Sierra County
Board of Supervisors’
Agenda Transmittal &
Record of Proceedings

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<tr>
<th>MEETING DATE:</th>
<th>TYPE OF AGENDA ITEM:</th>
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<td>June 4, 2019</td>
<td>☐Regular ☑Timed</td>
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<th>DEPARTMENT:</th>
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<td>Board of Supervisors</td>
<td>Heather Foster, Clerk of the Board</td>
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| PHONE NUMBER: | 530-289-3295 |

**AGENDA ITEM:** Appeal of Solid Waste Assessment Fees for 2017-2018 filed by Mr. Wayne DeLisle for APN 006-130-024-0 Pike City Road and 006-130-025-0 Pike Short Cut Road.

**SUPPORTIVE DOCUMENTS ATTACHED:** ☐Memo ☐Resolution ☐Agreement ☑Other

**BACKGROUND INFORMATION:**

**FUNDING SOURCE:**

**GENERAL FUND IMPACT:** No General Fund Impact

**OTHER FUND:**

**AMOUNT:** $ N/A

**ARE ADDITIONAL PERSONNEL REQUIRED?** ☐Yes, -- -- ☑No

**IS THIS ITEM ALLOCATED IN THE BUDGET?** ☑Yes ☐No

**IS A BUDGET TRANSFER REQUIRED?** ☐Yes ☑No

**SPACE BELOW FOR CLERK’S USE**

**BOARD ACTION:**

☐Approved
☐Approved as amended
☐Adopted
☐Adopted as amended
☐Denied
☐Other
☐No Action Taken

☐Set public hearing
   For: __________________________

☐Direction to: __________________

☐Referred to: __________________

☐Continued to: __________________

☐Authorization given to: __________________

Resolution 2019- ____________
Agreement 2019- ____________
Ordinance ____________

Vote:
   Ayes: __________________
   Noes: __________________
   Abstain: __________________
   Absent: __________________

☐By Consensus

**COMMENTS:**

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

(☐) by consensus

(☐) ___Approved

(☐) ___Approved as amended

(☐) ___Adopted

(☐) ___Adopted as amended

(☐) ___Denied

(☐) ___Other

(☐) ___Set public hearing

(☐) ___Direction to:

(☐) ___Referred to:

(☐) ___Continued to:

(☐) ___Authorization given to:

(☐) Resolution 2019- 

(☐) Agreement 2019- 

(☐) Ordinance 

(☐) By Consensus

Clerk to the Board

Date
APPEAL OF SOLID WASTE FEE ASSESSMENT
2017-2018

A separate appeal must be filed for each Parcel and/or unsecured property tax bill.

NAME: Wayne De Lisle
PARCEL/ACCOUNT NUMBER: 006-130-024-0

I/we hereby appeals the decision of the solid waste fee administrator denying my/our application for an adjustment to the solid waste fees that have been imposed for the 2017-2018 Fiscal Year. I/we further certify that I/we or the entity that I/we represent is/are the owner, or tenant or other party responsible for the waste disposal fee imposed on the above-identified property, pursuant to Section 8.05.010 of the Sierra County Code.

I/we further certify that the basis for the adjustment of solid waste fees is as follows: (Check all applicable boxes)

RESIDENTIAL FEE PROPERTIES:

[X] The property qualifies as a single-family residence.

(1.020) Section 8.05.010 of the Sierra County Code Solid waste system charges begins “A. Pursuant to the provisions of Section 6 of Article XIII D of the California Constitution, ...” (1.030) Whether the referenced property qualifies as a single-family residence pursuant to Section 8.05.010 of the Sierra County Code is irrelevant to the amount of the exaction, as it is being applied to my parcels, and being appealed from and encroaches upon prohibitions constitutionally expressed and held as rights. (1.040) Section 8.05.010 of the Sierra County Code is

[ ] The property qualifies as a multi-family residential property and the maximum total number of units that are available for occupancy during the year has been miscalculated as___________units, and the actual number of units that are or may at any time be located on the property during the year is___________.

[X] Solid Waste System is not immediately available for use by the subject property.

NON-RESIDENTIAL FEE PROPERTIES:

[X] The amount of refuse that has been generated from the property during the period set by ordinance (April 1, 2016 thru March 31, 2017) has been erroneously calculated as________ cubic yard of waste and should be________ cubic yards.

The basis for the above waste generation estimate is as follows: (Use separate page if necessary.)

Requiring appellant reliance upon unverifiable data derived from years prior to the subject appeal as set by County Ordinance violates due process and creates legal impossibilities for appellants. Furthermore, failure by FEE ADMINISTRATOR to “include a written statement of facts fully and fairly describing the basis for the” Appellant’s Applications For Adjustment to Solid Waste Fee Assessment 2017-2018 Fiscal Year appeal (demonstrating the misapplication of the solid waste fee to the property) together with copies of all relevant documents in support of the” Appellant’s Application For Adjustment to Solid Waste Fee Assessment 2017-2018 Fiscal Year De Lisle Sierra County APNs 006-130-024-0/006-130-025-0, which are constitutionally required, is an expressed prohibition on County from imposing these exactions in the first instance.

The appeal must include a written statement of facts fully and fairly describing the basis for the appeal (demonstrating the misapplication of the solid waste fee to the property) together with copies of all relevant documents in support of the appeal.

FAILURE TO PROVIDE ALL INFORMATION REQUIRED BY THIS APPLICATION MAY RESULT IN THE DENIAL OF THE APPLICATION FOR ADJUSTMENT TO SOLID WASTE ASSESSMENT. APPEALS MUST BE FILED WITHIN 60 DAYS OF THE DATE OF THE SOLID WASTE FEE ADMINISTRATOR’S DENIAL OF THE APPLICATION FOR ADJUSTMENT.

In submitting this application for adjustment in solid waste assessment, I declare under penalty of perjury that the foregoing information is true and correct.

Executed on this 26____ day of __July___, 2018

Wayne De Lisle

RETURN THIS FORM TO:
Sierra County Clerk - Recorder
P.O. Box D
Downieville, CA 95936

PRINT OR TYPE NAME

SIGNATURE

PRINT NAME OF PROPERTY OWNER IF DIFFERENT FROM APPLICANT
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Wayne De Lisle

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Sierra County Clerk - Recorder
P.O. Box D
Downieville, CA 95936

PRINT OR TYPE NAME

Wayne De Lisle

PRINT NAME OF PROPERTY OWNER IF DIFFERENT FROM APPLICANT
APPEAL OF SOLID WASTE FEE ASSESSMENT
2017-2018

A separate appeal must be filed for each Parcel and/or unsecured property tax bill.

NAME: Wayne De Lisle ; PARCEL/ACCOUNT NUMBER: 006-130-024-0

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In submitting this application for adjustment in solid waste assessment, I declare under penalty of perjury that the foregoing information is true and correct.

Executed on this 26 ___ day of Jul __, 2018

Wayne De Lisle

SIGNATURE

PRINT OR TYPE NAME

PRINT NAME OF PROPERTY OWNER IF DIFFERENT FROM APPLICANT

RETURN THIS FORM TO:
Sierra County Clerk - Recorder
P.O. Box D
Downieville, CA 95936
May 14, 2019

Mr. Wayne DeLisle
500 Pike City Rd.
Pike, CA 95960

APN's 006-130-024-0 & 006-130-025-0

Dear Mr. DeLisle,

Your appeals of the Solid Waste Fee Assessment for 2017-2018 and 2018-2019 will be held on Tuesday, December 4, 2018 at 10:00 a.m. The hearing will take place in the Board Chambers at the Courthouse in Downieville.

During the hearing you will be allowed no more than thirty (30) minutes to present your evidence concerning the waste generation occurring on the subject real property. The Solid Waste Fee Administrator shall have a representative present to provide a statement of the reasons for the Solid Waste Fee Administrator’s decision regarding the adjustment request.

Based upon information submitted with the appeal application and received at the hearing, the Board of Supervisors shall determine the reasonable refuse generation therefrom in order to impose the appropriate solid waste fees in accordance with the provisions of the Sierra County Code and the latest adopted resolution imposing solid waste fees for the present fiscal year. The Board shall announce its decision at the conclusion of the hearing or within twenty-one (21) days thereafter.

Your application and any additional information attached will be provided as background information for the Board of Supervisors. If you have anything further you wish to provide to the Board please either e-mail the information to my office at clerk-recorder@sierracounty.ca.gov no later than 4:00 p.m. on May 29, 2019 or bring eight (8) copies and an original to the meeting.

Sincerely,

Heather Foster
County Clerk-Recorder

Cc: Solid Waste Fee Administrator
Calculating residential exactions [XIII D, §6, (a, 1)]

XIII D, §6, (a, 1), states:
(1) 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 owners 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.

This section is applicable to any fee imposed on a parcel basis or for fees which provide a property related service and constitutional permission to impose an exaction under §6 authority is further restricted to compliance with §6, (b, 1-5), which states:

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

Note: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the "cost of service to either of my parcels", "service attributed to parcels other than to my parcels" or for "anything other than providing waste disposal service to one of my two parcels."

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

The stated purpose of these exactions from me are to provide my two parcels with solid waste disposal services. Revenues derived from exactions Imposed on either of my parcels cannot exceed the cost of providing solid waste disposal services to my parcels.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
Revenues derived from exactions on my parcels for solid waste disposal services cannot be used for any other purpose other than providing solid waste disposal services to my parcels.

(3) 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.

Fees and charges imposed upon any parcel or person as an incident of property ownership cannot exceed the proportional cost of the actual use of the service by the parcel. Deficiencies in derived revenues on one parcel heavily using Agency’s waste disposal service are not allowed to be attributed to other parcel(s) that is/are not generating the volume of waste that would be commensurate (proportional to) with that exaction for that parcel. Therefore, averaging high use and low use to arrive at an admitted average use also brings in tow with it admission of violating requirements (1), (2), and (3) above by supplementing the exactions made on high use parcels with the excess funds derive from low using parcels. Nevertheless, Agency Fee Administrator clearly demonstrates that under Agency’s fee scheme exactions imposed on low use parcels our use to supplement inadequate exactions from high use parcels. §6, (b, 1-3), prohibits Agency from imposing exactions on parcels that exceeds the proportional cost of providing the service to those parcels.

Neither the Board of Supervisors, Agency nor Fee Administrator advances no theory upon which exempts the Board of Supervisors, Agency nor Fee Administrator from the constitutional prohibition on using revenues derived from one parcel to supplement revenues inadequately derived from other parcels.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b)
"...As used herein "immediate availability" or "immediately available" shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner's use. (Immediate availability such be interpreted consisted with the court ruling in Paland v. Brooktrails Township Community Services Dist. Bd. of Directors, 176 Cal.App. 4th 158.)"

Whereas, the Paland Court said the term "immediately available", as used within California Constitution Article XIIID, §6, means:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold added.)

PUBLIC ACCESS HOURS FOR SOLID WASTE DISPOSAL

County Solid Waste Transfer Stations, located in Alleghany Ramshorn, Sattley and Sierra City, shall be open to receive solid wastes eighteen (18) hours per week on Saturday, Sunday and Monday – 10:00 A.M. to 4:00 P.M.

The Landfill Site, located on Garbage Pit Road, Loyalton, shall be open to receive solid wastes twenty-four (24) hours per week on Friday, Saturday, Sunday and Monday – 10:00 A.M. to 4:00 P.M. (Bold mine.)

So, that makes the Landfill Site only "immediately available" to the public for a whopping twenty-four (24) hours per week on Saturday, Sunday and Monday – 10:00 A.M. to 4:00 P.M., just 24 out of 168 hours a week, a niggardly 0.14285714285714% of the time, and, by no stretch of anyone's imagination "immediately available" in light of the Paland Court's conclusion on the meaning of "immediately available", save County Official's.

And, that makes the Alleghany Ramshorn, Sattley and Sierra City, County Solid Waste Transfer Stations only "immediately available" for eighteen (18) hours per week on Saturday, Sunday and Monday – 10:00 A.M. to 4:00 P.M. 18 out of 168 hours, an even more niggardly 0.10714285714286% of the time, and, by no stretch of anyone's imagination "immediately available" in light of the Paland Court's conclusion on the meaning of "immediately available", save County Official's.

All anyone need do is imagine what the Paland Court Decision would have been given their conclusions on the meaning of "immediately available" if the Brooktrails Township Community Services Dist. was only making water available to Paland's water meter a niggardly .10714285714286% of the time. Or, to bring it a wee bit closer to home, recon back to the time that the water
supply to the Downieville Court House went down and imagine if that were the case a whopping 99.89285714285714% of the time. The odds are 99.89285714285714% that Paland would have prevailed the first time around.

County, by positing the following text found in Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b) demonstrates their willful intent to mutate the express holding of the Paland Court to suit their own illicit purposes rather than comport their actions with Article XIII D, §6, (b), and the holding of the Paland Court:

...As used herein “immediate availability ” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner’s use.”

Contrary to the Board of Supervisors’ misattributed “finding of facts” above, the Paland Court soundly held that their immediately available” holding solely applies to Agency’s conduct, not to parcel owners as frequently admitted by the Fee Administrator much to the chagrin of the Board of Supervisors. Here, the Board of Supervisors, ever so boldly yet illicitly, mutates their their spin on “immediate availability ” or “immediately available” exemplarily distinguishing the Board of Supervisors’ version of “immediate availability ” or “immediately available” from the Paland Court’s “immediately available” all the while commingling that with unfathomable mumbo-jumbo.

Moreover, “Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.” Exacting fees or charges based on potential or future use of a service without compliance with Section 4 is having or showing a stubborn and determined intention to do as one wants, regardless of the consequences or effects.

The “customary use” of my APN 006-130-025-0 parcel is not as a “residential”, the use is for storage and for my APN 006-130-024-0 parcel is a single resident residence, no family whatsoever being involved.

Were “…As used herein “immediate availability ” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property. . . .” actually a true fact in the real world, which it is not, then the insignificant act of changing the
classification of the structure on the parcel would not alter the volume of waste generated by that parcel one iota.

However, here in Sierra County, multiple structure parcel owners being assessed multiple exactions can eliminate the exaction on one of the structures simply by changing the structure’s classification, actual volume of waste generation never being considered, which, flies directly in the face of Solid Waste Resolution 2017-087 which, in pertinent part reads: “... the imposition of fees for the use and support of the County solid waste system in proportion to the waste generated by property owners...” (Please peruse the foregoing quote extracted from Solid Waste Resolution 2017-087 again.) Is that an unintentional error regarded as revealing subconscious knowledge that only exactions pursuant to Article XIII D, §6, (b), and cannot, lawfully, be the superseded by the subterfuge found in:

...As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner’s use.”

The Sierra BOS is not, lawfully, at liberty to “negate” parcel owner’s “facts” that are not to the County’s advantage.

Here is what the Paland Court actually “conclude[d]”:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold added.)

1. Sadly, a super majority of the BOS constantly and errantly stick their heads deeply into the sand by willfully ignoring the following text found within the Paland Court’s conclusion above as though it does not exist, which, it most certainly does exist for all of those willing to see: “... a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied).” [Bold mine.]

1.1 Found among those “... other substantive requirements...” is §6, (b,3), requiring that “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.” to which that same super majority of the BOS constantly and arrogantly thumb their noses at it. Because I do not produce the volume of waste for which I am charged by these
illicit exactions together with the Agency Fee Administrator’s remiss in her duty to address the issues herein raised, proffers no relevant evidence to the contrary and yet denies my requests for adjustment to exactions from me, the methods by which these exactions are applied to me for my two parcels are done in violation of Proposition 218 Article XIII D, §6, subdivision b.

2. The "... immediately available" requirement clearly is logically focused on the Agency’s conduct, not the property owner's. "..." has been mutated by the County from their enterprise Agency onto the property owner which is expressly prohibited.

3. County, by positing the following text found in Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b) demonstrates their willful intent to mutate the express holding of the Paland Court to suit their own illicit purposes rather than comport their actions with Article XIII D, §6, (b), and the holding of the Paland Court positing the following text:

"...the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner’s use."

3.1 County Code limiting PUBLIC ACCESS HOURS FOR SOLID WASTE DISPOSAL, in Pike where the subject parcels are located, to a niggardly eighteen (18) hours per week, is neither an “unilateral act of the property owner” nor is the service “immediately available”, as required, to any property owner.

Additionally, exaction is a prepayment based on potential or future use of a service which are not permitted by 6, (b, 4).

No compelling evidence, not even a hint of a good faith attempt at proffering compelling evidence, nada, zilch, nothing.

Neither this BOS nor Its Agency has ever proffered an iota of compelling evidence relative to either BOS’ or its Agency’s full compliance with California Constitution Article XIII D, §6, (b), as required at §6, (b, 5) which reads, in pertinent part: “In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.”
In spite of the requirement at §6, (b, 5), County and its Agency advance an ultra vires ritual causing or intended to cause confusion or bewilderment over just how County gets away with feigning compliance with the Paland Court’s holding on the meaning of the term “immediately available” by illicitly mutating the Paland Court’s holding alleging that County’s brand of voodoo somehow validates County’s silly alternate conceptualization of reality, via vague implied association verses specific causation and correlation, e.g., a naked assertion, that the Paland Court allegedly found, that for County purposes, the term “immediately available” really means that County’s Waste Disposal System ‘only has to be “immediately available” for ‘eighteen hours a day’ when the Paland Court made no such holding.

The only supporting alleged evidence that available a niggardly ‘eighteen hours a day’ is the coequal with the Paland Court’s “immediately available” was advanced by Supervisor Adams, someone supposably unbiased but isn't, stating that the 18 hour Weekly restriction to availability was imposed equally on all parcel owners in Sierra County.

Well, here, imposing severely restricted availability equally on everyone while "immediately available" is the standard that must be met simply does not transform that which is substandard to that of meeting the standard set by the Paland Court.

Standby charges are usually nothing more than flat rate parcel taxes imposed on an on occupied residential parcel on the theory that residential solid waste disposal service may, at some point in the indefinite future should the residential parcel eventually be occupied, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent "special benefit" requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 4 or cease to be collected.

Residential exactions are allegedly "calculated" by surveying the waste production of the few parcels opting in for an additional fee driven home pick up Service roughly quantifying the volume of waste
picked up which is tabulated on route pick up tickets. Those route pick up tickets are alleged by Agency to be summarized in the form of an Excel spreadsheet. However, the figures therein cannot be reconciled and appear to be manipulated sub rosa. Agency asserts "privilege" to preclude parcel owners’ access to Agency alleged underpinnings of alleged calculations.

Agency denies public Records act requests for access to documentation alleged by Agency to support Agency calculations. When I challenged Agency’s denial, Agency defended it's denial of my request with an email represented to be the legal opinion of a paralegal supposedly in the office of County Council.

On challenging that paralegal’s determination, an attorney from County Council's office responded claiming an exemption from the public records act for Sierra County solid waste disposal system being a utility.

Upon my challenging that erroneous assertion with California Government Code section 25832 clearly stating that services provided pursuant to Government Code 25830 are specifically not a public utility, and, to which neither Agency no County Council's office has yet to respond. That failure to respond, in and of itself is a violation of California's public records act response mandates.

This fallacious withholding of the evidence necessary to discredit Agency’s errant modus operandi deprives this appellant of the ability to demonstrate methodology deployed by Agency to distort the various identified classifications/tiers/identified divers levels of service provided to individual parcels involved in Agency’s Survey.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

Comment: This provision prohibits the imposition of parcel "charges" for general governmental services. The purpose of this provision is to stop those levies, such as the County of Los Angeles' parcel "charge" for library services irrespective of use of library services.
Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.

And the Hoaxing continues: Another finding of fictitious facts

In pertinent part of Solid Waste Resolution 2017-087 which reads:

> WHEREAS, this is a continuation of the 2016-2017 fiscal year fee, no new fees are to be assessed, Proposition 218 procedures are not necessary.

Which also flies directly in the face of §6, (b), which reads:

> Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

Commercial fees are calculated on a her cubic yard of waste produced on a given parcel. Various supervisors have posited, on the records of these hearings and the records of the public hearings on imposing these fees, that this method is the maximum exaction allowed under article XIII D, section 6, while at the same time positing that article XIII D, section 6, (5, 3), does not apply to parcels County has classified residential parcels. Neither County nor agency can point to any language found within article XIII D, section 6, (5, 3), differentiating commercial parcels from residential parcels this is self-manufactured Fiction by county and imposed by a willing Agency to knowingly and willfully circumvent constitutional prohibitions on County and its agencies from exacting fees or charges that exceed the actual cost of providing service to any particular Parcel, including my two parcels, whether classified residential or commercial

XIII D, §6, (a, 1), states:

(1) 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 owners 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.

This section is applicable to any fee imposed on a parcel basis or for fees which provide a property related service and constitutional permission to impose an exaction under §6 authority is further restricted to compliance with §6, (b, 1-5), which states:

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:
Comment: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the "cost of service."

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

The stated purpose of these exactions from me are to provide my two parcels with solid waste disposal services. Revenues derived from exactions imposed on either of my parcels cannot exceed the cost of providing solid waste disposal services to my parcels.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

Revenues derived from exactions on my parcels for solid waste disposal services cannot be used for any other purpose other than providing solid waste disposal services to my parcels. Revenues derived from exactions on my parcels for solid waste disposal services to my parcels cannot be used for offsetting fees or charges for providing services to parcels other than my own parcels. Therefore, Agency is prohibited from both deriving excess revenues exacted from parcels lightly using Agency’s solid waste disposal services to supplement inadequate exactions from those parcels using Agency’s solid waste disposal services heavily as well as deriving revenues in excess of the actual cost of providing the solid waste disposal Service to the light user in the first instant.

