CASE #: S243360

No Fees per Gov. Code § 6103

S 243360

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

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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

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[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

administrative remedies set forth in section 6, reasoning (1) the substantive challenge involving the method used by the District to calculate its wastewater service fee is outside the scope of administrative remedies; and (2) under the facts of this case those remedies are inadequate. [Ex. A, p.3.] Based on this analysis, Plaintiffs were "not required to exhaust the administrative remedies in subdivision (a)(2) of section 6 either by objecting in writing beforehand to the annual increase in wastewater service fees District sought to impose in 2012, 2013 and 2014 and/or by appearing at the hearings in those years to challenge publicly such increases." [Ex. A, p.26.]

Throughout its decision, the Court of Appeal takes issue with the trial court's inadvertent citation to California Constitution, Article XIII D, section 4 (section 4) in its Statement of Decision, despite the trial court's other references to section 6 in its ruling and the understanding of all concerned that the trial court was resolving the administrative remedies issue under section 6. [Ex. A, pp.2, fn.2, 8-9; 8 AA 1645, 1646.] While it is true section 4 has a balloting procedure not included in section 6, the trial court's determination that an exhaustion requirement existed was not based on section 4's balloting procedure, but

instead the noticed public hearing which is provided for in both section 4 and section 6. [*Id.*]

It is the noticed public hearing requirement wherein the District was required to consider "all protests", and also carry the burden of supporting proposed charges, that differentiate Proposition 218 challenges from the other decisions relied upon by the Court of Appeal.

III. ARGUMENT

A. Exhaustion of Remedies Doctrine Generally.

It is well-settled that if an administrative remedy is provided by statute, it must be invoked and exhausted before judicial review of the administrative action is available. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) Exhaustion 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.) This rule is not a matter of judicial discretion, but rather is a jurisdictional prerequisite to resort to the courts. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [lawsuit barred because plaintiffs failed to object at the City Council hearing to an assessment on their property to abate a

public nuisance on their property]. "[E]ven where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief." (*Id.*, quoting *United States v. Superior Court* (1941) 19 Cal.2d 189, 195.)

This Court has held that due process "does not require any particular form of notice or method of procedure. If the [administrative remedy] provides for reasonable notice and a reasonable opportunity to be heard, that is all that is required. [Citations.]" (*Drummey v. State Bd. Funeral Directors* (1939) 13 Cal.2d 75, 80-81 [superseded by statute on other grounds]; see also *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486.) Exhaustion of remedies applies whether or not it may afford complete relief. (*Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 657; see *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 232-233 [submitting a written objection would have satisfied the aggrieved owner's obligation to exhaust administrative remedies].)

"[E]xhaustion of administrative remedies furthers a number of important societal and governmental interests,

including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; (3) mitigating damages; and (4) promoting judicial economy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 72.) The "'essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.'" (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137, citing *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 (emphasis original); *San Franciscians Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686 [rejecting methodological challenge to reports by city's financial expert because plaintiffs did not present competing financial analysis].) Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor "because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant

evidence and providing a record which the court may review. [Citation.]'" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874–75, citations omitted.)

B. Rules of Construction.

Ordinarily, "[r]ules of construction and interpretation that are applicable when considering statutes are equally applicable in interpreting constitutional provisions." (*County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 979.) This Court has stated: "When interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the intent of those who enacted the constitutional provision at issue.' [Citation.] When, as here, the voters enacted the provision, their intent governs. [Citation.] To determine the voters' intent, 'we begin by examining the constitutional text, giving the words their ordinary meanings.' [Citation.]" (*Bighorn–Desert View Water Agency, supra*, 39 Cal.4th at 212.) "'When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.' [Citations.]" (*People v. Benson* (1998) 18 Cal.4th 24, 30, quoting *People v. Overstreet* (1986) 42 Cal.3d 891, 895.) "If 'the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the

ostensible objects to be achieved and the legislative history.' [Citation.]" (*People v. Hazelton* (1996) 14 Cal.4th 101, 105, quoting *People v. Coronado* (1995) 12 Cal.4th 145, 151.)

C. Exhaustion is Required for Plaintiffs' Challenge to the District's Rate-Setting Methodology Under Proposition 218.

The opinion raises the issue of whether the "actions of the District in imposing or increasing any fee or charge" are legislative or administrative, but does not resolve the issue. [Ex. A, p.11, fn.7.] Nonetheless, the Court of Appeal suggests the District's rate-setting is legislative and not subject to an exhaustion of remedies requirement at all. [*Ibid.*] Regardless of the label put on the District's actions in imposing or increasing fees, the critical issue is whether there exists an administrative procedure to challenge that action. As held by the Court of Appeal in *Redevelopment Agency v. Superior Court* (1991) 228 Cal.App.3d 1487:

> Determining which "label" to attach to such governmental action is not, however, crucial to resolving the issue before us. Whatever one wants to call an adoption of a redevelopment plan, the critical question is whether there exists an administrative procedure to challenge such an adoption. The exhaustion doctrine speaks to whether or not an administrative remedy for questionable governmental action exists, not to the character of the underlying governmental action itself.

(*Id.* at 1492).

Here, the District's rate structure was subsumed within its proposed rates for 2012-2104. The Court of Appeal's finding that the District's Notices of Public Hearing support a conclusion to the contrary ignores this fact. [Ex. A, p.15.][3] Nothing in the language of Proposition 218 limited a property owner from challenging new or increased fees proposed in 2012-2014 simply because the same methodology was applied to set prior rates. An objection to the District's justification for the proposed rates at the hearing would have given the District the opportunity to apply its expertise prior to setting its rates and approving its

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[3] In *Morgan, supra*, 223 Cal.App.4th at 911, a different panel of the Fourth District, Division One recognized:

> Given the goals of section 6 to minimize water rates and promote dialog between ratepayers and rate makers, public agencies must be permitted to reasonably structure their revenues to cover costs and meet customer needs using a rate-setting process that includes notice and hearing requirements sufficient to allow meaningful public participation, but tolerably administrable and flexible to avoid needless expense and delay.

budget.[4] A written protest by a majority of property owners would have prevented the District from adopting the fee at all.

The District Board's Proposition 218 annual public hearing was the required forum for challenges to the District's wastewater rate-setting structure either by written protest and/or participation in the hearing. [5 AA 878-881.] It was at that meeting the Board had the discretion to change its rates, or to set a future noticed public hearing to accomplish a change in its rate structure had it been deemed appropriate. The trial court believed District employees who testified to the effect that "the District Board is genuinely interested in input from ratepayers, and that a legitimate, careful and legally/factually supported challenge the District's EDU regime in the context of the annual Prop218/budget hearing would have received careful consideration." [Ex. A, p.10.]

Nonetheless, the Court of Appeal's published decision concludes that the administrative remedies under Proposition

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[4] The published decision of the Court of Appeal also suggests a fee can be subject to section 6(b) without also being subject to 6(a), but does not provide any explanation or rationale for why voters who adopted Proposition 218 might have intended such a distinction. [Ex. A, pp.15-16.]

