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IN THE SUPREME COURT OF CALIFORNIA

RAMONA MUNICIPAL WATER DISTRICT,
Defendant, Respondent, and Petitioner,

v.

EUGENE G. PLANTIER, *et al.*,
Plaintiffs, Appellants and Respondents.

After a Published Decision by the Court of Appeal
Fourth District, Division One
Case No. D069798

PETITION FOR REVIEW

Kendra J. Hall (Bar No. 166836)
Gregory V. Moser (Bar No. 101137)
John D. Alessio (Bar No. 174900)
Adriana R. Ochoa (Bar No. 256854)
PROCOPIO, CORY, HARGREAVES
& SAVITCH LLP
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: 619.238.1900
Facsimile: 619.235.0398
kendra.hall@procopio.com
greg.moser@procopio.com
john.alessio@procopio.com
adriana.ochoa@procopio.com

Attorneys for Petitioner
RAMONA MUNICIPAL WATER DISTRICT

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CALIFORNIA CASES

CALIFORNIA STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

S _____

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Petitioner Ramona Municipal Water District ("District") hereby requests that this Court grant review of the June 13, 2017, published decision of the Court of Appeal, Fourth District, Division One. A copy of the Court of Appeal's published decision is attached to this petition as Exhibit A.

I. ISSUE PRESENTED

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

II. WHY REVIEW SHOULD BE GRANTED

Review should be granted to settle an important question of law arising under Articles XIII C and XIII D of the California Constitution (Proposition 218). Prior to Proposition 218's enactment, locally elected governing bodies held most of the power over local revenue-raising measures. Proposition 218 shifted the power over taxation to residents and property owners and specifically gave them the power to prevent or reduce any local tax, assessment or fee. However, with power comes responsibility. Responsibility to participate in the public process.

This Court has observed that the notice and hearing requirements set forth in section 6(a) of Article XIII D (hereinafter section 6) facilitate communications between local governments and those they serve, and the substantive restrictions on property-related charges in subdivision (b) should allay fee-payors' concerns that government service charges are too high. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220.) However, none of the named Plaintiffs in this class action participated in the mandatory Proposition 218 public hearing. Instead, they uniformly testified that participation would be a "waste of time." Communications between the local

governments and those they serve cannot be had if those that are pursuing the change do not participate. Potentially more important is that others in the community that will be impacted by those few seeking change will not have the opportunity to hear or respond to the proposed change in the mandatory open forum. Mandating participation, however minimal, in the Proposition 218 public hearing by those that seek to impact all fee-payors is a minimal administrative exhaustion requirement that serves both the Constitution and good public policy.

In a published opinion, the Court of Appeal ruled Plaintiffs Eugene G. Plantier as Trustee of the Plantier Family Trust (Plantier), Progressive Properties Incorporated, and Premium Development, LLC, on behalf of themselves and all other similarly situated (Plaintiffs) were not required to exhaust the administrative remedies mandated by section 6 (a) prior to challenging, and seeking to change and obtain a refund for, the District's sewer service fees imposed since November 22, 2012, as violative of subdivision (b)(3) of section 6. [Ex. A, p.26.]

In finding Plaintiffs' class action was permissible in lieu of compliance with the administrative remedies provided in section 6(a)(2), the Court of Appeal's decision draws an artificial

distinction between challenges to the *method* used by the District to calculate its wastewater service charges and the *imposition of* or *increase in* a proposed fee or charge. [Ex. A, pp.15-16.] The distinction is not supported by the plain meaning of Proposition 218 and creating such a distinction does not further Proposition 218's "purposes of limiting local government revenue and enhancing taxpayer consent." (See *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448.) The decision is also inconsisent with other authorities that hold when an administrative remedy is provided, it must be invoked.

The District Board had the authority to change its rate-structure, but was never given the opportunity to address Plaintiffs' challenge when it was addressing proposed rates in connection with its annual Proposition 218 public hearing. By eliminating the requirement that a fee-payor participate in the Proposition 218 hearing, the decision of the Court of Appeal reduces the public hearing requirement, and the District's duty to consider all protests, to a mechanical protest-counting exercise.

