless exercise, courts will be overburdened, and agencies will lose any opportunity to apply their expertise to avoid judicial review. (See *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 573 [deference to agency determination under separation of powers doctrine and in light of agency expertise].)

C. The Administrative Remedies Provided by Proposition 218 are Adequate.

1. The District Was Required to Accept, Evaluate and Resolve Protests at its Public Hearing.

Proposition 218 mandates that agencies "consider all protests," oral or written, even in the absence of a majority protest. (§6(a)(2).) The requirement that the District consider all protests must be construed to have meaning. (E.g., *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 ["We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language."].)

The Court of Appeal's determination that the remedy provided by participating in the Proposition 218 public hearing was inadequate denigrates the District's obligation to "consider all protests" and ignores

that the District must carry its burden to support proposed charges, including establishing that its fees are based on actual use or service that is actually available to a property. (§6(b)(5); see also *Morgan,* 233 Cal.App.4th at 905 [Proposition 218 "also shifted to agencies the burden to demonstrate the lawfulness of the challenged fees"].)[5] The District should have been provided the opportunity to apply its expertise and address Plaintiffs' challenges before being faced with a judicial action.

The case of *Roth v. City of Los Angeles, supra,* is instructive. In *Roth,* property owners were given notice that vegetation on their property had been declared by ordinance to be a nuisance and that if they failed to take the necessary action to abate it the city would do so at the property owners' expense. (53 Cal.App.3d at 683.) The notice "also stated property owners having objections to the proposed

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[5] In *Morgan,* a different panel of the Fourth District, Division One recognized:

> Given the goals of section 6 to minimize water rates and promote dialog between ratepayers and rate makers, public agencies must be permitted to reasonably structure their revenues to cover costs and meet customer needs using a rate-setting process that includes notice and hearing requirements sufficient to allow meaningful public participation, but tolerably administrable and flexible to avoid needless expense and delay.

Id. at 911.

abatement should appear at the city council meeting, ... at a specified time and place, when property owners' 'objections will be heard and given due consideration' and the council would make a final determination." (*Id.*) The property owners failed to attend the meeting, wherein the assessment was confirmed, but later filed a written protest asserting the entire assessment was void. (*Id.*) The property owners then sued.

In finding the property owners' lawsuit was barred, the Court of Appeal held their failure to attend the city council hearing to have their objections heard and considered constituted a nonexhaustion of an available administrative remedy. (*Id.* at 687.) The Court of Appeal first noted, "[t]he fact that the remedy is no longer available does not, of course, alter application of the doctrine, as to hold otherwise would obviously permit circumvention of the entire judicial policy behind the doctrine." (*Id.*) Further, even though the property owners' protest letter filed after the hearing stated numerous factual objections that could have been valid grounds for nonabatement, "[a]ny or all of these arguments could have been raised at the hearing before the city council and acted upon at that time, thus avoiding the need for the action...." (*Id.* at 687-688.) Accordingly, because the property owners choose not to attend the hearing wherein they had the right to have their objection

"considered"; they were precluded from attacking the abatement procedure by way of a judicial action. (*Id.*)

Roth supports a finding that Proposition 218 sets up an adequate administrative remedy by notifying fee-payors of a proposed fee increase, the right to file a written objection and/or appear at the public hearing, and in mandating that all objections to be considered before any fee is approved. Proposition 218's requirement that all objections to a proposed fee be considered involves more than rote counting of written protests to determine if there is a majority. "Consideration" necessarily entails a decision by the District to accept or reject the objection. A finding to the contrary necessarily renders the District's duty to consider all protests an empty exercise. For the same reason, the cases cited in the decision of the Court of Appeal as support for its finding the remedies provided by Proposition 218 are inadequate are distinguishable. [Slip Opin., pp. 19-21.]