218 are inapplicable to a "substantive challenging involving the method used by the District to calculate its wastewater service fees." [Ex. A, pp. 3, 13-16.] In *San Diego Water Authority v. Metropolitan Water District of Southern California* (2017)-- Cal.Rptr.--, 2017 WL 2665185, the Court of Appeal for the First District recently analyzed whether a challenge to the water authority's rates was untimely because the complaint challenged the water rate structure adopted nearly a decade prior to the specific fees and rates "subject to attack." (*Id.* at *10.) In rejecting the artificial distinction urged by defendant between a challenge to rate structure and specific annually adopted rates, the Court of Appeal found the argument untenable:

> Metropolitan concedes 'that the opportunity to challenge the amount of Metropolitan's rates renews with each rate-setting' but argues that the Water Authority's 2010 and 2012 lawsuits are untimely because they challenge the water rate structure adopted in 2002. The argument is untenable. Metropolitan first adopted its water rate structure in 2002 but it has readopted that structure in subsequent years when setting rates founded on it. Metropolitan's reenactment and extension of that rate structure to subsequent years, not its initial adoption, is the action being contested.

(*Id.*)

Similarly, the distinction drawn in the Court of Appeal's decision between challenges to the method used by the District to calculate its waste water service charges and challenges to the imposition or increase in a proposed fee or charge is equally untenable. Plaintiffs had the opportunity to challenge the District's methodology with each rate-setting, but failed to do so. Based on Plaintiffs' failure to exhaust their remedies under Proposition 218, the decision of the Court of Appeal should have affirmed the judgment of the trial court and ruled that Plaintiffs' lawsuit is jurisdictionally barred.

D. *The Administrative Remedies Provided by Proposition 218 are Adequate.*

1. Speculation Regarding Likely Success is Not the Standard.

The Court of Appeal's decision applies an incorrect standard in concluding the administrative remedies provided by Proposition 218 are inadequate. The decision finds 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.] The Court of Appeal inexplicably came to this factual conclusion

despite acknowledgment elsewhere in its decision that Plaintiffs represent a class composed of "District customers who paid a wastewater service fee on or after November 22, 2012." [Ex. A, pp.3, 6 at fn.6.] In other words, Plaintiffs need only have obtained a majority of votes from the class members they have undertaken to represent.

It is also unknown whether in fact the lead class representatives' interests differ from the majority of sewer uses because Plaintiffs never appeared and presented an objection at the Proposition 218 public hearing. The District was never informed of the scope of Plaintiffs' claims and given an opportunity to act when it was setting the now-challenged rates. 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."

Whether or not Plaintiffs would have ultimately been successful had they exercised available administrative remedies is not the standard. Exhaustion requirements cannot be avoided because of speculation of a likely outcome. Litigants normally go to court without having exhausted remedies precisely because

they believe a favorable outcome from exhausting an administrative outcome is unlikely.

2. The District Was Required to Accept, Evaluate and Resolve Protests at its Public Hearing.

Although an agency is precluded from imposing a new or increased fee by a majority written protest, the Constitution mandates it to "consider **all** protests," oral or written, even in the absence of a majority protest. (§ 6(a)(2), emphasis added.) This consideration is mandatory, expressly provided for in the Constitution and must be construed to have meaning. (E.g., *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 ["We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language."].) The Court of Appeal's determination that the remedy provided by participating in the Proposition 218 public hearing was inadequate denigrates the District's obligation to "consider all protests" at the hearing (Ex. A, p.19), and ignores that the District must carry its burden to support proposed charges, including establishing that its fees are based on actual use or service that is actually available to a property. (§6(b)(5); see also *Morgan, supra,* 233 Cal.App.4th at 905

[Proposition 218 "also shifted to agencies the burden to demonstrate the lawfulness of the challenged fees"].)

Proposition 218 provides a mechanism for submission, evaluation and resolution of a challenge; the District Board should have been provided the opportunity to apply its expertise and address Plaintiffs' challenges before being faced with a judicial action. The point of exhaustion is to make a record, invoke agency expertise, and provide the foundation for effective judicial review. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572–573 [deference to agency determination under separation of powers doctrine and in light of agency expertise].)

The case of *Roth v. City of Los Angeles, supra* is instructive. In *Roth*, property owners were given notice that vegetation on their property had been declared by ordinance to be a nuisance and that if they failed to take the necessary action to abate it the city would do so at the property owners' expense. (53 Cal.App.3d at 683.) The notice "also stated property owners having objections to the proposed abatement should appear at the city council meeting, . . .at a specified time and place, when property owners' 'objections will be heard and given due

consideration' and the council would make a final determination." (*Id.*) The property owners failed to attend the meeting, wherein the assessment was confirmed, but later filed a written protest asserting the entire assessment was void. (*Id.*) The property owners then sued.

In finding the property owners' lawsuit was barred, the Court of Appeal held their failure to attend the city council hearing to present their objections to the proposed abatement constituted a nonexhaustion of an available administrative remedy. (*Id.* at 687.) The Court of Appeal first noted, "[t]he fact that the remedy is no longer available does not, of course, alter application of the doctrine, as to hold otherwise would obviously permit circumvention of the entire judicial policy behind the doctrine." (*Id.*) Further, even though the property owners' protest letter filed after the hearing stated numerous factual objections that could have been valid grounds for nonabatement, "[a]ny or all of these arguments could have been raised at the hearing before the city council and acted upon at that time, thus avoiding the need for the action herein." (*Id.* at 687-688.) Accordingly, because the property owners choose not to attend the hearing wherein they had the right to have their objection "considered",

they were precluded from attacking the abatement procedure by way of a judicial action. (*Id.*)

Roth supports a finding that Proposition 218 sets up an adequate administrative remedy by notifying fee-payors of a proposed fee increase, the right to file a written objection and /or appear and the public hearing, and the fact that all protests will be considered before any fee is approved. By contrast, the cases relied upon by the Court of Appeal to reach a contrary conclusion are distinguishable. [Ex. A, pp.19-21.]

The Court of Appeal cites to *Glendale City Employees' Assn v. City of Glendale* (1975) 15 Cal.3d 328, wherein this Court found a city grievance procedure to be inadequate in two respects:

> First, the pertinent portion of Ordinance No. 3830 provides only for settlement of disputes relating to the 'interpretation or application of ... an ordinance resulting from a memorandum of understanding.' (Italics added.) The crucial threshold issue in the present controversy—whether the ratified memorandum of understanding itself is binding upon the parties—does not involve an 'ordinance' and hence does not fall within the scope of grievance resolution.
>
> Second, the city's procedure is tailored for the settlement of minor *individual* grievances. A procedure which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate to

> handle disputes of the crucial and complex nature of the instant case, which turns on the effect of the underlying memorandum of understanding itself. [Citation].

(*Id.* at 342-343, emphasis original.) Neither of the two factors which formed the basis of the *Glendale* court's decision regarding the exhaustion of administrative remedies is involved in this case. Proposition 218 provides an adequate procedure to address a plaintiff fee-payor's claim the District's rate structure is unconstitutional. The undisputed testimony at trial established the Proposition 218 hearing was the forum to raise a rate-structure challenge and that the District Board had the authority to make changes based on any such objection.

Additionally, in *Unfair Fire Tax Committee v. City of Oakland* (2006) 136 Cal.App.4th 1424, cited as support for the Court of Appeal's decision herein, the court rejected defendant's argument that an ordinance established an adequate administrative remedy because it "merely allows a person aggrieved by a resolution creating a fire suppression district to request reconsideration of the resolution by the same decision-making body that adopted the resolution, i.e., by the City Council." (*Id.* at 1429-1430.) The remedy of "appeal to the City

Council," without specifying a procedure to be followed in the appeal, was too "nebulous" to provide an adequate remedy for challenge to the formation of an assessment district. (*Id.* at 1428-1430.) Here, there is nothing "nebulous" about Proposition 218's notice and hearing requirements.

