S243360

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

v.

RAMONA MUNICIPAL WATER DISTRICT,
Defendant and Respondent.

Review of a Published Decision of the
Fourth Appellate District, Division One, Case No. D069798

On Appeal from the Superior Court of the County of San Diego
The Honorable Timothy B. Taylor, Judge
Case No. 37-2014-00083195-CU-BT-CTL

HOWARD JARVIS TAXPAYERS ASSOCIATION'S APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS

Trevor A. Grimm, SBN 34258
Jonathan M. Coupal, SBN 107815
Timothy A. Bittle, SBN 112300
Laura E. Murray, SBN 255855
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Telephone: (916) 444-9950
Facsimile: (916) 444-9823
Email: laura@hjta.org
Counsel for Amicus

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APPLICATION FOR LEAVE TO FILE

Howard Jarvis Taxpayers Association ("HJTA") is a California nonprofit public benefit corporation with over 200,000 members. The late Howard Jarvis, founder of HJTA, utilized the People's reserved power of initiative to sponsor Proposition 13 in 1978. Proposition 13 was overwhelmingly approved by California voters, and added Article XIIIA to the California Constitution. Proposition 13 has kept thousands of fixed-income Californians secure in their ability to stay in their own homes by limiting the rate and annual escalation of property taxes.

In 1996, HJTA authored and principally sponsored Proposition 218, the Right to Vote on Taxes Act. California voters passed Proposition 218, which added Articles XIIIC and XIIID to the California Constitution and placed strict limitations on local governmental entities' authority to levy taxes, assessments, fees, and charges.

At issue in this case is whether Proposition 218 requires an individual to participate in a protest proceeding as an administrative remedy that must be exhausted before he can challenge an invalid fee or charge in court. In over a dozen

published or pending cases involving Proposition 218, HJTA is the named plaintiff, representing its members. In no case has HJTA's standing ever been challenged on the grounds that it needs to prove participation by members in a protest proceeding. Such a requirement would hamstring public interest litigation.

HJTA takes no position on the underlying dispute regarding RMWD's Equivalent Dwelling Unit (EDU) billing methodology. As amicus, HJTA argues only that nonparticipation in the protest proceeding for a rate increase should not bar one from challenging the validity of a rate structure that is alleged to be unconstitutional at its core regardless of whether the rates are raised or remain the same. The purpose of the exhaustion doctrine is not served by such a requirement, nor does Proposition 218 impose such a condition on access to judicial review.

HJTA therefore has a direct interest in the case, both as author and sponsor of Proposition 218 and as a frequent defender of Proposition 218 in court. The interest of amicus is to have the intent of the drafters and voters acknowledged and given effect.

HJTA thus supports Plaintiff in this case and encourages

this Court to affirm the decision of the Fourth District, Division One, Court of Appeal. HJTA requests leave from this Court to file the accompanying Brief of Amicus Curiae.

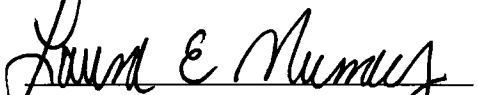
HJTA's staff attorneys authored the entirety of the proposed brief, and HJTA neither made nor received any monetary contributions intended to fund the preparation or submission of the brief.

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

Dated: March 2, 2018

Respectfully submitted,

JONATHAN M. COUPAL
TREVOR A. GRIMM
TIMOTHY A. BITTLE
LAURA E. MURRAY



LAURA E. MURRAY
Counsel for Amicus

BRIEF OF AMICUS CURIAE

INTRODUCTION

After more than twenty years of local governments functioning viably under Proposition 218, the Ramona Municipal Water District ("RMWD") argues that its viability is threatened by a regular challenge under Article 13D subsection 6(b) not to the amount of revenue it may collect from its customers, but only to the methodology of apportioning its revenue needs. RMWD is desperately trying to avoid judicial review of that methodology by erecting a new administrative remedy as a barrier to taxpayer litigation.

RMWD states that "[t]here appears to be no authority directly addressing the duty to exhaust administrative remedies under Proposition 218." (Petn. at p. 45.) Aside from any local legislative code as was satisfied here, the fee payer's administrative remedy has been clearly articulated in the Government Claims Act. (Cal. Code Civ. Proc., §313; Gov. Code, §§ 810; 945.4; *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349, 356, citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.) RMWD argues, however, that fee payers should

be barred by another new administrative remedy, one it claims voters self-imposed in 1996, but with no evidence of voter intent.

