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S226036

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IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN BUENAVENTURA,
Respondent and Cross-Appellant,

vs.

UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT,
Appellants and Cross-Respondents,

On Appeal of Published Decision of the

Second Appellate District, Division Six, Case No. B251810

Reversing a Judgment of the Superior Court of Santa Barbara County
Case Nos. VENCI-00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

SUPPLEMENTAL BRIEF OF UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT

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Pursuant to California Rules of Court, Rule 8.520, subd. (d), Respondents United Water Conservation District and Board of Directors of United Water Conservation District (collectively "the District") submit the following Supplemental Brief addressing the merits of *Great Oaks Water Co. v. Santa Clara Valley Water District*, published on December 8, 2015, at 242 Cal.App.4th 1187, but superseded by this Court's grant of review on March 23, 2016 and deferral of briefing pending consideration of this case.

The *Great Oaks* decision was filed by the Sixth District Court of Appeal after all briefing on the merits in this matter had concluded. In January 2016, Petitioner City of San Buenaventura addressed the *Great Oaks* decision in a brief responding to various amicus briefs filed in support of the District's position in this case. The District did not file a brief in response to the amicus briefs and therefore has not had an opportunity to address *Great Oaks* before this Court. The District thus respectfully submits this Supplemental Brief to discuss why *Great Oaks* is distinguishable, was wrongly decided on its related Proposition 218 issue, and failed to consider Proposition 26.

I. The *Great Oaks* Decision is Distinguishable

The *Great Oaks* decision followed two grants of rehearing. It represented the third issuance of largely the same opinion, with only minor changes, by the Sixth District Court of Appeal. Both sides had requested the initial rehearing and each of the rehearing petitions and answers referenced the Court of Appeal decision in this case. Curiously, however, even after successive rehearings, the final opinion did not attempt to distinguish or even mention the competing and contrary opinion in this case.

The *Great Oaks* decision considered groundwater extraction charges imposed on a water retailer under the Santa Clara County Water District Act, a water conservation act strikingly similar to the act governing the District in this case. *Great Oaks* holds that the charges are property-related under

Proposition 218, but, because they constitute a fee for water service, the fees are exempt from the initiative's voter approval requirements. In so holding, the *Great Oaks* decision reversed the trial court, which had invalidated the fees because, among other reasons, they were *not* for water service and therefore had required voter ratification which did not occur. By its decision, the Court of Appeal set aside the trial court's remedy requiring payment of a large refund by the Santa Clara County Water District.

Several facts distinguish *Great Oaks* and the instant case.

First, after making the determination that Proposition 218 applied to the Santa Clara Valley Water District's rate making procedure, the ultimate holding of *Great Oaks* answered a question not presented here, namely whether that particular groundwater extraction fee was exempt from the voter ratification requirement of Proposition 218.

Second, and more important, the original Complaint in *Great Oaks* was filed in 2005. Therefore, the additional law and voter guidance provided by the passage of Proposition 26 in 2010 for analyzing groundwater extraction charges, and for distinguishing them from Proposition 218 property service fees, were never considered by the *Great Oaks* court.

Third, *Great Oaks* was tried in the first instance as a damages case, instead of a mandamus case, with thousands of pages of fresh evidence beyond the administrative record to be considered by the trial court, leaving the appellate court with an anomalous judicial nightmare of a record for review.

Fourth, the *Great Oaks* court may have been influenced by the "good government" result that it achieved in these times of persistent drought. Its order reversing the trial court not only upheld the extraction fees, but also overturned the substantial refund and award of attorneys' fees that had been ordered against the water conservation agency by the lower tribunal.

II. *Great Oaks* Was Wrongly Decided and Its Analysis Should Not Be Adopted by This Court

While it is tempting to rely solely upon these marked points of factual distinction between the two cases, which by themselves can explain the different results by different divisions of the Court of Appeal, the District cannot do so and neither should this Court. The *Great Oaks* opinion contains two material legal rulings that are in error, particularly in light of enactment of Proposition 26 and the present need for the courts to reconcile the procedural requirements of Proposition 218 and Proposition 26.

Faced with groundwater extraction fees charged under constitutional and statutory authority quite similar to the laws that govern the District, *Great Oaks* incorrectly holds that such fees are "incidental" to property ownership and are therefore within the scope of the ratemaking requirements of Proposition 218. To reach this conclusion, *Great Oaks* makes the companion pronouncement that a fee is "regulatory" only if it is tiered or graduated, such that this fee escalation induces or achieves the regulatory purpose of conservation. To the *Great Oaks* court, it was not enough that the very existence of the fee realizes a conservation result. Yet, there is absolutely nothing in prior case law, Proposition 218, or Proposition 26 that imposes a tiered or graduated rate requirement on "regulatory" fees.