The other decisions relied upon in the Court of Appeal's decision are equally inapposite. (See *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 236–237 [city charter provision provides individual claims procedure and was not designed to address disputes between the City and the Board regarding retirement system's obligations to retirees and the city's resulting obligation to fund the system]; *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1288 ["While it is true that this rule does contain a mandatory provision requiring the scheduling of meetings, it is also true that the rule does not mandate that anything be done as a result of such meetings. This duty to hold meetings amounts to nothing more than an obligation to exercise a general investigatory power."]; *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 741 [plaintiff was not required to exhaust an internal grievance procedure

because his specific grievance was not within the scope of the hearing offered].)

Rosenfield v. Malcom (1967) 65 Cal.2d 559, and the supporting authorities cited therein, also do not support finding the administrative remedies provided by Proposition 218 are inadequate. In *Rosenfield*, the Court considered whether a county employee who claimed to have been wrongfully terminated exhausted his administrative remedies pursuant to Alameda County Charter sections 42 and 44. While those sections provided a general investigative power, they contained no "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Id.* at 566.) The *Rosenfield* court stressed that "[o]ur courts have repeatedly held that the mere possession by some official body of a continuing supervisory or investigatory power does not itself suffice to afford an 'administrative remedy.'" (*Ibid.*)

Proposition 218's administrative scheme, in contrast, provides for more than supervision and investigation. It provides procedures for the submission and evaluation of protests and places the burden on the District to consider and support proposed fees and charges. Accordingly, Plaintiffs were required

to avail themselves of these administrative procedures before resorting to judicial action.

3. The Court of Appeal's Published Decision Creates Confusion Regarding the Duty to Exhaust.

There appears to be no authority directly addressing the duty to exhaust remedies under Proposition 218. The case closest on point is *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist., supra,* involving a plaintiff's failure to exhaust administrative remedies under the Citrus Pest District Control Law (Food & Agric. Code §§ 5401 *et seq.*) prior to challenging the imposition of citrus pest control assessments, including on constitutional grounds under Propositions 62 and 218. (87 Cal.App.4th at 882.) The Court of Appeal for the Fifth District applied well-established authority holding that when an administrative remedy is provided, it must be exhausted. (*Id.* at 884.) Notwithstanding, the decision of the Court of Appeal goes to great lengths to distinguish *Wallich's* on facts that do not affect the over-all exhaustion of remedies analysis. [Ex. A, pp.22-26.]

Even though the Pest Control Law itself requires no notice to property owners of the proposed assessment or opportunity to

protest, it does provide for notice, opportunity to protest, and hearing on the question of the adoption of the proposed district budget in fixing the amount of the assessment. It allows written protests to be made by owners of citrus acreage "at any time not later than the hour set for hearing objections to the proposed budget" (Food & Agric. Code §8564), and requires the board at the hearing "to hear and pass upon all protests so made" and states that the board's decision on the protests "shall be final and conclusive." (*Id.* at §8565.)

Following the reasoning in *People ex rel Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 642, the Court of Appeal in *Wallich's* ruled that in order to challenge a citrus pest control assessment, one must first challenge the district budget, at which time the district has an opportunity to address the perceived problems and formulate a resolution. (*Id.* at 885.) Accordingly, plaintiff's failure to "protest or provide any testimony in opposition to the district's budget for any of the fiscal years in question" barred its lawsuit. (*Id.*)

In finding the Plaintiffs in this case had no duty to exhaust the administrative remedies of Proposition 218, the Court of Appeal finds *Wallich's* to be inapposite because it involved an

assessment under Pest Control Law. [Ex. A, p.23.] However, the fact that Pest Control Law involves a "comprehensive legislative scheme" does not mean Proposition 218 does not provide an adequate administrative remedy. Plaintiffs were notified of the right to protest at the public Proposition 218 hearing and that all protests would be considered. The District had the authority to change its rate-structure in response to an objection at the public hearing, but was not given the opportunity to consider the issue at the time it was approving rates.

Similarly, the Court of Appeal's decision deemed it important that *Wallich's* involved mandated annual proceedings, but in this case the District could decide not to impose a new or increased fee or charge and therefore plaintiffs challenging the method used by an agency to determine such fees or charges "would have no remedy, adequate or otherwise, under section 6 during such period." [Ex. A, p.24.] However, the District held hearings for each year challenged in Plaintiffs' lawsuit. The Plaintiffs were on notice of the public hearings and elected not to attend or otherwise participate by written objection. At most, the Court of Appeal's concern would go to the issue of futility in the unlikely event annual Proposition 218 meetings were no longer

held by the District. (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1132 [Conjecture and speculation are not a proper bases for statutory interpretation].)

Finally, the Court of Appeal's decision distinguished *Wallich's* because, unlike the plaintiff in *Wallich's*, the Plaintiffs here exhausted their administrative remedies under the District's legislative code. [Ex. A, p.25.] The District conceded Plaintiffs exhausted their remedies under the District's legislative code; however, that did not eliminate their separate duty to exhaust remedies under Proposition 218. (See *Acme Fill Corp. v. San Francisco* (1986) 187 Cal.App.3d 1056, 1064 [when multiple remedies are available, all must be exhausted before judicial review is available].) Also, the fact that Plaintiffs in this case were more determined in their attack against the District cuts in favor of requiring them to exhaust their remedies. Plaintiffs' should have put their evidence before the District board at the time it was deciding the issue of rates and allowed the District to apply its expertise and to provide the foundation for meaningful judicial review. Instead, the decision of the Court of Appeal undermines the goal of fostering communication and

permitting potential resolution of issues prior to resort to the courts.

IV. CONCLUSION

Plaintiffs' class action lawsuit directly challenges the District's compliance with Proposition 218, yet Plaintiffs failed to participate in the Proposition 218 mandatory process. Plaintiffs' participation in the Proposition 218 process would have permitted the District to address factual issues, apply the expertise of experts participating in the Proposition 218 hearings and allowed the community as a whole to consider and weigh in on the merit of Plaintiffs' claims. The District and the people it serves were denied the opportunity to receive and respond to Plaintiffs' objections before approval of the final budget for the year. The duty to exhaust administrative remedies under Proposition 218 is an important issue that should be resolved by this Court. It is therefore respectfully requested that this Court intervene by granting review.

DATED: July 24, 2017

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: Kendra J. Hall

Kendra J. Hall
Attorneys for Petitioner
RAMONA MUNICIPAL WATER DISTRICT

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.504(d)(1), I certify that this Petition for Review is proportionately spaced, has a typeface of 13 points or more, and contains 8,301 words.

DATED: July 24, 2017

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: Kendra J. Hall

Kendra J. Hall
Attorneys for Petitioner
RAMONA MUNICIPAL
WATER DISTRICT

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On July 24, 2017, I served the within documents:

PETITION FOR REVIEW

☑ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☐ **BY OVERNIGHT DELIVERY** by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at San Diego, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 525 "B" Street, San Diego, California the ordinary course of business on the date of this declaration.