(3) 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.

Fees and charges imposed upon any parcel or person as an incident of property ownership cannot exceed the proportional cost of the actual use of the service by the parcel. Deficiencies in derived revenues on one parcel heavily using Agency’s waste disposal service are not allowed to be attributed to other parcel(s) that is/are not generating the volume of waste that would be commensurate (proportional to) with that exaction for that parcel. Therefore, averaging high use and low use to arrive at an admitted average use also brings in tow with it admission of violating requirements (1), (2), and (3) above by supplementing the exactions made on high use parcels with the excess funds derive from low using parcels. Nevertheless, Agency Fee Administrator clearly demonstrates that under Agency’s fee scheme exactions imposed on low use parcels our use to supplement inadequate exactions from high use parcels. §6, (b, 1-3), prohibits Agency from imposing exactions on parcels that exceeds the proportional cost of providing the service to those parcels.

Agency advances no theory upon which exempts Agency from the constitutional prohibition on using revenues derived from one parcel to supplement revenues derive from other parcels. Exam exam exams legs Stamps exam magazine exam stamps exam exam exam example exam eggs exam exam exempt exempt

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

10. Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b)

“...As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property
would normally generate solid waste or create a need to dispose of solid waste from the property and as to
which, the County
solid waste system is available to the property owner for his or her use. The election of a property owner not to
use his or her
real property for any period of time does not negate the fact that the County solid waste system being available
for the
property owner's use. (Immediate availability such be interpreted consisted with the court ruling in Paland v.
Brooktrails
Township Community Services Dist. Bd. of Directors, 176 Cal.App.4th 158.)”

Whereas, the Paland Court said the term "immediately available", as used within California Constitution Article XIII D,
§6, means:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not
the property
owner's. As long as the agency has provided the necessary service connections at the charged parcel and
it is only the
unilateral act of the property owner (either in requesting termination of service or failing to pay for
service) that
causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee
rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold
added.)

PUBLIC ACCESS HOURS FOR SOLID WASTE DISPOSAL

County Solid Waste Transfer Stations, located in Alleghany Ramshorn, Sattley and Sierra City, shall be open to
receive solid
wastes eighteen (18) hours per week on Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M.
The Landfill Site, located on Garbage Pit Road, Loyalton, shall be open to receive solid wastes twenty-four (24)
hours per
week on Friday, Saturday, Sunday and Monday -10:00 A. M. to 4:00 P. M. (Bold mine.)

So, that makes the Landfill Site only "immediately available" to the public for a whopping twenty-four (24) hours per week on
Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M., just 24 out of 168 hours a week, a niggardly
0.14285714285714% of the
time, and, by no stretch of anyone's imagination "immediately available" in light of the Paland Court’s conclusion on
the meaning
of "immediately available", save County Official's.

And, that makes the Alleghany Ramshorn, Sattley and Sierra City, County Solid Waste Transfer Stations only
"immediately
available" for eighteen (18) hours per week on Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M."18 out of
168 hours, an
even more niggardly 0.10714285714286% of the time, and, by no stretch of anyone's imagination "immediately
available" in light
of the Paland Court’s conclusion on the meaning of "immediately available", save County Official's.

All anyone need do is imagine what the Paland Court Decision would have been given their conclusions on the meaning
of "immediately available" if the Brooktrails Township Community Services Dist. was only making water available
to Paland’s
water meter a niggardly .10714285714286% of the time. Or, to bring it a wee bit closer to home, recon back to the time
that the water
supply to the Downieville Court House went down and imagine if that were the case a whopping
99.89285714285714% of the time.
The odds are 99.89285714285714% that Paland would have prevailed the first time around.

County, by positing the following text found in Sierra County Code §8.05.010 Solid Waste System Charges in
pertinent part of (b) demonstrates their willful intent to mutate the express holding of the Paland Court to suit their own
illicit purposes rather than comport their actions with Article XIII D, §6, (b), and the holding of the Paland Court:
As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner's use.”

Here is what the Paland Court actually “conclude[d]”:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold added.)

1. The “. . . immediately available” requirement is logically focused on the agency's conduct, not the property owner's. . .” has been mutated by the County from their enterprise Agency onto the property owner which is expressly prohibited.

2. County, by positing the following text found in Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b) demonstrates their willful intent to mutate the express holding of the Paland Court to suit their own illicit purposes rather than comport their actions with Article XIII D, §6, (b), and the holding of the Paland Court positing the following text:

“. . .the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner's use.”

2.1 County Code limiting PUBLIC ACCESS HOURS FOR SOLID WASTE DISPOSAL, in Pike where the subject parcels are located, to a niggardly eighteen (18) hours per week, is neither an “unilateral act of the property owner” nor is the service “immediately available”, as required, to any property owner.

Standby charges are usually nothing more than flat rate parcel taxes imposed on an on occupied residential parcel on the theory that residential solid waste disposal service may, at some point in the indefinite future should the residential parcel eventually be occupied, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent "special benefit" requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 4 or cease to be collected.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.
Comment: This provision prohibits the imposition of parcel "charges" for general governmental services. The purpose of this provision is to stop those levies, such as the County of Los Angeles' parcel "charge" for library services irrespective of use of library services.

Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.

County’s solid waste disposal ????? Administrator has both historically and currently relies upon transfer site attendants to identify the point of origin, quantify the volume of waste to be transferred, collect gate-fees in addition to annual exactions for surcharge items which are not covered by this annual exaction, issue receipts for collected fees, transfer possession of receipts issued to administrator along with fees collected by attendant for deposit into County’s solid waste disposal Enterprise fund.

Furthermore, transfer site attendance are charged with both quantifying and rejecting disposal of solid waste generated by all parcels County has classified as residential sources that exceeding weekly disposal volume limits.

Residential exactions are allegedly "calculated" by surveying the waste production of the few parcels opting in for an additional fee driven home pick up Service roughly quantifying the volume of waste picked up which is tabulated on route pick up tickets. Those route pick up tickets are alleged by Agency to be summarized in the form of an Excel spreadsheet. However, the figures therein cannot be reconciled and appear to be manipulated sub rosa. Agency asserts "privilege" to preclude parcel owners’ access to Agency alleged underpinnings of alleged calculations.

Agency denies public Records at requests for access to documentation alleged by Agency to support Agency calculations. When I challenged Agency’s denial, Agency defended it's denial of my request with an email represented to be the legal opinion of a paralegal supposedly in the office of County Council.

On challenging that paralegal’s determination, an attorney from County Council's office responded claiming an exemption from the public records act for Sierra County solid waste disposal system being a utility.

Upon my challenging that erroneous assertion with California Government Code section 25832 clearly stating that services provided pursuant to Government Code 25830 are specifically not a public utility, and, to which neither Agency no County Council's office has yet to respond. That failure to respond, in and of itself is a violation of California's public records act response mandates.

Moreover, this fallacious withholding of the evidence necessary to discredit agency’s errant modus operandi deprives this appellant of the ability to demonstrate methodology deployed by Agency to distort the various identified classifications divers levels of service provided the if you parcels involved in agency’s Survey.

Existing law, Article XIII D, operative when the County takes action to impose an alleged assessment, fee or charge for alleged services alleged to be provided parcels within the County, sets strict restrictions upon imposition, namely §6(b). Those requirements are as follows:
(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

(Comment: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the “cost of service.”)

1. Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

2. Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(Comment: Requirements 1 & 2 will prohibit the current practice of siphoning off fee revenue to supplement a city’s general fund. This practice, sometimes known as charging an “in lieu franchise fee,” currently occurs both in Los Angeles and Sacramento, as well as in many other municipalities. However, “cost of service” may also include reasonable overhead expenses as well as other items on a service bill which are necessary to provide service to the particular service user. What is included in “cost of service” will have to be determined on a case by case basis.)

3. 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.

(Comment: As with assessments, fees and charges, must be no greater than the proportional cost of the actual use of the service provided to the parcel.)

4. No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(Comment: Standby charges are usually nothing more than flat rate parcel taxes imposed on the theory that water or sewer service may, at some point in the indefinite future, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent “special benefit” requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 4 or cease to be collected.)

5. No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

(Comment: This provision prohibits the imposition of parcel “charges” for general governmental services. The purpose of this provision is to stop those levies, such as the County of Los Angeles’ parcel “charge” for library services irrespective of use of library services.)

Reliance by an agency on any parcel map including, but not limited to, an assessor’s parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.
Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until such fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

Comment: This exemption for sewer, water and refuse collection is for voter approval only. Such fees must still meet all of the five substantive requirements of paragraph (b). The policy reason for this exemption is consistent with preventing end-runs around Proposition 13. Since water, sewer and refuse collection fees pre-date Proposition 13, they were exempted from voter approval.

(d) Beginning July 1, 1997, all fees or charges shall comply with this Section.

SECTION 5. LIBERAL CONSTRUCTION. The provisions of this Act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Comment: The purpose of this section is to ensure that, in the event of any ambiguity, the rights of taxpayers will be the paramount consideration.

SECTION 6. SEVERABILITY. If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

Comment: This provision is a standard severability clause.

Assuming, arguendo, that revenues derived from the fee or charge shall not exceed the funds required to provide the property related service, then the agency may be in compliance with §6, subdivision (b)(1). However, the following strongly indicates such is not the case:

Article XIII D, §6, subdivision (b)(2), requires that revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. This exaction is imposed on my parcels for the specific purpose of disposing of waste generated on my parcels for disposal by the county’s waste disposal enterprise.

The Solid Waste Fee Administrator has not, will not and cannot demonstrate any portion of these fees exacted from me for disposal of waste generated on either of my parcels is or has ever been used to offset the cost of disposing of waste generated on either of my parcels.

Therefore, funds derived from these exactions from me for my parcels must either be retained by the Agency/enterprise for potential or future use of this service in violation of this subdivision and §6, subdivision (b)(1) for exceeding the funds required to provide the property related service, and §6, subdivision (b)(3), or, these exactions must be based solely upon potential or future use of this service which are not permitted by §6, subdivision (b)(4).

The discretionary function of the Office of Solid Waste Fee Administrator in these proceedings, a function ascribed to the Office of Sierra County Tax Assessor, via Sierra County Code, being a legal action (a mandated administrative remedy) contesting the validity of a fee or charge (Article XIII D, §6(B)(5), the burden shall be on the agency to demonstrate compliance with this Article. This Office’s long practiced policy of avoiding addressing issues raised in these proceedings with the tacit consent of the Board of Supervisors, in spite of their directives to the contrary, is not
unique to me and my parcels. It dates back to the first imposition of solid waste disposal exaction impositions in Sierra County predating the passage of Proposition 218. In fact, both Sierra County and this Agency defiantly thumbed their noses at holding mandated protest hearing and votes for eight years (2004) after the effective date of Proposition 218, in blatant violation thereof.

§6, subdivision (b)(3), requires that 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. The ordinary meaning of the word "proportional" is "having a size, number, or amount that is directly related to or appropriate for something." (Merriam-Webster.com (2016) [as of 4/29/16].). The ordinary meaning of the phrase "attributable to" is "capable of being attributed or ascribed." (Oxford English Dict. Online (2016) [as of 4/29/16].) "Ascribe" means "to refer to a supposed cause, source, or author." (Merriam-Webster.com (2016) [as of 4/29/16].) In view of the foregoing, subdivision (b)(3) should be construed as requiring that a property-related charge not exceed an amount that is directly related to the cost of service caused by the individual parcel.

Solid Waste Fee Administrator’s own Waste Generation Studies/Surveys, arguendo, if taken at face value, which, are unreconcilable (The individual volumes do not tally with their represented grosses is acknowledged by the Solid Waste Fee Administrator by the statements found thereon: “Total does not include Extra Services”; and, “.”) classifies waste generation by those participating therein as producers of 1 can of waste per week, 2 cans of waste per week, 3 cans of waste per week,4 cans of waste per week,5 cans of waste per week, and 6 cans of waste per week. Nevertheless, each of those individually disparate levels of parcel usages within the Solid Waste Fee Administrator’s waste disposal enterprise reviewed by the Administrator are illogically conflated into a single-one-size-fits-all-flat-rate-exaction under the classification of ‘single-family-residence’, none of which pay an exaction proportional to the service provided to the parcel.

In testing the above construction of this exaction against those extrinsic aids that bear on the enactors' intent, in particular the ballot materials accompanying Proposition 218 that place the initiative in historical context. The Legislative Analyst's analysis of Proposition 218 informed voters that one of the measure's "proposed requirements for property-related fees" was that "[n]o property owner's fee may be more than the cost to provide service to that property owner's land." (Ballot Pamp. Gen. Elec. (1996) analysis of Prop. 218 by legislative analyst, p. 73.) Thus, the ballot materials confirm that subdivision (b)(3) requires a nexus between a property-related charge (the exaction) and the cost of service attributed to the individual parcel.

In view of the foregoing, Agency compliance with Proposition 218 plainly requires Agency to charge customers based on the cost of providing Agency service to their parcel. To comply with subdivision (b)(3), Agency also has to correlate its prices with the actual cost of providing Agency service at those tiered levels.

Given the $420.84 flat-rate-one-size-fits-all annual exaction on all parcels classified ‘single family residence’ and the per can rate of $3.34, the acknowledged weekly distribution of tiered solid waste generation exaction cost verses per parcel generation volumes looks like this (overcharges are red, undercharges are negative in blue):

<table>
<thead>
<tr>
<th>Parcel Generated</th>
<th>Overcharges</th>
<th>Undercharges</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Can</td>
<td>$8.0931</td>
<td>-$4.7531</td>
</tr>
<tr>
<td>2 Cans</td>
<td>$4.0465</td>
<td>-$1.4131</td>
</tr>
<tr>
<td>3 Cans</td>
<td>$2.6977</td>
<td>-$1.9269</td>
</tr>
<tr>
<td>4 Cans</td>
<td>$2.0233</td>
<td>-$5.2669</td>
</tr>
<tr>
<td>5 Cans</td>
<td>$1.6186</td>
<td>-$8.6069</td>
</tr>
<tr>
<td>6 Cans</td>
<td>$1.3488</td>
<td>-$11.9469</td>
</tr>
</tbody>
</table>

Proportionality
So, your own ‘source documentation’ demonstrates that the 1 can/week tier each pays for $247.16 to dispose of solid waste that they do not generate on their parcel under this exaction, and the 2 can/week tier pays $73.48. That renders Article XIII D, §6(b)(3), utter surplusage - Which, you swore an oath/affirmation to uphold.

Now, the courts have construed Article XIII D, §6(b)(3), not to prohibit exactions less than the actual cost of service to the parcel, but, only that the exaction cannot exceed the actual cost of providing the service to the parcel. That means you are permitted to undercharge to your hearts content, but, your are prohibited by 6(b)(1-3), from overcharging any parcel.

The record is devoid of any evidence that the Agency undertook to determine the proportional per-parcel cost of providing waste disposal service or how that cost varies by parcel usage of that service. Indeed, the Agency does not even mention the proportional per-parcel cost of service in justifying its rate. Accordingly, the Agency fails to carry its burden to show it is in compliance with subdivision (b)(3). Implementation of this exaction is predicated upon Agency compliance with subdivision (b)(3). The Agency has failed to demonstrate Agency compliance with subdivision (b)(3). Therefore, subdivision (b) prohibits Agency from imposing this exaction on those, like myself, producing much less than the volume of waste generation per-parcel that is represented by the amount of this illicit exaction.

Furthermore, this parcel owner, subject to this exaction, is prohibited from accessing, under authority of California’s Public Records Act requests, pickup run reports allegedly relied upon supporting the Solid Waste Fee Administrator’s Waste Generation Studies/Surveys. Thus preventing verification of any alleged ‘calculations’ proffered by the Solid Waste Fee Administrator.

Presumably, supplying excessive amounts of waste disposal service to some parcels increases the need for system maintenance and new waste disposal sources, thereby increasing the Agency's costs.

To the extent that certain consumers overutilize the resource, they contribute disproportionately to the necessity for conservation of landfill space, and the requirement that the Agency acquire new sources for the disposal of solid waste. That being the case, subdivision (b)(3) disallows the Agency from overcharging low-volume users to cover the excessive users’ higher costs. However, the Agency cannot simply assume the Agency’s rates bear the requisite relationship to its costs. Here, the Agency is improperly attempting to allocate the expenses for service not provided to users whose levels of waste generation are so low that they cannot be said to be responsible for the excess waste generation of others. This is further bolstered by statute law addressing operators of landfills such as Agency.

Sierra County's Solid Waste Enterprise is subject to Public Resources Code §§40051 -40052, 40057 and 40196 which state:

ARTICLE 2. General Provisions [40050. - 40063.] (Article 2 added by Stats. 1989, Ch. 1095, Sec. 22.)
This division shall be known and may be cited as the California Integrated Waste Management Act of 1989.

(Added by Stats. 1989, Ch. 1095, Sec. 22.)

40051.

In implementing this division, the board and local agencies shall do both of the following:
(a) Promote the following waste management practices in order of priority:
(1) Source reduction.
(2) Recycling and composting.
(3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.
(b) Maximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal. For wastes that cannot feasibly be reduced at their source, recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices.

Added by Stats. 1989, Ch. 1095, Sec. 22.)

Of particular note above is the part mandating source reduction.

Source, identified herein by APN, i.e., the ‘source’ of the solid waste generated by the parcel for disposal within Agency’s system of waste disposal.

40052.

The purpose of this division is to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs.

(Amended by Stats. 1993, Ch. 656, Sec. 1. Effective October 1, 1993.

The purpose of this division is to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible. . . and to specify the responsibilities of local governments to develop and implement integrated waste management programs.

40057.

Each county, city, district, or other local governmental agency which provides solid waste handling services shall provide for those services, including, but not limited to, source reduction, recycling, composting activities, and the collection, transfer, and disposal of solid waste within or without the territory subject to its solid waste handling jurisdiction.

(Added by Stats. 1989, Ch. 1095, Sec. 22.)

Each county, city, district, or other local governmental agency which provides solid waste handling services shall provide for those services, including, but not limited to, source reduction, recycling, composting activities.

40196.

“Source reduction” means any action which causes a net reduction in the generation of solid waste. “Source reduction” includes, but is not limited to, reducing the use of nonrecyclable materials, replacing disposable materials and products with reusable materials and products, reducing packaging, reducing the amount of yard wastes generated, establishing garbage rate structures with incentives to reduce the amount of wastes that generators produce, and increasing the efficiency of the use of paper, cardboard, glass, metal, plastic, and other materials. “Source reduction” does not include steps taken after the material becomes solid waste or actions which would impact air or water resources in lieu of land, including, but not limited to, transformation.

(Amended by Stats. 1990, Ch. 145, Sec. 5. Effective June 19, 1990.)
Sierra County’s Agency operates a landfill. Thus Agency is mandated to promote source reduction, recycling and composting as Agency’s top priority. Our Legislature defines source reduction to mean any action, which causes a net reduction in the generation of solid waste. Solid waste is alleged by both County and Agency on parcels classified ‘single family residences’. “Source reduction” includes, but is not limited to, establishing garbage rate structures with incentives to reduce the amount of wastes that generators produce. Agency’s disproportionate one-size-fits-all-fixed-flat-rate-fee provides no incentive whatsoever to parcel owners subject to this exaction to reduce the amount of wastes being generated on residential parcels. The only incentive Agency's disproportionate one-size-fits-all-fixed-flat-rate-fee provides is getting the most bang for the fixed amount of dollars exacted. Agency's disproportionate one-size-fits-all-fixed-flat-rate-fee flies directly in the face of mandated "source reduction" as well as Article XIII D, §6(b)(3)'s proportionality requirements.

The historic as well as the current schemes for establishing Agency’s exactions satisfies neither PRC §40051’s mandated incentives nor Article XIII D,§6(b)(3)’s proportionality mandate. Whereas, exactions comporting with Article XIII D,§6(b)(3)’s proportionality mandate satisfies both the PRC §40051’s mandated incentives and Article XIII D,§6(b)(3)’s proportionality mandate. Nevertheless, four of the five Sierra County Board of Supervisors continue to thumb their noses at both PRC §40051’s mandated incentives and Article XIII D,§6(b)(3)’s proportionality mandate.

Sierra County adopts the court's ruling in Paland v. Brooktrails Township Community Services Dist. Bd. of Directors, 176 Cal.App.4th 158, subsequent to rewriting that ruling to suit Sierra County whims.

§6, subdivision (b)(4), requires that no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

The records of your determinations and hearing held subsequent to determination are devoid of any evidence that the codified public access hours to our landfill and transfer sites comport with subdivision (b)(4)’s requirement that access must be “immediately available to, the owner of the property in question.”, Supervisor Lee Adam’s irrelevant machinations that I have the same access everyone else in the county has notwithstanding. The court in the Paland case, pursuant to Article XIII D, §6(b)(4) establishes that standard, not Supervisor Adams, not the Board of Supervisors. The fact that the County codified public access hours precluding owners’ access the vast majority of the time flies directly in the face of the court’s holding in Paland. That is at issue here, not Supervisor Adams’ or the Board of Supervisors’ irrelevant machinations.

§6, subdivision (b)(5), requires that no fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

The September 1997 issue of Debt Line reported on an Attorney General opinion which concluded that water service was not “property related” for purposes of Article XIIIID of the California Constitution (Proposition 218). Such an interpretation, if adopted by the courts, would permit local governments to impose water rates in a manner that deviates from the important “costs of service” requirements mandated by the new law, as well as depriving California taxpayers of significant procedural protections.
In light of the importance of this issue, the drafters and sponsors of Proposition 218 desire to set the record straight as to what they believe the proper (and only) interpretation of Proposition 218 is with respect to Proposition 218’s applicability to water rates.

