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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

PETITIONERS' OPENING BRIEF ON THE MERITS

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I.

ISSUES PRESENTED

1. In order to challenge the constitutionality of an assessment imposed by the City of Los Angeles for a business improvement district, must a property owner – who has complied with the express constitutional and statutory requirement to state publicly its opposition to the assessment via a ballot provided by the City – also articulate the specific reasons for its opposition (either orally or in writing) at the City's noticed public hearing in order to exhaust administrative remedies pursuant to the inferred requirement expressed for the first time by the Court of Appeal in this case?

2. If so, should this rule apply only prospectively?

II.

INTRODUCTION

Proposition 218, which added Article XIII D to the California Constitution, was specifically designed to make it *harder* for local governments to impose assessments and fees. Yet the Opinion of the Court of Appeal in this case makes it much *easier* to impose such assessments by creating a newly “inferred” administrative exhaustion requirement and applying this judicially created extra requirement retroactively. The new hurdle requires property owners to go above and beyond returning a public ballot expressing their opposition to the newly proposed assessments as described by Article XIII D. Instead, the Opinion for the first time requires – without constitutional or statutory basis – that property owners must provide detailed reasons for their objections at a public hearing before being allowed to challenge the assessments in court.

This newly inferred exhaustion requirement is directly contrary to the fundamental purpose of Proposition 218. As explained by this Court in the seminal case of *Silicon Valley Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431,

445 [“*Silicon Valley*”], the purpose of Proposition 218 is to make it more difficult for local government agencies to impose assessments and to defend challenges to those assessments in court. The Opinion undermines this purpose by creating a surprise impediment to property owners’ ability to challenge assessments in court, which requirement is at odds with the express terms of Article XIII D, its related statutes, and prior case law on challenges to assessments brought thereunder. Accordingly, this Court should reverse the Court of Appeals’ decision and find that a property owner seeking to challenge a special assessment in court satisfies the administrative exhaustion requirement if he participates in the ballot process regardless of whether he articulates the reason for his objection at the public hearing or in writing.

In any event, should this Court uphold the exhaustion requirement newly inferred by the Court of Appeal, the requirement should only apply prospectively and should not be applied to bar Petitioners from exercising their constitutional right to challenge the assessments in the Court of Appeal.

III.

STATEMENT OF THE CASE

A. Creation of the Business Improvement Districts

In April and May 2017, the City of Los Angeles adopted ordinances declaring its intent to create the Downtown Center Business Improvement District ("DCBID") and the San Pedro Historic Waterfront Business Improvement District ("SPBID"), respectively. Such ordinances provided for assessments against the property owners within those two districts to fund the activities of the BIDs.

The three Petitioners in this case are affiliates of Retirement Housing Foundation ("RHF"), one of the nation's largest non-profit providers of housing and services for low-income seniors. (AA 9-10, ¶1 [Hill]; AA 7-9, ¶¶1, 9-11 [Mesa].)[1] Petitioners Hill RHF Housing Partners, L.P. ("Hill") and Olive RHF Housing Partners, L.P. ("Olive") own federally subsidized residential rental property for low-income

[1] The Appellants' Appendix will be cited as "AA [page no.]." The Reporter's Transcript will be cited as "RT at [page no.]." The Administrative Record will be cited both as "AR or SP [page no.]" (based on the bates numbers used in the trial court) and "(NOL [page no.])" (based on the page numbers of the electronic version attached to the Notice of Lodgment submitted to the Court of Appeal in accordance with Rule of Court 8.123(d)(1)).

seniors located within the boundaries of the DCBID; Petitioner Mesa RHF Housing Partners, L.P. ("Mesa") owns residential rental property for low-income seniors inside the boundaries of the SPBID. (Opn. 4, attached as Exhibit A.) The properties are subject to Regulatory Agreements with the City of Los Angeles restricting the amount of rent that can be charged. (AA 274-365 [Hill]; AA 311-378 [Mesa].) Accordingly, these attractive and fully occupied senior facilities receive no possibility of increased rental rates from any BID service. Moreover, the purpose of the rental communities is to assure that senior citizens who receive only social security benefits and are otherwise without means can afford to live in quality housing. Raising rents would destroy the very point of the Foundation's efforts.

B. The Professed Special Benefits of the BIDs Include General Economic Enhancements Which Do Not Benefit RHF's Low Income Senior Apartments

The general purpose and benefits of the DCBID are described in Section A of its Engineer's Report as follows: "Each of the [DCBID] activities or improvements is intended to increase building

occupancy and lease rates, to encourage new business development, attract businesses that benefit the parcels, and improve the economic vitality of the parcels." (AR 94 [NOL 96] [emphases added].) DCBID's various services are discussed in Section B of the Engineer's Report, entitled "IMPROVEMENTS AND ACTIVITIES." (AR 97-101 [(NOL 99-103].) The categories of services are as follows:

Safe Team Program: The Safe Team Program consists of "security services for the individual assessed parcels located within the District in the form of patrolling bicycle personnel, nighttime vehicle patrol and downtown ambassadors." "[T]he special benefit to assessed parcels from these services is increased commercial activity which directly relates to increases in lease rates, residential serving business and customer usage." (AR 97 [NOL 99] [emphases added].)