The decision of the Court of Appeal cites to *Glendale City Employees' Assn v. City of Glendale* (1975) 15 Cal.3d 328, wherein this Court found a city grievance procedure to be inadequate in two respects:

> First, the pertinent portion of Ordinance No. 3830 provides only for settlement of disputes relating to the 'interpretation or application of ... an ordinance resulting

> from a memorandum of understanding.' (Italics added.) The crucial threshold issue in the present controversy—whether the ratified memorandum of understanding itself is binding upon the parties—does not involve an 'ordinance' and hence does not fall within the scope of grievance resolution.
>
> Second, the city's procedure is tailored for the settlement of minor *individual* grievances. A procedure which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate to handle disputes of the crucial and complex nature of the instant case, which turns on the effect of the underlying memorandum of understanding itself. [Citation].

(*Id.* at 342-343, emphasis original.) Neither of the two factors which formed the basis of the *Glendale* court's decision regarding the exhaustion of administrative remedies is involved in this case. Proposition 218 provides an adequate procedure to address a plaintiff fee-payor's claim the District's rate structure is unconstitutional. The undisputed testimony at trial established the Proposition 218 hearing was the forum to raise a rate-structure challenge and that the District Board had the authority to make changes based on any such objection.

In *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424, cited as support for the Court of Appeal's decision herein, the court rejected defendant's argument that an ordinance established an adequate administrative remedy because it "merely allows a person aggrieved by a resolution creating a fire suppression

district to request reconsideration of the resolution by the same decisionmaking body that adopted the resolution, i.e., by the city council." (*Id.* at 1429-1430.) The remedy of "appeal to the city council," without specifying a procedure to be followed in the appeal, was too "nebulous" to provide an adequate remedy for challenge to the formation of an assessment district. (*Id.* at 1428-1430.) Here, there is nothing "nebulous" about Proposition 218's notice and hearing requirements.

The other decisions relied upon in the Court of Appeal's decision are equally inapposite. (See *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 236–237 [city charter provision provides individual claims procedure and was not designed to address disputes between the City and the Board regarding retirement system's obligations to retirees and the city's resulting obligation to fund the system]; *City of Coachella,* 210 Cal.App.3d at 1288 ["While it is true that this rule *does* contain a mandatory provision requiring the scheduling of meetings, it is also true that the rule *does not* mandate that anything be done as a result of such meetings. This duty to hold meetings amounts to nothing more than an obligation to exercise a general investigatory power." (Emphasis original)]; *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 741

[plaintiff was not required to exhaust an internal grievance procedure because his specific grievance was not within the scope of the hearing offered].)

Rosenfield v. Malcolm (1967) 65 Cal.2d 559, and the supporting authorities cited therein, also do not support finding the administrative remedies provided by Proposition 218 are inadequate. In *Rosenfield*, the Court considered whether a county employee who claimed to have been wrongfully terminated exhausted his administrative remedies pursuant to Alameda County Charter sections 42 and 44. While those sections provided a general investigative power, they contained no "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Id.* at 566.) The *Rosenfield* court stressed that "[o]ur courts have repeatedly held that the mere possession by some official body of a continuing supervisory or investigatory power does not itself suffice to afford an 'administrative remedy.'" (*Ibid.*)

Proposition 218's administrative scheme, in contrast, provides for more than supervision and investigation. It provides procedures for the submission and evaluation of protests and places the burden on the District to consider and provide evidentiary support for proposed fees

and charges. Plaintiffs were required to avail themselves of these administrative remedies before resorting to judicial action.

2. Speculation Regarding Likely Success is Not the Standard.

The Court of Appeal's decision applies an incorrect standard in concluding the administrative remedies provided by Proposition 218 are inadequate. The decision finds it would have been "nearly impossible" for Plaintiffs to obtain written protests from a majority of parcel owners because the lead class representatives are commercial property owners, whose concerns might differ from the majority of sewer users. [Slip Opin., p. 17.] The Court of Appeal inexplicably came to this factual conclusion despite acknowledgment elsewhere in its decision that Plaintiffs represent a class composed of all "District customers who paid a wastewater service fee on or after November 22, 2012." [*Id.*, pp. 3, 6 at fn.6.] In other words, Plaintiffs need only have obtained a majority of votes from the class members they have undertaken to represent.

