
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S263734

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

Petitioners and Appellants,

v.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

MESA RHF PARTNERS, L.P.,

Petitioner and Appellant,

v.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF IN SUPPORT OF PETITIONERS;
PROPOSED AMICUS CURIAE BRIEF**

Los Angeles County Superior Court
Case Nos. BS170127 and BS170352
Hon. Mitchell L. Beckloff
Hon. Amy D. Hogue
Judges of the Superior Court

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APPLICATION FOR LEAVE TO FILE

Benink & Slavens, LLP (“BSLAW”) is a California limited liability partnership practicing law in the State of California. A substantial portion of BSLAW’s practice is in the representation of ratepayers and taxpayers in Proposition 218 and Proposition 26 cases. Its attorneys prosecuted their first Proposition 218 case in 2006 and have since represented dozens of plaintiffs throughout California. At least six of these cases have been appealed and one is subject to a pending Petition for Review before this Court. (*Wyatt v. City of Sacramento*, Case No. S267577.)

At issue in this case is whether a challenger to an assessment is required to articulate specific reasons at a public hearing mandated by Proposition 218 in order to exhaust administrative remedies. BSLAW has frequently litigated the issue of exhaustion of administrative remedies in the context of Proposition 218 and Proposition 26 cases – and expects to continue to litigate this issue in the future. BSLAW and its clients (current and future) have a concrete interest in the outcome here.

BSLAW supports Petitioners in this case and encourages this Court to reverse the judgment of the Second District Court of Appeal. BSLAW requests leave from this Court to file the attached Brief of

Amicus Curiae. This brief focuses on two issues that BSLAW does not believe were adequately addressed by the parties, but demands careful consideration.

BSLAW's attorneys authored the entirety of the proposed brief, and BSLAW neither made nor received any contributions intended to fund the preparation or submission of the brief.

For the foregoing reasons, BSLAW respectfully requests this Court's permission to file the accompanying Brief of Amicus Curiae.

DATED: March 29, 2021

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Eric J. Benink", is written over a horizontal line.

Eric J. Benink, Esq.
Counsel for Amicus

BRIEF OF AMICUS CURIAE

INTRODUCTION

This case involves a challenge to the establishment of business improvement districts. Section 4 of article XIII D of the California Constitution, and the Property and Business Improvement District Law of 1994, establish a comprehensive procedure local governments must follow to create a business improvement district. Article XIII D, section 4, subdivision (d) allows property owners to vote upon a proposed assessment. Subdivision (e) requires a local agency to conduct a public hearing and consider all protests against the proposed assessment.

Petitioners and Plaintiffs, affiliates of Retirement Housing Foundation (“Plaintiffs”) timely submitted ballots against the proposed assessment, but did not speak or submit any other written opposition at the hearing. Thereafter, they initiated this action in Superior Court. Respondents and Defendants, Downtown Center Business Improvement District Management Corp., San Pedro Property Owners Alliance, and City of Los Angeles (“Defendants”) argued that Plaintiffs were required to specify reasons for their opposition in order to exhaust their administrative remedies. In a published opinion (“Opinion”), the Court of Appeal agreed. In support, it cited many of the policies

underlying the exhaustion doctrine, including the fact “it facilitates the development of a complete record that draws on administrative experience,” and “can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review.” (Opinion, p. 11 [citations omitted].) Defendants invoke the same alleged concerns here.

BSLAW agrees with Plaintiffs that this Court should not impute to article XIII D, section 4, a duty on property owners to specify reasons why a local agency’s proposed action is unconstitutional. This brief expounds on the reasons why the policies underlying the exhaustion doctrine are not served in Proposition 218 cases. It also explains that the doctrine is not intended to apply *prior to* the adoption of the illegal act.

ARGUMENT

I. DEFENDANTS’ PREMISE THAT IT CANNOT ADEQUATELY PREPARE A RECORD WITHOUT CONSTITUENT INPUT IS WRONG

A Proposition 218 action is unlike most challenges to government action. Typically, agency action comes to the court with a presumption of validity. (*Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 389.) In a Proposition 218 case, the burden is on the

government to prove compliance with its mandates. (See Cal. Const., art. XIII D, § 4, subd. (f) [special assessments] and § 6, subd. (b)(5) [property-related fees and charges].)