Clean Program: The Clean Program consists of sidewalk cleaning, trash collection, graffiti removal, and landscape improvement and maintenance. (AR 98 [NOL 100].) The Engineer's Report provides that "the special benefit to assessed parcels from

these services is increased commercial activity which directly relates to increases in lease rates and customer usage." *Id*.

Economic Development/Marketing Services: The Economic Development/Marketing Program consists of "Marketing Collateral," including newsletters, public relations materials, information kiosks, a downtown center map, a retail guide, marketing materials, website design/operation, property owner communication, annual report/marketing plan, property owner survey, consumer attitude survey, special events, downtown center welcome program, convention and visitor program, banners, media relations, and advertising. (AR 100 [NOL 102].) The Economic Development/Marketing Program also consists of "Downtown Center Business Recruitment and Retention," which includes targeted business meetings, downtown center brokers program, outlying brokers program, investment media relations, trade show marketing, property managers program, property database development/update, property marketing material, economic studies and planning, and downtown center residential development programs. (AR 100-101 [NOL 102-103].) The Engineer's Report

justifies the Economic Development/Marketing Programs as follows:

> The special benefit to District assessed parcels from these services is increased commercial activity which directly relates to increases in lease rates and enhanced commerce. The special benefit to residential and mixed-use residential parcels is increased occupancy rates and an increase in residential serving businesses such as restaurants and retail stores . . . Residential and mixed-use residential parcels benefit from District programs that provide an increased awareness of District amenities such as retail and transit options which in turn enhances the business climate and improves the business offering and attracts new residents, businesses and District investment.

(Emphases added.) (AR 99-101 [NOL 101-103].)[2]

C. Petitioners Oppose the BIDs in Accordance With Statutory Requirements and the City's Notice

The City mailed notices to property owners within the districts that it would be considering the establishment of the BIDs at upcoming City Council hearings. The notices included summaries of the management district plans for each BID, assessment ballots, and summaries of procedures for completing, returning, and tabulation of the assessment ballots. (Opn. 4.) Hill and Olive returned public

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[2] The SPBID consists of similar programs (Opn. 5) with similar descriptions of the alleged "special benefits."

ballots on behalf of those properties opposing the establishment of the DCBID, and Mesa returned a public ballot opposing the establishment of the SPBID. (*Ibid*.) None of the Petitioners provided other written opposition or spoke at the public hearings. (Opn. 5.)

The City held the noticed public hearings on June 7, 2017 and June 27, 2017 for the DCBID and SPBID, respectively. After tabulating the ballots, the City created by ordinance the DCBID and SPBID for terms beginning on January 1, 2018. (*Ibid*.)

D. <u>Petitioners Challenge the BIDs in Superior Court</u>

On July 3, 2017, Hill and Olive filed a petition for writ of mandate challenging the establishment of the DCBID. (Opn. 5.) On July 26, 2017, Mesa filed a petition for writ of mandate challenging the establishment of the SPBID. Among other arguments, Petitioners raised facial challenges to the constitutionality of recent amendments to the Property and Business Improvement Law of 1994 ("PBID Law"), claiming the amendments redefined special benefits in a manner directly contrary to this Court's interpretation of Article XIII D. Petitioners also argued that the Engineer's Report improperly characterized general benefits (such as improved

economic vitality) as special benefits, and failed to account for the unique characteristics of Petitioners' properties. (Opn. 6.)

In answering the petitions, Respondents disputed Petitioners' arguments and also alleged failure to exhaust administrative remedies as an affirmative defense. The parties argued that defense in their trial briefs. (*Ibid*.)

On September 19, 2018, the trial court heard argument on the petitions. (Opn. 6.) As to administrative exhaustion, the trial court commented at oral argument that "I'm not sure what more petitioners should have done other than vote 'no' during that process to exhaust their administrative remedies. . . . And looking at the process and the discussion of the process for the adoption of a B.I.D., it seems to [me] that that argument is correct." (RT at 36.) The trial court denied the petitions on the merits,[3] and these appeals followed.[4] (Opn. 7.)

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[3] The trial court did not rule on the administrative exhaustion point in its ultimate orders, thereby implicitly rejecting it.

[4] The appeals were subsequently consolidated for oral argument and decision.

E. <u>The Court of Appeal Affirms Based on Failure to Exhaust Administrative Remedies</u>.

The Court of Appeal affirmed, not on the merits, but based on a failure to exhaust administrative remedies. The appellate court found that Petitioners were required to articulate the basis for their objections to the BIDs at the public hearing, and that submission of ballots in opposition did not suffice. The Opinion relied upon Government Code section 53753, subdivision (d), which provides:

> At the public hearing, the agency shall consider all objections or protests, if any, to the proposed assessment. At the public hearing, any person shall be permitted to present written or oral testimony.