The Court of Appeal's decision also applies an incorrect standard in concluding the administrative remedies provided by

Proposition 218 are inadequate. First, the decision concludes it would have been "nearly impossible" for Plaintiffs to obtain written protests from a majority of parcel owners because the *lead* class representatives are commercial property owners, whose concerns might differ from the majority of sewer users. [Ex. A, p.17.] However, section 6(a)(2) is effectively rendered meaningless if it is an adequate excuse for a property owner to fail to vote based on speculation a majority vote is "nearly impossible."

Second, the Court of Appeal's decision mistakenly concludes Proposition 218 does not require an agency to accept, evaluate and resolve protests at the mandated Proposition 218 hearing. Agencies have the mandatory obligation to "consider all protests." (§6(a)(2).) Proposition 218 also shifted the burden to agencies to support proposed charges. (§6(b)(5).) Further, judicial review of an agency's adoption of a proposed fee or charge is not entitled to deference, but instead is reviewed de novo. (*Id.* at 443-450; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912 ["We exercise our independent judgment in reviewing whether the District's rate increases violated section 6. In applying this standard of review, we will not provide any

deference to the District's determination of the constitutionality of its rate increase." (Citations omitted).]

The Court of Appeal decision states that without a majority of property owners to protest in writing, "a parcel owner is left solely with the right to 'protest' the proposed 'fee or charge.'" [Ex. A, p.19.] Despite acknowledging "subdivision (a)(2) *requires* the agency to 'consider all protests' at the hearing," the Court of Appeal decision concludes "merely having an agency consider a protest—without more—is insufficient to create a mandatory exhaustion requirement." [*Id.*, emphasis original.] In so finding, the decision not only sweeps aside an agency's duty to consider all protests, but also the agency's burden to support proposed charges, including establishing that its fees are based on actual use or service that is actually available to a property pursuant to section 6(b)(5). The duty to consider protests combined with the shifted burden of proof to the District under Proposition 218 provides property owners with an effective administrative remedy that must be exhausted.

These provisions provide fee-payors with an adequate remedy. The District had more than mere continuing supervisory or investigatory powers, it had the power to provide Plaintiffs the

relief they now seek in this judicial action. For that reason, the authorities relied upon by the Court of Appeal involving nebulous appeal procedures, or the right to file a protest without the concomitant requirement that the protest be considered by an agency with the burden to support its decision, are distinguishable. Likewise, the decision's efforts to distinguish *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878 ("*Wallach's*"), a case where a duty to exhaust was found prior to the imposition of Citrus Pest Control assessments, including on constitutional grounds under Propositions 62 and 218, creates confusion regarding the exhaustion of remedies analysis.

Rather than fostering communication between local governments and those they serve, the decision of the Court of Appeal permits Proposition 218's mechanism for submission, evaluation and resolution of a challenge to be bypassed. As a result, the District was deprived of the opportunity to address a methodological challenge before being faced with a judicial action potentially impacting all property owners and also threatening the viability of the District.

The duty to exhaust under Proposition 218 is an issue of critical importance. Clarity and consistency are particularly important in this area which affects all fee-payors, cities, counties and special districts throughout California. [See Ex. A, p.3, fn.3.] This case provides this Court with the opportunity to squarely decide whether a fee-payor challenging a property-related fee as non-compliant with section 6 is required to exhaust administrative remedies prior to resort to the courts. Review should be granted to resolve this important issue of statewide importance.

NATURE OF THE CASE AND PROCEDURAL HISTORY

A. Proposition 218.

Proposition 218 ensures a fee imposed on property owners shall not be extended, imposed, or increased by any agency unless certain substantive requirements are satisfied. Revenues derived from the fee cannot exceed the funds required to provide the property-related service. (§6(b)(1).) The funds arising from the fees may not be used for any purpose other than that for which the fee was imposed. (§6(b)(2).) The amount of the fee imposed on any parcel or person as an incident of property ownership cannot exceed the proportional cost of the service attributable to the

parcel. (§6(b)(3).) No fee may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. (§6(b)(4).) A fee may not be imposed for general government services where the service is available to the public at large in substantially the same manner as it is to property owners. (§6(b)(5).)