☑ **BY E-MAIL OR ELECTRONIC SERVICE (Per CRC 8.60(f))** based upon court order or an agreement of the parties to accept service by electronic transmission, by electronically mailing the document(s) listed above to the e-mail address(es) set forth below, or as stated on the attached service list and/or by electronically notifying the parties set forth below that the document(s) listed above

can be located and downloaded from the hyperlink provided. No error was received, within a reasonable time after the transmission, nor any electronic message or other indication that the transmission was unsuccessful.

SEE SERVICE LIST

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

Executed on July 24, 2017, at San Diego, California.

Kristina Terlaga

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DOCS 119525-000003/3002026.3

EXHIBIT "A"

Filed 6/13/17

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EUGENE G. PLANTIER, as Trustee, etc., et al., Plaintiffs and Appellants, v. RAMONA MUNICIPAL WATER DISTRICT, Defendant and Respondent.	D069798 (Super. Ct. No. 37-2014-00083195-CU-BT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Reversed and remanded with directions.

Patterson Law Group, James R. Patterson, Allison H. Goddard, Catherine S. Wicker; Carlson Lynch Sweet Kilpela & Carpenter and Todd D. Carpenter for Plaintiffs and Appellants.

Jonathan M. Coupal, Trevor A. Grimm and Timothy A. Bittle for Howard Jarvis Taxpayers Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Procopio, Cory, Hargreaves & Savitch, Kendra J. Hall, Gregory V. Moser, John D. Alessio and Adriana R. Ochoa for Defendant and Respondent.

Daniel S. Hentschke; Colantuono, Highsmith & Whatley, Michael G. Colantuono and Eduardo Jansen for California Association of Sanitation Agencies, California State Association of Counties and League of California Cities as Amicus Curiae on behalf of Defendant and Respondent.

Plaintiffs and appellants Eugene G. Plantier, as Trustee of the Plantier Family Trust (Plantier); Progressive Properties Incorporated (Progressive); and Premium Development LLC (Premium), on behalf of themselves and all others similarly situated (collectively plaintiffs), appeal the judgment in favor of defendant and respondent Ramona Municipal Water District (District or RMWD). In this class action, the trial court found plaintiffs failed to exhaust their administrative remedies under article XIII D of the California Constitution in connection with plaintiffs' substantive challenge to the *method* used by District to calculate wastewater service "fees or charges"[1] between about 2012 and 2014.

On appeal, plaintiffs contend the trial court erred when it found there was a mandatory exhaustion requirement in section 6 of article XIII D (hereinafter section 6).[2]

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1 "Because article XIII D provides a single definition that includes both 'fee' and 'charge,' those terms appear to be synonymous in both article XIII D and article XIII C. This is an exception to the normal rule of construction that each word in a constitutional or statutory provision is assumed to have independent significance." (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214, fn. 4.) Like our high court in *Verjil*, we use the terms "fee or charge" interchangeably in connection with our discussion of article XIII D. (See *ibid.*)

2 Although advancing this contention, plaintiffs assume—without discussing—that the trial court was interpreting *section 6* in imposing a mandatory exhaustion requirement on them, when, in fact, the statement of decision shows the court substantially relied on *section 4* of article XIII D (hereinafter section 4) to support its decision. As discussed *post*, section 4 governs "assessments," as opposed to imposition of "fees or charges" that

Plaintiffs further contend they took the necessary steps to satisfy the general principle of exhaustion when they separately satisfied the administrative remedy in the Ramona Municipal Water District Legislative Code, as amended, which District adopted in 1996 (hereinafter RMWD legislative code); and that, in any event, the exhaustion doctrine in section 6 should not have been applied to them because the remedy therein was inadequate and because it was "futile" to purse any administrative remedy under this constitutional provision.

As we explain, we independently conclude that plaintiffs' class action is not barred by their failure to exhaust the administrative remedies set forth in section 6 because plaintiffs' substantive challenge involving the method used by District to calculate its wastewater service fees or charges is outside the scope of the administrative remedies, and because, under the facts of this case, those remedies are, in any event, inadequate. Reversed.[3]

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is the subject of section 6. In addition, the procedures an agency must follow to impose an assessment under section 4 are different from those set out in section 6, subdivision (a) with respect to fees or charges. The parties, however, agree that section 6 governs the instant appeal.

3 We received and considered in association with this appeal the amicus curiae briefs, and responses thereto, of the Howard Jarvis Taxpayers Association filed in support of plaintiffs; and of the California Association of Sanitation Agencies, California State Association of Counties & League of California Cities, joined by the California Special Districts Association, filed in support of District. We found the amicus brief of Howard Jarvis Taxpayers Association —the author and principal sponsor of Proposition 218— particularly useful in resolving this case.

BACKGROUND[4]

A. *District*

District is a municipal water district organized under the Municipal Water District Act. (Wat. Code, § 71000 et seq.) District is governed by the RMWD legislative code. District provides, among others, water and, as relevant here, wastewater services to about 40,000 people living in Ramona, California, an unincorporated community within San Diego County. Ramona has two wastewater treatment plants, San Vicente and Santa Maria.

District uses an "Equivalent Dwelling Unit" (EDU)[5] system to calculate wastewater service fees. "Parcels are assigned EDUs and charged for sewer services on a per-EDU basis." Charges for such services are "based on estimates of wastewater capacity needs, flow and strength for different customer types or classes. . . . The District levies fixed sewer rates based on the number of EDUs assigned to each connection.

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4 Because judgment was based solely on plaintiffs' failure to exhaust their administrative remedies under section 6, we only briefly discuss the underlying lawsuit, as the court never reached "phase 2," i.e., "phase 1" of the trial, concerning the merits of plaintiffs' claims. (Compare *Capistrano Taxpayers Assn, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1515 [interpreting subdivision (b)(3) of section 6—the same provision at issue in the instant case—to find that new water rates imposed by the city violated the constitutional requirement that fees " 'not exceed the proportional cost of the service attributable to the parcel' " *without* discussing or analyzing whether the plaintiff exhausted its administrative remedy in subdivision (a) of section 6 by challenging the new water rates in writing beforehand and/or by appearing at the public hearing of the city].)

5 EDU is defined in section 7.52.020 of the RMWD legislative code as "a measure where one unit is equivalent to two hundred gallons/day of sewage, with suspended solids of two hundred milligrams per liter, and BOD of two hundred milligrams per liter." BOD is further defined therein as a "unit of measurement of biochemical oxygen demand . . . ."

EDUs are assigned based on the type of development and associated wastewater flow and loadings."

Sewer rates for residential customers within District living in single-family homes and multi-family dwelling units with one or more bedrooms are assigned 1 EDU per dwelling unit. District has over 20 sewer rate classes for commercial customers; EDUs are assigned for commercial customers based on such factors as "square footage, number of washing machines [and] number of students [per school]."

District has authority to set and collect charges for sewer services. (Wat. Code, § 71670.) Revenues collected from service charges are used to pay operating and maintenance fees. (*Id.*, § 71671.) District is required to recover sufficient revenues to cover both the operating expenses of the sewer services it provides to customers and repairs to, and depreciation of, works it owns and/or operates in connection with such services. If the board of directors (board) of District determines the "revenues . . . will be inadequate . . . to pay [its] operating expense[s] . . . , to provide for repairs and depreciation of works owned or operated by it, and to meet all of its obligations[,] the board shall provide for the levy and collection of a tax . . . sufficient to raise the amount of money determined by the board to be necessary for the purpose of paying [its] operating expenses . . . , providing for repairs and depreciation of works owned or operated by it, and meeting all of its obligations." (*Id.*, § 72092.)