The opinion of the Attorney General was in response to an inquiry from Senator Richard Rainey regarding “tiered” water rates. Such rates typically assess higher charges per unit of water as the level of consumption increases. Although tiered water rates conceivably could reflect the actual “cost of service” for water users, such a rate structure is usually imposed for the purpose of encouraging conservation, and thus deviates from “cost of service” requirements under Article XIII D.

The opinion contained little actual analysis of tiered rates and, what little analysis was presented, was flawed. For example, the opinion set forth a substantial discussion of various “rules of construction” applicable to the interpretation of initiatives. Yet, the opinion failed to mention or follow Proposition 218’s very specific liberal construction provision which constitutionally mandates that the provisions of the act “shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” (Section 5 of the Right to Vote on Taxes Act.)

Contrary to the opinion of the Attorney General, the express language of Proposition 218 subjects water rates to the procedural and substantive requirements of the new law. Under Article XIID, the terms “fee” and “charge” are defined broadly as “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.” (Cal. Const., art. XIID, sec. 2, subd. (e).)

A. Meaning of “Incident of Property Ownership”

Any fee or charge imposed by a local agency upon a person as an “incident of property ownership” is subject to Article XIID unless expressly exempt therefrom under Proposition 218. The opinion of the Attorney General construes the phrase “incident of property ownership” as something that is dependent upon property ownership. However, this interpretation is inconsistent with the way the term “incident of property ownership” has been used and understood under California law.

For example, excise taxes are imposed on the exercise of one of the incidents of property ownership, such as the ability to transfer or devise property or the ability to use, store, or consume it. City of Oakland v. Digre (1988) 205 Cal.App.3d 99, 106.) An excise tax is a tax whose imposition is triggered not by ownership but instead by some particular use of the property or privilege associated with ownership. (Thomas v. City of East Palo Alto (1997) 53 Cal.App.4th 1084, 1089.) An excise tax generally is levied against an activity which can be foregone without loss of ownership. (Digre, supra, 205 Cal.App.3d at p. 109.) The target of an excise tax can always avoid taxation by not engaging in the privilege taxed. (Id.) An excise tax is imposed upon the person engaging in the privilege being tax, which can be the property’s occupant rather than the property owner. (Cf. City of Glendale v. Trondsen (1957) 48 Cal.2d 93.)

Corpus Juris Secundum notes the following concerning what constitutes an “incident of ownership” for purposes of property generally:

“Ownership of property comprises numerous different attributes. The chief incidents of the ownership of property are the right to its possession, the right to its use, and the right to its enjoyment, according to the owner’s taste and wishes, free from unreasonable interference, usually to the exclusion of others…In addition, an incident of ownership is the right to exercise dominion over property, to change or improve the property, or to sell or otherwise dispose of it according to the will of the owner, and without any diminution or control except only by the laws of the land.” (73 C.J.S., Property, Sec. 27, pp. 209-212.)
“Incidents of property ownership” include the sale, transfer, or rental of property, as well as the use of services. (Thomas, supra, 53 Cal.App.4th at p. 1088.) The development of property is also an “incident of property ownership” as an excise tax may be imposed on the privilege of developing property. (Centex Real Estate Corp. v. City of Vallejo (1993) 19 Cal.App.4th 1358, 1364.)

Consistent with the above analysis and Section 5 of Proposition 218 which constitutionally mandates that its provisions be liberally construed, a fee or charge imposed upon a person as an “incident of property ownership” is a fee or charge associated with the exercise of one or more of the incidents of property ownership including, but not limited to, the use of property, rental of property, or the use of services related to the property.

Property-related fees or charges under Article XIIID are not based merely on the ownership of property, as that would be an unduly restrictive interpretation inviting easy circumvention, as well as being inconsistent with the way the term “incident of property ownership” has been used and understood under California law.

B. “User Fee or Charge for a Property-Related Service”

The above discussion of the phrase “incident of property ownership” is only half the analysis. The conclusion that water rates are governed by Article XIIID is further supported by the inclusion of “a user fee or charge for a property related service” within the scope of the “fee” or “charge” definition under Section 2 of Article XIIID.

A usage fee is typically charged “only to those who use goods or services. The amount of the charge is related to the actual goods or services provided to the payer. The usage fee for an ongoing service would normally be a monthly charge rather than a one-time charge.” (San Marcos Water Dist. v. San Marcos Unified School Dist. (1986) 42 Cal.3d 154, 162.) Thus, a usage fee is triggered by the use of goods or services and not by the mere ownership of property. Such a fee is “voluntary” in the sense that it is the payer’s solicitation and utilization of a service which triggers the charge. (Id. at p. 161.) This clearly indicates that the scope of the “fee” or “charge” definition in Section 2(e) applies to levies beyond those based merely on the ownership of property. This situation is analogous to and consistent with an excise tax whose imposition is triggered not by ownership but instead by some particular “incident of property ownership” such as the use of services. (See Thomas, supra, 53 Cal.App.4th at p. 1089.)

Under Section 2(e), in order for a user fee or charge to be subject to Article XIIID, it must be for a “property related service.” In determining what constitutes a “property related service,” the focus is on the nature of the service being provided and whether that service is sufficiently related to property. The focus is not on the nature or characteristics of the fee or charge, as the “user fee or charge” component of the definition addresses that issue.

A “property related service” is defined as “a public service having a direct relationship to property ownership.” (Cal. Const., art. XIIIID, sec. 2, subd. (h).) The definition specifically states that the public service for which the fee or charge is imposed must have a direct relationship to property ownership rather than being based on the mere ownership of property or imposed on a parcel basis.

Mindful of the constitutionally mandated Section 5 liberal interpretation provision which requires a liberal interpretation that effectuates the purposes of limiting local government revenue and enhancing taxpayer consent, a “property related service” must be broadly construed. The “ownership” of property is defined as the “right of one or more persons to possess and use it to the exclusion of others.” (Civ. Code, sec. 654.) It is a “collection of rights to use and enjoy property.” (Black’s Law Dict. (6th ed. 1990) p. 1106, col. 2.) As further evidence that “property ownership” under Proposition 218 is broad in its scope, the term includes “tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.” (Cal. Const., art. XIIIID, sec. 2, subd. (g).)

Consistent with the Section 5 liberal interpretation provision and the foregoing definitions of “ownership,” a user fee or charge for a “property related service” is a fee or charge for a public service that has a direct relationship to the use, possession, or enjoyment of property. Under the foregoing, water service is the quintessential property related service. Virtually all water service has meaning only in the context of the use and enjoyment of property. The opinion of the Attorney General abjectly fails to provide any analysis supporting a contrary conclusion.

C. Purpose of Levy, Not Form, Controls Analysis

In contrast to the opinion of the Attorney General, it is unlikely that any court would construe the provisions of Proposition 218 in a manner so clearly contrary to its stated intent. Indeed, with respect to revenue issues in particular, courts have repeatedly rejected efforts to circumvent provisions of law by simply manipulating the form of the levy. An excellent example was encountered by the Supreme Court in the San Marcos case (San Marcos, supra, 42 Cal.3d 154).

At issue in San Marcos was whether a utility fee for capital improvements was a special assessment from which public entities are exempt, or a user fee which public entities must pay. In resolving the issue, the Supreme Court established a “purpose” test which looks to the purpose of the fee rather than how the form of the fee is varied, a matter which can be easily manipulated. The Supreme Court noted:

“By placing the emphasis on the purpose of the charge, the courts in those cases created a rule which conforms to the policy behind the implied exemption for public entities, and avoids easy manipulation…Under the rule we adopt, no matter how the form of the fee is varied (i.e., whether it is based on actual or anticipated use; whether a one-time fee or monthly fee; and whether charged to all property owners or only to users of the sewer system), the purpose of the fee will determine whether or not public entities are exempt from paying the fee.” (Id. at p. 164.)

The Attorney General has previously followed the San Marcos “purpose” rule, and in doing so noted that it was not significant what the fees were called, upon whom they were imposed, or the basis upon which they were assessed. It was the use of the revenues that was the controlling factor. If the fees were to help pay for ongoing services provided, they were user charges. (See 71 Ops.Cal.Atty.Gen. 163, 165 (1988).)

Applying the San Marcos “purpose” rule in the context of a “user fee or charge for a property related service,” which determines whether or not a levy is subject to Article XIIID, the purpose of the charge must be the controlling factor rather than the form of the charge, a factor which can be easily manipulated by local governments in an attempt to avoid the requirements of Article XIIID.

Thus, if the purpose of a fee or charge is to fund a service, then it should not matter how the form of that fee or charge is varied (e.g., whether it is based on actual or anticipated use; whether a one-time fee or monthly fee; whether it is based on a per parcel basis or some other basis; or whether charged to all property owners or only to users of the service). Consistent with the “purpose” rule articulated in the San Marcos case, if a fee or charge is for a property related service, then it is subject to the requirements of Article XIIID without regard to the form of the fee or charge, a matter which can be easily manipulated by local governments in an attempt to avoid the requirements of Proposition 218.

D. Utility Services are “Property Related Services”

Mindful of the constitutionally mandated Section 5 liberal interpretation provision which requires a liberal interpretation that effectuates the purposes of limiting local government revenue and enhancing taxpayer consent, utility services are “property related services” under Article XIIID.
Section 6(c) of Article XIIID specifically exempts water, sewer, and refuse collection services only from the voter approval requirements of Article XIIID, but not from the other requirements of Article XIIID. (Cal. Const., art. XIIID, sec. 6, subd. (c).) It has long been a rule of interpretation that “the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made.” (Brown v. State of Maryland (1827) 25 U.S. 419, 438.) This rule is applicable to the constitution as to other instruments. (Id.) Thus, water, sewer, refuse collection, and similar services are intended to be within the scope of Article XIIID as “property related services.”

Proposition 218 also expressly exempts fees for the provision of electrical or gas service from not being deemed imposed as an incident of property ownership for purposes of Article XIIID. (Cal. Const., art. XIIID, sec. 3, subd. (b).) However, the scope of the exemption does not include other types of utility services such as water, drainage, sewer, or refuse collection. It is a settled rule of statutory construction that “where a statute provides a specific exemption to a general rule, other exceptions are necessarily excluded.” (Adams v. County of Sacramento (1991) 235 Cal.App.3d 872, 880.) Had the drafters intended to expand the exemptions to include fees for water service, they would have done so expressly.

Furthermore, it has been stated by our courts that “land to which utility service cannot be extended…cannot be developed.” (L & M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal.App.3d 1038, 1048.) At issue in the Ferreira case was the constitutionality of two statutes (Civ. Code, sec. 1001, Code Civ. Proc., sec. 1245.325) which provide private condemnation authority to a property owner to acquire an appurtenant easement to provide utility service to the owner’s property.

Section 1001 of the Civil Code specifically authorizes any owner of real property to “acquire by eminent domain an appurtenant easement to provide utility service to the owner’s property.” (Civ. Code, sec. 1001, subd. (b).) “Utility service” refers to “water, gas, electric, drainage, sewer, or telephone service.” (Civ. Code, sec. 1001, subd. (a).) Section 1001 is designed to serve “the function of opening what would otherwise be landlocked property to enable its most beneficial use.” (Ferreira, supra, 146 Cal.App.3d at p. 1048.) This clearly illustrates the “direct relationship” between utility service and property ownership (the use, possession, and enjoyment of property), thereby making utility service a “property related service” for purposes of Article XIIID of the Constitution.

Conclusion

It is the drafters’ position, supported by the clear language of Proposition 218, the liberal construction provision, and the intent of the voters that fees and charges for water service are governed by Proposition 218. To the extent tiered water rates are imposed in a manner that deviates from “cost of service” requirements, those rates are in violation of Proposition 218. Local governments or special districts which do not abide by the requirements of the new constitutional language do so at the risk of litigation.

Here, as applied to my parcels, both County and Agency bifurcates the effect of Article XIII D, §6(b)(3), one fork applied to commercial parcels, the other is denied residential parcels, all the while having relied upon the very same source text, §6(b)(3). Nothing within §6(b) distinguishes or permits distinguishing commercial from residential parcels. Nevertheless, both County and Agency lamely assert that County’s ability to rely solely upon County’s ability to “classify” parcels overrides §6(b)(3)’s substantive limitation on exactions from residential parcels while maintaining full force and effect on commercial parcels. Neither this Agency nor County has ever carried their burden of proof under Article XIII D, §6(b)(5), to demonstrate compliance with §6(b)(3)’s substantive limitation on exactions from residential parcels, because they cannot — So, both just thumb their noses at it.
Article XIII D, § 6 (b) establishes five substantive limitations on fees subject to its provisions. They are:

1. Fee revenues cannot exceed the funds required to provide the service (cost of service limitation);

2. Fee revenues cannot be used for any purposes other than that for which the fee is imposed (use limitation);

3. The amount of the fee imposed on a parcel or person as an incident of property ownership cannot exceed the proportional cost of service attributable to the parcel (proportionality limitation);

4. Fees may be imposed only for service actually used by, or immediately available to, the owner of the property (service limitation);

5. Fees may not be imposed for general governmental services where the service is available to the public at large in substantially the same manner as it is to property owners (general purpose limitation).

In this case, the court found the transfer violated the cost of service and use limitations.

The court also held that the city had the burden of proof under Article XIII D, § 6 (b)(5), but had failed to show that any portion of the transferred funds related to the production or provision of water or water-related services. The court rejected the city’s argument that the fee was not property-related because some customers were not property owners or tenants. The court found that it must look to the “character of the primary revenue source: property owners and tenants,” not to a miniscule portion of LADWP’s water revenue. According to the court, if it looked to the exceptions rather than the rule, “a municipality could avoid the Constitutional transfer restrictions by selling a few bottles of water to merchants.” The court rejected the city’s argument that enforcement by lien is required for a fee to be subject to Proposition 218, relying on Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal. App. 4th 1364, 1393 (enforcement through a lien tends to support the determination that a fee is imposed as an incident of property ownership, but lack of that enforcement mechanism is not determinative). Finally, the court flatly rejected the city’s home rule argument citing Johnson v. Bradley (1992) 4 Cal. 4th 389, 403 (a charter city remains subject to the guarantees and requirements of the state and federal Constitutions).

The judgment against the city provides, “Thus, the City may not collect, either for retention or transfer, rates for water and water-related services that are designed to generate a surplus (i.e., ‘revenues [that] exceed the funds required to provide [water and water-related] service’ to its customers) after servicing all debts and paying all expenses related to the production and provision of water and water-related services for its customers and setting aside reasonable reserves (including reserves for water- and water service-related capital projects and contingencies) as outlined in Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal. App. 4th 637, Howard Jarvis Taxpayers Assn. c. City of Fresno (2005) 127 Cal. App. 4th 914, and Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal. 4th 209.”
This decision confirms that cost of service is the ceiling for property-related fees. Cost of service is also the floor for agencies that rely on fee revenue to support their operations. Interagency payments, such as charges for administrative overhead by cities and districts that provide multiple services, must be justified based on costs of service actually provided to the enterprise supported by the fee generating the revenue to make the payment, not on theories such as “in-lieu franchise fees” (rejected in Roseville) or “fees in-lieu of taxes” (rejected in Fresno). Further, although water to run the enterprise itself is a cost of service that may be passed on to customers, a city cannot expect to obtain free water for its general municipal services such as parks and libraries.


Base service fee for water provided through an existing connection is a property-related fee, not a standby charge (assessment). The cost of providing service includes capital as well as operating expenses.

Brooktrails Township CSD was established to provide water and sewer service to approximately 6,500 parcels of land near Willits. Slightly more than 1,500 of the parcels are connected to the water system, and a slightly less than that number connected to the sewer system. The district generates revenue through standby charges, pursuant to Government Code § 61124 and by reference the Uniform Standby Charge Procedures Act [Gov’t Code §§ 54984 et seq.], connection fees, and monthly rates. The monthly rates include a base rate and, for water service, an inclining usage-based rate. Rate revenue is used to pay a portion of the district’s capital, operation, and maintenance expenses. Paland fell behind on his monthly bills, resulting in the district shutting off service and locking his meter. The district refused to unlock the meter unless Paland paid all delinquent charges, but continued to assess the base rate for water and sewer services. After Paland brought his bill current, the district reinstituted service. Thereafter the monthly bills showed no actual water use on the property, but the district continued to charge the base monthly rate for water and sewer. Paland sued the district for declaratory and injunctive relief alleging the base monthly rates for the periods when his water service was turned off were “standby charges” that had not been approved pursuant to Article XIII D, § 4 (procedural and substantive requirements for levy of special assessments).

Article XIII D, § 6 (b)(4) prohibits property-related fees for service “unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.” Proposition 218 does not define “standby charges.”

Keller v. Chowchilla Water Dist. (2000) 80 Cal. App. 4th 1006, 1011. Paland contended that service is not immediately available when the meter is locked in the closed position, even though it could be reopened at any time upon payment of delinquent bills. In Paland’s view, the district could charge him for water only if “he can ‘twist his tap and turn on water.” The court rejected Paland’s narrow view, stating,

“We conclude the ‘immediately available’ requirement is logically focused on the agency’s conduct, not the property owner’s. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes services not to be actually used, the service is “immediately available” and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied).”
The court also rejected Paland’s arguments that operation and maintenance costs could be paid only by assessments, and that once he had paid his connection charge he was exempt from further charges for operation and maintenance unless he further burdens the system by actual use. **Stating the obvious, the court said, “Common sense dictates that continuous maintenance and operation of the water and sewer systems is necessary to keep those systems immediately available to inactive connections like Paland’s.”**

The case also contains brief discussion of the application of the 120 day limitations period of Government Code § 66022(a) to rate challenges. The trial court had dismissed a previous challenge based on this provision, and had limited the scope of the challenge in the amended complaint to the fees imposed by the resolution adopted within 120 days of the filing. Because of its ruling that the fee was valid, the court of appeal did not decide the procedural question.

This case confirms the practice of many agencies. Enterprise operations are frequently funded from a variety of revenue sources, including capacity charges, connection charges, standby charges, investment earnings, some tax revenues if the agency has preexisting tax authority, as well as rate revenue. The amount of

1 As the court in Keller observed, the term also does not appear to be defined in any of the various statutes authorizing imposition of standby charges (sometimes called availability charges). The standby charge evaluated in the Keller case was imposed on all property capable of receiving water from the District, thus even property owners who did not and had not used district water were required to pay for the cost of water purchases made by the district. Keller v. Chowchilla Water Dist., 80 Cal. App. 4th 1006, 1009. Government Code § 61124, which authorizes community services districts to levy standby charges for water, sewer, or water and sewer services, contains typical language authorizing the charges on parcels, “to which water or sewers are made available for any purpose of the district, whether the water or sewers are actually used or not.” (See also, Gov’t Code § 54984.2, similar language.) Water Code § 389 says that “water standby charge” and “water availability charge” have the same meaning. The court in Kennedy v. City of Ukiah (1977) 69 Cal. App. 3d 545, 553, used this definition, “Standby and availability charges are fees exacted for the benefit which accrues to property by virtue of having water available to it, even though the water might not actually be used at the present time.”

The revenue requirement that is satisfied by rates is determined by taking total costs of the enterprise operation (operating and maintenance expenses, debt service, pay-as-you-go capital, changes in reserves, etc.), deducting the revenue expected to be generated by other sources such as investment income, taxes, standby charges, and capacity charges, then spreading the rest of the revenue over the amount of service or volume of commodity expected to be sold for the relevant rate period. In order to ensure sufficient revenues and smooth rate ramps (either up or down), agencies rely on “fixed” revenues such as base charges to support core activities.

3. In Pajaro Valley Water Agency v. Amrhein (2007) 150 Cal. App. 4th 1364, groundwater pumping charges imposed on all pumpers within the district, including small domestic users, were found to be property-related fees subject to Article XIII D, not assessments on property or taxes, or regulatory fees exempt from Proposition 218 under Apartment Owners Assn. of Los Angeles County v. City of Los Angeles.

Great Oaks Water Co. v. Santa Clara Valley Water District involves a challenge to a groundwater extraction fee paid by a water utility for commercial extraction of water that is then resold to the utility’s water customers. One question presented is whether the extraction fee imposed on the commercial water utility is a property-related fee subject to the requirements of Article XIII D. Another question, if it is a property-related fee, is whether the fee is subject to the exemption from the election requirement of Article XIII D, § 6(c) as a fee for “sewer, water or refuse collection services”. North San Joaquin Water Conservation District. v. Howard Jarvis Taxpayers Assoc. also involves the question whether a groundwater extraction fee is subject to the election requirement. Both cases also involve challenges
to the fees based on the proportionality limitation of Article XIII D, § 6(b)(3). The districts’ enabling acts requires that groundwater charges be established at different rates for agricultural water and non-agricultural water, without regard to any cost of service differences. [Water Code § 75594 (water conservation districts); Santa Clara Valley Water District Act § 26.9 (a)(3)(D); West’s Cal. Wat. Code Appendix § 60-26.9 (a)(3)(D).]

Article XIII D, § 6 (c) provides,

“Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted to and approved by a majority vote of property owners of the property subject to the fee or charge, or at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.”

In North San Joaquin, the trial court determined that services funded by the ground water pumping charge were within the scope of “water, sewer, or refuse collection services.” In Great Oaks Water Co. the trial court found they were not. ACWA has authorized participation in an amicus brief supporting the position that groundwater extraction fees are exempt from the election requirement.

