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CHW Bulletin: *Update on Public Law*

June 2019

Supreme Court Allows Prop. 218 Challenge Without Participation in Protest Hearing in Narrow Ruling

By Michael G. Colantuono

Introduction. On May 31, the California Supreme Court decided *Plantier v. Ramona Municipal Water District*. The case had been expected to resolve whether a challenger to a property related fee or charge under Proposition 218 must participate in the majority protest hearing to sue or, at least, limit claims in court to those raised at the hearing. Instead, the Court decided the case very narrowly, leaving that issue to be decided in another case, perhaps *Marin Municipal Water District v. Walker (Marin)*, a recent, unpublished decision of the San Francisco Court of Appeal. A petition for Supreme Court review of *Marin* must be granted or rejected in June or July.

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The Decision. The Ramona Municipal Water District provides water and sewer services. Unlike many such dual-utility agencies, it does not collect sewer charges on water bills, but on the property tax roll. Accordingly, sewer fees are fixed annual amounts based on the size and use of property expressed in "equivalent dwelling units" or EDUs. The District adjusted a restaurant's EDU assignment from 2.0 to 6.82, concluding the original figure was mistaken. The restaurateur challenged the reassignment, arguing that Proposition 218's mandate that fees be proportionate to service cost requires sewer rates to be based on the volume of water used. He later sued, along with two commercial property owners, as representatives of a class of all customers.

The District argued the plaintiffs did not exhaust their administrative remedies by participating in the protest hearing on sewer rate increases proposed at about the same time as Mr. Plantier disputed his EDU assignment. The trial court certified the class, but accepted the exhaustion of remedies defense, dismissing the case. The San Diego Court of Appeal reversed, in a very broad and troubling opinion, concluding exhaustion is never required in a Proposition 218 case. The Supreme Court granted review — leading to the new, and much narrower, decision.

The Supreme Court reasoned that, even if one must participate in a Proposition 218 majority protest hearing before bringing **some** challenges (which it assumed without deciding), a challenge to Ramona's EDU methodology was not among them. This was because the District gave notice of hearings

on proposed rate increases, not on a change to its rate structure — i.e., the EDU formula. As the District could not have acted on Mr. Plantier's complaint at its hearing except by making a new rate proposal that **did** change the EDU formula, which would require a new hearing, its majority protest hearing was not a fit forum to resolve it.

The trial court cited *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001), which many public lawyers read to require exhaustion in Proposition 218 cases. The Supreme Court read that case to require exhaustion under the Citrus Pest District Control Law, not Proposition 218. Thus, with *Wallich's Ranch* found off-point and the Court of Appeal opinion in this case largely displaced by the Supreme Court decision — which does not decide whether one must participate in a majority protest hearing under Proposition 218 — this question is now plainly open. Perhaps the *Marin* case will resolve it. Along the way the Court made these helpful points:

- The Proposition 218 Omnibus Implementation Act of 1997 is good law to construe the measure. *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) held this previously, but it is nice to have a current restatement of the rule.
- Rate-making is legislative activity, a question the Court of Appeal here had thought unclear and, by stating so in a published decision, made it so.
- The provision of the Omnibus Act allowing inflation adjustment of property related fees without triggering a new protest hearing is good law. Although this language is technically "dicta," rather than a holding, it is helpful nonetheless.

Options for Rate-Makers. In light of this decision, public agencies which make rates subject to Proposition 218 should consider:

- Adopting a local procedure for resolving complaints about legislative decisions to adopt rates and rate-making formulas (like the EDU system here) as well as administrative decisions to assign a property or rate-payer to a rate class. A plainly applicable local procedure must be exhausted whether or not participation in the Proposition 218 majority protest hearing is required. Indeed, Ramona has such a procedure and Mr. Plantier was obliged to exhaust it.
- Writing notices of majority protest hearings broadly to invite protests on rates, rate-making formulas and, perhaps, customer classification issues, so that its clearer than in *Plantier* than the Board or Council can address potential plaintiffs' claims.

Conclusion. The question that *Plantier* left open will eventually be decided.

Stay tuned. As always, we will keep you posted!

For more information on this topic, contact Michael at (530) 432-7257 or MColantuono@chwlaw.us.

Colantuono, Highsmith & Whatley is a law firm with offices in Pasadena and Grass Valley in the Sierra Foothills that represents public agencies throughout California. Its municipal law practice includes public revenues, land use, housing, CEQA, LAFCO matters and associated litigation. We are committed to providing advice that is helpful, understandable, and fairly priced.

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