B. *Plaintiffs and Their Operative Complaint*

Since 1998, Plantier has owned a commercial property in Ramona. As such, he pays wastewater service fees to District.

Progressive, a California corporation, owns a 25,000 square foot office building in Ramona. Like Plantier, Progressive pays for wastewater services provided by District.

Finally, Premium, a California limited liability company, owns two properties located in Ramona. It too pays District for wastewater services.

Plaintiffs' operative complaint asserted claims on behalf of themselves and all other District customers who paid a wastewater service fee on or after November 22, 2012.[6] The complaint alleged causes of action against District for declaratory relief and for "refund [of] unlawful sewer service charges." Plaintiffs sought a declaration that District's method of determining the costs of sewer service based on each parcel's assigned EDU violated the "proportionally" provision of subdivision (b)(3) of section 6. Plaintiffs also sought a refund from District of alleged overcharges for wastewater service fees paid by its customers.

Specifically, plaintiffs in their operative class action complaint alleged that District assigned EDU's arbitrarily and without regard to a property's actual wastewater use and to the proportional cost of providing that property's wastewater service; that District's EDU-based wastewater billing system was "inconsistent with general practice among California water districts"; that all District wastewater customers were required to pay an annual sewer service fee imposed on a per-EDU basis; that at all times relevant, District's board established the dollar amount of the sewer service fee on an "ad-hoc basis, without reliance on a rate study or other technical document providing a rational

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6 The court in February 2015 granted plaintiffs' motion for class certification. In so doing, the court ruled class certification applied to both causes of action in plaintiffs' operative complaint and designated Plantier, Progressive and Premium as class representatives.

basis for [the sewer service fees it] adopted"; that the sewer service charge was a property-related fee subject to section 6, subdivision (b)(3); that the then-current sewer service fee for District customers in the San Vicente sewer service area was about $605 per EDU, and about $637 per EDU for the Santa Maria sewer service area; and that the lack of "any rational relationship between the [sewer service fee] and actual wastewater use has resulted in the systematic overcharge of wastewater customers for whom the proportional cost of providing their property with wastewater service is less than their EDU-based" sewer service fee.

C. *Proposition 218*

California voters in November 1996 passed Proposition 218, which added articles XIII C and XIII D to the California Constitution. (*Paland v. Brooktrails Tp. Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365.) As noted *ante*, the instant case concerns article XIII D, which undertook to "constrain the imposition by local governments of 'assessments, fees and charges.' (Art. XIII D, § 1.)" (*Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1378.) "Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges." (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640.)

At issue in this case is section 6 (of article XIII D), which sets forth mandatory procedures an agency, such as District, must follow "in imposing or increasing any fee or charge." Among other requirements, section 6 mandates that an agency provide "written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition" (§ 6, subd. (a)(1)); the amount

of the proposed fee or charge (*ibid.*); the "basis" upon which the fee or charge was "calculated" and the "reason" for the fee or charge (*ibid.*); "together with the date, time, and location of a public hearing on the proposed fee or charge" (*ibid.*).

An agency is required to conduct a public hearing on the proposed fee or charge "not less than 45 days after mailing the notice . . . to the record owners of each identified parcel" upon which the fee or charge is sought to be imposed. (§ 6, subd. (a)(2).) At the public hearing, the agency shall "consider all protests against the proposed fee or charge" and if "written protests against the fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." (*Ibid.*)

D. *Exhaustion of Administrative Remedies*

On District's motion, the court bifurcated the trial into two phases, as noted. In phase 1, the court considered the threshold issue of whether Proposition 218 imposed an exhaustion requirement and, if so, whether plaintiffs satisfied that requirement or were otherwise excused from doing so. After hearing witness testimony and the argument of counsel, the court granted District's motion. In so doing, the court in its statement of decision ruled in part as follows:

"The court finds there is an exhaustion requirement under Prop. 218. Plaintiffs argue there isn't one, yet in the next breath argue they complied with it. The court, acknowledging the dearth of direct authority, holds that the case closest in point is *Wallich's Ranch v. Kern County Pest Control Dist.* 87 Cal.App.4th 878 (2001) [(*Wallich's*)]. Fairly read, and extended to the facts of this case, *Wallich's* imposes a requirement that plaintiffs participate in the annual Prop. 218 process, which is

(according to the evidence in this case), inextricably intertwined with the annual budget process.

"Cal. Const. art. 13D, § 4 provides: [¶] 'The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. **At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots.** The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the propositional financial obligation of the affected property.'

"Participation in a 'public hearing' contemplated by the sentence in bold type immediately above is a centerpiece of the process set up by Prop. 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 [they] were free to ignore this part of the process would be tantamount to the court excising these provisions from the constitutional scheme. This the court is not free to do. [Citation.]"

After finding section 4 (but not section 6) included a mandatory exhaustion requirement, the court next turned to the issue of whether "plaintiffs made the necessary effort to give the RMWD Board the opportunity to resolve the dispute short of litigation and without threatening the viability of the District by not allowing the District to take up

a challenge to the EDU scheme in the context of the annual budget process. The court finds they did not.

"In order to be meaningful, the effort at exhaustion must set forth at least the outlines of the basis for the disagreement. Otherwise the exhaustion requirement is just a mechanical charade. And plaintiff[s'] purported efforts to exhaust their remedies never did this. The letters were long on summary pronouncements and bald assertions, but backup for these allegations was not provided. And the District reasonably offered to receive same."

The court next rejected plaintiffs' contention it was "futile" for them to appear and object at the 2012, 2013 and 2014 budgetary hearings because District previously had rejected their administrative claim raising the same issue that District alleged should have been raised in connection with those hearings. The court in its statement of decision on this issue stated it "believed RMWD employees [who testified] to the effect that the District Board is genuinely interested in input from ratepayers, and that a legitimate, careful and legally/factually supported challenge to the District's EDU regime in the context of the annual Prop. 218/budget hearing would have received careful consideration."

Finally, the court addressed plaintiffs' contention that they gave District "every opportunity to act before they commenced litigation." The court found this contention missed the "point of the exhaustion requirement as laid out in *Wallich's*: by stubbornly refusing to participate in the public hearing process, they failed to give the District the opportunity to act before it set its rates (and consequently its budget) for the 2012-2013 and 2013-2014 fiscal years. The time to protest the EDU regime was in the context of the

annual Prop. 218/budget process, when the District was considering rates and revenue requirements for the coming year. This is what plaintiffs failed to do substantively, procedurally and temporally. Allowing them to bypass the public hearing process set up by Prop. 218 and proceed immediately to litigation seeking (according to plaintiffs' trial brief . . .) a refund of 'excessive fund balances' turns art. 13D, § 4 of the Constitution on its head and may very well threaten the viability of the RMWD.

"In light of the foregoing, the court finds the District carried its burden of proof on the special defense, and the special defense was proven by a preponderance of the evidence. The District acknowledges the plaintiffs may file another action . . . . For the present, the case as pled is clearly barred by the failure to exhaust administrative remedies. Plaintiffs' effort to reach back to November 21, 2012 is clearly untenable due to their failure to exhaust. RMWD is entitled to dismissal. There is no need for phase 2 of the trial, which was scheduled to start [the following day]."