These limitations, among others, have led local government agencies to implement extensive procedures to support, explain and publicize their rate-setting methodologies and needs for services provided to the public. Many agencies, including the District, set new or increased fees in conjunction with adoption of an annual budget and the fee hearings conducted by the District Board are commonly the most heavily attended meetings of the year. [5 AA 578-881.]

Pursuant to section 6 (a), an agency must comply with the following mandatory procedures before imposing or increasing any fee or charge: (1) identify the parcels on which a fee is proposed; (2) calculate the amount of the fee; and (3) provide written notice by mail of the proposed fee to the record owner of each identified parcel. (§6(a)(1).) The written notice must provide the amount of the fee proposed upon each parcel, the basis upon

which the proposed fee was calculated, the reason for the fee, and the date, time, and location of the public hearing on the proposed fee. (*Ibid.*)

Section 6 also requires that not less than 45 days after mailing the notice, the agency shall conduct a public hearing regarding the proposed fee. At this hearing, the agency must consider all protests against the proposed fee. If a majority of the owners of the identified parcels present written protests to the fee, the agency cannot impose the fee. (§6(a)(2).) If the District votes to impose a fee, it has the burden to establish it complies with the substantive provisions of Proposition 218. (§6(b)(5).)

There is no dispute that the fees imposed by the District in 2012-2014 were for the purpose of funding the wastewater operations of the District and that the fees were adopted as specified in section 6, subdivision (a). There is likewise no dispute that neither Plaintiffs, nor anyone else, raised objections to the "proportionality" of the District's sewer service fees at the public hearings held for the years at issue in this case. [5 AA 920-921, 984:28-985:25, 995-997, 1033-1035, 1044.] Instead, the lead class plaintiffs testified that despite receiving the rate-setting notices they felt the public hearings were a "waste of time." [*Id.*]

B. The District's Annual Proposition 218 Hearing Process.

1. The District's Authority to Set Rates and Collect for Sewer Services.

The District, which is organized and operates as a municipal water district (Wat. Code §§71000 *et seq.*), provides sewer/wastewater, water, fire protection, parks and recreation and other services to approximately 40,000 people in an unincorporated area of San Diego County covering roughly 45,800 acres (75 square miles). [Ex. A, pp.4-5.] The District has authority to set and collect charges for sewer services. (*Id.*, §71671.) By law, the District must recover revenues adequate to cover the operating expenses of the sewer services it provides and to provide for the repairs and depreciation of works owned or operated by it; otherwise, the District Board of Directors must provide for the levy and collection of a tax sufficient to raise the amount of money determined by the board to be necessary to cover all of the District's obligations. (*Id.*, §72092.) The District is obligated to set rates sufficient to cover operating and maintenance expenses of its sewer service facilities. (*Id.*, §72093 ["The board shall determine the amounts necessary to be raised by taxation during the fiscal year and shall fix the rate or rates of

tax to be levied which will raise the amounts of money required by the district."].)

2. Notice Regarding Wastewater Proposed Rates.

Like many other local agencies, the District determines the costs of sewer service based on each parcel's assigned Equivalent Dwelling Units ("EDUs") determined by the estimated wastewater flow and strength from the type of use being conducted on the respective parcel. [*Id.*][1] Each year, as part of its annual budgeting process, the District sends a "Notice of Public Hearing Concerning Proposed Increases in Rates and Fees for Water and Wastewater" to all parcel owners in the District with water and/or wastewater connections. [6 AA 1074-1077, 1150-1153, 7 AA 1342-1345.] Literally thousands of notices are mailed out no less than 45-days before the public hearing. The notices identify the location and time of the public meeting, in addition to providing a summary of "the reasons for the proposed rate and fee increases." [*Id.*; 5 AA 876:8-877:11; 880:1-6; 884:17-885:18.] The notice also lists the new, increased annual sewer fee to be

[1] Judgment was entered in the District's favor solely on Plaintiffs' failure to exhaust their administrative remedies. The merits of Plaintiffs' claims have not been adjudicated. [Ex. A, p.4, fn.4.]

considered at the meeting. The initial calculations are based on the anticipated cost of providing the service to the customers. [5 AA 885:2-28.]