Amicus HJTA submits that if there is an administrative remedy created by Article 13D subsection 6(a), this remedy attaches not to the fee payer who should be following local codes and the Government Claims Act, but to RMWD. Like individuals, public agencies are subject to the doctrine of exhaustion of administrative remedies. RMWD could choose to bring an action for enforcement of unpaid fees, in which case RMWD would have to show that it followed all proper procedures. Where the word "shall" is used following the noun "agency", as in subsection 6(a), it indicates a duty to be exercised by the agency, not the fee payer in a way that can only be, as here, speculative and duplicative.

The Court of Appeal correctly decided the case. RMWD conceded that Plantier exhausted administrative remedies established in the relevant codes. Subsection 6(b) is fundamentally distinct from subsections 6(a) and 4(d-e). The Court of Appeal amply explains how the application of subsection 6(a) as an administrative remedy to subsection 6(b) would be nonetheless inadequate. Amicus HJTA submits that it is also duplicative and unnecessary. The difference between rate

structures and rate-setting is far from artificial, especially here where RMWD's notices of public hearing expressly addressed only "proposed increases" and never the billing methodology itself. Amicus HJTA submits it is *impossibly* inadequate because fee payers will not have sufficient time or information to present claims in the detail RMWD proposes they should be able to do.

Lastly, there is no plain language in Proposition 218 demonstrating the voter intent RMWD claims.

In short, there is no exhaustion requirement in Proposition 218, except on the public agency imposing the fee. Subsection 6(a) simply requires the agency to honor a veto right, representing one step the agency must follow in order to validly establish a fee. Further requirements on the agency are listed in subsection 6(b), under which Plantier has validly brought its case.

QUESTION PRESENTED

The issue is presented in RMWD's petition as follows:

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?

(Petn. at p. 8.)

The answer to that question is no. The public hearing is not an administrative remedy attaching to the fee payer, and was not self-imposed in 1996.

ARGUMENT

I.

THE MANDATORY DUTY OF SUBSECTION 6(a) IS ON RMWD, NOT PLANTIER

Confusion has been set spinning regarding the majority protest hearing that RMWD is obligated to hold under subsection 6(a) of Article 13D of the California Constitution. Though it is spelled out clearly as to what *the agency* "shall" do, RMWD strives to convert that into a duty on the fee payer.

Hypothetically, RMWD could bring an enforcement action against an individual property owner who hasn't paid his fees. To do so, RMWD must exhaust its administrative remedies.

The doctrine of exhaustion of administrative remedies applies as firmly to government agencies as it does to individuals. (See *City of Oakland v. Hotels.com* (9th Cir. 2009) 572 F.3d 958, 961-962 ["Oakland argues that its Ordinance does not require a tax assessment before suit is brought and that, in any case, the administrative remedies apply only to the operators, not the

taxing authority. This strained interpretation is belied by the plain language of the Ordinance. ... it does not follow that the City can simply sue in federal court without exhausting its administrative remedies."].)

In *City of Oakland*, the Ninth Circuit described similar cases of cities across the nation suing hotels for tax assessments. All concluded that cities must first exhaust their administrative remedies by following the clear commands of their ordinances in *establishing* the assessments they sought to enforce. (*Ibid.*) Just as a City "shall" follow the process for assessing a tax (*ibid.*), RMWD "shall," per subsection 6(a), follow the process of proposing a new or increased fee. RMWD could not sue to recover unpaid fees if it had not first exhausted the remedy of holding the majority protest hearing.

Regarding rate-making, Local Government Amici argue it is legislative, and that the doctrine of exhaustion of administrative remedies applies to *both* legislative and administrative acts. (See Amicus Curiae Letter of Government Amici in Support of Petition for Review, August 17, 2017, p. 1.; See also AOB at p. 55 [describing rate-setting as "legislative line-drawing"].) If the process here is legislative rather than

administrative, the doctrine would not apply at all and certainly not through a public hearing. (See *Howard v. County of San Diego* (2014) 184 Cal.App.4th 1422, 1432 ["While the County recognizes that a [General Plan Amendment] is a legislative act, it argues it has provided an administrative process for seeking such relief. However, regardless of the *process* by which landowners may seek a GPA, the ultimate decision is a legislative one to be voted on, after a notice and hearing, by the County's Board of Supervisors. (Gov. Code, §§ 65355-65356.) That is not an administrative remedy."]. Emphasis in original.)