Subdivision (e)(5) goes on to provide that "If there is a majority protest against the imposition of a new assessment . . . the agency shall not impose, extend or increase the assessment."[5] (Opn. 9.)

The Opinion then cited this Court's decision in *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, for the proposition that an exhaustion requirement will be inferred "even within statutory

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[5] "A majority protest exists if the assessment ballots submitted, and not withdrawn, in opposition to the proposed assessment exceed the assessment ballots submitted, and not withdrawn, in its favor . . ." (Government Code § 53753(e)(4).)

schemes that ‘do not make the exhaustion of the [administrative] remedy a condition of the right to resort to the courts.’” (Opn. 10.) The appellate court concluded that the procedure outlined in the PBID Law “bespeaks a legislative determination that the [City] should, in the first instance, pass on” the questions Petitioners presented. (Opn. 12.)

Petitioners argued that *Williams & Fickett* should not apply because Article XIII D specified only the ballot process. However, the Court of Appeal rejected that argument, finding that “for just a ‘no’ vote in the context of the remedies the statute provides to constitute exhaustion would frustrate the purpose of the exhaustion doctrine.” (Opn. 12-13.) The Opinion further stated:

> If the agency’s decision is to be challenged in court, the agency – the City in this context – is entitled to the benefit of the opportunity to either address the specific issues a property owner raises or to pass on the opportunity to do so and allow the courts to make the decision based on an administrative record that reflects a development of the disputed issues to the extent the administrative process allows.

(Opn. 15.)

RHF petitioned for rehearing, urging that the Opinion should

only be given prospective effect because (1) Petitioners reasonably relied on prior case law – including California Supreme Court authority – which made no mention of the newly announced requirement that a property owner appear and speak at the public hearing or provide detailed written opposition in addition to the ballot in order to exhaust administrative remedies; (2) the nature of the change worked by the Opinion will have a substantive effect; (3) denying retroactive application would not unduly impact the administration of justice; and (4) retroactive application would deprive Petitioners of any remedy whatsoever. The Court of Appeal denied the Petition for Rehearing on July 15, 2020. (Exhibit B, attached.)

IV.

ARGUMENT

A. Legal Background

Article XIII D was added to the California Constitution by Proposition 218, which was adopted in 1996 by voters to protect taxpayers from local governments seeking to exact revenues without taxpayer consent. *(*See *Silicon Valley, supra,* 44 Cal.4th at 443

[Prop. 218 "buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges."].)

Section 4 of Article XIII D of the California Constitution contains the requirements for assessments, and Section 2 contains the definitions of terms used in Article XIII D. In relevant part, Section 4(a) provide as follows:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by an agency, the State of California or United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

In turn, Section 2(i) provides:

> "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

Taken together, these sections "tighten[] the definition[s] of two key findings necessary to support an assessment: special benefit and proportionality." *(Silicon Valley, supra,* 44 Cal.4th at 443.)

Subdivisions (c) through (e) of section 4 of Article XIII D specify the procedural requirements imposed on the assessing agency, starting with the requirement that the assessing agency's written notice of its proposed assessments "include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest . . . will result in the assessment not being imposed." (Art. XIII D, § 4(c).) Subsection (d) further clarifies, "Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner of the parcel, and his or her support or opposition to the

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

Subdivision (e) nowhere states that anything other than submission of a ballot is required to record a property owner's protest.

The Legislature facilitated Article XIII D by enacting the Proposition 218 Omnibus Implementation Act of 1997, Government Code section 53750 *et seq.* The notice, hearing, and protest procedures for new or increased assessments are codified in Government Code, section 53753. Like Article XIII D, section 53753 provides a detailed procedure that local government agencies must follow when issuing and tabulating ballots. Special assessments are also subject to the PBID Law, California Streets and Highways Code, sections 36600 *et seq.,* whose purpose is, in part, to ensure that assessments conform to all constitutional requirements. (*See*

Sts. & Hy. Code § 36601(h).)

B. Imputing to Article XIII D an Administrative Exhaustion Requirement in Excess of the Ballot Submission Procedure Would Be Inconsistent with the Fundamental Purpose of Proposition 218, Which Gave Property Owners and Courts, Not Local Governments, Authority to Determine the Propriety of a Special Assessment.

The Opinion's new administrative exhaustion requirement runs directly contrary to Proposition 218's fundamental purpose, which was to make it more difficult for local governments to impose assessments and to defend those assessments in court. Proposition 218 gave taxpayers final authority over special assessments by requiring that an assessment be approved by a weighted majority of affected property owners via the ballot process articulated in Article XIII D, section 4, subdivisions (c) through (e). Nothing in Article XIII D imposes an additional requirement to articulate a detailed basis for objecting at the public hearing set to tabulate the ballots. Such a requirement is at odds with the procedures expressly provided in Article XIII D and with the amendment's purpose of curtailing the

authority of local governments to impose special assessments.