The only prior appellate case construing the scope of section 6(b)(3) is Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal. App. 4th 1351. That case involved a storm water drainage fee imposed on owners and occupants of developed lots in the city to pay for the cost of the storm drain system. The court found that storm water management was not a “water, sewer, or refuse collection service.” Having concluded "that the storm drainage fee 'burden[s] landowners as landowners,'" the court of appeal in Salinas next concluded that no exemption from the voter approval requirement applied. The City had argued, and the trial court had found, that the storm drainage fee was for water and sewer services and, thus, was within the exemption of subdiv. (c) of Article XIID, § 6 for fees "for sewer, water and refuse collection services." "Sewer" is an undefined term in Article XIII D and is also not defined by the Proposition 218 Omnibus Implementation Act. [Gov’t Code §§ 53750 et seq.] The City argued that the court should apply dictionary and other definitions of sewer that include both sanitary and storm water facilities within the term. The HJTA relied on the 1998 Attorney General's opinion that concluded that because flood control and drainage facilities were distinguished from sewer facilities in the Proposition 218 exemption provisions relating to assessments (Article XIII D, § 5, subdiv. (a)), that they should also be distinguished from sewer facilities for the purposes of the vote exemption for property related fees (Article XIII D, § 6, subdiv. (c)), even though the language of the exemptions is different. [81 Ops. Cal. Atty. Gen. 104 (1998).] The court rejected both arguments. Instead, it said, "The popular, nontechnical sense of sewer service, particularly when placed next to 'water' and 'refuse collection' services, suggests the service familiar to most households and businesses, the sanitary sewerage system." Concluding that use of the term"sewer" is ambiguous in Proposition 218 and relying on its previous determination that its provisions must be construed liberally to curb the rise of fees (citing the uncodified Section 5 of Proposition 218), the court resorted to the principle that exceptions to a general rule must be strictly construed and concluded that sewer services should have the "narrower, more common meaning applicable to sanitary sewerage.

Relying on the court’s discussion of water and sewer service in Salinas, HJTA and Great Oaks take the position that water service is narrowly limited to only those activities associated with delivery of water directly to consumers. Salinas stands for the proposition that storm water management and flood control are generally not provision of sewer or water service, it does not stand for the proposition that a fee imposed on the extraction of groundwater from a basin and used to purchase water and provide facilities necessary to refill the basin is not provision of water or water service. In its only discussion of water, the Salinas court wrote:

“For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." Government Code section 53750, enacted to explain some of the terms used in articles XIII C and XIII D, defines "[w]ater" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or
distribution of water.” (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.” Id. at 1358.

Groundwater management generally involves all of the activities necessary to put water into groundwater basins where it is stored for later consumption. Although the extraction of the water may be done by others, without “water service” provided the groundwater replenishment and management activities funded by the groundwater extraction charge, there would be no water to extract and consume. Similarly, the Pajaro case held that the groundwater extraction charges at issue in that case were subject to Prop. 218 because the water provided to the wells of rural domestic users was not meaningfully different from the water provided via pipes to urban users and that both such services required compliance with the protest hearing procedures of Article XIII D, § 6(a). This reasoning suggests that efforts to supply water to wells by maintaining functioning groundwater basins ought to be a “water” service subject to the protest hearing requirement of § 6(a) and exempt from the election requirement of § 6(c).


This case involves a property-related storm drainage fee imposed to partially fund a flood protection plan. The flood protection plan and fee were developed after months of collaboration among local government agencies and community organizations, and the fee was approved by a majority of landowners though a mail-ballot “special election.” The special election was held pursuant to procedures adopted by the district’s board as authorized by Article XIII D, § 6(c), which authorizes an agency to “adopt procedures similar to those for increases in assessments in conduct of elections under this subdivision.” Because the district chose to submit the fee to approval by a majority of landowners, the procedures contained provisions for property and owner identification, as well as signatures, on the ballots. The trial court upheld the election, but the court of appeal reversed, setting aside the election results “because the voters’ names were printed on the ballots and ballots had to be signed, yet voters were provided no assurances that their votes would be kept secret.” The Supreme Court granted review.

The issues presented in the petition upon which review as granted are:

1. Does the voting secrecy requirement of California Constitution, article II, § 7 apply to property-owner “voting” on a property-related fee pursuant to Article XIII D, § 9(c)?

2. Does the voting secrecy requirement of California Constitution, article II, § 7 apply to property-owner “ballots” on assessments subject to Article XIII D, § 4 notwithstanding the contrary direction of subdivision (d) of that § 4 and of Government Code § 53753?

3. If voting secrecy applies in these contexts, must local governments affirmatively inform property owners ballot secrecy will be maintained?

4. May a court overturn property owners’ election to approve an assessment or property-related fee because a local government failed to inform property owners that ballot secrecy would be maintained or because a lapse in ballot secrecy occurred?”

The ACWA, CSAC, CSDA, and League of Cities have authorized a joint amicus brief on behalf of the district. If the requirement for secret ballots applies to property owner approval of fees and assessments, weighted or fractional voting becomes particularly problematic.

Automatic inflationary increases and pass-through of wholesale water charges.

6. This section specifically authorizes the agencies providing water, sewer, or refuse collection services to adopt automatic rate adjustments for inflation or to pass-through increases in wholesale water charges. The automatic increases are good for up to five years; compliance with Article XIII D, § 6 is required for future changes to the schedule. Notice of automatic increases must be given in 30 days in advance, and may be included in regular billing statements. **Inflation adjustments may not result in a charge that exceeds the costs of service.**


**Allocation-based Conservation Water Pricing**

This bill establishes an alternative method of establishing a conservation based price structure for water service. Under the bill, an “allocation-based conservation water pricing” structure is comprised of a “basic charge” and a “conservation charge.” The **basic charge is a volumetric charge for the cost of water service**, other than fixed costs recovered through the type of charge described in the *Paland* case, and other than the costs recovered by the conservation charge. The conservation **charge is a volumetric charge** to recover the “incremental costs” of service for use of water in excess of the basic use allocation and for other conservation or demand management programs. The statute requires establishment of a basic use **allocation for each customer account based on consumer needs** and property characteristics. The Irvine Ranch Water District and Santa Ana Watershed Project Authority were the co-sources of the bill. Many believed the bill was unnecessary because pre-existing law permitted agencies to develop pricing **structures that deter waste and encourage efficiency.** (E.g., *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal. App. 4th 1364, 1390.)

**B. Assessments**


This case involves an assessment district formed to provide enhanced security, streetscape maintenance (e.g., street sweeping, gutter cleaning, graffiti removal), and marketing, promotion, and special events for business improvement in a commercial area. These services are provided only to the properties within the district, and exceeded the services that would be otherwise be provided by the city. The engineer’s report concluded and the court found that these services “affect the assessed property in a way that is particular and distinct from [their] effect on other parcels and that real property in general and the public at large do not share.” The opinion was the result of reconsideration after remand in light of *Silicon Valley Taxpayers Assn v. Santa Clara County Open Space Authority* (2008) 44 Cal. 4th 431.

The engineer’s report based the amount of the assessment for each assessed property within the district on three factors: street frontage, building size, and lot size. Those factors account for 40 percent, 40 percent, and 20 percent, respectively, of the amount assessed for each property. The City determined the amount of the assessment by first identifying the special benefits as the enhanced services, separating the special benefits from general benefits, and identifying the estimated costs of the special benefits. The City then calculated the assessment for each assessed property as a portion of the total cost of the services by applying the three factors. The City heavily discounted the assessment for various nonprofit entities (“religious organizations, clubs, lodges and fraternal organizations”) within the boundaries of the district, and totally exempted from assessment properties zoned solely for residential use.

Dahms challenged the assessment arguing: (1) that the city council held the hearing on the proposed assessment too early, in violation of article XIII D, because the hearing took place on the 45th day after the City mailed notices of the
proposed assessment, (2) the discounts to certain properties violated the requirement that assessments be proportional to special benefits, (3) the city failed to properly separate general from special benefit, and (4) that the special benefit was not properly apportioned. After exercising its independent judgment as required by Silicon Valley, the Court of Appeal upheld the assessment.

The court rejected the first argument applying the standard rule of CCP § 12 that “[t]he time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.” It also concluded that nothing in article XIII D prohibits discounted assessments or required that any discounts be uniformly granted across all parcels in an assessment district.

The assessment on a particular parcel cannot exceed the reasonable cost of the proportional special benefit conferred on that parcel, but if the assessments imposed on some parcels are discounted, article XIII D is not violated so long as those discounts do not cause the assessments imposed on the remaining parcels to exceed the reasonable cost of the proportional special benefit conferred on those parcels. There was no showing that the assessments on some parcels went up because of the discounts, and Dahms does not argue that they did.

Dahms argued that if the special benefits that are conferred also produce general benefits, then the value of those general benefits must be deducted from the reasonable cost of providing the special benefits before the assessments are calculated. The court rejected this theory concluding that once general and special benefits are separated, the entire cost of the special benefit is subject to assessment. The court also rejected Dahms’ challenge to the front footage component of the assessment spread formula. Dahms argued that total length of streets on all sides of a parcel should be used rather than front footage. The court found that it made sense to use front footage only rather than total street length to determine the proportional special benefit from the services provided because, for example, a clean and safe front entrance to a commercial parcel is more likely to constitute a special benefit to that parcel than a clean and safe side or rear, where there may or may not be any entrance at all. At the same time, the formula took into account building size and lot size of each assessed parcel, which the engineer’s report and court found, when taken together, provided for an assessment that did not exceed special benefit.


This case involved the interpretation of two internally inconsistent provisions of the Municipal Improvement Act of 1913 relating to the filing of actions. The upshot of the case is that the Supreme Court reversed the Court of Appeal and concluded that that under Sts. & Hwy. Code § 10601 validation actions involving such assessments can be brought only by the legislative body that approved the assessment or the contractor that would perform the work, while property owner actions to contest assessments are governed solely by Sts. & Hy. Code, § 10400, and consequently are not subject to the general validation procedure, but must be filed within 30 days after the assessment is levied.

3. SB 321 (Benoit)

Assessment majority protest ballots.

This bill, sponsored by the Howard Jarvis Taxpayers Association, is intended to provide greater transparency to the majority protest ballot process for special assessments. As presently drafted, the bill would amend Government Code § 53753 as follows:

- Subdivision (b) is amended to add a requirement that the envelope containing the assessment ballot state on the outside “OFFICIAL BALLOT ENCLOSED” in no less than 16 point type. (The quoted language is in 16 point type, Times New Roman font.) The agency may additionally place the statement on the envelope in a language or
languages other than English.

- Subdivision (e)(1) is amended to provide that the impartial person designated by the agency to tabulate the assessment ballots may include the clerk of the agency. It is also amended to provide that ballots shall be unsealed and tabulated “in public view at the conclusion of the hearing so as to permit all interested persons to meaningfully monitor the accuracy of the tabulation process” if the tabulation is done by agency personnel or vendors that participated in research, design, engineering, public education, or promotion of the assessment.

- Subdivision (e)(2) is amended to provide that assessment ballots and information used to determine the weight of each ballot shall be treated as disclosable public records during and after tabulation, equally accessible to assessment proponents and opponents. The subdivision is also amended to require that the ballots be kept a minimum of two years.

"The right to notice and appeal (See: Sophia R. Meyer’s Dec 27, 2016, at 4:43 PM, response to my CPRA request #20 of you dated Dec 16, 2016, at 12:43 AM, which was also CCed to you.) is conferred by statute (See: Dana Point Safe Harbor Collective v. Superior Court (2010) 51 Cal.4th 1, 5 . . . ).

The text of California Government Code §§25830-25831 follow:

25830. (a) On or before the first day of July of each calendar year, the board of supervisors of any county may, by resolution or ordinance, establish a schedule of fees to be imposed on land within the unincorporated area of the county and incorporated areas of the county where cities do not provide their own waste disposal sites, revenue from the fees to be used for the acquisition, operation, and maintenance of county waste disposal sites and for financing waste collection, processing, reclamation, and disposal services, where those services are provided. In establishing the schedule of fees, the board of supervisors shall classify the land based upon the various uses to which the land is put, the volume of waste occurring from the different land uses and any other factors that the board determines would reasonably relate the waste disposal fee to the land upon which it would be imposed. Fees imposed within the incorporated and unincorporated areas shall be uniform. Prior to imposing fees within an incorporated area, the board of supervisors shall obtain the consent of the legislative body of the city to impose the fees.

(b) The board shall set a reasonable fee for each category established and divide the land according to categories and ownership; provided, however, that the board shall establish categories of land for which:

(1) No services are provided and no fee required.

(2) Services are provided and no fee required.

(c) The board shall determine eligibility for inclusion in these categories, upon application, on a case-by-case basis. The board shall impose the appropriate fee upon each division of land and provide for the billing and collection of the fees. The fees may be established, billed, and collected on a monthly or yearly basis, and may be billed and collected by the county tax collector as part of the regular county tax billing system.
Any fees authorized pursuant to Section 25830, or pursuant to Section 40059 of the Public Resources Code, that remain unpaid for a period of 60 or more days after the date upon which they were billed may be collected thereafter by the county as provided in this section.

(a) At least once a year, the board of supervisors shall cause to be prepared a report of delinquent fees. The board shall fix a time, date, and place for hearing the report and any objections or protests to the report.

(b) The board shall cause notice of the hearing to be mailed to the landowners listed on the report not less than 10 days prior to the date of the hearing.

(c) At the hearing, the board shall hear any objections or protests of landowners liable to be assessed for delinquent fees. The board may make revisions or corrections to the report as it deems just, after which, by resolution, the report shall be confirmed.

(d) The delinquent fees set forth in the report as confirmed, or the list prepared pursuant to subdivision (e), shall constitute special assessments against the respective parcels of land and are a lien on the property for the amount of the delinquent fees. A certified copy of the confirmed report, or the list prepared pursuant to subdivision (e), shall be filed with the county auditor for the amounts of the respective assessments against the respective parcels of land as they appear on the current assessment roll. The lien created attaches upon recordation, in the office of the county recorder of the county in which the property is situated, of a certified copy of the resolution of confirmation or the list prepared pursuant to subdivision (e). The assessment may be collected at the same time and in the same manner as ordinary county ad valorem property taxes are collected and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for those taxes. All laws applicable to the levy, collection, and enforcement of county ad valorem property taxes shall be applicable to the assessment, except that if any real property to which the lien would attach has been transferred or conveyed to a bona fide purchaser for value, or if a lien of a bona fide encumbrancer for value has been created and attaches thereon, prior to the date on which the first installment of the taxes would become delinquent, then the lien that would otherwise be imposed by this section shall not attach to the real property and the delinquent fees, as confirmed, relating to the property shall be transferred to the unsecured roll for collection.

(e) The requirements of subdivisions (a), (b), and (c) may be waived only if the county has adopted an alternative administrative procedure that allows property owners to appeal the solid waste fee and property owners are notified of their right to appeal. A list of delinquent fees shall be prepared showing the assessments of each respective parcel and shall be filed with the auditor.

California Government Code section 25830, authorizes imposition of ‘reasonable’ parcel exactions to support solid waste disposal. In 1996, We, The People, having had our fill with state, county, city and district’ officers’, officials’ and courts’ lame prestidigitation with our taxes, assessments, fees and charges, redefined the breadth of what ‘reasonable’
now consists of by passage of Proposition 218. Article XIII D, 6(b), now prohibits imposers of property related fees and charges from imposing exactions on property parcels that do not comport with §6(b)(1-5). To wit:

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) 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.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

Reliance by an agency on any parcel map, including, but not limited to, an assessor’s parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

My fees have remained unpaid for a period of 60 or more days after the date upon which they were billed. California Government Code section 25831 addresses collection of California Government Code section 25830 that remain unpaid for a period of 60 or more days after the date upon which they were billed. In doing so, our State Legislature, in California Government section 25831, (D), in pertinent part says that these fees:

“shall constitute special assessments against the respective parcels of land and are a lien on the property for the amount of the delinquent fees.” (Bold added.)

Article XIII D, §6(b)(4), in pertinent part says:

"assessments . . . shall not be imposed without compliance with Section 4.” (Bold added.)

Neither County nor this Agency has ever complied with Section 4 as required by Article XIII D.. Both County and this Agency defiantly thumb their noses at this prohibition.

California Government section 25831, subdivision (a) lists appealable judgments and orders. These include 'an order made after a judgment made appealable by paragraph (1).' (Code Civ. Proc., § 904.1, subd. (a)(2) (section 904.1(a)(2)).) Under section 904.1(a)(2), postjudgment orders granting or denying motions for attorney fees are deemed to be appealable. (Lakin v. Watkins Associated Industries (1993) 6 Cal.4th 644, 648 . . .; see Eisenberg et al., Cal. Practice
The notion that ‘I do what I’m told to do’ satisfies all Article XIII D, §4, or, §6(b) prohibitions is untenable. §6(b)(5) requires the exacting Agency to “... demonstrate compliance with this article.” Silence on challenged elements of required compliance admits this Agency’s inability to ‘demonstrate compliance’ — Thus constitutionally prohibiting this Agency’s exactions for my parcels.

The following court cases support all of this appellant’s above assertions:

TOWN OF TIBURON et al., Plaintiffs, Cross-Defendants, and Respondents,

v.

JIMMIE D. BONANDER et al., Defendants, Cross-Complainants, and Appellants.

A119918.

Court of Appeals of California, First District, Division Three

Filed December 31, 2009

Frank Mulberg and Brett D. Mulberg for Defendants, Cross-Complainants, and Appellants.

McDonough Holland & Allen PC, Thomas R. Curry and Andrea S. Visveshwara; Ann R. Danforth, Town Attorney, for Plaintiffs, Cross-Defendants and Respondents.

McGUINESS, P.J.

The Town of Tiburon (the Town) formed a special assessment district for the purpose of placing overhead utility lines underground within the district. When original estimates of the project's cost proved to be too low, the Town sought to impose a supplemental assessment to cover the increased costs. After the Town filed an action to validate the supplemental assessment, a group of affected property owners (appellants) filed a cross-complaint challenging the supplemental assessment on a variety of grounds. On appeal from a judgment in favor of the Town, appellants argue the trial court erred in denying their petition for writ of mandate seeking to invalidate the supplemental assessment.

After conducting an independent review of the record, we conclude the supplemental assessment fails to satisfy the proportionality requirement imposed by article XIII D of the California Constitution (article XIII D), which mandates that no assessment shall exceed the reasonable cost of the proportional special benefit conferred on a parcel. (Art. XIII D, § 4, subd. (a).) Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants own real property located within the boundaries of the Del Mar Valley Utility Undergrounding Assessment District (Original District) and the Del Mar Valley Utility Undergrounding Supplemental Assessment District (Supplemental District). The Original District and the Supplemental District share the same boundaries and include the same parcels. Both districts employ the same approach for assigning special benefits and apportioning costs among the
parcels within the district. Thus, although this appeal concerns the Supplemental District, we consider the events giving rise to the Original District in order to give context to our consideration of the Supplemental District.

In May 2003, two property owners who live in a neighborhood of the Town commonly referred to as the Del Mar Valley area presented a petition of 116 homeowners to the Town to urge the creation of the Original District in order to finance the replacement of overhead utility wires with underground lines carrying electricity, telephone signals, and cable services. The property owners who signed the petition represented approximately 62 percent of the 187 homes in the proposed district. The petition satisfied the requirements of the Town's policy and procedures for the formation of utility undergrounding assessment districts in that it reflected the support of at least 60 percent of all the parcels in the proposed district. As indicated in the petition, it was understood that each owner would pay the assessment based upon "an equal payment," and it was estimated the project would cost $16,000 to $20,000 per parcel, exclusive of incidental costs, in addition to costs of $650 to $3,000 per parcel to cover the cost of undergrounding the lateral connection from the street to a residence.

After receiving the property owners' petition, the Town's council adopted a resolution of intention in June 2003 to form the Original District pursuant to the Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 et seq.). In July 2003, the Town approved expanding the Original District to include 18 parcels in a "special zone" referred to as the "West Hawthorne Drive Area." Although several properties in the West Hawthorne Drive Area border properties in the Original District as initially proposed, the administrative record reflects that the special zone receives its electrical utilities from a different grid than the rest of the Original District. The Town received petitions from 11 of the 18 parcel owners in the West Hawthorne Drive Area (or approximately 61 percent) favoring inclusion in the Original District.

The Original District is located on the Tiburon Peninsula, which extends into San Francisco Bay in Marin County. The boundaries of the district extend from Tiburon Boulevard, which runs along or near the bay, up to Hacienda Drive, which is roughly parallel to Tiburon Boulevard. Parcels within the district's boundaries near Tiburon Boulevard are generally smaller than parcels located closer to Hacienda Drive. A public school in the district occupies 10 parcels near Tiburon Boulevard. As reflected by comments in the public record, some of the parcels in the Original District are hillside properties with bay views, whereas some of the parcels, such as those closer to Tiburon Boulevard and the school, are generally situated at a lower elevation and lack bay views. Some properties in the Del Mar Valley have views toward Sausalito and the Golden Gate Bridge.

The Town engaged a civil engineer designated the "engineer of work" to prepare a report analyzing the proposed project. On March 10, 2005, the engineer of work submitted a preliminary engineer's report, which the Town's council approved on March 16, 2005. The report explained that the utilities to be placed underground provided direct service to the properties within the Original District. The report stated that the proposed underground utility facilities would confer a special benefit on the 221 parcels located in the proposed district as a result of aesthetic, service reliability, and safety benefits associated with the improvements. The engineer of work opined that the general benefits, if any, enjoyed by the surrounding community and the public in general as a result of the undergrounding of the local overhead utilities within the Original District were intangible and therefore not quantifiable. Therefore, the engineer of work concluded that 100 percent of the proposed improvements were of direct and special benefit to the properties located within the Original District.