DISCUSSION

A. *Guiding Principles*

When an applicable statute, ordinance, or regulation provides an *adequate* administrative remedy, a party must exhaust it before seeking judicial relief. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080; see *American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 291.)[7] "Exhaustion requires 'a full

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7 None of the parties sufficiently briefed or considered the issue of whether the actions of the District "in imposing or increasing any fee or charge" under section 6 were "legislative" as opposed to "administrative" in nature. (See *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1431-1432 [noting "[l]egislative actions are political

presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings.' [Citation.] ' "The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)." ' " (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609 (*City of San Jose*); see *AIDS Healthcare Foundation v. State Dept. of Health Care Services* (2015) 241 Cal.App.4th 1327, 1337.)

We apply a de novo or independent standard of review in determining whether the doctrine of exhaustion of administrative remedies applies in a given case. (See *Defend Our Waterfront v. State Lands Com.* (2015) 240 Cal.App.4th 570, 580 (*Defend our Waterfront*); see also *Coastside Fishing Club v. California Fish & Game Com.* (2013) 215 Cal.App.4th 397, 414 [noting "[w]hether the doctrine of exhaustion of administrative remedies applies in a given case is a legal question that we review de novo"].)

The exhaustion requirement is subject to exceptions, one of which is where the administrative remedy is inadequate. (*City of San Jose*, *supra*, 49 Cal.4th at p. 609.) The

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in nature, 'declar[ing] a public purpose and mak[ing] provisions for the ways and means of its accomplishment,' " in contrast to administrative actions that "apply law that already exists to determine 'specific rights based upon specific facts ascertained from evidence adduced at a hearing,' " and further noting that, because an amendment of a general plan is deemed a legislative action, plaintiffs were not required to seek an amendment to the general plan to adequately exhaust their administrative remedies].) Nor was counsel at oral argument able to respond meaningfully to this issue on questioning by the panel. In any event, because we conclude the administrative remedies in section 6 are inadequate, we need not decide whether the District's actions were legislative, as opposed to administrative, in nature.

statute, ordinance, regulation, or other written policy establishing an administrative remedy must provide clearly defined procedures for the submission, evaluation, and *resolution* of disputes. (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 236–237 (*City of Oakland*); *Unfair Fire Tax Com. v. City of Oakland* (2006) 136 Cal.App.4th 1424, 1429–1430 (*Unfair Fire Tax Com.*). A policy that only provides for the submission of disputes to a decision maker without stating whether the aggrieved party is entitled to an evidentiary hearing or the standard for reviewing the prior decision is generally deemed inadequate. (*City of Oakland*, at p. 237; *Unfair Fire Tax Com.*, at p. 1430.) An administrative remedy that fails to satisfy these and other requirements need not be exhausted. (*City of Oakland*, at pp. 236–237; *Unfair Fire Tax Com.*, at p. 1430.)

B. *Section 6*

To determine whether plaintiffs were required to exhaust their administrative remedies in connection with their challenge to the method used by District to determine wastewater service fees for the years from about 2012 through 2014, we turn to the language of section 6 (and *not* section 4). (See *Sheridan v. Touchstone Television Productions, LLC* (2015) 241 Cal.App.4th 508, 512 [noting a court "begin[s] with the language of the statutes" in determining whether a plaintiff was required to exhaust his or her administrative remedies before filing suit].)

As summarized *ante*, section 6 includes mandatory procedures an agency such as District must follow when it seeks to impose or increase any "fee or charge." A "fee or charge" is defined in section 2, subdivision (e) to mean "any levy *other than* an ad valorem tax, a special tax, *or an assessment*, imposed by an agency upon a parcel or upon

a person as an incident of property ownership, including a user fee or charge for a property related service."[8] (Italics added.)

Subdivision (a)(1) of section 6 provides: "The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge."

At the heart of the instant dispute is subdivision (a)(2) of section 6. It provides: "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.*"[9] (Italics added.)

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8 An "assessment," in contrast to a "fee or charge," is defined to mean "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.' " (§ 2, subd. (b).)

9 Subdivision (b) of section 6 sets out various substantive requirements that an agency must follow when seeking to "extend[]," "impose[]" or "increase[]" a "fee or charge." As noted, plaintiffs contend District failed to comply with subdivision (b)(3) of

C. *Analysis*

Here, we independently conclude under the facts of this case that plaintiffs were not required to exhaust the administrative remedies in subdivision (a)(2) of section 6 before seeking judicial relief. (See *Defend our Waterfront, supra*, 240 Cal.App.4th at p. 580.)

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 its 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.

Indeed, the language of subdivision (a)(2) of section 6 supports such an interpretation, inasmuch as the primary administrative remedy set forth therein—rejection of the proposed fee or charge—requires a "majority of owners" to submit "written" (as opposed to oral) "protests" to the proposed "*fee or charge*." (Italics added.)

District's own notices of public hearing for the years 2012, 2013 and 2014 support this interpretation. The 2012 public hearing notice states: "Any property owner or any tenant directly responsible for the payment of water or wastewater service fees may

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section 6, which provides: "The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." As also noted, the court never reached this issue, however, as it went to the merits or "phase 2" of the dispute that was rendered moot by the court's finding in "phase 1" that plaintiffs failed to exhaust their administrative remedies either by not objecting in writing before, or by appearing at, the annual budget hearings when District increased the wastewater system rates per EDU.

submit a written protest to the proposed *increases* to the rates and fees; provided, however, only one protest will be counted per identified parcel. Any written protest must . . . state that the identified property owner or tenant is opposed to the proposed water rate and/or wastewater service *fee increases*" among other requirements. (Italics added.)

The notice goes on to state that, when submitting a protest, an owner or tenant must identify on the envelope that the "enclosed protest is for the Public Hearing on the Proposed *Increases* to Rates for Water and Wastewater Service Fees" (italics added); that District at the hearing "will hear and consider all written and oral protests to the proposed *rate increases*"; and that, at the conclusion of the public hearing, the District board "will consider adoption of the proposed *rate and fee increases*" unless a majority of "property owners or customers" submitted written protests against such *increases*. (Italics added.) This language is also included in the public hearing notices for 2013 and 2014.

Thus, District's own public notices support the conclusion that the administrative remedy in subdivision (a)(2) of section 6 is limited to a protest over the imposition of, or increase in, rates for water and wastewater service fees, as opposed to protests over whether District complied with the substantive requirements of subdivision (b) of this section.

Second, assuming for the sake of argument a challenge to the substantive requirements of subdivision (b) of section 6 falls within the scope of the administrative remedies set forth in subdivision (a)(2) of that section, we nonetheless conclude under the facts of this case that these administrative remedies are inadequate. (See *Glendale City Employees' Ass'n v. Glendale* (1975) 15 Cal.3d 328, 343 (*Glendale*).)

Here, the record shows that District provides wastewater services to about 40,000 people in Ramona, or to about 6,900 parcel owners. The record also shows that only four "people" (as opposed to "parcel owners") protested the sewer service fees or charges in 2012; eight people protested in 2013; and 12 people protested such fees or charges in 2014. The record further shows that, with the exception of two protests in 2014, none of these protests went to the proportionality requirement that is the subject of this lawsuit. (§ 6, subd. (b)(3).)[10]

The record therefore shows it would have been nearly impossible during these years for plaintiffs to obtain "written protests" from a "majority" of parcel owners in order to trigger the primary administrative remedy set forth in subdivision (a)(2) of section 6—rejection of the imposed or increased fee or charge.

