No. S263734
Court of Appeal
2 CIVIL No. B295181
c/w B295315

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HILL RHF HOUSING PARTNERS, L.P., et al.,

Petitioners and Appellants,

vs.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

MESA RHF PARTNERS, L.P.,

Petitioner and Appellant,

vs.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

Los Angeles County Superior Court Case Nos.
BS170127 and BS170352
Hon. Mitchell L. Beckloff, Department 86
Judge of the Superior Court

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I.

INTRODUCTION

In their Answers, Respondents extoll the salutary purposes and jurisdictional nature of administrative exhaustion. But those principles are not at issue here. The question presented by this Petition for Review is whether a previously unknown administrative exhaustion requirement can be inferred where the California Constitution specifies a ballot process that must be followed – and was followed – prior to levying assessments for a business improvement district ("BID"). Petitioners respectfully submit that the Court of Appeal improperly grafted a new requirement onto Article XIII D which is *directly contrary* to Proposition 218's express language, as well as its express intent to make it harder, not easier, for local governments to impose assessments and fees. Moreover, the Court of Appeal imposed that requirement retroactively, erasing not only Petitioners' substantive challenges to the propriety of these BIDs, but all other pending challenges made in ignorance of the new requirement. Finally, Petitioners' challenge raised a significant constitutional challenge to the recent legislative amendments to the

Streets & Highways Code upon which these BIDs were based, which this Court should also review.

II.

ARGUMENT

A. The Court of Appeal Improperly Inferred Additional Burdensome Requirements for Administrative Exhaustion Contrary to Language From Recent Supreme Court Authority.

The fundamental problem with the Opinion is that it infers an administrative exhaustion requirement into a constitutional scheme which already specifies how to protest an assessment. Thus, this Court's statement in *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, that an exhaustion requirement will be inferred "even within statutory schemes that 'do not make the exhaustion of the [administrative] remedy a condition of the right to resort to the courts'" has no application here. Section 4 of Article XIII D specifies in great detail the ballot process to be employed in determining whether to enact a business improvement district; nothing more can or should be inferred.

Contrary to the City's hyperbole, acceptance of Petitioners' position would not mean that Article XIII D "silently abolished" the principle of administrative exhaustion. (City's Answer at 15). Rather, Petitioners assert that Proposition 218 specified the administrative procedure to be used, which was the ballot process.[1] Article XIII D, section 4, subdivision (e) provides:

> The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all *protests* against the proposed assessment and tabulate the *ballots*. The agency shall not impose an assessment if there is a majority protest. A *majority protest* exists if, upon the conclusion of the hearing, *ballots* submitted in

[1] To the extent the City suggests that Petitioners somehow did not challenge the propriety of the administrative exhaustion requirement advocated for by Respondents below, that was simply not the case. Petitioners clearly disputed that Article XIII D required anything beyond submission of a ballot, noting that "Subsections (c) through (e) of section 4 of Article XIII D specify the procedural requirements imposed on the assessing agency," and that "None of these subsections supports Respondents' argument that submitting an opposing ballot does not constitute a written protest." (ARB at 37-38.) The City also raises a red herring by claiming that "Appellants did not argue that they lacked an adequate administrative remedy." (City's Answer at 10.) The issue is not the adequacy of the administrative remedy inferred by the Court of Appeal, but whether exhaustion of such a remedy can be required under Article XIII D.

> opposition to the assessment exceed the ballots submitted in favor of the assessments.

(Emphases added). Article XIII D, section 4, makes clear that "protests" are conflated with ballots. The existence of a majority protest is entirely dependent on the number of ballots submitted in opposition. Nothing further is indicated or required.

Respondents, like the Court of Appeal below, fall back on Government Code section 53753, which provides: "At the public hearing, the agency shall consider all *objections* ***or*** *protests*, if any, to the proposed assessment." However, the addition of the word "objection" to the term "protest" does not superimpose an additional administrative exhaustion requirement onto Proposition 218. Indeed, this Court just recently equated the two terms in *Wilde v. City of Dunsmuir* (August 3, 2020) 9 Cal.5th 1105, 1114 ("Consistent with the requirements of Proposition 218, the City issued public notice of the hearing and provided an opportunity for residents to submit *objections via protest ballots*.") (Emphases added.) But to the extent the two terms signify something different, the Code uses the word "or," not "and," clearly providing that *any* form of objection *or* protest satisfies the administrative exhaustion requirements. The

plain meaning of the words in the statute should not allow the Court of Appeal to infer more – as it did here.