The first *Great Oaks* error – its ruling that a groundwater extraction fee is for a property-related service under Proposition 218 – draws from, but then extends without appropriate examination, the same Court of Appeal's prior opinion in *Pajaro Valley Water Mgmt. Agency v. Amrhein* (2007) 150

Cal.App.4th 1364 (*Pajaro I*)[1]. Citing to *Pajaro I*, *Great Oaks* then offers the following comprehensive proposition:

> Our further study of the matter has led us to conclude that any charge on the extraction of groundwater will typically place a direct burden on an interest in real property and is thus incidental to property ownership. This is because any extraction of groundwater by a longtime extractor like Great Oaks is almost certain to involve the exercise of a right in real property. Since a charge on that activity directly burdens the exercise of that right, it must be deemed incidental to it, and thus to ownership of real property. (*Id.* at p. 15.)

This sweeping conclusion is not a logical outgrowth from *Pajaro I*. *Pajaro I* stands for the limited principle that, where pumping serves as the substitute for residential water delivery for the bulk of the property owners, groundwater extraction charges are the same as charges for residential water delivery through pipelines, and, for that narrow reason, are likewise deemed to be fees charged as an incident of property ownership.

Great Oaks does not make any reference to the unique homeowner water delivery facts that drove the result in *Pajaro I*. The Court in *Great Oaks* fails to examine or identify the Proposition 218 "property related service" that might be at issue or whether that "service" is a mismatch for the strict procedural rubric of Proposition 218.

The Court of Appeal's far-reaching *Great Oaks* conclusion contradicts the exacting reasoning of this Court's decisions in *Apartment Association of Los Angeles County, Inc. v City of Los Angeles* (2001) 24 Cal.4th 830 (*Apartment Assn.*) and *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 (*Richmond*).

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[1] Although the *Great Oaks* court refers to the case as *Amrheim,* the District continues to use *Pajaro,* as did the Second District Court of Appeal.

The *Great Oaks* Court rejects *Apartment Association's* essential proscription that a property-related service must be imposed "as," and not "on," an incident of property ownership.[2] *Great Oaks* substitutes an extensive treatise on whether the right to extract ground water is a property right for the proper inquiry into whether the extraction fee is levied as the consequence of a public service directly related to the mere fact of property ownership. *Great Oaks* also ignores *Richmond's* instruction to reject the label "property-related service" when a person's volitional act, like the unforced decision to create a water connection or to pump scarce groundwater, rather than the fact of property ownership, leads to the imposition of the fee.

Great Oaks bolsters its property-related service conclusion by referencing the Legislature's after-the-fact Proposition 218 implementing definitions, which define "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) According to *Great Oaks*, "the entity who produces, stores, supplies, treats, or distributes water necessarily provides water service." (Id., at p. 1216.) The flaw in this judicial bootstrapping is that the phrase "water service" only appears in the voter exemption passage of Proposition 218. It does not also appear in the text to inform whether something is a "public service having a direct relationship to property ownership."

Further, *Great Oaks* erroneously then states: "It follows that if the charge here is for `water service,' it is indeed a property-related charge subject to Article 13D, though exempt from the voter ratification requirement." (Id., at

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[2] The *Pajaro I* opinion dismissed the *Apartment Assn.* decision on the mistaken belief that it had been overruled by this Court's decision in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205.

p. 1214.) In *Richmond*, this Court expressly disagreed that all water service charges are necessarily subject to the restrictions imposed by Proposition 218. Rather, this Court concluded "that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.'" (*Richmond* at p. 427.) If the *Great Oaks'* conclusion that a fee for "water service" of whatever nature is a fortiori a property-related charge , by parity of reasoning, the *Richmond* connection charges involving "water service" were for a property-related service, and *Richmond* was improperly decided by this Court.

Unfortunately, the Sixth District did not turn to the controlling authority of *Apartment Association* and *Richmond*, which would have directed it to a different result. At bottom, pumping charges, whether those in *Pajaro I*, *Great Oaks* or this case, must be examined on a case-by-case basis to decide whether they are imposed for a "property-related service." *Great Oaks* erred in purporting to bring all pumping charges within the scope of Proposition 218.

The second mistake in *Great Oaks* – the court's belief that an extraction fee is likely not regulatory unless the fee itself is structured to escalate to ever-increasing levels of monetary punishment – was offered with insufficient legal justification and no judicial support. The Sixth District simply built upon its own surmise, first announced in *Pajaro I*:

> The possibility we meant to hold open in [*Amrhein*] is that Article 13D might not be intended to foreclose the imposition of fees—or perhaps more precisely their structuring—in such a way as to regulate, through market forces, the consumption or use of a scarce or protected commodity or service. The quoted passage contemplated a hypothetical fee that was "structur[ed]" in such a way as to operate in this manner. The most obvious example would be a fee that scales up as consumption of the public service increases, or is triggered only after a certain threshold quantity has been taken. While we do not mean to suggest that this is the only way a fee might fall within our

> hypothetical "regulatory" rubric, we did indicate that any such regulatory purpose would have to be "clearly established." (*Id.*, at p. 29.)