In determining the special benefit conferred on each parcel within the Original District, the engineer of work assigned each parcel "benefit points" based on three categories: (1) aesthetic benefit from removal of unsightly poles and overhead wires, (2) improved safety because of the reduced risk of downed poles and wires, and (3) greater service reliability attributable to new wiring and equipment as well as the reduced risk of downed power lines. The engineer of work assigned benefit points according to the highest and best use of each property.[1] Thus, a vacant property would be treated as if it were developed to its highest potential and connected to the system.
The engineer of work assigned one benefit point for aesthetics to each parcel that is adjacent to existing overhead utility lines, irrespective of the particular view the property enjoys. Likewise, with respect to the safety benefit, each parcel adjacent to existing overhead utility lines received one benefit point. By contrast, the reliability benefit was dependent upon the nature of the property's use, with parcels containing a single family residence (designated "single family residential") assigned one benefit point for service reliability. Parcels other than those designated single family residential, such as parcels containing multiple dwellings and those on which the school is situated, were assigned benefit points for service reliability according to a formula contingent upon relative peak energy use. Therefore, a parcel containing a single family residence could receive a total of three benefit points—one for aesthetics, one for safety, and one for reliability.

Because almost all of the parcels within the Original District are considered single family residential, almost all of the parcels were assigned exactly three benefit points. Of the 221 parcels in the Original District, all but 23, or a total of 198, received three benefit points. Two parcels containing multiple dwelling units received 3.4 benefit points each, and the ten parcels on which the school is situated received a total of 17.3 benefit points.

The remaining 11 parcels are in areas that had previously placed their overhead utilities underground. These 11 parcels are located in two different areas, with seven of the parcels located on Noche Vista Lane, a private drive, and four of the parcels on Geldert Court, a cul-de-sac extending off of Geldert Lane. Nine of the 11 properties have no frontage along roadways with poles and overhead wires. These properties received no benefit points for aesthetics. However, with respect to two of the properties determined to have frontage along roadways with poles and overhead wires, the engineer of work assigned one-half of an aesthetic benefit point to each parcel, even though the parcels already received their utilities from an underground network. The report assigned one-half of a safety benefit point and one-half of a reliability benefit point to each of the 11 properties in the previously undergrounded areas. The engineer of work reasoned that "[t]hese properties are considered to receive half the benefit from service reliability, as their small systems are completely surrounded by and dependent on the larger overall system that is to be undergrounded, and half the benefit from improved safety, as ingress and egress from their property is directly affected by overhead lines and poles." Accordingly, of the 11 parcels in previously undergrounded areas, nine received one total benefit point each and two received 1.5 total benefit points each.

The Original District was split into three "zones of benefit" described as the Del Mar Valley Area, the West Hawthorne Drive Area, and the Hacienda Drive Area. The engineer of work calculated the construction costs separately for each of these zones. The West Hawthorne Drive Area consists of the 18 parcels that had petitioned to be included in the Original District but that receive their utilities from a separate system of overhead utility lines. The Del Mar Valley Area comprises the largest zone within the Original District, consisting of 164 parcels. The Hacienda Drive Area consists of 39 parcels on or near Hacienda Drive, on the northeastern border of the Original District. Although the engineer of work's report does not state why the Hacienda Drive Area was created as a separate zone for purposes of calculating construction costs, elsewhere in the administrative record it is explained that the area contains lower density development (i.e., larger parcels), thus making it more costly per parcel to place utilities underground.

Total costs for the assessment were estimated to be $4,720,000, of which $3,900,611 were construction costs. Construction costs in each of the three benefit zones were calculated separately and apportioned to properties within that zone in proportion to the number of benefit points assigned to each property. The remaining project costs, including incidental expenses and financial costs, were allocated to each zone in the same proportion as construction costs among the zones. As a consequence, a parcel in a zone with a higher construction cost per parcel would also have a correspondingly higher allocated cost for incidental expenses and financial costs.
Because the engineer of work determined construction costs separately for each of the three benefit zones, a parcel assigned three benefit points in one zone had a different proposed assessment than a parcel assigned the same number of benefit points in another zone. Thus, the proposed assessment for a single family residential parcel receiving three benefit points was $12,528.19 in the West Hawthorne Drive Area, $21,717.04 in the Del Mar Valley Area, and $31,146.62 in the Hacienda Drive Area. Proposed assessments for the 11 parcels in areas with utilities already placed underground ranged from $7,239.02 to $15,573.51.

Owners of parcels in the Original District voted in favor of the assessment. The vote was 71 percent in favor and 29 percent opposed, with individual parcel votes weighted according to each parcel's proposed assessment. On May 18, 2005, the Town's council voted unanimously to approve the engineer of work's final report, to order the improvements, to establish the Original District, and to confirm the proposed individual assessments. On May 27, 2005, assessment notices were sent to property owners within the Original District.

Two couples who had previously objected to inclusion of their parcels in the Original District filed suit in June 2005 against the Town and its council. (See Bonander v. Town of Tiburon (2009) 46 Cal.4th 646, 650.) That lawsuit, which remains pending, is not the subject of this appeal. [2]

In January 2006, while the legal challenge to the Original District was on appeal, property owners in the Original District received notice that projected construction costs were significantly higher than previously estimated. Construction costs had risen significantly since the summer of 2005, with the price of asphalt alone increasing 73 percent from July to October 2005. The engineer of work estimated that actual construction costs would exceed previous cost estimates by over $2 million.

At a meeting held on February 1, 2006, the Town's council considered a number of options in response to the increased cost estimates, including cancelling the project or pursuing the process for implementing a supplemental assessment to cover the increased costs. The Town's council chose to pursue the supplemental assessment process to allow affected property owners to determine for themselves whether to continue the project. Accordingly, the Town's council adopted a resolution of intention at the February 2006 meeting to form the Supplemental District pursuant to the Municipal Improvement Act of 1913. [3] The Town's resolution of intention indicated that the Supplemental District was to be established pursuant to section 10426 of the Streets and Highways Code. [4] The Town directed the engineer of work to prepare a supplemental engineer's report.

At a meeting held March 20, 2006, the Town's council considered a preliminary report for the Supplemental District prepared by the engineer of work. The engineer of work estimated that the net construction costs to be funded by the Supplemental District were $2,860,488, which represented the amount by which revised construction costs for the project exceeded construction funds available from the Original District assessment. Overall, taking into account incidental expenses and financing costs, there was a shortfall of $3,180,000 that would have to be covered by a supplemental assessment.

The engineer's report for the Supplemental District employed the same method of assessment as the Original District. The Supplemental District included the same 221 parcels as the Original District. The special benefit determinations and apportionment methodology were unchanged from the Original District. As with the Original District, it was determined that 100 percent of the proposed improvements specially benefited the properties within the Supplemental District. Benefit points were assigned for aesthetics, safety, and reliability. Each parcel in the Supplemental District received the same number of total benefit points as it had received in the Original District. The engineer of work again determined construction costs separately for the three zones of benefit—Del Mar Valley Area, West Hawthorne Drive Area, and Hacienda Drive Area. Thus, as reflected in the preliminary report for the Supplemental District, the
methodology for the Supplemental District assessment was identical to the methodology used for the Original District assessment.

At a March 2006 meeting, the Town's council considered whether to revise the proposed boundaries of the Supplemental District, and specifically considered whether to exclude the Hacienda Drive Area from the district. The engineer of work explained that the Town could modify the boundaries of the proposed Supplemental District. The construction costs attributable to any removed properties would be deleted from the total construction costs, but any incidental costs would generally be unaffected, causing the costs to be spread among fewer properties. Following the public comment period, the Town's council adopted a resolution approving the preliminary engineer's report and finalizing the external boundaries for the Supplemental District as proposed by the engineer of work. The Town's resolution set a public hearing for May 8, 2006, for the ultimate decision on whether to form the Supplemental District. The Town was directed to mail notices and ballots to affected property owners, along with envelopes for returning the ballots to the Town's clerk, not less than 45 days before the date of the public hearing.

The Town mailed notices, ballots, and return envelopes to property owners within the proposed Supplemental District on March 24, 2006. Property owners could return their ballots to the Town's clerk at any time before the close of the public hearing on May 8, 2006. The ballots were weighted according to each parcel's proposed assessment.

On the evening of May 8, 2006, the Town's council held a public hearing to hear and consider public testimony, tally the property owner votes, and, if the property owners voted in favor of the Supplemental District, to vote on whether to establish the district. The final engineer's report for the Supplemental District contained one change from the preliminary report. Specifically, the engineer of work had determined that a parcel located at 1 Tanfield Road, which is not within the Supplemental District, would receive a special benefit from the undergrounding project. Although the parcel takes its utility service from Tanfield Road, a cul-de-sac off of Hacienda Drive that is not part of the undergrounding project, it was determined the property has a secondary utility access point on Hacienda Drive and also has some overhead wires crossing a corner of the property that would be removed. Thus, the engineer of work assigned the property half a benefit point for aesthetics and half a benefit point for safety. The property received a total of one special benefit point, which was equivalent to $6,778 in special benefits. Because the property was not included in the Supplemental District (or the Original District), this special benefit amount of $6,778 was deducted from the total amount to be assessed. Proposed assessment amounts in the Hacienda Drive Area were reduced accordingly. The Town's council adopted a resolution approving the revised assessment amounts.

The votes were tallied at the close of the public hearing. Property owners voted in favor of forming the Supplemental District by a margin of 56 percent to 44 percent. Although the overall vote totals favored creation of the Supplemental District, the vote was not so favorable within the Hacienda Drive Area. Among property owners in the Hacienda Drive Area, 12 parcels voted for the Supplemental District while 23 parcels voted against its formation. The vote as weighted by assessment amounts in the Hacienda Drive Area was $246,332.16 for and $379,762.08 against, equating to roughly 61 percent opposition to formation of the Supplemental District. All of the property owners on Noche Vista Lane, which was in an area with its utilities already located underground, voted against the Supplemental District.

Following tabulation of the vote, the Town's council adopted a resolution to create the Supplemental District. The approved supplemental assessments for single family residential parcels receiving three benefit points were $7,740.00 in the West Hawthorne Drive Area, $14,812.21 in the Del Mar Valley Area, and $20,331.24 in the Hacienda Drive Area. Supplemental assessments for the 11 parcels in areas with utilities already placed underground ranged from $4,937.41 to $10,165.79.

On May 18, 2006, the Town filed a complaint in the Marin County Superior Court seeking to validate the Supplemental District pursuant to section 860 et seq. of the Code of Civil Procedure. The Town sought a judgment declaring that it
had the authority to collect the assessments authorized by the resolution creating the Supplemental District and that it could use the assessments as security for the issuance of bonds. It further sought a judgment that the Supplemental District was formed in conformity with all applicable provisions of law, including the Municipal Improvement Act of 1913 and article XIII D.

Appellants are 21 individuals who own property within the Supplemental District.[7] Appellants answered the Town's complaint and filed a cross-complaint against the Town, the Town's council, Doe defendants, and "All Persons Interested in the Validity of the Del Mar Valley Utility Undergrounding Supplemental Assessment District." The cross-complaint contains seven causes of action. The first cause of action seeks to nullify the election approving the Supplemental District on the ground the Town violated property owner voting procedures. The second cause of action seeks to invalidate the resolution adopting the formation of the Supplemental District on the ground the district was not lawfully formed. The third cause of action seeks declaratory relief with respect to two distinct allegations—that the Town unfairly affected the vote by misleading property owners into believing the supplemental assessments would qualify as an income tax deduction, and that it was unfair for the Town to reach a settlement with the school district in which the Town agreed to pay for the school's proposed assessment in exchange for the school district abstaining from voting its 10 parcels against the Supplemental District. The fourth through sixth causes of action seek a writ of mandate directing the Town to set aside its resolution creating the Supplemental District. Among other things, appellants allege the Town violated article XIII D by creating an assessment district in which assessments on parcels exceed the reasonable cost of the proportional special benefit conferred on the parcel. The seventh cause of action seeks a declaration regarding the validity of the Supplemental District but contains no new factual allegations.

On September 12, 2006, appellants filed their opening brief in support of their petition for writ of mandate. On October 26, 2006, the Town moved for judgment on the pleadings on the ground that appellants had not raised any viable affirmative defenses in their answer. In an order dated January 3, 2007, the trial court denied appellants' petition for writ of mandate as well as the Town's motion for judgment on the pleadings. In denying the writ claims, the court determined that the Town did not abuse its discretion in determining benefits and proportional assessments for the Supplemental District. The court found there was nothing "'plainly arbitrary'" in the Town's determinations. The court also concluded that the Town was justified in relying upon the final engineer's report and that the method of assessment described in the report was sufficient to support the determination of benefits and proportional assessments.

The Town filed a motion for summary judgment and/or summary adjudication on January 5, 2007, in which it sought to dispose of the remaining three causes of action in the cross-complaint. In an order dated April 24, 2007, the trial court granted summary adjudication as to the first and second causes of action but denied summary adjudication as to the third cause of action, at least in part. The trial court determined that the third cause of action contained two separate and distinct claims. The court granted summary adjudication as to the issue of whether the Town had misrepresented the tax deductibility of assessments but denied summary adjudication as to the issue of the propriety of the Town's settlement agreement with the school district.

Appellants agreed to dismiss, with prejudice, the remaining claim in the cross-complaint's third cause of action in order to fully resolve the matter and allow the trial court to enter final judgment in the case. (See Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 399-403.) Accordingly, on October 4, 2007, the trial court entered an order of dismissal that was intended to fully resolve the action and act as a final judgment from which an appeal could be taken. This appeal followed.

**DISCUSSION**

Appellants contend the trial court erred in denying their petition for writ of mandate, asserting that the Supplemental District assessments violate the special benefit and proportionality requirements imposed by article XIII D. They also
claim the trial court erred in granting summary adjudication on claims that (1) the Town unlawfully formed the Supplemental District, (2) the vote approving the Supplemental District is a nullity because the Town gave district proponents improper access to ballot envelopes during the voting period, and (3) the Town misrepresented the income tax deductibility of the assessments. Because the assessments violate the proportionality requirement of article XIII D, we agree with appellants that they are entitled to a writ of mandate invalidating the assessments and vacating the Town's resolution creating the Supplemental District.

I. Overview of Article XIII D and Law Governing Special Assessments

We begin with an overview of special assessments and Proposition 218, the 1996 initiative that added article XIII D to the California Constitution. The Supreme Court explained the nature of a special assessment in Knox v. City of Orland (1992) 4 Cal.4th 132, a pre-Proposition 218 case. "[A] special assessment is `levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.]

"[T]he essential feature of the special assessment is that the public improvement financed through it confers a special benefit on the property assessed beyond that conferred generally. [Citations.]

"(Id. at p. 142.)"

"A tax is different from a special assessment. Unlike a special assessment, a tax may be levied without regard to whether the property or person subject to the tax receives a particular benefit. (Knox v. City of Orland, supra, 4 Cal.4th at p. 442.)"

The voters approved Proposition 218, the Right to Vote on Taxes Act, in November 1996. (Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 835.) Proposition 218 can best be understood as the progeny of Proposition 13, the landmark initiative measure adopted in 1978 with the purpose of cutting local property taxes. (Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal.App.4th 679, 681.) One of the principal provisions of Proposition 13 "limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to 2 percent per year unless and until the property changed hands. [Citation.]

"[¶] To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without the two-thirds vote of the electorate. [Citations.]

"(Howard Jarvis Taxpayers Assn. v. City of Riverside, supra, 73 Cal.App.4th at pp. 681-682.)"

Local governments found a way to get around Proposition 13's limitations, owing in part to a determination that a "special assessment" was not a "special tax" within the meaning of Proposition 13. (See Knox v. City of Orland, supra, 4 Cal.4th at p. 141.) As a consequence, a special assessment could be imposed without the two-thirds vote required by Proposition 13. (Howard Jarvis Taxpayers Assn. v. City of Riverside, supra, 73 Cal.App.4th at p. 682.) The ballot arguments in favor of Proposition 218 declared that politicians had exploited this loophole by calling taxes "assessments" and "fees" that could be enacted without the consent of the voters. (Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra, 24 Cal.4th at p. 839.) Proponents of Proposition 218 claimed that "[s]pecial districts [had] increased assessments by over 2400% over 15 years" (ibid.), and they argued assessments were unfair, with "[t]he poor pay[ing] the same assessments as the rich." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument in favor of Prop. 218, p. 76.) The argument in favor of the initiative claimed that under then-existing law, "[a]n elderly widow pays exactly the same on her modest home as a tycoon with a mansion." (Ibid.)

To address these concerns, the electorate approved Proposition 218, adding articles XIII C and XIII D to the California Constitution. (Howard Jarvis Taxpayers Assn. v. City of Riverside, supra, 73 Cal.App.4th at p. 682.) "Proposition 218 allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. [Citations.] It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges." (Ibid.)
Article XIII D imposes both procedural and substantive limitations on a public agency's ability to impose assessments. A public agency must comply with certain notice and hearing requirements before it may adopt a special assessment. (Art. XIII D, § 4, subds. (c), (d) & (e).) Also, an assessment may only be imposed if it is supported by an engineer's report and receives a vote of at least half of the owners of affected parcels, weighted "according to the proportional financial obligation of the affected property." (Art. XIII D, § 4, subds. (b) & (e).)

A valid assessment under Proposition 218 must also satisfy the substantive requirements of section 4, subdivision (a) of article XIII D. In particular, article XIII D "tightens the definition of the two key findings necessary to support an assessment: special benefit and proportionality." (Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 443 (Silicon Valley).) "An assessment can be imposed only for a `special benefit' conferred on a particular property. (Art. XIII D, §§ 2, subd. (b), 4, subd. (a).) A special benefit is `a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large.' (Art. XIII D, § 2, subd. (i).) . . . Further, an assessment on any given parcel must be in proportion to the special benefit conferred on that parcel: 'No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel.' (Art. XIII D, § 4, subd. (a).)"

II. STANDARD AND SCOPE OF REVIEW

"Before Proposition 218 was passed, courts reviewed quasi-legislative acts of local governmental agencies, such as the formation of an assessment district, under a deferential abuse of discretion standard. [Citations.]" (Silicon Valley, supra, 44 Cal.4th at pp. 443-444.) “[C]ourts presumed an assessment was valid, and a plaintiff challenging it had to show that the record before the legislative body 'clearly' did not support the underlying determinations of benefit and proportionality. [Citation.]” (Id. at p. 444.)

"The drafters of Proposition 218 specifically targeted this deferential standard of review for change. Article XIII D, section 4, subdivision (f), provides: 'In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.'" (Silicon Valley, supra, 44 Cal.4th at p. 444.)

In Silicon Valley, supra, 44 Cal.4th at p. 450, our Supreme Court held that "courts should exercise their independent judgment in reviewing whether assessments that local agencies impose violate article XIII D."[9] (Fn. omitted.) This standard of review applies because "after Proposition 218 passed, an assessment's validity, including the substantive requirements, is now a constitutional question." (Silicon Valley, at p. 448.) Thus, as a reviewing court we exercise de novo review of "local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Proposition 218. [Citations.]" (Ibid.)

The litigants dispute whether our independent review may extend beyond the administrative record of the Town's creation of the Supplemental District. Specifically, they disagree about whether we may consider matters contained in the administrative record associated with the Original District. The trial court limited its review to the administrative record associated with the Supplemental District. We took judicial notice of the Original District administrative record but deferred consideration of the relevance or materiality of that record.

Ordinarily, when we review the decision of a public agency under the substantial evidence standard, we confine our review to the administrative record of the agency's action. (See Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 573.) However, we are not so constrained when we exercise independent judgment in reviewing
the action of a public agency. As set forth in Code of Civil Procedure section 1094.5, subdivision (e), a court authorized to exercise independent judgment may admit and consider extra-record evidence in administrative mandate proceedings if the evidence was improperly excluded by the public agency or could not have been produced through the exercise of reasonable diligence at the time of the hearing. Although the Town acknowledges this rule, it contends that appellants have made no showing as to why the Original District administrative record was not presented to the Town's council or was improperly excluded from consideration.

The more salient point, in our view, is that the Supplemental District concerns the same project as did the Original District and employs the same special benefit formulas, boundaries, zones, and methodology. Evidence concerning special benefit determinations and proportionality analyses in the Original District administrative record bears directly upon the validity of the Supplemental District, which is merely an extension of the Original District. The administrative record of the Original District cannot be characterized as evidence that was never proffered to or considered by the Town's council, which approved the formation of the Original District less than a year before it initiated proceedings to impose a supplemental assessment. Under the circumstances, we conclude it is proper to consider evidence in the Original District administrative record to the extent it relates to special benefit and proportionality determinations relied upon by the Town in creating the Supplemental District.[10]

III. SPECIAL BENEFITS

Appellants contend the Town failed to meet its burden under article XIII D, section 4, subdivision (f) to demonstrate that the properties in question receive a special benefit over and above the benefits conferred on the public at large. We are not persuaded.

Only special benefits are assessable under Proposition 218. (Art. XIII D, § 4, subd. (a).) "If a proposed project will provide both general benefits to the community and special benefits to particular properties, the agency can impose an assessment based only on the special benefits. It must separate the general benefits from the special benefits and must secure other funding for the general benefits. [Citations.]" (Silicon Valley, supra, 44 Cal.4th at p. 450.)

The state Constitution defines the term "special benefit" as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." (Art. XIII D, § 2, subd. (i).) "General enhancement of property value does not constitute `special benefit.'" (Ibid.)