However the process may be characterized here, if the ultimate decision on a rate structure is legislative, the majority protest opportunity on a rate increase is simply a duty of the district and cannot be an administrative remedy required of the fee payer.

In contrast to what the agency "shall" do, the Government Code and local legislative codes prescribe what the fee payer must do before filing a claim against a local entity, including a district. (Gov. Code, §900.4.) Part 3 of Division 3.6 of Title 1 of the Government Code, using the claimant as the noun, provides for the claimant's procedures before bringing suit against a district.

Local legislative codes also prescribe procedures, which RMWD admits that Plantier followed.

No reasonable claimant would interpret another administrative remedy to apply from Article 13D, subsection 6(a) since the actor in subsection 6(a) is "the agency" and the actor in the Government Claims Act is "the claimant." Nowhere in Proposition 218 does it say that to litigate a claim under any part of subsection 6, the fee payer must have submitted a protest vote at the latest (or earliest) public hearing, related or unrelated, particularly where no ballot is provided and where all relevant information may not have been publicly available in advance[2]. In this case, someone may not have objected to the rate *increase* and logically found no reason to submit a protest vote.

If the rate structuring is an administrative act to which the doctrine of exhaustion of administrative remedies applies, the simple conclusion following the Ninth Circuit's reasoning in *City of Oakland v. Hotels.com, supra,* 572 F.3d at pp. 961-962 is that

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[2]See *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1501, n. 12 ["...A minor issue in the briefing is whether City Water should have made its consultants report available for taxpayer scrutiny prior to the public hearing contemplated in article XIIID, section 6, subdivision (c)."].

the majority protest hearing is a mandatory administrative remedy on RMWD, not Plantier.

II.

THE COURT OF APPEAL CORRECTLY DECIDED THE CASE

A. RMWD Conceded Exhaustion of Remedies Under The Relevant Codes.

On November 21, 2013, plaintiffs submitted a "written administrative claim to District" with "a detailed explanation of plaintiffs' challenge to the EDU system." (*Plantier v. Ramona Municipal Water Dist.* ("*Plantier*") (2017) 12 Cal.App.5th 856, 874.) This alone distinguishes the case from *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* ("*Wallich's Ranch*")(2001) 87 Cal.App.4th 878 where that plaintiff "did not attempt whatsoever" to do so. (*Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856, 874.) Plantier thus exhausted remedies per the RMWD legislative code.

The "District conceded both in its reply brief in support of its bifurcation motion and at the hearing that plaintiffs' administrative claim satisfied the general exhaustion requirement under the RMWD legislative code." (*Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856, 874.)

RMWD has crafted a notion that the duty which befalls the agency in subsection 6(a) of Article 13D creates another administrative remedy which Plantier should have exhausted in order to challenge the EDU rate structure under subsection 6(b).

B. Subection 6(b) Is Fundamentally Distinct From Subsection 6(a) and Certainly Distinct From Subsections 4(d-e).

The Court of Appeal correctly stated:

> First, it is not even clear that the present controversy falls within the purview of subdivision (a)(2) of section 6, inasmuch as the subject of the instant case involves whether District complied with one (or more) of the *substantive* requirements of section 6, which, as noted *ante*, are set forth in subdivision (b) of this section, in calculating wastewater usage based on the EDU system, as opposed to the imposition of, or increase in, any proposed 'fee or charge' that is the subject of subdivision (a) of this section. (*Plantier, supra*, 12 Cal.App.5th at p. 867. Emphasis in original.)

There are key differences between subsection 6(a) and 6(b) which RMWD would blur even as the voter intent is clear on plain language. Subsection 6(a) is entitled: "*Procedures* for New or Increased Fees and Charges." (Emphasis added.) Subsection 6(b) is entitled: "*Requirements* for *Existing,* New or Increased Fees and Charges." (Emphasis added.) These are voter-approved headings in the State Constitution.

Subsection 6(a) requires mailed notice containing specified information about the new or increased fee, an opportunity to submit written protests, and a hearing to tabulate protests to determine whether a majority protest exists.

Subsection 6(b) applies not just to new or increased fees, but to existing fees as well. Accordingly, property-related fees cannot exceed the cost of providing service, cannot be for some purpose other than providing service, and must be proportional to a parcel's use of service.

