No Fees per Gov. Code § 6103

S243360

IN THE SUPREME COURT OF CALIFORNIA

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

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

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

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CALIFORNIA CASES

STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

S243360

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ISSUE PRESENTED

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

STATEMENT OF CASE

A. Proposition 218.

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

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

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

a. Procedural Requirements.

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

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

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

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

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

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

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

b. Substantive Limits.

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

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

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

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

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

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

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

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

2. The District's EDU Methodology.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Procedural Background.

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

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

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

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

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