A project confers a special benefit when the affected property receives a "direct advantage" from the improvement funded by the assessment. (Silicon Valley, supra, 44 Cal.4th at p. 452, fn. 8.) By contrast, general benefits are "derivative and indirect." (Id. at p. 453.) The key is whether the asserted special benefits can be tied to particular parcels based on proximity or other relevant factors that reflect a direct advantage enjoyed by the parcel. [11] (Id. at pp. 455-456.)

The Supreme Court applied these principles in the seminal case of Silicon Valley, supra, 44 Cal.4th 431. There, the court considered whether an assessment district created by Santa Clara County for the purpose of acquiring and preserving open space satisfied article XIII D. The assessment district covered a vast area, including "approximately 314,000 parcels and over 800 square miles containing over 1 million people." (Silicon Valley, supra, at p. 439.) The engineer's report set the amount of the assessment at $20 for a single-family home and provided a formula for estimating the proportionate special benefit that other properties would receive. (Ibid.) The engineer's report enumerated seven special benefits the assessment would confer on all residents and property owners in the district, including protection of views and enhanced recreational activities, among others. (Id. at p. 453.)
The *Silicon Valley* court concluded that properties in the open space assessment district received no particular and distinct benefits beyond those shared by the district's property in general or by the public at large. (*Silicon Valley, supra, 44 Cal.4th at p. 456.*) The assessment district demonstrated "no distinct benefits to particular properties above those which the general public using and enjoying open space receives." (*Id.* at p. 455.) Any special benefits that might have arisen would likely have resulted from "factors such as proximity, expanded or improved access to the open space, or views of the open space. [Citation.]" (*Ibid.*) However, because the open space assessment district had "not identified any specific open space acquisition or planned acquisition, it [could not] show any specific benefits to assessed parcels through their direct relationship to the 'locality of the improvement.'" (*Id.* at pp. 455-456.) No attempt was made to tie benefits to particular parcels. (*Id.* at p. 454.) As a consequence, the court concluded the assessment failed to satisfy the special benefit requirement of article XIII D. (*Id.* at p. 456.)

The Supplemental District bears little relation to the defective assessment district in *Silicon Valley*. The Town's engineer of work identified three special benefits—improved aesthetics, increased safety, and improved service reliability. Each of these benefits is tied to individual properties based on proximity to existing overhead utility lines. The benefits are neither indirect nor derivative but instead are direct and relate to specific properties.

Appellants contend the Town failed to demonstrate that the aesthetics special benefit applies to each property in the Supplemental District, arguing that the engineer's report makes no attempt to tie the aesthetic benefit point to specific properties. They also argue that special benefits for safety and reliability do not pass constitutional muster. In essence, they claim there is nothing to indicate that placing overhead utility lines underground would improve safety or service reliability, asserting there have been no extraordinary safety or service reliability issues in the neighborhood. Appellants' claims lack merit.

A property received an aesthetics benefit point only if it is adjacent to visible overhead utility lines. Those properties in the Supplemental District that are not adjacent to overhead utility lines received no benefit points for aesthetics. Appellants' primary complaint with regard to the aesthetics benefit appears to be that the engineer of work assigned an equivalent aesthetics benefit to all parcels adjacent to overhead utility lines regardless of the degree to which the view from a parcel will be improved. However, the mere fact a particular benefit is conferred equally on most or all properties in an assessment district does not compel the conclusion the benefit is not tied to particular properties. The engineer of work explained that the key aesthetics criterion was proximity to overhead utility lines, without regard to subjective assessments of relative improvements in views.

As for appellants' contentions regarding safety and service reliability benefits, they have offered no support for their contention that the neighborhood has been free of service reliability and safety issues. Further, it requires no independent research to support the self-evident conclusion that placing overhead utility wires underground will reduce the risk of weather-related power outages as well as the safety risk posed by downed utility poles and lines. These benefits are plainly tied to specific properties located adjacent to utility poles and lines.

Appellants further contend the Town improperly treats the general enhancement of property value as a special benefit. They cite the engineer of work's conclusion that the undergrounding project will confer specific benefits because the improvements will "specifically enhance the values of the properties within the [Supplemental] District." Appellants assert "[p]roperty value enhancement from undergrounding of overhead utility wires is not a permissible consideration in a special assessment under [article XIII D]."

General enhancement of property value is a general benefit and thus not assessable under article XIII D. (*Silicon Valley, supra, 44 Cal.4th at p. 454.*) In other words, the mere fact that a project or service has the effect of enhancing property values in a community does not necessarily mean those properties enjoy a special benefit. On the other hand, the prohibition against basing assessments on *general* property value enhancements does not mean any benefit that
enhances property values is a general benefit. Nearly every assessment that confers a particular and distinct advantage on a specific parcel will also enhance the overall value of that property in some respect. Such an effect does not transform a special benefit into a general benefit. An increase in property value attributable to a project that provides a direct advantage to a particular property—instead of an indirect or derivative benefit—is a specific rather than a general enhancement in property value. Here, any enhancement in property values arises from specific benefits conferred on parcels in the Supplemental District.

Appellants complain that the engineer's report is flawed because it determined that the undergrounding project would yield no quantifiable general benefits for the community at large or the parcels within the Supplemental District. When determining whether benefits are general or special, we must be mindful of the rationale for making the distinction. The purpose of limiting assessments to special benefits conferred on particular properties is to avoid having property owners in an assessment district pay for general benefits enjoyed by the public at large. Conversely, if a project confers particular and distinct benefits upon specific properties in an assessment district, it would be unfair to have taxpayers outside the assessment district pay for those benefits that specifically benefit only property owners within the district. In this case, there is little reason to believe the undergrounding project will confer derivative and indirect benefits upon property owners or others outside the Supplemental District.\[13\]

Furthermore, the mere fact that properties throughout the Supplemental District share the same special benefit does not render that benefit "general" and therefore an improper subject of an assessment. Section 2, subdivision (i) of article XIII D specifies that a special benefit is a "particular and distinct benefit over and above general benefits conferred on real property located in the district . . . ." As the court in *Silicon Valley* observed, in a properly drawn district—"limited to only parcels receiving special benefits from the improvement—every parcel within that district receives a shared special benefit." (*Silicon Valley, supra,* 44 Cal.4th at p. 452, fn. 8.) One might be tempted to characterize these shared special benefits as "general" because they are not "particular and distinct" or "over and above" the benefits conferred on other properties in the district. However, the Supreme Court stated it did not "believe that the voters intended to invalidate an assessment district that is narrowly drawn to include only properties directly benefitting from an improvement." (*Ibid.*) As the court explained: "[I]f an assessment district is narrowly drawn, the fact that a benefit is conferred throughout the district does not make it general rather than special. In that circumstance, the characterization of a benefit may depend on whether the parcel receives a direct advantage from the improvement (e.g., proximity to a park) or receives an indirect, derivative advantage resulting from the overall public benefits of the improvement (e.g., general enhancement of the district's property values)." (*Ibid.*)

We conclude the Town has met its burden to establish that properties in the Supplemental District receive a particular and distinct benefit not shared by the district in general or the public at large within the meaning of article XIII D.

IV. PROPORTIONALITY

Appellants assert that the Town failed to meet its burden under article XIII D, section 4, subdivision (f) to demonstrate that the amounts of the contested assessments are proportional to, and no greater than, the benefits conferred on the properties in question. We agree. As we explain, the assessment scheme suffers from two infirmities that result in assessments that are disproportionate to special benefits. First, the Town's apportionment method is largely based on cost considerations rather than proportional special benefits. Second, properties within the Supplemental District are required to pay for special benefits conferred upon parcels that were excluded from the Supplemental District.

A. Apportionment Based Upon Cost Rather than Benefit

Under article XIII D, "[f]or an assessment to be valid, the properties must be assessed in proportion to the special benefits received . . . ." (*Silicon Valley, supra,* 44 Cal.4th at p. 456.) The public agency bears the burden of
demonstrating that the amount of any contested assessment is proportional to the benefits conferred on the property. (Art. XIII D, § 4, subd. (f.))

For the sake of clarity, it must be emphasized that an assessment is not measured by the precise amount of special benefits enjoyed by the assessed property. (White v. County of San Diego (1980) 26 Cal.3d 897, 905.) Instead, an assessment reflects costs allocated according to relative benefit received. As a general matter, an assessment represents the entirety of the cost of the improvement or property-related service, less any amounts attributable to general benefits (which may not be assessed), allocated to individual properties in proportion to the relative special benefit conferred on the property. (Ibid.; Art. XIII D, § 4, subd. (a.)) Proportional special benefit is the "equitable, nondiscriminatory basis" upon which a project's assessable costs are spread among benefited properties. (White v. County of San Diego, supra, at p. 905.) Thus, the "reasonable cost of the proportional special benefit," which an assessment may not exceed, simply reflects an assessed property's proportionate share of total assessable costs as measured by relative special benefits. (See Art. XIII D, § 4, subd. (a.).)

Here, the primary determinant of the assessment amount is the relative cost of constructing the capital improvement, not the proportional special benefit conferred on a property. As a consequence of this cost-based apportionment scheme, properties that receive identical special benefits pay vastly different assessments. In the case of single family residential parcels that received a total of three benefit points for aesthetics, safety, and service reliability, the different assessments for the three "benefit zones" are as follows:

West Hawthorne Drive Area: $7,740 Del Mar Valley Area: $14,812.21 Hacienda Drive Area: $20,331.24

As the numbers make clear, the assessment for a property in the Hacienda Drive Area is nearly three times the assessment for a property in the West Hawthorne Drive Area receiving the same proportional benefit. This result violates the proportionality requirement of article XIII D.

The disproportionate assessments result directly from the engineer of work's creation of three "benefit zones" for which construction costs were determined—and apportioned—separately. The benefit zones have nothing to do with differential benefits among the three zones but instead are better characterized as "cost zones," as counsel for the Town acknowledged at oral argument. In other words, the engineer did not justify the zones based upon any differential benefit enjoyed by parcels within the different zones. Instead, the only justification for the different zones appears to be variances in cost per parcel of placing overhead utilities underground in the various areas of the Supplemental District. It is purportedly more costly to place utilities underground in the Hacienda Drive Area, where lot sizes are generally larger.

As a result of the manner in which the Town has allocated costs and determined benefits, almost all of the differential in assessments is based on cost rather than benefit. All but 23 of the 221 parcels in the Supplemental District are assigned three benefit points under the engineer of work's analysis. Thus, but for cost differentials, 198 of the 221 parcels would have identical assessments, if total project costs were divided among all parcels in proportion to special benefits. There are three different assessment amounts among those 198 parcels only because the engineer of work chose to determine and allocate costs separately in each of the three zones of benefit.

The Town acknowledges that the engineer of work allocated the cost of undergrounding based on varying construction costs throughout the Supplemental District. It claims that if construction costs were not determined and allocated zone-by-zone, then smaller properties in more dense areas, such as the West Hawthorne Drive Area, would subsidize undergrounding in less dense areas with larger lot sizes, such as the Hacienda Drive Area. The Town asserts that this result is prohibited by article XIII D.
The Town's approach has a certain appeal. After all, an apportionment method that determines assessments based upon the actual cost of constructing the improvement on each property, or within a particular neighborhood, would appear to be equitable. However, there are a variety of problems with the Town's approach.

Among other things, the Town's apportionment method violates the express terms of article XIII D, which specifies that the "proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement . . . ." (Art. XIII D, § 4, subd. (a), italics added.) Thus, article XIII D expressly contemplates that proportionate special benefit is a function of the total cost of a project, not costs determined on a property-by-property or a neighborhood-by-neighborhood basis.[14] Further, subdivision (f) of section 4 of article XIII D states that it is the public agency's burden to demonstrate that the "amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question." (Italics added.) The critical inquiry, therefore, concerns the special benefits conferred on the property. Properties that receive the same proportionate special benefit pay the same assessment, without regard to variations in the cost of construction among the properties.

There may be cases in which the relative cost of an improvement is a reliable measure of relative benefit conferred. This relationship does not always hold true, however. For example, one could envision an undergrounding project in which all properties receive an identical benefit—e.g., all the benefited properties sit on level ground, are the same size, have exactly the same street frontage, and have essentially the same view of overhead utility lines that will be removed. Assume for purposes of this hypothetical that it is substantially more expensive to place utilities underground in front of a particular group of properties because of the condition of the ground on which the homes sit (e.g., they are situated on top of solid rock that makes it difficult to dig trenches). Under the Town's logic, those properties should be assessed more to avoid having neighboring properties subsidize the properties' greater costs, even though it is acknowledged the project confers the same proportionate special benefit on all properties.

The fallacy in this approach is that it assumes the costs associated with particular properties—or a particular neighborhood—can be considered in isolation. To the contrary, the costs of an improvement project must be considered as a whole. A public improvement such as a utility undergrounding project is either undertaken in an entire district or not at all. In the hypothetical involving certain properties with higher construction costs, the neighboring properties enjoy the benefits of the undergrounding project only because the project was pursued in the entire assessment district, which necessarily includes the properties with higher construction costs.[15] It is for this reason that the individual assessments for benefited properties must be apportioned in relation to the entirety of the project's assessable costs, as article XIII D requires. (Art. XIII D, § 4, subd. (a).) To reiterate, proportionate special benefit is the basis upon which a project's total assessable costs are apportioned among parcels within an assessment district. This method ensures that each property owner pays an equitable share of the overall assessable cost as measured by the relative special benefit conferred on the property.

We do not suggest the Town should have applied equal assessments to each of the properties in the Supplemental District. It may be that lot size, length of street frontage with overhead wires, and/or some combination of similar factors are proper considerations in determining each property's relative special benefit. For example, in Dahms v. Downtown Pomona Property & Business Improvement Dist. (2009) 174 Cal.App.4th 708, 720-721 (Dahms), the Court of Appeal determined that an assessment for a downtown business district was properly apportioned based on building size, street frontage, and lot size. The apportionment formula (40 percent front footage, 40 percent building size, and 20 percent lot size) reflected that larger businesses would receive proportionally greater benefits from the business district than would businesses in smaller buildings on smaller lots. (Id. at p. 721.) Here, the Town did not establish or even suggest that lot density was a proper determinant of proportional special benefit.
During oral argument in this matter, the Town's counsel suggested the recently decided case of Dahms supports the proposition that properties may be assessed in proportion to the cost of providing an improvement, as opposed to the special benefit conferred by the improvement. The case stands for no such principle. The court in Dahms stated that the formula for determining special benefit turned upon lot size and street frontage because some properties received "more special benefit than others." (Dahms, supra, 174 Cal.App.4th at p. 720.) Specifically rejecting an argument that the apportionment formula should have been based on the total length of streets bordering all sides of a business instead of the business's front street footage, the court explained that "[i]t makes sense to use front footage rather than total street length to determine the proportional special benefit that a parcel will derive from the services of the [business district] (e.g., increased security, litter removal, and graffiti removal). For example, a clean and safe front entrance to a commercial parcel is more likely to constitute a special benefit to that parcel than a clean and safe side or rear, where there may or may not be any entrance at all. At the same time, the City's formula also takes into account other measures (namely, building size and lot size) of each parcel's size and consequent proportional special benefit, and those other measures should compensate for any disproportionality that might have resulted from exclusive reliance on front footage." (Id. at p. 721, italics added.) The apportionment formula in Dahms turned on special benefits and not upon costs.

Even if it were proper to divide the Supplemental District into different zones based upon special benefits conferred on properties in each of the zones, the approach followed by the Town nevertheless lacks adequate support in the record. As the map of the Supplemental District reflects, lots in the West Hawthorne Area are smaller, as are lots in the lower portion of the Del Mar Valley Area. Lots in the Hacienda Drive Area are larger, but so too are lots in the upper areas of the Del Mar Valley Area. Thus, if lot density were a determinant of special benefit conferred on a parcel, the division of zones selected by the engineer of work is illogical. The upper parts of the Del Mar Valley Area should be treated no differently than the Hacienda Drive Area; the lot sizes appear to be no different. In fact, many of the lots in the upper Del Mar Valley Area appear to be larger than lots in the Hacienda Drive Area, so it would appear that, under the Town's logic, the Hacienda Drive Area is actually subsidizing the upper reaches of the Del Mar Valley Area. In short, the manner in which the engineer of work divided the Supplemental District into three zones of benefit appears to be arbitrary, even assuming lot density has some bearing on proportionate special benefit. The engineer provided an inadequate justification for the particular boundaries delineating the benefit zones.

B. Specially Benefited Properties Excluded from the Supplemental District

Section 4, subdivision (a) of article XIII D provides that an agency proposing to "levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed." As contemplated by this constitutional provision, the boundaries of an assessment district are dictated by a determination of which properties receive special benefits. If a property receiving a special benefit is excluded from the assessment district, then the assessments on properties included in the district will necessarily exceed the proportional special benefit conferred on those properties. In such a case, the properties in the assessment district effectively subsidize the special benefit enjoyed by properties outside the district that pay no assessment.

Here, the Town excluded certain properties from the Supplemental District even though they receive special benefits. Specifically, the engineer of work saw fit to exclude two streets from the Supplemental District—Tanfield Road and Acacia Court. These streets are cul-de-sacs that extend off of Hacienda Drive. Tanfield Road has overhead utility lines and is not part of the undergrounding project. Acacia Court already has its utility lines placed underground and is also not part of the project. Based on maps contained in the record on appeal, it appears that nine parcels are located on Tanfield Road, while seven parcels are located on Acacia Court. There appears to be no dispute that both Tanfield Road and Acacia Court receive their electrical, telephone, and cable utilities from Hacienda Drive.
Initially, the engineer of work assigned no benefit points to the Tanfield Road and Acacia Court properties. However, in the final engineer's report, the engineer of work identified a parcel at 1 Tanfield Road, located at the corner of Tanfield Road and Hacienda Drive, that receives a special benefit from the proposed undergrounding project. The engineer determined that the property has a "secondary access point" on Hacienda Drive and that overhead wires crossing a corner of the property are slated to be removed during the undergrounding project. The engineer's report assigned the property half the benefit for aesthetics and half the benefit for safety, resulting in one full benefit point. Because the property was not included in the Supplemental District, the assessment that would have otherwise been applied to the property was deducted and "not assessed to the rest of the properties in the [Supplemental] District." In other words, the engineer of work deducted the cost of the proportional special benefit conferred on 1 Tanfield Road in order to prevent the properties in the Supplemental District from subsidizing that property's special benefit and paying correspondingly higher assessments as a result.

Our independent review indicates that all of the properties on Tanfield Road and Acacia Court should have been assigned special benefits, if the engineer of work's methodology had been applied consistently. Those properties are situated no differently than the properties on Noche Vista Lane and Geldert Court which, as previously discussed, are in areas where the utilities have already been placed underground. In the case of Noche Vista Lane, a cul-de-sac off of Hacienda Drive, and Geldert Court, a cul-de-sac off of Geldert Lane, the engineer of work determined the properties in those areas received half the benefit from service reliability and half the benefit from improved safety. The engineer reasoned that "their small systems are completely surrounded by and dependent on the larger overall system that is to be undergrounded." As a result, the properties benefit from increased service reliability. With respect to the safety benefit, the engineer reasoned that "ingress and egress from their property is directly affected by overhead lines and poles."

This reasoning applies equally to the excluded Tanfield Road and Acacia Court properties. The properties on Acacia Court, in particular, share the same reliability and safety benefits as the properties on Noche Vista Lane and Geldert Court.[16] Although the utilities on Acacia Court are already placed underground, its system is completely dependent upon the larger system that is being undergrounded. Further, ingress and egress from the property is through Hacienda Drive and is therefore directly affected by overhead lines and poles. If the engineer of work's methodology had been consistently applied, the seven parcels on Acacia Court should have received one benefit point each, composed of one-half of the reliability benefit and one-half of the service benefit. The same reasoning should also apply to the nine or so parcels on Tanfield Road, even though they will not have their utilities placed underground. They will enjoy increased service reliability because their system is completely dependent upon the larger overall system that is being undergrounded. There is less chance that downed power lines in the Supplemental District will cause a service interruption in their neighborhood. Moreover, they enjoy a safety benefit because ingress and egress to their cul-de-sac is through areas where overhead utilities will be placed underground.

Property owners in the Supplemental District are effectively subsidizing special benefits received by properties on Tanfield Road and Acacia Court. The exclusion of those areas from the Supplemental District causes the assessments to exceed the proportionate special benefit conferred on each parcel. This outcome violates the proportionality requirement of article XIII D, section 4, subdivision (a).

At oral argument, counsel for the Town acknowledged there may be imperfections in the way the Supplemental District is drawn, such as the exclusion of Tanfield Road and Acacia Court. Counsel nonetheless urged that we uphold the validity of the Supplemental District in spite of its imperfections, reasoning in effect that no special assessment district could survive scrutiny if courts expected rigorous mathematical precision in the calculation and apportionment of assessments. We agree with the Town in principle. Any attempt to classify special benefits conferred on particular properties and to assign relative weights to those benefits will necessarily involve some degree of imprecision. For example, in this case the engineer assigned equal weight to the three special benefits—aesthetics, service reliability,
and safety. While this formula may be a legally justifiable approach to measuring and apportioning special benefits, it is not necessarily the only valid approach. Whichever approach is taken to measuring and apportioning special benefits, however, it must be both defensible and consistently applied.

Here, the analysis adopted by the engineer was applied inconsistently. The result is that parcels on Noche Vista Lane were assessed for the Supplemental District while parcels on Acacia Court—which should have been treated the same as those on Noche Vista Lane—were not assessed at all. This disparity is not the product of excusable imprecision but instead reflects an inconsistent approach to imposing assessments. Taken together with the fact that assessments amounts are based on relative cost instead of proportionate special benefit, the flaws in the Supplemental District are simply too great to disregard as mere "imperfections."