1. The New Exhaustion Requirement Undermines the Ballot Procedure Detailed in Article XIII D, Section 4

"The Legislative Analyst explained to the voters that Proposition 218 was designed to 'constrain local governments' ability to impose . . . assessments . . .' and to place 'extensive requirements on local governments charging assessments.'" (*Silicon Valley, supra,* 44 Cal.4th at 445, citing Ballot Pamp., Gen. Elec. (Nov. 5, 1996) analysis of Prop. 218 by Legis. Analyst, p. 73.) Proposition 218 was born out of a concern that local governments were abusing the assessment process. "The argument in favor of Proposition 218 referred to a 'growing list of assessments imposed without voter approval' after Proposition 13 that are in fact special taxes." (*Ibid*.) Because a special assessment was deemed to not be a tax within the meaning of Proposition 13, local governments were able to increase effective tax rates without voter approval by labeling them fees or assessments. (*Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 380.) "To address these and related concerns, voters approved Proposition 218, known as the

'Right to Vote on Taxes act,' which added articles XIII C and XIII D to the California Constitution. [Citation.]." (*Ibid).*

The express purpose of Proposition 218, then, was to check local government agencies by requiring them to obtain taxpayer consent in order to levy special assessments. Article XIII D specifically provides the ballot submission procedure as the mechanism for ensuring such consent. If the ballots in opposition to the assessment outweigh the ballots in its favor, then a "majority protest" exists and the agency has no authority to levy the special assessment. (Art. XIII D, § 4(c); *see also* Gov. Code § 53753(e)(4)-(5).) Subdivision (e) of section 4 provides that the ballots are to be tabulated at the public hearing, but there is no requirement that voters attend the hearing to have their oppositions (or approval) credited. In fact, the agency is *required* to provide an address at which assessment ballots may be submitted and received outside of the place and time of the public testimony, and those ballots must be counted. (Gov. Code § 53753(c).)[6]

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[6] While property owners may withdraw a previously-submitted ballot prior to the conclusion of the hearing, they are obviously not required to do so. " A majority protest exists if the assessment

The Opinion's new rule that property owners must attend the public hearing or submit a further writing in order to challenge an assessment later clearly undermines Article XIII D's express requirement that government agencies receive and credit opposition (and supportive) ballots submitted outside the context of the public hearing. The Opinion's newly-inferred administrative exhaustion requirement disregards an express constitutional mandate, and is therefore inconsistent with the judiciary's obligation to interpret constitutional provisions in a manner that gives effect to their underlying purpose. (See *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355 ["We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers – in this case, the voters of California – in a manner that effectuates their purpose in adopting the law."].)

Moreover, Article XIII D emphasizes voter consent and does not require that the property owner articulate a reason for opposing

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ballots submitted, and not withdrawn, in opposition to the proposed assessment exceed the assessment ballots submitted, and not withdrawn, in its favor[.]" (Gov. Code § 53753(e)(4).)

an assessment, either orally at the hearing or in writing, for his or her ballot to be counted. In fact, such a requirement would make no sense because Article XIII D does not require that a taxpayer have a specific "reason" for voting against an assessment at all – there is no requirement that opposition be founded on some legal or constitutional challenge to the assessment that could then be rectified at the hearing. The purpose of Article XIII D is to give property owners final authority to determine the propriety of an assessment by voting, not to allow government agencies to evaluate the legality of an assessment before it goes into effect.

2. Article XIII D Abrogates Agency Authority to Adjudicate the Validity of Special Assessments

The newly-inferred administrative exhaustion requirement is also at odds with Article XIII D, section 4, subsection (f), which provides that, in any legal challenge to a special assessment, the agency bears the burden of demonstrating that the assessment meets the special benefit and proportionality requirements. This Court has acknowledged that voters intended this provision to "curtail the deference that had been traditionally accorded legislative

enactments on fees, assessments, and charges" and to "shift the burden of demonstrating assessments' legality to local government[] mak[ing] it easier for taxpayers to win lawsuits." (*Silicon Valley, supra,* 44 Cal.4th at 448.) Thus, this Court has concluded that section 4, subdivision (f)'s burden-shifting provision means that "courts should exercise their *independent judgment* in reviewing local agency decisions" regarding the validity of special assessments, effectively abrogating traditional deference to agency decisions. *(Ibid*., emphasis added.)[7]

In effect, Proposition 218 gave property owners the authority to determine the propriety of a special assessment, and it gave courts the authority to determine its validity. The administrative remedy available to opponents of a proposed assessment is participation in the ballot submission procedure. An additional