In a section titled "PUBLIC HEARING," the notices provide "[a]ny property owner or tenant . . . may submit a written protest to the proposed increases to the rates and fees." [5 AA 886:16-887:19; see, e.g., 6 AA 1076.] The notices require any protest "must (1) state that the identified property owner or tenant is opposed to the proposed water rate and/or wastewater service fee increases; (2) provide the location of the identified parcel (by assessor's parcel number or street address); and (3) include the name and signature of the property owner or tenant submitting the protest." [*Id.*] The notices provide written protests may be submitted by mail, in person, or at the public hearing, and instruct that protests must be received "prior to the close of the Public Hearing, which will occur when public testimony on the proposed rate increases is concluded." [*Id.*] The notices also state the District Board "will hear and consider all written and oral protests to the proposed rate increases at the Public Hearing," and that at the end of the hearing, the Board

"will consider adoption of the proposed rate and fee increases." [6 AA 1077.]

3. The Annual Proposition 218 Public Hearing.

In compliance with Proposition 218, the District holds an annual public hearing to address the following year's anticipated sewage services fees in conjunction with approving the District's annual budget. [5 AA 880-881.] In order for the District to set and approve its annual budget, it must determine the sewage service fees for the various types of property within the District, including anticipated revenues and expenses, so that the proportional cost of the service attributable to each parcel can be set in an amount not to exceed the funds required to provide sewage service.[2] "[T]he public hearing is the most significant hearing during the year to receive public input." [5 AA 923:22-23.] At trial, the District's Chief Financial Officer testified:

> The public hearing for the Proposition 218 notices is the most comprehensive public hearing typically held over the course of a year. The District mails out thousands of notices to essentially all of the property owners. The District spends thousands of dollars

[2] The purpose of the EDU calculation is to determine the sewage system's maximum usage so that the collection and wastewater treatment and disposal are legally adequate. [5 AA 1045, 1055:1-27.]

> mailing out notices. There is extensive publicity typically of the meetings. And they are typically the most attended meetings of the year. It's my observation, as a member of staff that the Board members pay very close attention to the input that they receive from the public at these hearings.

[5 AA 921:19-922:5.]

The public hearings are attended by property owners, members of the public, the press, engineers and experts involved with the calculation of sewer rates. [5 AA 878:16-24.] Additionally, District staff members, including the General Manager, Chief Financial Officer, Department Managers associated with water and waste water, and the District Engineer, are in attendance. [5 AA 879:1-9.] There is a presentation regarding rates and the impact on revenues and expenses. [5 AA 879:12-26; 6 AA 1080-1085, 1156-1159, 7 AA 1407-1408.]

The Board opens a public hearing to receive any verbal protests from the public. It also formally takes in all of the written protests that have been received. [5 AA 891:24-27.] "The Board is always very interested in input that they get from the public, and is very sensitive to input from the public on rates and expenses." [5 AA 881:21-24.] The District's EDU-methodology is

a part of the discussion to the extent it impacts the sewer charge. [5 AA 926:15-21; 5 AA 926:27-927:1 ("I think if any member of the public wanted to discuss that schedule that would be the appropriate forum for them to do that.").] The District has a significant interest in ensuring the certainty of revenue so it can stabilize its finances and plan for and provide public services.

After all of the input is received, the Board closes the public hearing, discusses the information and votes on what adjustments, if any, they wish to authorize. [5 AA 892:9-13.] Even when there has not been a majority protest, the Board has authorized an amount lower than a proposed rate on the notice following hearing. [5 AA 887:24-892:13; 6 AA 1076, 1078.] Once the budget is approved, the County is notified regarding the parcels that are subject to the sewer charge and sends out the billing. [5 AA 922:6-923:23.]