This burden-shifting feature reflected Proposition 218 voters' intent to reverse the usual deference accorded governmental action. (See *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [“[w]e construe article XIID, section 4, subdivision (f)—the ‘burden...to demonstrate’ provision—liberally in light of the proposition’s other provisions, and conclude that courts should exercise their independent judgment in reviewing local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Proposition 218.” [citation omitted].)

Defendants acknowledge the independent judgment standard of review and Proposition 218’s burden-shifting feature. (Respondents’ Joint Answer Brief on the Merits (“Ans. Brf.”), p. 50.) Yet, they contend that “the government cannot later justify an assessment on grounds not raised during the assessment process, because it is limited to the record on which it legislated” citing *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 (*Western States*). (Ans. Brf., p. 13; see also *id.* at p. 50.) According to the Defendants, if aggrieved

property owners do not identify specific reasons during the protest hearing, it will “deprive[] the defendant agency of notice and reasonable opportunity to resolve any dispute and avoid litigation or to build a record that can pass Proposition 218 muster.” (Ans. Brf., p. 50.)

Defendants’ statement about record-building is wrong because *Western States* has no application in a dispute governed by independent review. Furthermore, if Defendants’ argument were accepted, it would effectively shift the burden back to challengers.

A. *Western States* Does Not Limit Defendants to an Administrative Record as They Contend

Western States is the seminal case that espoused the rule barring extra-record evidence in challenges to administrative agency decision-making. Contrary to Defendants’ argument, it has no application here. This is because the holding in *Western States* was based entirely on the fact that the applicable standard of review was “prejudicial abuse of discretion.” (See *Western States, supra*, 9 Cal.4th at p. 564.) *Western States* addressed a challenge under the California Environmental Quality Act (CEQA), which must be decided under that standard. (*Ibid.* [“In determining whether to grant a petition for traditional mandamus on the ground that an administrative body failed to comply with CEQA in making a quasi-legislative decision, the court may

consider only ‘whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.’ (Pub. Resources Code § 21168.5.)”].) In contrast, our state Constitution requires a court to exercise its independent review here, and places the burden to prove compliance on the government. This fundamental distinction renders *Western States* completely inapplicable here.

In *Western States*, an oil industry trade group challenged CEQA regulations adopted by a state agency, the Air Resources Board (“ARB”). Unlike here, there was no dispute that the ARB was required by statute (CEQA) to prepare and certify an administrative record. At issue was whether extra-record evidence was admissible to challenge the ARB’s adoption of the regulations.

To answer the question, the Court began by examining the standard of review that governs a trial court’s consideration of an agency’s quasi-legislative¹ CEQA decision. It explained that:

¹ The Court found that the adoption of the regulations was “quasi-legislative” and thus, should be reviewed under traditional mandamus. (*Id.* at p. 567.)

...the court may consider only ‘whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or the determination or decision **is not supported by substantial evidence.**’ [citation.] The issue now before us is whether a court may consider evidence outside the administrative record in determining whether a quasi-legislative administrative decision was an **abuse of discretion** under this statute.

(*Id.* at pp. 568-569 [emphasis added].)

The Court next explained that:

The admissibility of extra-record evidence turns on whether the existence of substantial evidence is a question of fact that may be disputed by contradictory evidence or whether it is instead purely a question of law.

(*Id.* at p. 570.)

The Court then concluded that there was no meaningful difference between the substantiality of the evidence standard used by appellate courts in reviewing factual determinations of trial courts and the substantiality of evidence rule applicable in CEQA proceedings. (*Id.* at pp. 570-573.) It held:

[W]e are persuaded that the factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determinations of trial courts, that the substantiality of the evidence supporting such administrative decisions is a question of law, and that both types of substantial evidence review are governed by similar evidentiary rules.

Accordingly, a court generally may consider only the administrative record **in determining whether a quasi-legislative decision was supported by substantial evidence** within the meaning of Public Resources Code section 21168.5.

(*Id.* at p. 573.)

Western States expanded its holding to non-CEQA quasi-legislative administrative decisions. (See *id.* at p. 574.) But the entire basis for doing so was that such decisions are governed by a standard similar to the one governing CEQA actions, the “arbitrary and capricious” standard. (*Ibid.* [“Although these standards are not fungible . . . there is no sound reason why CEQA and non-CEQA cases should be governed by different evidentiary rules.”].)