In contrast to the majority requirement in section 6, subdivision (a)(2), section 4—which the trial court incorrectly relied on in its statement of decision when imposing a mandatory exhaustion requirement on plaintiffs—includes a *balloting procedure* for any "assessment" sought to be imposed by an agency. Subdivision (c) of section 4 provides that, in addition to notice of the date, time, and location of the public hearing concerning any proposed assessment, each notice "shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the *ballots* required pursuant to subdivision (d), including a disclosure statement that the

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10 District in its respondent's brief claims there were actually six written protests in 2012 and nine in 2013. In reviewing the record, we counted five written protests in 2012 and eight in 2012. In any event, the point is there were very few written protests during the relevant time period.

existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed." (Italics added.)

Subdivision (d) of section 4 further provides that the notice sent to each identified parcel "shall contain a *ballot* which includes the agency's address for receipt of the *ballot* once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment." (Italics added.) Subdivision (e) of this section provides in part that, at the public hearing, the "agency shall consider all protests against the proposed assessment *and tabulate the ballots*. The agency shall not impose an assessment if there is a majority protest. *A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment.* In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property." (Italics added.)

Clearly, section 4 has procedures—including a balloting requirement—that are nonexistent in subdivision (a)(2) of section 6. For this reason, we conclude the court erred in relying on section 4 when it imposed on plaintiffs a mandatory exhaustion requirement.[11]

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11 We note subdivision (c) of section 6 requires approval "by a majority vote" before a "property related fee or charge" may be imposed when that fee or charge does *not* involve "*sewer*, water, and refuse collection services." (Italics added.) Under subdivision (c) of section 6, the agency is required to "adopt procedures similar to those for increases in assessments [in section 4] in the conduct of elections under this subdivision." Because the instant case involves "sewer . . . collection services," subdivision (c) of section 6 is inapplicable.

What's more, the record shows that, at all times relevant, each of the named plaintiffs were "commercial business owners" in the Santa Maria sewer area. The record further shows that within this area, commercial properties account for only about 15 percent (or 257 of 1,750) of the parcels, with the remaining 85 percent primarily being residential properties (i.e., assigned an EDU of 1.5 or less).

As such, *if* commercial property owners "successfully argued that they were overcharged for sewer service charges, the source of the funds for any potential refunds would be higher assessments on other property owners, who are predominately property owners." Because the relief plaintiffs are seeking in the instant case will potentially require other parcel owners to pay higher fees or charges for wastewater services—what District describes as a "zero-sum game"[12]—it seems implausible plaintiffs would ever have been able to secure written opposition by a "majority" of parcel owners in order to trigger the primary administrative remedy in subdivision (a)(2) of section 6.

Without the administrative remedy that requires a "majority" of parcel owners to protest in writing to the proposed "fee or charge," a parcel owner is left solely with the right to "protest" the proposed "fee or charge." Although subdivision (a)(2) *requires* the agency to "consider all protests" at the public meeting, we conclude merely having an agency consider a protest—without more—is insufficient to create a mandatory exhaustion requirement. (See *Glendale*, *supra*, 15 Cal.3d at pp. 342-343 [noting a

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12 Merriam-Webster defines the term "zero-sum game" to mean a "situation in which one person or group can win something only by causing another person or group to lose it <Dividing up the budget is a zero-sum game.>" (See Merriam-Webster's Online Dictionary (2017) <http://www.merriam-webster.com/dictionary/zero-sum game> [as of June 1, 2017].

"procedure which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate to handle disputes of the crucial and complex nature of the instant case" involving a memorandum of understanding adopted under the Meyers-Milias-Brown Act (Stats. 1968, ch. 1390)]; see also *City of Oakland, supra*, 224 Cal.App.4th at pp. 236-237 [noting even if a city's charter language requiring a public hearing before a police and retirement board " 'in all proceedings pertaining to retirement and to the granting of retirement allowances, pensions, and death benefits' " was broadly construed to include disputes with the city, the court would still conclude that the process articulated in the charter was insufficient to create a mandatory exhaustion requirement because the "public hearing requirement contained in [the c]harter [did] not require the [b]oard to do anything in response to the submissions or testimony received by it at the hearing" and, thus, "the procedure does not provide for the acceptance, evaluation and *resolution* of disputes"]; *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 741-742 [concluding the physician plaintiff's allegations "against his coworkers present[ed] complex issues -- a pattern of racist conduct intended to provide his minority patients with a lesser standard of care, and to interfere with his own ability to care of them," and, thus, further concluding that, unless the court presumed such allegations were unfounded, "which [it was] not permitted to do," the court could not "agree that the procedure outlined in [the hospital's bylaws], which, as in *Glendale* . . . , 'provides merely for the submission of the grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact' [was] adequate to resolve them"]; *City of Coachella v. Riverside County Airport Land*

Use Com. (1989) 210 Cal.App.3d 1277, 1287 [concluding the public hearing process of the airport land use commission with respect to the adoption of the commission's land use plan did not constitute an adequate administrative remedy because the "public hearings held by the [c]ommission with regard to the adoption of [that plan] did not require that the [c]ommission *do* anything in response to submissions or testimony received by it incident to those hearings"]; *Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1029, quoting *Rosenfield v. Malcom* (1967) 65 Cal.2d 559, 566 [noting the "mere possession by some official body, such as the board, of a 'continuing supervisory or investigatory power' does not itself suffice to afford an administrative remedy" and further noting "[t]here must be 'clearly defined machinery' for the submission, evaluation and resolution of complaints by aggrieved parties"]; *Sunnyvale Public Safety Officers Assn. v. City of Sunnyvale* (1976) 55 Cal.App.3d 732, 736 [noting the administrative procedures enacted by the city for the settlement of employee grievances and disputes involving the city and public safety officers were inadequate as such procedures neither provided for a hearing before the city council nor the "taking of testimony [n]or the submission of legal briefs"]; *Martino v. Concord Community Hosp. Dist.* (1965) 233 Cal.App.2d 51, 57 [rejecting hospital's contention that physician had no right to judicial relief after seeking appointment to the medical staff because he had failed to appeal to the executive committee of the hospital staff as authorized in the hospital's bylaws, after concluding the hospital's procedures were "nebulous" because they did "not set forth any procedure for the hearing or determination of the appeal and state[] only that it shall be 'considered' " under the bylaws]; and *Henry George School of Social Science v. San Diego Unified School Dist.* (1960) 183 Cal.App.2d 82, 85 [rejecting a school board's

claim that plaintiff had failed to exhaust its administrative remedies in connection with plaintiff's efforts to enjoin the board from enforcing rental charges in excess of those authorized by state law because "no authority has been cited, and we have found none, that applies the doctrine of exhaustion of administrative remedy to any case where no specific remedy is provided, permitted or authorized by statute or by rule of the administrative agency involved"].)

Like the trial court in its statement of decision, District relies extensively on *Wallich's* to support its contention plaintiffs were required to exhaust their administrative remedies either by objecting beforehand in writing to the proposed increase in wastewater services fees or by appearing at the public hearing(s) when this issue was taken up by District in connection with its annual budget. In *Wallich's*, the court ruled the plaintiff failed to exhaust its administrative remedy when it challenged various assessments imposed under the Citrus Pest District Control Law (Food & Agr. Code, § 8401 et seq.; hereinafter pest control law) by the Kern County Citrus Pest Control District in connection with its efforts to eradicate the citrus tristeza virus. (*Wallich's*, *supra*, 87 Cal.App.4th at p. 880.)