In summary, because differences in assessments are primarily driven by cost differentials, the assessments are disproportionate, with parcels receiving the same special benefits assigned substantially different assessment amounts. Additionally, because certain parcels that receive a special benefit were excluded from the Supplemental District, the assessments exceed the proportional special benefit conferred on each parcel in the Supplemental District. Accordingly, we conclude the Supplemental District violates the proportionality requirement of article XIII D. In light of this conclusion, we need not reach the other arguments appellants raise.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to enter a new judgment granting appellants' petition for writ of mandate. The trial court shall issue a writ vacating the Town of Tiburon's Resolution No. 24-2006 and invalidating the assessments imposed by the Del Mar Valley Utility Undergrounding Supplemental Assessment District. Appellants shall recover their costs on appeal.

We concur:

Siggins, J.

Jenkins, J.

[1] Certain parcels with no potential for development were considered exempt from the assessment, such as parcels too small to be developed or those designated as open space.

[2] The plaintiff property owners sought to invalidate the resolution establishing the Original District on a number of grounds, including that the assessment violated article XIII D. (Bonander v. Town of Tiburon, supra, 46 Cal.4th at p. 650.) The trial court dismissed the complaint on procedural grounds, concluding that the plaintiffs had failed to comply with requirements applicable to validation actions (Code Civ. Proc., § 860 et seq.). (Bonander v. Town of Tiburon, supra, at p. 652.) After this court affirmed the dismissal, the Supreme Court accepted review of the matter. (Ibid.) The Supreme Court ultimately held that a property owner who contests an individual assessment levied under the Municipal Improvement Act of 1913 is not required to comply with procedural requirements applicable to validation actions. (Bonander v. Town of Tiburon, supra, at p. 659.) Accordingly, the trial court's judgment of dismissal was reversed and the plaintiffs were allowed to proceed with their challenge to the Original District. The record before this court does not disclose whether the trial court in that action has ruled on the challenge to the Original District or, if so, how the court ruled.

[3] The Town adopted the resolution of intention without requiring petitions of support from at least 60 percent of the parcels in the proposed Supplemental District. The Town reasons that the 70 percent favorable vote on the Original
District obviated the need for a separate petition to demonstrate support among property owners for pursuing the project.

[4] Streets and Highways Code section 10426 provides: "The supplemental assessment shall be made and collected in the same manner, as nearly as may be, as the first assessment. [¶] Subsequent supplemental assessments may be made, if necessary, to pay for the improvement. At the hearing the legislative body may confirm, modify, or correct the supplemental assessment. The decision of the legislative body thereon is final."

[5] For a parcel designated single family residential in the Hacienda Drive Area that received three benefit points, the proposed total assessment for the Supplemental District declined from $20,527.68 to $20,331.24, or a reduction of $196.44. Because the engineer of work's assessment methodology considered each benefit zone separately for purposes of allocating costs and calculating special benefits, the proposed assessments in the Del Mar Valley Area and the West Hawthorne Drive area were unaffected.

[6] The combined assessment from the Original District and the Supplemental District for a single family residential parcel receiving three benefit points was $20,268.19 in the West Hawthorne Drive Area, $36,529.25 in the Del Mar Valley Area, and $51,477.86 in the Hacienda Drive Area.

[7] Two of the appellants, Jimmie D. Bonander and Frank Mulberg, are also parties to the lawsuit seeking to invalidate the Original District.

[8] On the court's own motion, we take judicial notice of the 1996 ballot pamphlet materials associated with Proposition 218, including the summary prepared by the Attorney General, the Legislative Analyst's analysis, and the ballot arguments for and against the initiative. (See *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1204, fn. 25.)

[9] Because the trial court ruled on appellants' writ claims before the Supreme Court decided *Silicon Valley*, the lower court did not independently review whether the Supplemental District satisfies article XIII D. Instead, the trial court applied a deferential standard of review, relying on case law later expressly disapproved by the Supreme Court in *Silicon Valley*. (*Silicon Valley, supra,* 44 Cal.4th at p. 450, fn. 6.) Although the trial court applied what turned out to be an improper standard of review to appellants' writ claims, no purpose would be served by remanding the matter to the trial court for reconsideration under the appropriate standard because our review is de novo and affords no deference to the trial court's determinations in any event. (But see *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 659-660 [reversal required where trial court failed to exercise independent judgment and appellate review limited to whether substantial evidence supports trial court's conclusions].)

[10] We do not suggest that our consideration of the Original District administrative record permits us to entertain a challenge to the validity of the Original District in this appeal, which is limited to a consideration of whether the Supplemental District complies with article XIII D and other applicable law. The Original District administrative record is relevant only insofar as it supports or undermines a claim that the Supplemental District satisfies the substantive benefit and proportionality requirements of article XIII D. Nevertheless, we acknowledge that this appeal may have a bearing on the separate lawsuit challenging the Original District to the extent that litigation remains pending and raises the proportionality issue that is dispositive in this appeal.

[11] The analysis prepared by the Legislative Analyst for Proposition 218 included as examples of "[t]ypical assessments that provide general benefits" "fire, park, ambulance, and mosquito control assessments." (Ballot Pamp., Gen. Elec., supra, analysis of Prop. 218 by legislative analyst, p. 73.)
Appellants assert—without support—that some properties in the Supplemental District that are not adjacent to poles and overhead wires still received a benefit point for aesthetics. Because appellants have not pointed to any evidence in the record to support this assertion, we disregard it.

As explained below in section IV.B, we agree with appellants that some specially benefited parcels were not included in the Supplemental District. That problem—excluding specially benefited parcels from an assessment district—is distinct from the issue of distinguishing between general and special benefits.

We are aware that the ballot materials for Proposition 218 explained that one purpose of the measure was to ensure that "no property owner's assessment is greater than the cost to provide the improvement or service to the owner's property." (Ballot Pamp., Gen. Elec., supra, analysis of Prop. 218 by legislative analyst, p. 74.) We do not read this statement to suggest that individual assessments may be determined based on the actual construction cost associated with a particular property. Instead, the "cost to provide the improvement" to a particular property necessarily takes into account the project's costs as a whole, apportioned to that property in an equitable manner according to special benefit. This interpretation is consistent with the express terms of article XIII D as well as other statements in the ballot materials, where it was clarified that "[a]ssessments are limited to the special benefit conferred." (Ballot Pamp., Gen. Elec., supra, Attorney General's summary of Prop. 218, p. 72.)

The Town complains that aggregating costs for an entire improvement project causes low-cost areas to subsidize high-cost areas. This is not necessarily so. It may be that the proportional special benefit conferred on properties in the area with lower construction costs is less than that conferred on properties in the area with higher construction costs, resulting in proportionally larger assessments in the high-cost area. In any event, because the low-cost properties cannot enjoy the benefits of the improvement project without inclusion of the high-cost properties in the district, it is only fair that the entirety of the assessable construction cost is spread among all properties in proportion to special benefits.

Although the final engineer's report purports to justify the exclusion of Acacia Court from the Supplemental District on the ground its utility poles and lines have already been placed underground, the report contains no explanation as to why that street is treated differently from Noche Vista Lane or Geldert Court, which have also had utility lines and poles placed underground. One possible explanation for the differential treatment is that Noche Vista Lane is completely surrounded by the Supplemental District, whereas Tanfield Road and Acacia Court are not surrounded by the Supplemental District but instead are situated at its border. This explanation fails to justify the differential treatment, however, because the safety and service reliability benefits do not turn on whether a property is "surrounded" by other properties included in the district. Instead, the relevant criteria in assigning these benefits are (1) the source of the utilities supplying electrical, cable, and telephone services to the area, and (2) whether ingress and egress to the property is through areas that will have their utilities placed underground. For all practical purposes, Tanfield Road and Acacia Court are "surrounded" by the Supplemental District because they receive their utilities from the Supplemental District and ingress and egress is through the Supplemental District.

We deny as moot appellants' request for judicial notice of the legislative history of Government Code section 53753.

186 Cal.Rptr.3d 362

CAPISTRANO TAXPAYERS ASSOCIATION, INC., Plaintiff and Respondent,

v.
I. INTRODUCTION

Southern California is a "semi-desert with a desert heart." Visionary engineers and scientists have done a remarkable job of making our home habitable, and too many of us south of the Tehachapis never give a thought to its remarkable reclamation. In his brilliant — if opinionated — classic Cadillac Desert, the late Marc Reisner laments how little appreciation there is of "how difficult it will be just to hang on to the beachhead they have made." In this case we deal with parties who have an acute appreciation of how tenuous the beachhead is, and how desperately we all must fight to protect it. But they disagree about what steps are allowable — or required — to accomplish that task. We are called upon to determine not what is the right — or even the more reasonable — approach to the beachhead's preservation, but what is the one chosen by the state's voters.

We hope there are future scientists, engineers, and legislators with the wisdom to envision and enact water plans to keep our beloved Cadillac Desert habitable. But that is not the court's mandate. Our job — and it is daunting enough — is solely to determine what water plans the voters and legislators of the past have put in place, and to determine whether the trial court's rulings complied with those plans.
We conclude the trial court erred in holding that Proposition 218 does not allow public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water — such as building a recycling plant. Its findings were that future water provided by the improvement is not immediately available to customers. (See Cal. Const., art. XIII D, § 6, subd. (b)(4) [no fees "may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question"]). But, as applied to water delivery, the phrase "a service" cannot be read to differentiate between recycled water and traditional, potable water. Water service is already "immediately available" to all customers, and continued water service is assured by such capital improvements as water recycling plants. That satisfies the constitutional and statutory requirements.

However, the trial court did not err in ruling that Proposition 218 requires public water agencies to calculate the actual costs of providing water at various levels of usage. Article XIII D, section 6, subdivision (b)(3) of the California Constitution, as interpreted by our Supreme Court in Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 221 [46 Cal.Rptr.3d 73, 138 P.3d 220] (Bighorn) provides that water rates must reflect the "cost of the service attributable" to a given parcel. While tiered, or inclined rates that go up progressively in relation to usage are perfectly consonant with article XIII D, section 6, subdivision (b)(3) and Bighorn, the tiers must still correspond to the actual cost of providing service at a given level of usage. The water agency here did not try to calculate the cost of actually providing water at its various tier levels. It merely allocated all its costs among the price tier levels, based not on costs, but on pre-determined usage budgets. Accordingly, the trial court correctly determined the agency had failed to carry the burden imposed on it by another part of Proposition 218 (art. XIII D, § 6, subd. (b)(5)) of showing it had complied with the requirement water fees not exceed the cost of service attributable to a parcel. That part of the judgment must be affirmed.

II. FACTS

Sometimes cities are themselves customers of a water district, the best example in the case law being the City of Palmdale, which successfully invoked Proposition 218 to challenge the rates it was paying to a water district. (See City of Palmdale v. Palmdale Water Dist. (2011) 198 Cal.App.4th 926 [131 Cal.Rptr.3d 373] (Palmdale)) And sometimes cities are, as in the present case, their own water district. As amicus curiae Association of California Water Agencies (ACWA) points out, government water suppliers in California are a diverse lot that includes municipal water districts, irrigation districts, county water districts, and, in some cases, cities themselves. To focus on its specific role in this case as a municipal water supplier — as distinct from its role as the provider of municipal services which consume water such as parks, city landscaping or public golf courses — we will refer to appellant City of San Juan Capistrano as "City Water."

In February 2011, City Water adopted a new water rate structure recommended by a consulting firm. The way City Water calculated the new rate structure is well described in City Water's supplemental brief of November 25, 2014. City Water followed a pattern generally recommended by a manual used by public water agencies throughout the western United States known as the "M-1" manual. It first ascertained its total costs, including things like debt service on previous infrastructural improvements. It then

identified components of its costs, such as the cost of billing and the cost of water treatment. Next it identified classes of customers, differentiating, for example, between "regular lot" residential customers and "large lot" residential customers, and between construction customers and agricultural customers. Then, in regard to each class, City Water
calculated four possible budgets of water usage, based on historical data of usage patterns: low, reasonable, excessive and very excessive.

The four budgets were then used as the basis for four distinct "tiers" of pricing. For residential customers, tier 1, the low budget, was assumed to be exclusively indoor usage, based on World Health Organization guidelines concerning the "minimum quantity of water required for survival," with adjustments for things like "low-flush toilets and other high-efficiency appliances." Tier 2, the reasonable budget, included an outdoor allocation based on "typical landscapes," and assumed "use of native plants and drought-tolerant plants." The final two tiers were based on budgets of what City Water considers excessive usages of water or overuse volumes. Using these four budgets of consumption levels, City Water allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs, and thus the four-tier system would be, taken as a whole, revenue neutral, and City Water would not make a profit on its pricing structure. City Water did not try to calculate the incremental cost of providing water at the level of use represented by each tier, and in fact, at oral argument in this court, admitted it effectively used revenues from the top tiers to subsidize belowcost rates for the bottom tier.

Here is the rate structure adopted, as applied to residential customers:

<table>
<thead>
<tr>
<th>Tier</th>
<th>Usage</th>
<th>Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Up to 6 ccf[7]</td>
<td>$2.47 per ccf</td>
</tr>
<tr>
<td>2</td>
<td>7 to 17 ccf[8]</td>
<td>$3.29 per ccf</td>
</tr>
<tr>
<td>3</td>
<td>18 to 34 ccf[9]</td>
<td>$4.94 per ccf</td>
</tr>
<tr>
<td>4</td>
<td>Over 34 ccf[10]</td>
<td>$9.05 per ccf</td>
</tr>
</tbody>
</table>

City Water obtains water from five separate sources: a municipal groundwater recovery plant, the Metropolitan Water District, five local groundwater wells, recycled water wells, and the nearby Moulton Niguel Water District. With the exception of water obtained from the Metropolitan Water District, City Water admits in its briefing that the record does not contain any breakdown as to the relative cost of each source of supply.

The breakdown of cost from each of its various sources of water is, in percentage terms:

<table>
<thead>
<tr>
<th>Source</th>
<th>Percent of Supply</th>
<th>Cost to Supply</th>
</tr>
</thead>
<tbody>
<tr>
<td>Groundwater Recovery Plant</td>
<td>51.95%</td>
<td>Not ascertained</td>
</tr>
<tr>
<td>Metropolitan Water District</td>
<td>28.54%</td>
<td>$1,007 per-acre foot[11]</td>
</tr>
<tr>
<td>Local Wells</td>
<td>7.79%</td>
<td>Not ascertained</td>
</tr>
<tr>
<td>Recycled Wells</td>
<td>6.11%</td>
<td>Not ascertained</td>
</tr>
<tr>
<td>Moulton Niguel Water District</td>
<td>5.61%</td>
<td>Not ascertained</td>
</tr>
</tbody>
</table>
Various percentages of City Water's overhead — or fixed costs in the record — were allocated in percentages to some of the sources of water, so the price per tier reflected a percentage of fixed costs and costs of some sources.

This chart reflects those allocations:

<table>
<thead>
<tr>
<th>Tier</th>
<th>Price</th>
<th>Percentage Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$2.47</td>
<td>$1.78 to fixed costs, $0.62 to wells</td>
</tr>
<tr>
<td>2</td>
<td>$3.29</td>
<td>$1.78 to fixed, $1.46 to wells</td>
</tr>
<tr>
<td>3</td>
<td>$4.94</td>
<td>$1.53 to fixed, $0.69 to wells, $0.17 to the Metropolitan Water District, and $2.50 to the groundwater recovery plant</td>
</tr>
<tr>
<td>4</td>
<td>$9.05</td>
<td>0 to fixed, 0 to wells, $0.53 to groundwater recovery plant, $2.53 to recycled, $3.32 to the Metropolitan Water District, and $2.64 to penalty set aside</td>
</tr>
</tbody>
</table>

There is no issue in this case as to the process of the adoption of the new rates, such as whether they should have been voted on first under the article XIII C part of Proposition 218. For purposes of this appeal it is enough to say City Water adopted them.\[12\]

In August 2012, the Capistrano Taxpayers Association, Inc. (CTA), filed this action, challenging City Water's new rates as violative of Proposition 218, specifically article XIII D, section 6, subdivision (b)(3)'s limit on fees to the "cost of the service attributable to the parcel." After a review of the administrative record and hearing, the trial court found the rates were not compliant with article XIII D, noting it "could not find any specific financial cost data in the A/R to support the substantial rate increases" in the progressively more expensive tiers. In particular the trial judge found a lack of support for the inequality between the tiers.

The statement of decision also concluded that the imposition of charges for recycling within the rate structure violated the "immediately available" provision in article XIII D, section 6, subdivision (b)(4), because recycled water is not used by residential parcels. (City Water concedes that when the recycling plant comes on line, it will supply water to some, but not all, of its customers. Residences, for example, are not typically plumbed to receive non-potable recycled water.) City Water has timely appealed from the declaratory judgment, challenging both determinations.

III. DISCUSSION

A. Capital Costs and Proposition 218

We first review the constitutional text. Article XIII D, section 6, subdivision (b)(4) provides: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4."

The trial court ruled City Water had violated this provision by "charging certain ratepayers for recycled water that they do not actually use and that is
not immediately available to them." The trial judge specifically found, in his statement of decision, that "City [Water] imposed a fee on all ratepayers for recycled water services and delivery of recycled water services, despite the fact that not all ratepayers used recycled water or have it immediately available to them or would ever be able to use it."

(1) But the trial court assumed that providing recycled water is a fundamentally different kind of service from providing traditional potable water. We think not. When each kind of water is provided by a single local agency that provides water to different kinds of users, some of whom can make use of recycled water (for example, cities irrigating parkland) while others, such as private residences, can only make use of traditional potable water, providing each kind of water is providing the same service. Both are getting water that meets their needs. Non-potable water for some customers frees up potable water for others. And since water service is already immediately available to all customers of City Water, there is no contravention of subdivision (b)(4) in including charges to construct and provide recycled water to some customers.

On this point, Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586 [163 Cal.Rptr.3d 243] (Griffith) is instructive. Griffith involved an augmentation fee on parcels that had their own wells. An objection to the augmentation fee by the well owners was that the fee included a charge for delivered water, even though some of the properties were outside the area and not actually receiving delivered water. The Griffith court said that even if some parcel owners were not receiving delivered water, revenues from the augmentation fee still benefited those parcels, since they funded "activities required to prepare or implement the groundwater management program for the common benefit of all water users." (Id. at p. 602.) In Griffith the augmentation fee was thus intended to fund aggressive capital investments to increase the general supply of water, including some customers receiving delivered water when other customers did not. It was undeniable that by funding delivered water to some customers water was freed up for all customers. (See Griffith, supra, 220 Cal.App.4th at p. 602; accord, Paland v. Brooktrails Township Community Services Dist. Bd. of Directors (2009) 179 Cal.App.4th 1358 [102 Cal.Rptr.3d 270] [customer in rural area who periodically went inactive still had water immediately available to him].)

In the present case, there is a Government Code definition of water which shows water to be part of a holistic distribution system that does not distinguish between potable and non-potable water: "'Water' means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source." (Gov. Code, § 53750, subd. (m).)

A recycling plant, like other capital improvements to increase water supply, obviously entails a longer timeframe than a residential customer's normal one-month billing cycle. As shown in Morgan v. Imperial Irrigation Dist. (2014) 223 Cal.App.4th 892 [167 Cal.Rptr.3d 687], the timeframe for the calculation of the true cost of water can be, given capital improvements, quite long. (See id. at p. 900 [costs amortized over a six-year period].) And, as pointed out by amicus curiae Howard Jarvis Taxpayers Association, Government Code section 53756 contemplates timeframes for water rates that can be as much as five years. There is no need, then, to conclude that rates to pay for a recycling plant have to be figured on a month-to-month basis.

(2) The upshot is that within a five-year period, a water agency might develop a capital-intensive means of production of what is effectively new water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced. As amicus curiae Mesa Water District points out, Water Code section 31020 gives local water agencies the power to do acts to "furnish sufficient water in the district for any present or future beneficial use." (Wat. Code, § 31020, italics added.)
The trial court thus erred in concluding the inclusion of charges to fund a recycling operation was, by itself, a violation of subdivision (b)(4).

(3) However, the record is insufficient to allow us to determine at this level whether residential ratepayers who only use six ccf or less — what City Water considers the superconservers — are being required to pay for recycling facilities that would not be necessary but for above-average consumption. Proposition 218 protects lower-than-average users from having to pay rates that are above the cost of service for them because those rates include capital investments their levels of consumption do not make necessary. We note, in this regard, that in Palmdale, one of the reasons the court there found the tiered pricing structure to violate subdivision (b)(3) was the perverse effect of affirmatively penalizing conservation by some users. (See Palmdale, supra, 198 Cal.App.4th at pp. 937-938; accord, Brydon, supra, 24 Cal.App.4th at p. 202 ["To the extent that certain customers overutilize the resource, they contribute disproportionately to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water."]).

There is a case with an analogous lacuna, the Supreme Court case of California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421 [121 Cal.Rptr.3d 37, 247 P.3d 112] (Farm Bureau). In Farm Bureau, the record was also unclear as to the issue of apportionment between a regulatory activity's fees and its costs. (Id. at p. 428.) Accordingly, the high court directed the matter to be remanded to the trial court for such necessary findings.

That seems to us the appropriate way to complete the record in our case. Following the example of Farm Bureau, we remand the matter for further findings on whether charges to develop City Water's nascent recycling operation have been improperly allocated to users whose levels of consumption are so low that they cannot be said to be responsible for the need for that recycling.