Because the linchpin of *Western States* is not present in a Proposition 218 case, the general rule against extra-record evidence is

simply not applicable.² (See also *Western States, supra*, 9 Cal.4th 559 at p. 575-576 [“The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with non-reviewability at one end and **independent judgment** at the other.”] [emphasis added] [citing *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 232]; cf. *San Luis & Delta-Mendota Water Auth. v. Locke* (9th Cir. 2014) 776 F.3d 971, 992 [extra-record evidence rule “ensures that the reviewing court affords sufficient **deference** to the agency’s action” and “[w]hen a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency.”] [citation omitted] [emphasis added].)

Thus, contrary to Defendants’ argument, a local agency is not confined to an administrative record and nothing precludes it from adducing any admissible evidence at trial in order to meet its burden in a Proposition 218 case. All relevant evidence is admissible, unless a specific statutory or constitutional provision bars its admission. (*People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 334 (2014) (*Bryant*))

²Furthermore, there are no statutory procedures for requesting, preparing, or certifying an administrative record – or establishing the content of such a record – in Proposition 218 challenge.

as modified on denial of reh'g (Oct. 1, 2014) [citing Evid. Code, § 351].) Thus, Defendants' concerns about being limited to an inadequate record find no support in the law.

B. Defendants Seek to Shift the Burden to Challengers

It is the solemn duty of a local government agency seeking to adopt assessments or property-related fees to set those levies in a manner that complies with our state Constitution. Here, Defendants ask that this Court establish a rule that would bar aggrieved property owners from constitutional challenges unless they inform the agency about unconstitutional aspects prior to adoption. In other words, they demand that aggrieved property owners ferret out any constitutional flaws for them because “City Councils cannot be expected to be clairvoyant and Proposition 218 is not ready (sic) to require the impossible.” (Rsp. Brf., p. 50.)

It is, of course, not impossible to comply with Proposition 218 in the absence of constituent participation. The demands of Proposition 218 are stringent – and intentionally so. But this Court should reject the idea that city councils cannot navigate Proposition 218's requirements and restrictions without detailed input from their constituents. From the moment a local government initiates the formation of an assessment district, it is on notice that it will be **its**

burden to prove compliance with section 4’s mandates. It should comport itself accordingly by carefully analyzing the relevant constitutional requirements and by ensuring it can adduce supporting evidence in the event of a lawsuit. Under Defendants’ theory, challengers must prove why a local government **is not** in compliance. But there is no meaningful difference between proving compliance and setting forth detailed reasons why compliance is lacking. This Court has previously recognized that Proposition 218’s burden-shifting feature was intended to make easier for taxpayers to win lawsuits and more difficult for an assessment to be validated in a court proceeding. (*Silicon Valley, supra*, 44 Cal.4th at p. 445 [citing Prop. 218 Legislative Analyst].) The Court should not countenance an interpretation that guts the critical constitutional requirement Proposition 218 voters placed on local governments that wish to levy assessments (art. XIII D, § 4) or property-related fees (art. XIII D, § 6).

II. THE EXHAUSTION DOCTRINE IS INTENDED TO REDRESS ILLEGAL ACTION, NOT PREVENT IT

The public hearing at which Defendants contend property owners must submit specific information regarding the constitutionality of the proposed assessments, occurred *prior* to the adoption of Ordinance No. 185006. (See Rsp. Brf., pp. 21-22.) But the word “remedy” in the

context of the exhaustion doctrine, addresses a wrong that **has already occurred**. As the Third District Court of Appeal has explained:

Ordinarily we use the word remedy as meaning a device to redress a wrong. It is decidedly inappropriate to speak of remediating a wrong which has not and may not occur. Prior to the adoption of a negative declaration under the scheme here in issue there is no wrong to be remediated. Hence, the mere public opportunity to participate in an administrative proceeding prior to the adoption of a negative declaration is not a remedy.

(Tahoe Vista Concerned Citizens v. County of Placer (2000) 81

*Cal.App.4th 577, 590 [citations omitted]*³; see also *Lindelli v. Town of San Anselmo (2003) 111 Cal.App.4th 1099, 1106* [“The opportunity to participate in a public hearing prior to a legislative action does not constitute an administrative remedy subject to exhaustion.”];

California Aviation Council v. County of Amador (1988) 200 Cal.App.3d

³ The Third District explained that the statutory provision in CEQA that demands that challengers present alleged grounds for noncompliance orally or in writing prior to close of public hearing (Pub. Resources Code § 21177) is actually a standing requirement, not an exhaustion requirement. (*Id.* at p. 590.)