In reaching its decision, the *Wallich's* court noted that the pest control law provided "a specific mechanism for levying and assessing taxes for district purposes." (*Wallich's*, *supra*, 87 Cal.App.4th at p. 880.) The court further noted that, " '[g]iven the public health and safety issues inherent in the [p]est [c]ontrol [l]aw, in addition to the policy of resolving disputes expeditiously,' " a "general exhaustion rule" was warranted (*id.* at p. 884); and, therefore, that the appropriate procedure for challenging the assessments was for the plaintiff to first exhaust its remedy by challenging the budget

before the district, which could only be adopted after a noticed hearing and which the plaintiff had failed to do. (*Id.* at pp. 884-885.)

We conclude *Wallach's* is inapposite in the instant case. First, although the plaintiff in *Wallach's* contended the imposition of assessments violated Proposition 218 among other constitutional provisions, as noted the *Wallach* court found there was a "general exhaustion" requirement under the pest control law, and, thus, unlike the trial court in the instant case, the court in *Wallach's* did not impose an exhaustion requirement under Proposition 218. (See *Wallich's*, *supra*, 87 Cal.App.4th at p. 884.) In fact, the trial court in *Wallich's* found the district in that case was exempt from article XIII D (as a result of section 5, subdivision (a), which subdivision is not at issue in the instant case). (*Wallich's*, at p. 882.)

Second, in contrast to section 6, which generally applies to the imposition or increase in *any* "fee or charge" by *any* agency, the pest control law is a "comprehensive legislative scheme" (see *City of Oakland*, *supra*, 224 Cal.App.4th at p. 237) providing for the formation (Food & Agr. Code, § 8451 et seq.) and organization of districts (*id.*, § 8501 et seq.); setting forth the powers and duties of districts (*id.*, § 8551 et seq.), including the levying and assessing of taxes for district purposes (*id.*, § 8601 et seq.); and providing for the consolidation and, ultimately, dissolution of districts (*id.*, §§ 8701 et seq. & 8751 et seq., respectively).

For this separate reason, we conclude *Wallich's*—and its requirement that a party challenging an assessment exhaust its administrative remedy under a "comprehensive legislative scheme" (i.e., the pest control law)—is distinguishable from the instant case. (See also *Woodard v. Broadway Federal Sav. & Loan Asso.* (1952) 111 Cal.App.2d 218,

223-225 [concluding a challenge to validity of an election must first be brought to what was then known as the "Home Loan Bank Board" (12 U.S.C. former § 1462), which promulgated under federal law "comprehensive" and "explicit" rules and regulations governing the operation of federal savings and loan associations from their inception to their dissolution].)

Third, the pest control law requires a district board, after adopting a plan to control and eradiate citrus pests within the district (Food & Agr. Code, § 8557), to "make or cause to be made an estimate of the cost of operating the plan for the *next fiscal year* beginning not sooner than 90 days thereafter" (*id.*, § 8558, italics added). The pest control law expressly requires a district board to hold an *annual* "budget hearing" to institute that plan. (See *id.*, §§ 8560 [budget hearing, time, and place]; 8561 [publication of notice]; 8562 [notice, duration of publication]; 8563 [contents of notice]; 8564 [protests against budget or items]; 8565 [hearing protests against budget or items]; & 8566 [adoption of the budget for the forthcoming fiscal year].)

Unlike the pest control law, section 6 does not require an agency such as District to hold an *annual* meeting. As such, if an agency such as District decided not to impose a new or increased fee or charge year over year, parcel owners like plaintiffs herein challenging the *method* used by an agency to determine such fees or charges would have no remedy, adequate or otherwise, under section 6 during such period. For this separate reason, we conclude *Wallich's* is inapposite in the instant case.

Fourth, in contrast to the instant case in which plaintiffs' action presented a substantive challenge to the method used by District to determine its wastewater service fees via an EDU system, in *Wallich's* the plaintiff merely challenged the amount it was

assessed on various parcels over a three-year period. The court in *Wallich's* noted that, after the budget was fixed by the agency in that case, the " 'computation of the assessments [was] a simple matter of division and amount[ed] to no more than the performance of a ministerial act.' " (*Wallich's*, *supra*, 87 Cal.App.4th at p. 885, quoting *Irvine v. Citrus Pest Dist.* (1944) 62 Cal.App.2d 378, 383.) Thus, the nature of the challenge by the plaintiff in *Wallich's* further distinguishes it from the instant case.

Finally, the trial court in its statement of decision found plaintiffs had in fact exhausted their administrative remedy under the RMWD legislative code as a result of plaintiffs' November 21, 2013 submission of a written administrative claim to District. Included with the administrative claim was a draft complaint, which the trial court noted was "similar to the one [they] later filed with the [c]ourt." As such, the draft complaint included a detailed explanation of plaintiffs' challenge to the EDU system. District ultimately rejected that claim.

The trial court further noted in its statement of decision that 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.[13] For this separate reason, we conclude the facts in the instant case are

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13 Also in support of the general exhaustion requirement, plaintiffs contend they made numerous other attempts in addition to filing their administrative claim to apprise District of the nature of their claims short of objecting in writing before and/or appearing at the public meetings in 2012, 2013, and 2014. Such efforts included a letter sent by Plantier's then legal counsel to District in July 2012 in which his counsel alleged the EDU system was "arbitrary and discriminatory" as it pertained to Plantier's commercial property; an August 2012 letter sent directly by Plantier to District memorializing a meeting between him and District earlier that month; and a letter sent in December 2012 by a consumer advocacy group on behalf of Plantier stating the EDU-based wastewater rate structure was unconstitutional because of the alleged lack of a rational relationship

distinguishable from those in *Wallich's*, where the plaintiff did not attempt whatsoever to exhaust its administrative remedy under the "general exhaustion" rule set forth in the pest control law. (See *Wallich's*, *supra*, 87 Cal.App.4th at p. 884.)

In sum, we conclude under the facts of the instant case that plaintiffs were not required to exhaust the administrative remedies in subdivision (a)(2) of section 6 either by objecting in writing beforehand to the annual increase in wastewater service fees District sought to impose in 2012, 2013, and 2014 and/or by appearing at the hearings in those years to challenge publicly such increases.[14]

DISPOSITION

The judgment in favor of District is reversed and the matter is remanded to the trial court. On remand, the trial court is directed to vacate its order finding plaintiffs failed to exhaust their administrative remedies under section 6 of article XIII D and to enter a new order finding section 6 does not include a mandatory exhaustion requirement

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between the EDU system and the actual wastewater used by a customer. However, in light of the concession by District that plaintiffs' administrative claim satisfied the general exhaustion requirement in the RMWD legislative code, we find it unnecessary to determine whether this additional evidence separately satisfied this requirement.

14 In light of our decision, we conclude it is unnecessary to decide whether it was "futile" for plaintiffs to have objected in writing before and/or at the budget hearings in 2012, 2013, and 2014 in order to challenge the method in which District calculated wastewater service fees it imposed under its EDU system. (See *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1459, quoting *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936 [noting the " '[f]ailure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile' " and further noting the " 'futility exception requires that the party invoking the exception "can positively state that the [agency] has declared what its ruling will be on a particular case" ' "].)

in this case. Plaintiffs to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

06/13/2017

KEVIN J. LANE, CLERK

By _____ Deputy Clerk