But even if Government Code section 53753 can be read to acquire an objection in addition to a protest, the California Constitution controls. (*Nunes Turfgrass, Inc. v. County of Kern* (1980) 111 Cal.App.3d 855, 862 ["The Legislature cannot expand the meaning of the amendment by subsequent legislation, since such an expansion would be equivalent to a constitutional amendment."].) Article XIII D, section 4, does not use the term "objection."

Moreover, in considering a question of administrative exhaustion under section 6 of Article XIII D, this Court recently stated that "'participation' in a Proposition 218 hearing refers to *either* submitting a written protest *or* speaking at the hearing." (*Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 370, n. 6.) (Emphases added.) As already noted, Article XIII D, section 4, clearly defines a negative ballot as a protest.[2] Petitioners protested

[2] Unlike section 6, section 4 does not use the term "written protest," only "protest."

through a public ballot and thus participated in the assessment hearing for purposes of administrative exhaustion.

The City claims that "this Court appears to have already resolved when an administrative remedy requires exhaustion prior through the analysis" in *Plantier*.[3] (City's Answer at 7.) Yet even the BIDs acknowledge that the *Plantier* decision did not reach such a conclusion:

> We do not decide and express no view on the broader question of whether a Proposition 218 hearing could ever be considered an administrative remedy that must be exhausted before challenging the substantive propriety of a fee in court.

(BID's Answer at 36-37, quoting *Plantier*, *supra*, 7 Cal.4th at p. 388.) Moreover, as noted by the BIDs, *Plantier* was decided under section 6, not section 4. (*Id*. at 36.) The issue of administrative exhaustion under Article XIII D clearly still needs clarification from this Court.

Aside from the independent importance of this state

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[3] The City also cites *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878, for the proposition that an assessment hearing offers an adequate administrative remedy. However, as noted in *Plantier*, "the court in *Wallich's Ranch* had no occasion to consider whether Proposition 218 imposes a separate exhaustion requirement."

constitutional issue, review is also warranted to secure uniformity of decision. While none of the many BID cases decided prior to the Opinion below specifically held that there was *not* an inferred administrative exhaustion requirement, the fact remains that none of those cases ever suggested the existence of any such requirement, and there is no indication that the challengers in those cases provided anything like the detailed objection mandated by the Court of Appeal.

Finally, and most tellingly, all Respondents ignore the express purpose of 218, which was to make it *more* difficult for an assessment to be validated in a court proceeding, not *less* difficult. As a practical matter, the new administrative exhaustion requirement inferred by the Court of Appeal will make it much harder for property owners to challenge BID assessments. It is one thing to return a ballot objecting to a new or renewed BID; it is quite another to require (as the Court of Appeal did here) that objections must analyze and articulate the very technical issues which typically form the basis for a challenge to BID assessments, such as the questions about what constitutes “special benefits” versus “general benefits”

that were litigated in this case. The policies underlying the enactment of Article XIII D by the voters must be considered by this Court in deciding whether to grant review, and militate in favor of doing so.

B. The Court of Appeal's Holding That Its Inferred Administrative Exhaustion Requirement Should be Retroactive Is Contrary to Public Policy.

Respondents assert that the question of the Opinion's retroactive effect was forfeited because it was raised in the Petition for Rehearing below. However, this was not a new legal issue, but rather a ramification of the Opinion that the Court of Appeal failed to consider. Rule of Court 8.500(c)(2) specifically provides that a Petition for Rehearing is a necessary and proper mechanism to call the Court of Appeal's attention to such an omitted issue prior to seeking Supreme Court review.

On the merits of review, the BIDs argue that there is no reason to consider the propriety of extending retroactive effect to the Opinion because "the Court of Appeal adopted no new administrative requirement here." (BID's Reply at 39.) This, of

course, is belied by the decision of the Court of Appeal to publish its decision, as well as the plethora of prior BID cases which never hinted at such an administrative exhaustion requirement. Nor do Respondents address the fact that these Petitioners, along with any other challengers who failed to anticipate the Opinion, will be deprived of any remedy whatsoever absent review. Accordingly, considerations of fairness and public policy require prospective application of the Opinion only, and this Court should take up the broader question of whether newly inferred administrative exhaustion requirements based on this Court's language in *Williams & Fickett*, *supra*, should have retroactive effect as a general proposition.

C. The 2015 Amendments to the Streets and Highways Code Are Unconstitutional.

While it is true that the Court of Appeal did not reach the constitutionality of the 2015 Amendments, the Court should clearly take the opportunity to consider this fundamental constitutional question at this time.