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[7] In addition, Proposition 218 limited agency discretion by making the validity of assessments a constitutional question. This Court noted that special assessment law prior to Proposition 218 was primarily statutory, and "the constitutional separation of powers doctrine served as the foundation for a more deferential standard of review by the Courts." (*Ibid.*) However, local agencies have no authority to exercise discretion in a way that undermines the Constitution, and courts are charged with the obligation of enforcing the provisions of the Constitution as to effectuate its purpose.

requirement that a property owner articulate the reason for his or her opposition at the public hearing would serve no purpose within this constitutional scheme, and certainly would not advance the interests promoted by the administrative exhaustion doctrine. "The fundamental purposes of the exhaustion doctrine are respect for an agency's autonomy and expertise in adjudicating an issue[.]" (*Public Employees' Retirement System v. Santa Clara Valley Transportation Authority* (2018) 23 Cal.App.5th 1040, 1048.) However, Proposition 218 did away with local agencies' 'autonomy' to impose assessments, as agencies have no authority to disregard opposition ballots, override a majority protest vote, or even to require that voters articulate a reason for their opposition. And, to the extent a property owner's objection might be based on the validity of a proposed assessment, agencies have no authority to resolve that constitutional question**.** The administrative exhaustion requirement inferred by the Court of Appeals – which requirement appears nowhere in Article XIII D or any of the statutes comprising the Implementation Act – is inconsistent with the reallocation of discretionary and adjudicatory authority which was the fundamental

purpose of Proposition 218.

The procedures articulated in Article XIII D and reflected in the statutes promulgated under the Implementation Act were calculated to accomplish Proposition 218's underlying purpose to limit local government's power to impose assessments and curtail deference traditionally accorded to an agency's legislative enactments. The ballot procedure in Article XIII D, section 4, subdivisions (c) through (e) reflects Proposition 218's emphasis on voter consent by requiring a majority vote of affected property owners as a condition to the enactment of any special assessment. The Court of Appeal's newly-inferred requirement that property owners articulate the reason for their objection at the public hearing is clearly absent from the legislation and is inconsistent with express provisions in Article XIII D which require that local governments receive and credit ballots submitted outside the context of the public hearing. Moreover, the requirement is a surprise impediment to property owners' right to challenge constitutionality of assessments in court, a right voters purposely gave themselves by adopting Proposition 218. Finally, the requirement does not advance the interests of the administrative

exhaustion doctrine, as Proposition 218 abrogated agency authority to impose special assessments and discretion to determine their validity.

C. **Article XIII D and the Statutes Promulgated Under the Implementation Act Expressly Provide that Ballot Submission is the Administrative Procedure for Challenging a Proposed Special Assessment.**

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. In inferring the new administrative exhaustion requirement, the Opinion glosses over the fact that Article XIII D, Government Code section 53753, and the PBID Law (Streets & Highway Code, section 36600 *et seq*.) provide a detailed scheme for objecting to a proposed assessment by submission of a ballot (as discussed above).

1. The Constitutional Scheme at Issue Already Provides a Procedure for Protesting a Proposed Assessment

The Opinion cites *Williams & Fickett* for the proposition 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.'" (Opn. 10.) That statement has no application here.

As an initial matter, this Court did not, in fact, infer an unstated exhaustion requirement in *Williams & Fickett*, determining that "the relevant statutes provide affirmative indications of the Legislature's desire that claims such as plaintiff's be submitted to a local board through the assessment appeal process." (*Williams & Fickett v. County of Fresno* (2018) 2 Cal.5th 1258, 1271.) Similarly, there is no need to infer an unstated exhaustion requirement here because the legislative scheme at issue provides an affirmative administrative procedure for challenging a proposed assessment.

In fact, under the standard articulated by this Court in *Williams & Fickett*, such an inference may only be justified when the statutory (or, in this case, constitutional) scheme in question contains no specified procedures. That is *not* the case with respect to Article XIII D, which contains only the ballot requirement.

In *Williams & Fickett*, the relevant statute provided an

administrative appeals process for challenging assessments. This Court determined that plaintiffs had failed to exhaust administrative remedies because they failed to bring an administrative appeal before challenging the assessment in court. (*Williams & Fickett*, *supra*, 2 Cal.5th at 1271.) That is not the case here, where Petitioners did challenge the assessments through the procedures detailed in Article XIII D and Government Code section 53753.