It is also unknown whether in fact the lead class representatives' interests differ from the majority of sewer users because Plaintiffs never appeared and presented an objection at the Proposition 218 public hearing. The District was never informed of the scope of

Plaintiffs' claims and given an opportunity to act when it was setting the now-challenged rates. Section 6(a)(2) is effectively rendered meaningless if it is an adequate excuse for a property owner to fail to participate in the public hearing process based on speculation that obtaining a majority protest is "nearly impossible."

Whether or not Plaintiffs would have ultimately been successful had they exercised available administrative remedies is not the standard. Exhaustion requirements cannot be avoided because of speculation of a likely outcome. Exhaustion is not about winning. The point of exhaustion is to make a record, invoke agency expertise, and provide the foundation for effective judicial review. (See *Western States Petroleum Assn.,* 9 Cal.4th at 572–573.) Litigants normally go to court without having exhausted remedies precisely because they believe a favorable outcome from exhausting an administrative outcome is unlikely.

3. Balloting Procedures Are Not Required for a Remedy to be Adequate.

The Court of Appeal's decision takes issue with the trial court's inadvertent citation to California Constitution, Article XIII D, Section 4 (Section 4) in its Statement of Decision, despite the trial court's other references to Section 6 in its ruling and the understanding of all

concerned that the trial court was resolving the administrative remedies issue under Section 6. [Slip Opin., pp. 2, fn.2, 8-9; 8 AA 1645, 1646.] While it is true Section 4 has a balloting procedure not included in Section 6, the trial court's determination that an exhaustion requirement existed was not based on Section 4's balloting procedure, but instead on the noticed public hearing that is required by both Section 4 and Section 6. [*Id.*]

It is the noticed public hearing requirement wherein the District was required to consider "all protests", and also carry the burden of supporting proposed charges, that established the administrative remedies Plaintiffs were required to exhaust prior to challenging the propriety of a property-related fee or charge as non-compliant with Proposition 218.

4. The Duty to Exhaust Does Not Require a "Comprehensive Legislative Scheme."

In finding Plaintiffs had no duty to exhaust the administrative remedies of Proposition 218, the Court of Appeal found *Wallich's Ranch, supra,* to be inapposite because it involved an assessment under Pest Control Law, a "comprehensive legislative scheme." [Slip Opin., p. 23.] However, the fact that Pest Control Law may involve a "comprehensive legislative scheme" does not mean Proposition 218's

administrative remedies are inadequate. Protests by a majority of voters would have prevented the fee from being imposed. Every written and oral protest was likewise entitled to consideration. The District had the authority to take the necessary steps to change its rates or rate structure in response to an objection at the public hearing, but was not given the opportunity to consider the issue at the time it was approving rates. (See Wat. Code §71670.)

5. Proposition 218's Administrative Remedies Are Not Inadequate Due to the Absence of Mandated Annual Proceedings.

The decision of the Court of Appeal deems it important that *Wallich's Ranch, supra,* involved mandated annual proceedings, but in this case the District could decide not to impose a new or increased fee and therefore plaintiffs challenging the method used by an agency to determine such fees "would have no remedy, adequate or otherwise, under section 6 during such period." [Slip Opin., p. 24.] Government Code section 53756, added in 2008 and amended in 2012, allows an agency that provides water, wastewater, sewer, or refuse collection service to adopt a schedule of fees or charges authorizing automatic adjustments. The adjustments may be for inflation or to pass through increases in wholesale charges for water, sewage treatment, or

wastewater treatment and may extend no more than 5 years. (Gov. Code §53756, subd. (a).)

Whether a hearing occurs annually or every five years is a function of legislative line-drawing that does not eliminate the duty to exhaust. Moreover, the District held noticed hearings for each year challenged in Plaintiffs' lawsuit. The Plaintiffs were on notice of the public hearings held in 2012, 2013 and 2014, but elected not to attend or otherwise participate by written objection. The Court of Appeal's concern regarding the lack of a mandated annual proceeding is speculative and not a proper basis for statutory interpretation. (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1132 [Conjecture and speculation are not a proper bases for statutory interpretation].)