Respondents claim (incorrectly) that the amendments are

consistent with Proposition 218 based on *Dahms v. Downtown Pomona Property & Business Improvement District* (2009) 174 Cal.App.4th 708. However, their reading of *Dahms* severely distorts that decision. *Dahms* involved a business improvement district in Pomona, California, which levied assessments for security services, streetscape maintenance services, and marketing, promotion, and special event services. *Dahms, supra,* 174 Cal.App.4th at 713. For nonprofit entities (such as Petitioners here), the *Dahms* business improvement district levied discounted assessments – "only 5 percent of the amount that [the nonprofit entities] would otherwise have to pay." (*Id.*) Properties zoned exclusively residential were exempted altogether from the business improvement district's assessments. (*Ibid.*)

The plaintiff in *Dahms* was a for-profit property owner who challenged the business improvement district on several grounds not relevant here. However, as to its constitutional analysis, the *Dahms* court presumed that the plaintiff's argument was that "if the PBID confers special benefits on the parcels within the PBID, and those special benefits themselves produce general benefits (either for the

PBID or for the broader community), then the value of those general benefits must be deducted from the cost of providing the special benefits and must not be included in any assessment." (*Id.* at 723 ["Dahms *appears* to argue [this]"] [emphasis added].) The *Dahms* court rejected the argument that Article XIII D mandates the deduction of general benefits from the cost of providing special benefits:

> [N]othing in article XIII D says or implies that if the special benefits that are conferred also produce general benefits, then the value of those general benefits must be deducted from the reasonable cost of providing the special benefits before the assessments are calculated. Rather, the only cap the provision places on the assessments is that it may not exceed the reasonable cost of the proportional special benefit conferred on that parcel.

(*Id.* at 724.) The court explained its reasoning as follows:

> For example, according to [the plaintiff's] argument, if the reasonable cost of providing enhanced security services for the parcels in the PBID were $100,000, and those enhanced security services produced general benefits (e.g., increased property values or increased safety for the general public) valued at $70,000, then the $70,000 value of the general benefits would have to be deducted from the $100,000 cost of providing the special benefits (i.e., the enhanced security services for the parcels in the PBID), and only the remaining $30,000 could be assessed. The argument fails

> because . . . nothing in article XIII D says or implies that if the special benefits that are conferred also produce general benefits, then the value of those general benefits must be deducted from the reasonable cost of providing the special benefits before the assessments are calculated. Rather, the only cap the provision places on the assessment is that it may not exceed the reasonable cost of the proportional special benefit conferred on that parcel . . . [In other words] article XIII D prohibits *adding* the $70,000 value of the general benefits to the $100,000 cost of providing the security services and then imposing assessments totaling $170,000.

(*Id.* at 723-24.) Thus, *Dahms* held that Article XIII D, section 4, does not require a business improvement district to deduct the value of general benefits from the reasonable cost of special benefits. But *Dahms* did not conclude that incidental or collateral benefits should be treated as special benefits. Yet this is the proposition for which Respondents cite *Dahms*, attempting to justify the 2015 Amendments.

Put another way, that the *Dahms* court held that Article XIII D does not mandate a deduction of the value of general benefits does not mean that a business improvement district (or state legislature) can conclude that general benefits are simply deemed special benefits. The Legislature is not allowed under the California

Constitution to define general benefits out of existence, and *Dahms* does not support that. The assessing agency must still separate and quantify the special benefits from the general benefits. In the *Dahms* court's hypothetical, the general benefits were still allotted a value of $70,000. Ignoring this, the trial court below misconstrued the *Dahms* holding to mean that incidental and/or collateral effects to unassessed persons or property that may arise from a special benefit are themselves special benefits – even though the *Dahms* opinion nowhere uses the words "collateral" or "incidental." This was error.

To the extent that the Streets and Highways Code was amended to support this misconstruction of the *Dahms* ruling, such amendments clearly and directly violate the California Constitution. (*See Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ["There is a clear limitation, however, upon the power of the Legislature to regulate the exercise of a constitutional right . . . All such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or

embarrass it"].) The Legislature's creation of a third kind of benefit (incidental and collateral benefits which are deemed to be special rather than general) unconstitutionally contradicts Article XIII D.

III.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court grant this Petition for Review.

DATED: September 3, 2020 REUBEN RAUCHER & BLUM

By: _____
Stephen L. Raucher
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CERTIFICATE OF COMPLIANCE

[Cal. Rule of Court 8.204(c)(1)]

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DATED: September 3, 2020 REUBEN RAUCHER & BLUM

By: 
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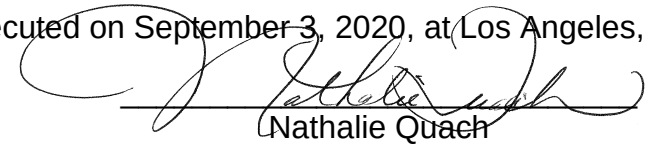

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