Moreover, the process in *Williams & Fickett* was markedly different from the constitutional and statutory scheme at issue here. In *Williams & Fickett*, "when the County first gave notice of the escape assessments, it informed plaintiff that *if plaintiff wished to challenge the assessments*, it had 60 days from the date of the notice to apply to the County's assessment appeals board for assessment reductions," which application the plaintiff did not make. (*Williams & Fickett*, *supra*, 2 Cal.5th at 1265, emphasis added.) In contrast, consistent with Government Code section 53753, Petitioners *did* challenge the assessments by voting against them as specified in the notice they received from the City. The "Notice of Public Hearing" to establish these BIDs merely stated that the City

Council "will hold a public hearing to determine whether to establish [the BID] and levy assessments." (AA 49-50 [Hill RHF]; AA 38-39 [Mesa RHF].) The notice went on to state that the City Council "may correct minor defects in the proceedings." The notice then provided detailed instructions regarding the enclosed *assessment ballot*, noting that the ballot must be received by the City Clerk prior to the close of the public hearing. The notice then explained as follows:

> The City Council will not impose an assessment if there is a majority protest. A majority protest will exist if the *assessment ballots* submitted, and not withdrawn, in opposition to the proposed assessment exceed the assessment ballots submitted, and not withdrawn, in its favor, weighting those assessment ballots by the amount of the proposed assessment to be imposed upon the identified parcel for which each assessment ballot was submitted.

(*Id*., emphasis added.) These procedures clearly did not require or provide notice that anything other than a ballot was necessary to challenge the assessments.

2. The Procedure for Protesting an Assessment Under Article XIII D, Section 4 is Limited to the Ballot Process

Article XIII D, section 4, subdivision (e), quoted in full above,

provides that "At the public hearing, the agency shall consider all *protests* against the proposed assessment and tabulate the *ballots*. […] A *majority protest* exists if, upon the conclusion of the hearing, *ballots* submitted in *opposition* to the assessment exceed the ballots submitted in favor of the assessments." (Emphasis added). Thus, 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.

The Opinion falls 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." (Opn. 7-8, emphasis added.) 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 require 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.[8] Petitioners protested through a public ballot and thus participated in the assessment hearing for purposes of administrative exhaustion.

Finally, the fact that Article XIII D, section 4, subsection (f) expressly addresses the right to challenge a special assessment in court provides further evidence that the legislature intended to require only the ballot procedure. "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." (Cal. Code Civ. Proc. § 1858.) When a statute addresses a particular subject, omission of a particular provision from that discussion indicates an intent that the provision is not applicable. (See *McAlexander v. Siskiyou Joint Cmty. College* (1990) 222 Cal.App.3d 768, 776.) Article XIII D section 4, subsection (f) provides particular procedures associated with the right to contest the validity of an assessment in a

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

legal proceeding. In particular, as discussed above, subsection (f) makes it easier for property owners to successfully challenge assessments in court by requiring agencies to bear the burden of proving an assessment's validity. The legislature's choice to not include in Government Code section 53753 or Streets and Highway Code section 36620 *et seq.* an administrative hurdle in excess of the ballot procedure must be taken as evidence that the legislature did not intend that one be imposed. Indeed, this reading is consistent with Proposition 218's underlying purpose to make it easier for taxpayers to win legal challenges to assessments.

3. The Newly Created Exhaustion Requirement Contradicts Prior Case Law

Moreover, nothing in any of the several pre-existing published appellate decisions regarding BIDs suggested that property owners were required to state their reasons at a public hearing as a condition to a later court challenge to BID assessments. Indeed, in *Silicon Valley*, *supra*, 44 Cal.4th 431, the seminal California Supreme Court case on BID assessments, while the plaintiff participated in the public hearing, its objection was limited to a

procedural issue regarding the tabulation of ballots, not the substantive issue which ultimately led the Supreme Court to invalidate the BID. (*Id*. at p. 440.)

Nor do any of the pertinent Court of Appeal decisions mention anything about such an exhaustion requirement. (*Dahms v. Downtown Pomona Property & Business Improvement District* (2009) 174 Cal.App.4th 708, 713 [no indication that plaintiff participated in the city council hearing or even submitted an opposing ballot]; *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1209 [plaintiff attended city council meeting but “did not directly challenge the resolution approving the formation of the assessment district”]; *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1070 [no indication that property owners participated in the council hearing on the supplemental district at issue]; *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516, 1527 [no indication that plaintiff participated in the public hearing or even submitted an opposing ballot]; *Golden Hill Neighborhood Assn., Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 424-425 [no indication that plaintiff participated in the city council hearing

or even submitted an opposing ballot].)

The new requirement is a surprise impediment that is not reasonably inferred from the applicable constitutional scheme and is inconsistent with prior case law. In light of the fact that Article XIII D, section 4 already specifies a detailed procedure for challenging a proposed assessment, the Court of Appeal's decision to infer an additional unstated requirement is unsupportable.

D. Requiring That An Objecting Property Owner Articulate The Reasons for His Objection at the Public Hearing Would Not Serve the Purpose of the Administrative Exhaustion Doctrine.

"The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency[.]" (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391.) One of the most often-cited ways administrative exhaustion serves the interest of judicial efficiency is that it "'facilitates the development of a complete record that draws on administrative expertise[.]' [Citation.]" (*Yamaha Motor*

Corp. v. Superior Court (1986) 185 Cal.App.3d 1232, 1240.)