Thus, subsection 6(a) sets forth procedures that must be followed to enact or increase a fee. Subsection 6(b) is exactly as the Court of Appeal described it: *substantive*. It sets forth the substantive requirements not only for new and increased fees, but for *existing* fees. Subsection 6(d) then reinforces this by imposing the substantive requirements of subsection 6(b) on all property-related fees, even those pre-dating Proposition 218: "Beginning on July 1, 1997, all fees or charges shall comply with this section."

Plantier challenges RMWD's existing EDU billing methodology as violating the substantive requirements of subsection 6(b), namely that the oversimplified EDU system does not charge parcels in proportion to their use of sewer service.

Plantier did not bring its action under subsection 6(a). Plantier challenged the *existing* charge.

The Court of Appeal correctly found that the trial court "erred in relying on section 4 when it imposed on plaintiffs a mandatory exhaustion requirement." (*Plantier, supra*, 12 Cal.App.5th at p.870.) Section 4 of Article 13D is entitled "Procedures and Requirements for All Assessments," not property-related fees. It likewise imposes on the agency a 45-noticed hearing requirement, but unlike subsection 6(a) with regard to new and increased property-related fees, subsections 4(c-d) require the agency to mail actual paper ballots and marked return envelopes for the majority protest. The agency does not have to provide ballots or return envelopes under subsection 6(a).

The assessment majority protest process also differs from the property-related fee majority protest process in that the weight of ballots in an assessment majority protest is according to financial obligation whereas the weight of ballots in a property-related fee majority protest is per parcel. (Cal. Const., Art. 13D, §§4(e); 6(a)(2).) Amicus HJTA would not support an interpretation that this imposes an administrative remedy to be exhausted by the assessment payer anymore than subsection 6(a)

could possibly do for subsection 6(b), but at least the property owner is provided a ballot and envelope in hand solemnizing the procedure. Subsection 6(a) provides the least formal process in all of Proposition 218 for rendering a protest vote.

Nowhere does Proposition 218 say that the property owner must submit a protest vote under subsection 6(a) or forego all other constitutional rights established therein, including subsection 6(b) claims unrelated to the latest hearing. RMWD concludes with no support: "The voters intended that these provisions be enforced together and that a substantive challenge to a proposed fee based on subdivision (b) be made at the majority protest hearing provided by subdivision (a)." (AOB at p. 36.) It provides zero evidence of this contention. The plain language, by contrast, contradicts RMWD's assertion.

RMWD's tangential emphasis on what it means to "consider" all protests for increased fees or charges is contrary to existing precedent interpreting that term, and would impose an administrative hardship on local agencies, especially those with large populations. The true intent of the term is simple. The word "consider" means to act, and offers no guarantees about the meaningfulness of the interaction occurring beforehand. (See

Zumbrun Law Firm v. California Legislature (2008) 165 Cal.App.4th 1603, 1614.) The level of thoughtful interaction *before* the acting is purely discretionary. The words "shall consider" only enforce the counting of protest votes. (See *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 902 [in rate protest involving 12,642 APNs, "[t]he protests by owners/tenants were then counted by parcel per section 6 of article XIIID of the California Constitution and Government Code section 53755 subdivision (b).".]

In *Morgan v. Imperial Irrigation District*, water rate payers sought separate protest tabulations for each rate level and lost. The Fourth District Court of Appeal determined that a "fee-by-fee protest procedure" would be unworkable and beyond the general nature of the language of Section 6. (*Id.* at pp. 907-908.) It would be ironic to conclude that a public agency need not separately consider each rate class, but must separately consider the protest form submitted by each rate payer.

The agency could entertain discussion of any protests beyond a mere veto vote, including perhaps a complaint about the rate structure even though that is not the subject of the hearing, but none of this is required, much less enforced, by Proposition

218. No record is created other than the percentage of protest votes. There are no guidelines for the level of consideration RMWD proposes. Aside from counting the votes, "[s]ection 6 offers no other instructions regarding the procedural requirements of holding a protest vote." (*Morgan v. Imperial Irrigation Dist., supra*, 223 Cal.App.4th at p.907.) "Instead, the requirements are very general regarding the timing of the public hearing and considering all protests." (*Id.* at p. 908.) On RMWD's assertion, there would have to be a substantive responsive procedure compliant with due process to which the agency is obligated for each and every protest, lest the asserted administrative remedy be nothing but a facade. But there is no such requirement in Proposition 218.