Great Oaks states that it suggests this escalating fee test so that revenue generating measures cannot escape the ratemaking procedures required by Proposition 218. Yet, no such tiered or graduated rate requirement or test for regulatory fees was ever established by prior case law or Proposition 218.

III. ***Great Oaks* Ignores Proposition 26**

Proposition 26, enacted by the electorate five years after *Great Oaks* was decided in the trial court, but also five years before issuance of the *Great Oaks* appellate opinion, provides an alternative rubric for adjudging regulatory fees, separate from the requirements of Proposition 218, without imposing the tiered or graduated rate requirement announced by *Great Oaks*.

Proposition 26 was designed in part by the Howard Jarvis Taxpayers Association and, according to the ballot literature, was drafted to exempt fees, such as those imposed for environmental regulation, from the definition of tax. Proposition 26 does not require that a regulatory fee must escalate in order to be exempt from its mandates. Rather, it merely requires that the charges not exceed the cost of the government service provided and that the allocation of those costs bear a reasonable relationship to the benefits accorded or the burdens imposed by the payors. Nothing more.

It is possible that the *Great Oaks* decision, especially its discussion of a properly structured fee, was unduly influenced by the developing law of the tiered water rate cases that are now pending in the State's courts. Those water delivery cases turn on the justification for the structured, unequal water delivery rates under Proposition 218. The *Great Oaks dicta* on the topic of what constitutes a proper regulatory rate structure, particularly in light of the

legal clarity provided by Proposition 26, should not be allowed to stand and should not be endorsed by this Court.

Proposition 218 was designed to stop the use of "fees" by governments to avoid the constraints of Proposition 13, which added Article XIII A to the Constitution and which limited the imposition of *ad valorem* taxes on real property. In essence, it mandated that before the imposition of any fee as an incident of property ownership, the state or local agency must secure the majority of the property owners' consent after notice and an opportunity to contest the fee.

After the adoption of Proposition 218, this Court ruled in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 that certain fees imposed by the Legislature by a simple majority vote for regulatory purposes were not taxes subject to super-majority vote, even if they did not benefit the payor, provided the fee bears a reasonable relationship to the negative impact imposed on society from the activities of those charged the fee. In reaction, the proponents of Proposition 26, including amicus Howard Jarvis Taxpayers Association, felt that the *Sinclair Paint* rule required some definitions and limitations, which became the amendments to Article XIII C, section 1 added as Proposition 26 in November 2010.

Proposition 26 completed the intent of 218 by recognizing that certain fees which are charged, not as an incident of property ownership, but for regulatory purposes, are valid if specified criteria are met, with the charging agency bearing the burden of proof. This amendment to Article XIII C defined "taxes" (both *ad valorem* and non-property related) and established seven exceptions to voter approval, including those fees already complying with Proposition 218 and those charged for specific purposes such as mitigation of environmental issues. (Article XIII C, section 1 (e)).

In sum, Proposition 26 added a comprehensive definition of tax to Article XIII C, as well as a comprehensive methodology for identifying and

substantiating those charges that are not taxes. This comprehensive scheme for the imposition of regulatory fees does not require any tiered or graduated rate structure as a condition for imposition of regulatory fees.

The *Great Oaks* opinion is built on a shaky foundation that is missing the reinforcing legal framework provided by Proposition 26 and the ballot materials that were used to persuade the electorate to adopt that measure. The court in *Great Oaks* might well have come to a different and correct conclusion if it had taken into consideration the guidance provided by Proposition 26 and the need to reconcile Proposition 26 with Proposition 218. *Great Oaks* failed to create a harmonized legal landscape which public entities can readily understand and with which they can readily comply to effectuate their public purposes.

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IV. Conclusion

This Court should reject the reasoning of *Great Oaks* and adopt the correct and comprehensive reasoning of the Court of Appeal's decision in this case. For all of the reasons set forth in this Supplemental Brief, the District respectfully submits that *Great Oaks* case is distinguishable on its facts, is flawed because it contradicts controlling Supreme Court precedent, and is devoid of a discussion and consideration of Proposition 26, which would have illuminated the proper analysis.

DATED: April 15, 2016

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Jane Ellison Usher, hereby certify pursuant to rules 8.268(b)(2) and (3) and 8.204 of the California Rules of Court that this SUPPLEMENTAL BRIEF OF UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT was produced on a computer, and that it contains 2,696 words, exclusive of tables, the verification, this Certificate, and the proof of service, but including footnotes, as calculated by the word count of the computer program used to prepare this brief.

DATED: April 15, 2016

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, California 90017.

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Executed on April 15, 2016, at Los Angeles, California.

Cindy L. Staley

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Santa Barbara County Superior Court
Case Nos. VENCI 00401714 and 1414739
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