337, 348 (conc. Opn. of Blease, J.) [same]; *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1432 [ultimate decision whether to amend general plan is a legislative act to be voted upon, after notice and hearing, by county board of supervisors, and process does not constitute an administrative remedy].)

Many municipalities enact procedures to redress legislation *after* it is enacted. For example, in *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424, plaintiff challenged an assessment district that was subject to Proposition 218. The City of Oakland had enacted an ordinance that provided that “[t]he exclusive remedy of any person affected or aggrieved [by the assessment proceeding or assessment] shall be by appeal to the City Council.” (*Id.* at p. 1428.) Because plaintiff had not pursued this post-legislation appeal, Oakland argued that the plaintiff had failed to exhaust its administrative remedies. (*Ibid.*) The Court of Appeal held that the process was inadequate because it lacked “any procedural mechanism for submission, evaluation and resolution of the appeal.” (*Id.* at p. 1430.) But more important, Oakland did not argue that the Proposition 218 public protest hearing which *preceded* the adoption of the resolution forming the fire assessment district at issue constituted an administrative remedy. (*Id.* at p. 1428). Its sole focus was that the

post-adoption right to appeal as provided by local ordinance constituted the remedy. (*Ibid.*)

Here, the City of Los Angeles could have enacted a post-adoption procedure by which property owners may challenge assessment procedures or assessments. It did not. Article XIII D, section 4, subdivision (e) is not a post-legislation procedure and thus, does not embody a true administrative remedy.

CONCLUSION

Proposition 218 demands that local governments assume the responsibility of proving compliance with its mandates. Implicit in its burden-shifting provisions is an assumption that a local government should be prepared to defend its actions without prompting or assistance from its citizens. Defendants' arguments effectively shift the burden back to challengers. Furthermore, an exhaustion requirement cannot exist prior to enactment of illegal legislation; there is nothing to *remedy*. For these reasons and the reason Plaintiffs set forth in their briefs, BSLAW urges the Court to reject the exhaustion requirement Defendants advocate here.

DATED: March 29, 2021

Respectfully submitted,



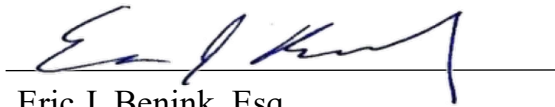
Eric J. Benink, Esq.
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CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court, Rule 8.204(c), that the text of this brief, as counted by Microsoft Word 2016, consists of 2,807 words (including footnotes, but excluding the tables of contents and authorities, this certificate and the proof of service) and therefore has fewer than the 14,000 total words permitted by the Rules of Court.

Dated: March 29, 2021

BENINK & SLAVENS, LLP

A handwritten signature in blue ink, appearing to read "Eric J. Benink", is written over a horizontal line.

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PROOF OF SERVICE

Supreme Court of the State of California
Hill RHF Housing Partners, L.P. v. City of Los Angeles
Mesa RHF Partners, L.P. v. City of Los Angeles
Case No. S263734

I, Robin Griffin, declare as follows:

I am employed with the Law Office of Benink & Slavens, LLP. My business address is: 8885 Rio San Diego Drive, Suite 207, San Diego, CA 92108; my electronic service address is robin@beninkslavens.com; At the time of service, I was at least 18 years of age and not a party to this legal action.

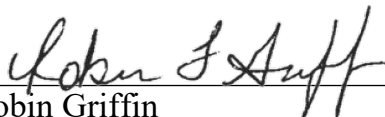
On March 29, 2021, I filed the **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS; PROPOSED AMICUS CURIAE BRIEF** with the Supreme Court of the State of California and the Third District Court of Appeal (CRC, Rules 8.70 & 8.500(f)) through the Court's electronic filing system, TrueFiling.

I further declare this same day, I caused to be served the document(s) listed above by electronic service upon uploading and filing the document(s) with the Court through their electronic filing system, TrueFiling, and by UPS overnight mail upon:

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

Dated: March 29, 2021



Robin Griffin

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Hill RHF Housing Partners, L.P. v. City of Los Angeles
Mesa RHF Partners, L.P. v. City of Los Angeles
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