However, as discussed above, Proposition 218 did away with local agencies' 'autonomy' to impose assessments by requiring majority voter approval for all assessments and abrogating judicial deference to agency decisions when the validity of an assessment is challenged in court. Voters have ultimate authority to veto a proposed assessment, and they may oppose an assessment for any reason, whether grounded in a legally-cognizable challenge or not. Relatedly, the new exhaustion requirement would not promote judicial efficiency either because Proposition 218 expressly abrogated judicial deference to agency decisions about assessments, requiring courts to "exercise their independent judgment in reviewing local agency decisions" on the validity of an assessment. (*Silicon Valley*, *supra*, 44 Cal.4th at 448.)

The PBID Law requires that, following the public hearing, an agency that decides to proceed with establishing a BID adopt a resolution of formation of a BID including "A determination regarding any protests received." (Sts. & Hy. Code § 36625(a)(4).) However, it appears that an agency is not actually required to determine

anything beyond whether a majority protest was received. In any case, that was the only determination made in the resolutions of adoption issued by the City in the instant case. (AA 73-74 [Hill] ["City Council has received all evidence and heard all testimony concerning the establishment of the District and desires to establish the District"; "City Council hereby finds that there was no majority protest against the establishment of the District and levy of assessments"]; AA 83-84 [Mesa].) Thus, the PBID Law does not require the City to make a determination as to the legal merits of any objections received, and therefore the procedure required by the Opinion would not promote the creation of an administrative record that would aid a reviewing court by drawing on agency expertise. And even if the statute did require the agency to respond to the merits of each objection received, these determinations would not be entitled to deference by the reviewing court, which must make an independent assessment of any legal challenge.

Similarly, Government Code section 53753 requires that a city council keep a detailed public record of how the ballots were

received and tabulated at the hearing,[9] but contains absolutely no requirement that an agency keep a record of any determinations it may make about the merits of an objection raised at the hearing, or even that the agency record what those objections actually were. Thus, consistent with Proposition 218's purpose, the statute requires the local agency to create a detailed administrative record showing that it met the procedural requirements for the provision and tabulation of ballots. There is no requirement that the agency make a record of its responses to substantive objections. The clear focus of the hearing and the associated recordkeeping requirements is on ensuring that local agencies follow the constitutionally mandated procedures for obtaining voter consent to the proposed assessment, not on addressing substantive objections to a proposal.

With no requirement that a written or oral objection be formally resolved or that the decision be recorded – at least beyond the tabulation of the objection ballots – there is no way to know whether

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[9] "During and after the tabulation, the assessment ballots and the information used to determine the weight of each ballot shall be treated as disclosable public records […] The ballots shall be preserved for a minimum of two years." (Gov. Code § 53753(e)(2).)

the issues raised in a challenge to a proposed assessment in court were even raised before the agency at the hearing. And, given that the laws governing assessments are constitutional and must be independently reviewed by the courts anyway, it makes sense that the legislative scheme would not emphasize the agency's role in responding to any objections on the merits.

One of the main justifications the Opinion cites for imposing the new exhaustion requirement is that requiring property owners to present the specific reason for their objection at the public hearing will lighten the burden on the courts reviewing the validity of an assessment. (Opn. 14.) However, it is clear that the Court of Appeal's analysis does not account for the extremely limited role of local government agencies in responding to any challenges to a proposed assessment on the merits.

E. If This Court Upholds the Exhaustion Requirement Newly Inferred by the Court of Appeal, the Requirement Should Only Apply Prospectively.

The key case upon which the Opinion rests, *Williams & Fickett*, found that a taxpayer was required to pursue a property tax

assessment appeal even though the taxpayer's challenge was based on an assertion that it did not own the property, rather than an issue of valuation. In so finding, the Court overruled previous case law which had created a "nullity exception" to the exhaustion doctrine. However, *Williams & Fickett* itself found that the new administrative exhaustion requirement it imposed should only be applied prospectively. As explained by this Court:

> [C]onsiderations of fairness and public policy may require that a decision be given only prospective application. [Citations.] Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule.

(*Williams & Fickett*, *supra*, 2 Cal.5th at 1282, quoting *Claxton v. Waters* (2004) 34 Cal.4th 367, 378–379.) In *Williams & Fickett*, this Court determined that its decision overruling an exception to the exhaustion requirement articulated in a prior decision should only be given prospective application because not doing so would unfairly deprive plaintiffs of a remedy. Should the Court uphold the new-inferred exhaustion requirement, the present case demands this

same result.

1. Reasonable Reliance

As discussed above, nothing in any of the several published appellate decisions regarding BIDs suggested that property owners were required to state their reasons to the City Council as a condition to a later court challenge to BID assessments. Accordingly, Petitioners reasonably relied on the state of the law in effect at the time of the City Council hearings on these BIDs in June of 2017. "Reliance by litigants on the former rule and the unforeseeability of change" is of primary importance in determining whether a judicial decision may fairly be applied retroactively. (*Woods v. Young* (1991) 53 Cal.3d 315, 330.)