Even in the unrelated context of assessment protests, where ballots are required under subsection 4(d) indicating "name, reasonable identification of the parcel, and his or her support or opposition of the proposed assessment," the common practice of agencies is to provide a machine-readable protest form containing nothing more than the parcel's identity and check boxes for "I protest" or "I approve." If RMWD's "administrative remedy" is super-imposed on subsection 6(b), protest forms will

need to be provided as in subsection 4(d), and they will need to have room for property owners to write out their detailed protest and explanation of their particular grievance, together with attached documentation as necessary to provide the full information, as the trial court said, "to insure that boards in small municipalities such as RMWD have ample opportunity to address and investigate issues relating to charges and fees prior to litigation" (8 AA 1629) because "[e]xhaustion requires 'a full presentation to the administrative agency upon all issues of the case." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.)

In populated areas such as Los Angeles where protests number in the thousands, the City Council would need to continue the hearing for several days, weeks, or months to consider each property owner's potentially unexpected challenge and accompanying support. Small districts with no staff attorney would need to increase their budget for outside legal counsel to research the merits of each protest, not just those made under the Government Claims Act as a formal precursor to litigation.

RMWD's novel interpretation of Proposition 218 would create unworkable new administrative responsibilities for

districts large and small, something courts should avoid unless the voters clearly intended it. *Morgan v. Imperial Irrigation Dist., supra,* 223 Cal.App.4th 892 addressed the same suggestion. "The individual protest procedure argued by Farm Bureau would create an almost unworkable system, where a minority of voters could frustrate the purposes of section 6." *(Id.* at p. 911.)

The majority protest opportunity for an increased fee or charge is designed to offer fee payers a streamlined way to object to something so obviously over-priced that they can come together in a short window of time to say so. It is an efficiency mechanism to ward off what could be property taxation violating Proposition 13. The substance of an *existing* fee, after opportunity to review *all* information[3], however, is guided by subsection 6(b) and the relevant codes impose the administrative remedies to exhaust.

The trial court may have laudably intended to give full effect to the requirement that agencies "consider all protests against the proposed fee or charge," but the word "all" simply means that the agency must count all qualified protest votes.

Amicus HJTA regularly sends out letters to agencies not counting all qualified votes. Tenants are the most common group

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[3]See fn. 2, *infra.* See section III, *infra.*

of disenfranchised voters because they represent a large percentage of the total count and by disqualifying them the agency can reduce the total to less than a majority[4]. Other improperly disqualified groups include owners who do not live in the district or protesters who are not registered to vote. Ensuring that all qualified protests are counted, amicus submits, is the intended purpose of requiring all protests to be considered.

C. If Plantier Has An Administrative Remedy In Subsection 6(a) That Somehow Applies to Subsection 6(b), It Is Inadequate And Unnecessary.

The Court of Appeal next correctly concluded, with extensive reasoning, that if subsections 4(d-e) and 6(a) somehow did apply to subsection 6(b) to mandate an administrative remedy on fee payers, the remedy is nonetheless inadequate. (*Plantier, supra*, 12 Cal.App.5th at pp. 868-874.) Boiled down, since there is no procedure located in subsection 6(b) or even 6(a) for "acceptance, evaluation, and *resolution*, of disputes," any "remedy" imposed from subsection 6(a) is inadequate. (*Id.* at p. 871, emphasis in original, citing *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 741-742.)

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[4]Tenants are entitled to protest under article 13D, section 2(g) and Government Code section 53755(b).

RMWD asserts that the plethora of cases cited in support of the Court of Appeal's decision do not support the decision. Its assertion hinges upon District testimony given in hindsight that "[t]he Board is always very interested in input that they get from the public, and is very sensitive to the input from the public on rates and expenses," and that "I think if any member of the public wanted to discuss that schedule that [the rate protest hearing] would be the appropriate forum for them to do that." (AOB at p. 24, citing 5 AA 921-922; 5 AA 881; 5 AA 926-927.) This hindsight testimony is speculative at best and even if taken as a promise or intention, still applies only to the personal intentions of individuals currently serving on RMWD's Board. The good intentions of today's Board members cannot be deemed a legal requirement for future RMWD Boards, or the boards of other agencies throughout California. Without such a codified legal requirement, there is no adequate remedy assuring that "the [b]oard [will] *do* anything in response to the submissions or testimony received by it at the hearing." (*Plantier, supra*, 12 Cal.App.5th at p. 871, citing *Payne v. Anaheim Memorial Medical Center, Inc., supra*, 130 Cal.App.4th at pp. 741-742, emphasis added.) There is nothing in Proposition 218 requiring the district