C. Plantier's Dispute With the District.

In March 2012, during regular maintenance of District sewer pipelines, significant amounts of grease were found in a recently-installed line. Video of the line showed the grease was coming from a restaurant owned by class representative Plantier. Investigation revealed the restaurant lacked an Industrial Waste

Discharge Permit in violation of the District's legislative code. [5 AA 943-944, 992.] Further, the property had been assigned and charged sewer services at 2.0 EDUs of capacity despite that the property had an actual discharge capacity of 6.82 EDUs. [5 AA 944:7-14.] Therefore, the District notified Plantier of the deficiencies. [5 AA 944-945; 6 AA 1064-1065.]

Plantier met with District engineers regarding the deficiency notice, but the parties were unable to reach a resolution. [5 AA 1003-1004.] Plantier was of the opinion that the EDU designation for his restaurant should be reduced because it was vacant for a period of time, even though the District had to be prepared at all times to service the facility as if it was running at full capacity. [5 AA 993-994, 986-989, 1055:1-27.] Prior to filing suit, Plantier engaged counsel and enlisted the support of a consumer advocacy group to send letters to the District regarding the District's deficiency notice. [Ex. A, p.25, at fn.13.]

D. The Class Action Complaint.

Plaintiffs filed their class action complaint in January 2014, alleging the District's EDU billing system and wastewater fees do not meet the proportionality requirements set forth in

Proposition 218. [1 AA 1-2, ¶1.] The lead class representatives are commercial property owners. [Ex. A, pp.5-6.] The First Amended Complaint states:

> This is a class action seeking declaratory and monetary relief for a class of Ramona Municipal Water District ("RMWD") wastewater customers. RMWD's wastewater fees are based on an Equivalent Dwelling Unit ("EDU") billing system. This system does not meet the requirements set forth in Article XIII D Section 6(b)(3) of the California Constitution ("Proposition 218"). Because the EDU system violates Proposition 218, RMWD's EDU-based Sewer Service Charge is unlawful and invalid.

[1 AA 1-2, ¶1.] Additionally, the Amended Complaint seeks a refund of alleged overcharges since November 22, 2012. [1 AA 8.] In February 2015, the trial court granted Plaintiffs' motion for class certification. [Ex. A, p.6 at fn.6.]

E. The Statement of Decision and Judgment.

The trial court granted the District's motion to bifurcate its special defense of failure to exhaust administrative remedies and following a two-day bench trial entered judgment in favor of the District. [Ex. A, p.8; 4 AA 834-837; 8 AA 1639-1655.] In its Statement of Decision, the trial court found the public hearing requirement and duty of the District to consider all protests established an administrative remedy under Proposition 218:

> Participation in the "public hearing" . . .is the center piece of the process set up by Proposition 218. The constitutional mandate is for the agency board to "consider all protests," not just those from a majority. Obviously, the RMWD Board could not have considered a protest that was never made. Plaintiffs' contention that Messrs. Day and Plantier were free to ignore this part of the process would be tantamount to the court excising these provisions from the constitutional scheme.

[Ex. A, p.9; 8 AA 1653, ¶2, emphasis original.] Further, the trial court determined "[t]he time to protest the EDU regime was in the context of the annual Proposition 218/budget process, when the District was considering rates and revenue requirements for the coming year." [Ex. A, pp.10-11; 8 AA 1655, ¶1.] "Allowing plaintiffs to bypass the public hearing process set up by Proposition 218 and to proceed immediately to litigation seeking. . .a refund of excessive fund balances not only turns Proposition 218 on its head but may very well threaten the viability of the District." [Ex. A, p.11.]

F. The Court of Appeal's Decision.

On June 13, 2017, the Court of Appeal filed its published decision reversing the judgment and remanding the matter with directions. [Ex. A, p.26.] The Court of Appeal's decision holds Plaintiffs' class action is not barred by their failure to exhaust the