Moreover, unlike the notice of administrative procedures provided in *Williams & Fickett*, the notices sent to Petitioners did not indicate that participation in the City Council hearing was necessary to preserve their rights. Thus, Petitioners had no notice that they had to do anything other than return their assessment ballots in order to lodge a protest to the BID assessments. Under such conditions, a newly inferred administrative exhaustion requirement

should only be applied prospectively.

2. Substantive Effect

Prospective application is also appropriate because the Opinion will have a substantive effect on pending cases, not just a procedural one. Prospective application is favored where "[p]rospective application will not remove any substantive defense to which defendants would otherwise be entitled," but "retroactive application of the change, on the other hand, would bar plaintiffs' actions regardless of their merits." (*Woods*, *supra*, 53 Cal.3d at 330.) For example, in *Claxton*, *supra*, this Court held that extrinsic evidence was inadmissible in workers' compensation proceedings to show that a standard release form was also meant to apply to claims outside the workers' compensation system. Noting that "our holding . . . has a substantive effect because it may, in individual cases, effectively alter the legal consequences of executing the standard compromise and release form," the Court gave its decision only prospective effect. (*Claxton*, *supra*, 34 Cal.4th at 379.)

Similarly, here, any BID challenges filed prior to publication of the Opinion in which the petitioners did not articulate their objections

to the city council or other body will suddenly be defective, with substantive effect. And, retroactive application will result in these nonprofits paying more than $1,000,000 in assessments in the Hill RHF case alone, without ever having the opportunity to challenge the constitutionality of this assessment in the Court of Appeal. In RHF's case, the BIDs were approved for a term of 10 years, so RHF will not have an opportunity to challenge the constitutionality of the assessments for around another seven years.

3. Administration of Justice

In giving its holding only prospective application, the Court in *Claxton*, *supra*, also reasoned that, "although barring the use of extrinsic evidence will preserve judicial resources, denying retroactive application will not unduly impact the administration of justice because it will merely permit a gradual and orderly transition." (34 Cal.4th at 379.) In this case, requiring challengers to present the specific reasons for their objections at the designated public hearing is similarly designed to "lighten the burden of overworked courts." (Opinion at 14, quoting *Leff v. City of Monterey Park* (1990) 218 Cal.App.3d 674, 681.) By the same token, however, there is no

reason to believe that denying retroactive application will unduly burden the courts while any pending BID challenges are gradually resolved. Thus, limiting the retroactivity of the Opinion would not have an adverse effect on the administration of justice.

4. Deprivation of Remedy

Finally, while the purpose of the administrative exhaustion rule announced in the Opinion will not be served as to any pending challenges where the petitioners did not present their objections to the city council, the result of retroactive enforcement would be to deprive those petitioners of any remedy whatsoever. As in *Williams & Fickett*:

> Prospective application will not remove any substantive defense to which defendants would otherwise be entitled. Retroactive application of the change, on the other hand, would bar plaintiffs' actions regardless of their merits. Retroactive application of an unforeseeable procedural change is disfavored when such application would deprive a litigant of 'any remedy whatsoever.'

(*Williams & Fickett*, *supra*, 2 Cal.5th at 1282, quoting *Woods v. Young*, *supra*, 53 Cal.3d at 330.) Here, barring Petitioners' claims will result in these nonprofits paying more than $1,000,000 in

assessments in the Hill RHF case alone, without ever having had their day in the Court of Appeal. On the other hand, Respondents will retain all of their constitutional and other arguments to defend against any pending BID challenges. Accordingly, considerations of fairness and public policy require prospective application of the Opinion only.

V.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the decision of the Court of Appeal requiring that a property owner must articulate the specific reasons for its opposition (either orally or in writing) to a proposed assessment at the noticed public hearing in order to exhaust administrative remedies prior to challenging the assessment in court. In the alternative, this Court should hold that the Opinion be given only prospective effect.

DATED: November 10, 2020 REUBEN RAUCHER & BLUM

By:_________________________
Timothy D. Reuben
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

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

The text of this brief consists of 7,949 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief, not including the tables of contents and authorities, and caption page.

DATED: November 10, 2020   REUBEN RAUCHER & BLUM

By:______________________________
Timothy D. Reuben
Attorneys for Petitioners

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12400 Wilshire Boulevard, Suite 800, Los Angeles, California 90025.

On November 10, 2020, I served the foregoing document described as:

PETITIONERS' OPENING BRIEF ON THE MERITS

on all interested parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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Nathalie Quach

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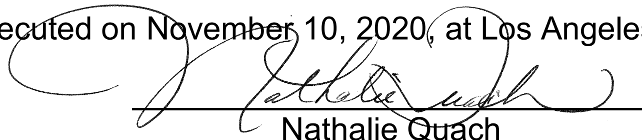

Nathalie Quach

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