6. Exhaustion Under the District's Legislative Code Does Not Eliminate the Duty to Exhaust Under Proposition 218.

The Court of Appeal's decision distinguished *Wallich's Ranch* because, unlike the plaintiff in that case, the Plaintiffs here exhausted their administrative remedies under the District's legislative code. [Slip Opin., p. 25.] The District's legislative code authorizes the District to impose annual sewer service charges "per EDU as established by the Board of Directors for the District from time to time." (RMWD Code §§

7.52.040, 7.54.040.) The code explains how the District determines the EDU for various classes of parcels in the District based on the "occupancy types" identified in a section of the rules aptly titled "Schedule of EDUs for Occupancy Types." (RMWD Code §§ 7.52.050; 7.54.050.) Subsection D in each of those code provisions allows the District to "at any time, or upon Owner request, perform a re-evaluation of the EDU level required to serve a parcel," and under subsection E of those provisions, if a reduction in EDUs is justified, "the owner may request an appropriate adjustment to future service charges by abandoning the excess EDUs." (*Id.*)

The District conceded Plantier exhausted his remedy under the District's legislative code; however, that process is aimed strictly at correcting errors in individualized application of the current rate structure. The legislative code allows a property owner to challenge, and the District to re-evaluate, whether a parcel's use has been misclassified or the number of EDUs miscalculated. An individualized challenge under the District's legislative code is not a vehicle for challenging the entirety of the District's adopted methodology and therefore did not eliminate Plaintiffs' separate duty to exhaust

remedies under Proposition 218.[6] When multiple remedies exist, they all must be exhausted. (*See Acme Fill Corp.,* 187 Cal.App.3d at 1064; *Park Area Neighbors,* 29 Cal.App.4th at 1447-1448.) Also, the fact that Plaintiffs in this case were more determined in their attack against the District cuts in favor of requiring them to exhaust their remedies. Plaintiffs should have put their evidence and arguments before the District Board at the time it was deciding the issue of rates and allowed the District to apply its expertise and to provide the foundation for meaningful judicial review. Instead, the decision of the Court of Appeal undermines Proposition 218's goal of fostering communication and permitting potential resolution of issues prior to resort to the courts. It also threatens the ability of public agencies to engage in sound financial planning by allowing those that fail to participate in the public hearing process at the time when decisions are being made and budgets are being set to seek a judicial remedy to contest approved rates.

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[6] Plaintiffs' complaint does not challenge the District's EDU methodology as applied to a particular property; instead, it claims the EDU system violates Proposition 218. [1 AA 1-2, ¶1.]

CONCLUSION

Applying ordinary rules of construction applicable to constitutional amendments, a fee-payor's participation in Proposition 218's mandated protest process is required before the propriety of a proposed property-related fee, including the methodology used to determine that fee, may be subject to judicial challenge. The decision of the Court of Appeal should be reversed.

DATED: December 12, 2017 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

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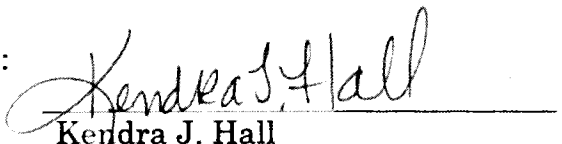
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.520(c)(1), I certify that this Opening Brief on the Merits is proportionately spaced, has a typeface of 13 points or more, and contains 9,953 words.

DATED: December 12, 2017 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On December 12, 2017, I served the within documents:

OPENING BRIEF ON THE MERITS

☑ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

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☑ **BY E-MAIL OR ELECTRONIC SERVICE (Per CRC 8.60(f))** based upon court order or an agreement of the parties to accept service by electronic transmission, by electronically mailing the document(s) listed above to the e-mail address(es) set forth below, or as stated on the attached service list and/or by electronically notifying the parties set forth below that the document(s) listed above can be located and downloaded from the hyperlink provided. No error was received, within a reasonable time after the transmission, nor any electronic

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

Executed on December 12, 2017, at San Diego, California.

Kristina Terlaga

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