B. Tiered Pricing and Cost of Service

1. Basic Analysis

We begin, as we did with the capital cost issue, with the text of the Constitution. In addition to subdivision (b)(3), the main provision at issue in this case, we also quote subdivision (b)(1), because it throws light on subdivision (b)(3). Subdivision (b) describes "Requirements for Existing, New or Increased Fees and Charges," and provides that, "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] ... [¶] (3) 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." (Italics added.)

In addition to these two substantive limits on fees, article XIII D, section 6, subdivision (b)(5) puts an important procedural limit on a court's analysis in regard to the burden of proof: "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." The trial court found City Water had failed to carry its burden of proof under subdivision (b)(5) of showing its 2010 tiered water fees were proportional to the cost of service attributable to each customer's parcel as required by subdivision (b)(3).

As respondent CTA quickly ascertained, the difference between tier 1 and tier 2 is a tidy 1/3 extra, the difference between tier 2 and 3 is a similarly exact 1/2 extra, and the difference between tier 3 and tier 4 is precisely 5/6ths extra. This fractional precision suggested to us that City Water did not
In voluminous briefing by City Water and its amici curiae allies, two somewhat overlapping core thoughts emerge: First, they contend that when it comes to water, local agencies do not have to — or should not have to — calculate the cost of water service at various incremental levels of usage because the task is simply too complex and thus not required by our Constitution. The second core thought is that even if agencies are required to calculate the actual costs of water service at various tiered levels of usage, such a calculation is necessarily, as City Water's briefing contends, a legislative or quasilegislative, discretionary matter, largely insulated from judicial review. We cannot agree with either assertion.

(4) The appropriate way of examining the text of Proposition 218 has already been spelled out by the Supreme Court in Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448 [79 Cal.Rptr.3d 312, 187 P.3d 37] (Silicon Valley): "We ''must enforce the provisions of our Constitution and "may not lightly disregard or blink at ... a clear constitutional mandate."'" [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.]

(5) Proposition 218 specifically states that '[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.' (Ballot Pamp., [Gen. Elec. (Nov. 5, 1996)] text of Prop. 218, § 5, p. 109; see Historical Notes, [2A West's Ann. Const. (2008 supp.) foll. Cal. Const., art. XIII C.] at p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent." (Silicon Valley, supra, 44 Cal.4th at p. 448, italics added.)

(6) If the phrase "proportional cost of the service attributable to the parcel" (italics added) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really is an ascertainable cost of service that can be attributed to a specific — hence that little word "the" — parcel. Otherwise, the cost of the service language would be meaningless. Why use the phrase "cost of the service to the parcel" if a local agency does not actually have to ascertain a cost of service to that particular parcel?

(7) The presence of subdivision (b)(1) of section 6, article XIII D, just a few lines above subdivision (b)(3), confirms our conclusion. Constitutional provisions, particularly when enacted in the same measure, should be construed together and read as a whole. (Bighorn, supra, 39 Cal.4th at p. 228.) The "proportional cost of the service" language from subdivision (b)(3) is part of a general subdivision (b), and there is an additional reference to costs in subdivision (b)(1). Subdivision (b)(1) provides that the total revenue from fees "shall not exceed the funds required to provide the property related service." (Italics added.)

(8) It seems to us that to comply with the Constitution, City Water had to do more than merely balance its total costs of service with its total revenues — that is already covered in subdivision (b)(1). To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since City Water did not try to calculate the actual costs of service for the various tiers, the trial court's ruling on tiered pricing must be upheld simply on the basis of the constitutional text.
We find precedent for our conclusion in the Palmdale case. There, a water district obtained its water from two basic sources: 60 percent from a reservoir and the state water project, and the 40 percent balance from the district's own area groundwater wells. Most (about 72 percent) of the water went to single-family residences, with irrigation users accounting for 5 percent of the distribution. (Palmdale, supra, 198 Cal.App.4th at p. 928.) For the previous five years, the district had spent considerable money to upgrade its water treatment plant ($56 million) but revenues suffered from a "decline in water sales," so its reserves were depleted. The district wanted to issue more debt for "future capital projects." (Id. at pp. 928-929.) Relying on consultants, the water district adopted a new, five-tiered rate structure, which progressively increased rates (for the top four tiers) for three basic categories of customers: residences, businesses, and irrigation projects. The tiered budgets for irrigation users were more stringent than for residential and commercial customers. (Id. at p. 930.) The way the tiers operated, all three classes of customers got a tier 1 budget, but irrigation customers had less leeway to increase usage without progressing to another tier. Thus, for example, the tier 2 rates for residential customers did not kick in until 125 percent of the budget, but tier 2 rates for irrigation customers kicked in at 110 percent of the budget. The tiered rate structure was itself based on a monthly allocated water budget. (Ibid.)

Two irrigation users — the city itself and its redevelopment agency — sought to invalidate the new rates. The trial court had the advantage of the newly decided Supreme Court opinion in Silicon Valley, which had clarified the standard of review for Proposition 218 cases. There, the high court made it clear that in Proposition 218 challenges to agency action, the agency had to bear the burden of proof of demonstrating compliance with Proposition 218, and both trial and reviewing courts are to apply an independent review standard, not the traditional, deferential standards usually applicable in challenges to governmental action. (Silicon Valley, supra, 44 Cal.4th at p. 448.) More directly, said Silicon Valley, it is not enough that the agency have substantial evidence to support its action. That substantial evidence must itself be able to withstand independent review. (See id. at pp. 441, 448-449 [explaining why substantial evidence to support the agency action standard was too deferential in light of Prop. 218's liberal construction in favor of taxpayer feature].)

With this in mind, the Palmdale court held the district had failed to carry its burden of showing compliance with Proposition 218. (Palmdale, supra, 198 Cal.App.4th at pp. 937-938.) The core of the Palmdale court's reasoning was twofold. First, there was discrimination against irrigation-only customers, giving an unfair price advantage to those customers in other classes who were inclined to inefficiently use — or, for that matter, waste — outdoor water. (The opinion noted the perfect exemplar of water waste: hosing off a parking lot.) Thus an irrigation user, such as a city providing playing fields, playgrounds and parks, was disproportionately impacted by the inequality in classes of users. (Palmdale, supra, 198 Cal.App.4th at p. 937.) Second, the discrimination was gratuitous. The district's own consultants had proposed a "cost of service" option that they considered Proposition 218 compliant, but the district did not choose it because it preferred a "fixed" option providing better "rate stability." (Palmdale, supra, 198 Cal.App.4th at pp. 937, 929.) In fact the choice had the perverse effect of entailing a "weaker signal for water conservation" for "small customers who conserve water." (Id. at pp. 929, 937, some italics added.)

We recognize that Palmdale was primarily focused on inequality between classes of users, as distinct from classes of water rate tiers. But, just as in Palmdale where the district never attempted to justify the inequality "in the cost of providing water" to its various classes of customers at each tiered level (Palmdale, supra, 198 Cal.App.4th at p. 937), so City Water has never attempted to justify its price points as based on costs of service for those tiers. Rather, City Water merely used what it thought was its legislative, discretionary power to attribute percentages of total costs to the various tiers. While an interesting conversation might be had about whether this was reasonable or wise, we can find no room for arguing its constitutionality. It does not comply with the mandate of the voters as we understand it.
2. City Water's Arguments

a. Article X, Section 2

In supplemental briefing prior to oral argument, this court pitched a batting practice fastball question to City Water, intended to give the agency its best chance of showing that the prices for its various usage tiers, particularly the higher tiers (e.g., $4.94 for all usage over 17 ccf to 34 ccf, and $9.05 for usage over 34 ccf) corresponded with its actual costs of delivering water in those increments. We were hoping that, maybe, we had missed something in the record that would demonstrate the actual cost of delivering water for usage over 34 ccf per month really is $9.05 per ccf, and City Water would hit our question into the upper deck.

What we got back was a rejection of the very idea behind the question. As would later be confirmed at oral argument, City Water's answer was that there does not have to be a correlation between tiered water prices and the cost of service. Its position is that the "cost-of-service principle of Proposition 218" must be "balance[d]" against "the conservation mandate of article X, section 2." In short, City Water justifies the lack of a correlation between the marginal amounts of water use represented by its various tiers and the actual cost of supplying that water by saying the lack of correlation is excused by the subsidy for low usage represented by tier 1, on the theory that subsidized tier 1 rates are somehow required by article X, section 2. While we agree that low-cost water rates do not, in and of themselves, offend subdivision (b)(3) (see Morgan v. Imperial Irrigation Dist., supra, 223 Cal.App.4th at p. 899), we cannot adopt City Water's constitutional extrapolation of that point.

We quote the complete text of article X, section 2 in the footnote. Article X, section 2 was enacted in 1928 in reaction to a specific Supreme Court case.

1509 *1509 decided two years earlier, Herminghaus v. South. California Edison Co. (1926) 200 Cal. 81 [252 P. 607] (Herminghaus). The Herminghaus decision, as Justice Shenk wrote in his dissent there, allowed downstream riparian landowners — basically farmers owning land adjacent to a river — to claim 99 percent of the flow of the San Joaquin River even though they were actually using less than 1 percent of that flow. To compound that anomaly, the downstream riparian landowners' claims came at the expense of the efforts of an electric utility company to generate electricity for general, beneficial use by building reservoirs at various points upstream on the river. (See Herminghaus, at p. 109.) In the process of upholding the downstream landowners' "riparian rights" over the rights of the electric company to use the water to make electricity, the Herminghaus majority invalidated legislation aimed at preserving water in the state for a reasonable beneficial use, thereby countenancing what Justice Shenk perceived to be a plain waste of good water. (Herminghaus, supra, 200 Cal. at p. 123 (dis. opn. of Shenk, J.).) As our Supreme Court would describe Herminghaus about half a century later: "we held not only that riparian rights took priority over appropriations authorized by the Water Board, a point which had always been clear, but that as between the riparian and the appropriator, the former's use of water was not limited by the doctrine of reasonable use." (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 442 [189 Cal.Rptr. 346, 658 P.2d 709].)

The voters overturned Herminghaus in the 1928 election by adopting article X, section 2, then denoted article XIV, section 3. (See Gin S. Chow v. City of Santa Barbara (1933) 217 Cal. 673, 699 [22 P.2d 5] (Gin Chow).) In the 1976 constitutional revision, old article XIV, section 3, was recodified verbatim as article X, section 2. (See Gray, "In Search of Bigfoot": The Common Law Origins of Article X, Section 2 of the California Constitution (1989) 17 Hastings Const. L.Q. 225 (hereinafter Origins of Article X, Section 2).)

The purpose of article X, section 2 was described in Gin Chow, the first case to reach the Supreme Court in the wake of the adoption of what is now
article X, section 2, in 1928. Justice Shenk, having been vindicated by the voters on the point of a perceived need to prevent the waste of water by letting it flow to the sea, summarized the new amendment in terms emphasizing beneficial use: "The purpose of the amendment was stated to be 'to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea', and is an effort 'on the part of the state, in the interest of the people of the state, to conserve our waters' without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners. That such purpose is reflected in the language of the amendment is beyond question. Its language is plain and unambiguous. In the main it is an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource, and thereby render available for beneficial use that portion of the waters of our rivers and streams which, under the old riparian doctrine, was of no substantial benefit to the riparian owner and the conservation of which will result in no material injury to his riparian right, and without which conservation such waters would be wasted and forever lost." (Gin Chow, supra, 217 Cal. at p. 700.)

The emphasis in the actual language of article X, section 2 is thus on a policy that favors the beneficial use of water as against the waste of water for nonbeneficial uses. That is what one would expect, consistent with both Justice Shenk's dissent in Herminghaus and his majority opinion in Gin Chow. (See Gray, supra, Origins of Article X, Section 2, 17 Hastings Const. L.Q. at p. 263 [noting emphasis in text on beneficial use].) The word "conservation" is used in the introductory sentence of the provision in the context of promoting beneficial uses: "the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." (Origins of Article X, Section 2, at p. 225, italics added.)

But nothing in article X, section 2, requires water rates to exceed the true cost of supplying that water, and in fact pricing water at its true cost is compatible with the article's theme of conservation with a view toward reasonable and beneficial use. (See Palmdale, supra, 198 Cal.App.4th at pp. 936-937 [reconciling art. X, § 2 with Prop. 218]; accord, Brydon, supra, 24 Cal.App.4th at p. 197 [noting that incremental rate structures create an incentive to reduce water use].) Thus it is hard for us to see how article X, section 2, can be read to trump subdivision (b)(3). We would note here that in times of drought — which looks increasingly like the foreseeable future — providing water can become very pricey indeed. And, we emphasize, there

nothing at all in subdivision (b)(3) or elsewhere in Proposition 218 that prevents water agencies from passing on the incrementally higher costs of expensive water to incrementally higher users. That would seem like a good idea. But subdivision (b)(3) does require they figure out the true cost of water, not simply draw lines based on water budgets. Thus in Palmdale, the appellate court perceived no conflict between Proposition 218 and article X, section 2, so long as article X, section 2 is not read to allow water rates that exceed the cost of service. Said Palmdale: "California Constitution, article X, section 2 is not at odds with article XIII D so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel.' (Art. XIII D, § 6, subd. (b), par. (3))." (Palmdale, supra, 198 Cal.App.4th at pp. 936-937, italics added.) And as its history, and the demonstrated concern of the voters in 1928 demonstrates, article X, section 2 certainly does not require above-cost water rates.

In fact, if push came to shove and article X, section 2, really were in irreconcilable conflict with article XIII D, section 6, subdivision (b)(3), we might have to read article XIII D so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel.' (Art. XIII D, § 6, subd. (b), par. (3))." (Palmdale, supra, 198 Cal.App.4th at pp. 936-937, italics added.) And as its history, and the demonstrated concern of the voters in 1928 demonstrates, article X, section 2 certainly does not require above-cost water rates. (Greene v. Marin County Flood Control & Water Conservation Dist. (2010) 49 Cal.4th 277, 290 [109 Cal.Rptr.3d 620, 231 P.3d 350] ["As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision."] ; Izazaga v. Superior Court (1991) 54 Cal.3d 356, 371 [285 Cal.Rptr. 231, 815 P.2d 304] [same].)
Fortunately, that problem has not arisen. We perceive article X, section 2 and article XIIIID, section 6, subdivision (b) (3) to work together to promote increased supplies of water — after all, the main reason article X, section 2 was enacted in the first place was to ensure the capture and beneficial use of water and prevent its wasteful draining into the ocean. As a pre-Proposition 218 case, *Brydon, supra, 24 Cal.App.4th 178* observed, one of the benefits of tiered rates is that it is reasonable to assume people will not waste water as its price goes up. (See *id.* at p. 197 [noting that incremental rate structures create an incentive to reduce water use].) Our courts have made it clear they interpret the Constitution to allow tiered pricing; but the voters have made it clear they want it done in a particular way.

b. *Brydon and Griffith*

We believe the precedent most on point is *Palmdale*, and we read *Palmdale* to support the trial court's conclusion *City Water* did not comply

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*1512 with the subdivision (b)(3) requirement that rates be proportional to cost of service. The two cases *City Water* relies on primarily for its opposite conclusion, *Brydon and Griffith*, do not support a different result.

*Brydon* was a pre-Proposition 218 case upholding a tiered water rate structure as against challenges based on 1978's Proposition 13 rational basis and equal protection challenges. Similar to the case at hand, the water district promulgated an "inclining block rate structure." (*Brydon, supra, 24 Cal.App.4th at p. 182; see p. 184 [details of four-tier structure].) Proposition 218 had not yet been enacted, so the opponents of the block rate structure did not have the "proportional cost of the service attributable to the parcel" language in subdivision (b)(3) to use to challenge the rate structure. They relied, rather, on the theory that Proposition 13 made the rate structure a "`special tax,'" requiring a vote. (*Brydon*, at p. 182.) As a backup they made traditional rational basis and equal protection arguments. They claimed the rate structure was "arbitrary, capricious and not rationally related to any legitimate legislative or administrative objective" and, further, that the structure unreasonably discriminated against customers in the hotter areas of the district. (*Brydon, supra, at p. 182.*) The *Brydon* court rejected both the Proposition 13 and rational basis/equal protection arguments.

But *Brydon* — though it might still be read as evidence that tiered pricing not otherwise connected to cost of service would survive a rational basis or equal protection challenge — simply has no application to post-Proposition 218 cases. In fact, the construction of Proposition 13 applied by *Brydon* was based on cases Proposition 218 was designed to overturn. [*19*] The best example of such reliance was *Brydon's* declination to follow *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227 [211 Cal.Rptr. 567] (*Beaumont*) on the issue of the burden of proof. *Beaumont* had held it was the agency that had the burden of proof to show compliance with Proposition 13. *Brydon*, however, said the burden was on the taxpayers to show lack of compliance. In coming to its conclusion, *Brydon* invoked *Knox v. City of Orland* (1992) 4 Cal.4th 132 [14 Cal.Rptr.2d 159, 841 P.2d 144]. *Knox*, said *Brydon*, had "cast substantial doubt" on the "propriety of shifting the burden of proof to the agency." (*Brydon, supra, 24 Cal.App.4th at *

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*1513 p. 191.*) But, more than a decade later, our Supreme Court in *Silicon Valley* recognized that *Knox* itself was one of the targets of Proposition 218. (See *Silicon Valley, supra, 44 Cal.4th at p. 445.* [*20*] In the wake of *Knox*'s fate (see in particular subd. (b)(5) [changing burden of proof]), it seems safe to say that *Brydon* itself was part of the general case law which the enactors of Proposition 218 wanted replaced with stricter controls on local government discretion.

As the *Silicon Valley* court observed, Proposition 218 effected a paradigm shift. Proposition 218 was passed by the voters in order to curtail discretionary models of local agency fee determination. (See *Silicon Valley, supra, 44 Cal.4th at p. 446* ["As further evidence that the voters sought to curtail local agency discretion in raising funds ...."].) [*21*] Allocation of water rates might indeed have been a purely discretionary, legislative task when *Brydon* was decided, but not after passage of Proposition 218.
The other key case in which City Water's analysis of this point is *Griffith*. There, the fee itself varied according to the location of the property, e.g., whether the parcels with wells were coastal and metered, noncoastal and metered, or residential and nonmetered. Objectors to the fee asserted certain tiers in the fee, *based on the geographic differences in the parcels covered* by the fee, were not proportional to the cost they were paying. One objector in particular complained the fee was improperly established by working backwards from the overall amount of the project, subtracting other revenues, the balance being the augmentation charge, which was then apportioned among the users. (*Griffith, supra, 220 Cal.App.4th at p. 600.*) This objector argued that the proportional cost of service had to be calculated prior to setting the rate for the charge.

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The court noted the M-1 industry manual recommends such a work-backwards-from-total-cost methodology in setting rates, and held that the objectors did not attempt to explain why such an approach "offends Proposition 218 proportionality." (*Griffith, supra, 220 Cal.App.4th at p. 600.*) The best the objectors could do was to point to what *Silicon Valley* had said about assessments, namely, agencies cannot start with "an amount *taxpayers* are likely to pay" and *then* determine their annual spending budget from that. (*Ibid.,* quoting *Silicon Valley, supra, 44 Cal.4th at p. 457.*) The *Griffith* court distinguished the language from *Silicon Valley*, however, by saying the case before it did not entail any what-the-market-will-bear methodology. (*Griffith, supra, 220 Cal.App.4th at p. 600.*)

The objectors had also relied on *Palmdale* for the proposition that "... Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis." (*Griffith, supra, 220 Cal.App.4th at p. 601.*) The *Griffith* court rejected that point by stating "Apportionment is not a determination that lends itself to precise calculation," for which it cited a pre-Proposition 13, pre-Proposition 218 case, *White v. County of San Diego* (1980) 26 Cal.3d 897, 903 [163 Cal.Rptr. 640, 608 P.2d 728], without any explanation. (*Griffith, supra, 220 Cal.App.4th at p. 601.*)

When read in context, *Griffith* does not excuse water agencies from ascertaining the true costs of supplying water to various tiers of usage. Its comments on proportionality necessarily relate only to variations in property location, such as what side of a water basin a parcel might fall into. That explains its citation to *White*, which itself was not only pre-Proposition 218, but pre-Proposition 13. Moreover, while the *Griffith* court may have noted that the M-1 manual generally recommends a work-backwards approach, we certainly do not read *Griffith* for the proposition that a mere manual used by utilities throughout the Western United States can trump the plain language of the California state Constitution. The M-1 manual might show working backwards is reasonable, but it cannot excuse utilities from ascertaining cost of service now that the voters and the Constitution have chosen cost of service.

To the extent *Griffith* does apply to this case, which is on the (b)(4) issue, we find it helpful and have followed it. But trying to apply it to the (b)(1) and (b)(3) issues is fatally flawed.

c. Penalty Rates

A final justification City Water gives for not tying tier prices to cost of service is to say it does not make any difference because the higher tiers can be justified as penalties not within the purview of Proposition 218 at all. (In the context of art. X, § 2, City Water euphemistically refers to its higher tiered rates as conservation rates as if such a designation would bring them within art. X, § 2 and exempt them from subd. (b)(3), but as we have explained, art. X, § 2, does not require what art. XIII D, § 6, subd. (b)(3) forbids) and designating something a "conservation rate" is no more determinative than calling it an "apple pie" or "motherhood" rate.

City Water's theory of penalty rates relies on the procedural first part of Proposition 218, specifically article XIII C, section 1, subdivision (e)(5). This part of Proposition 218 defines the word "tax" to exclude fines "imposed by" a local
government "as a result of a violation of law." That is hardly a revelation, of course. We may take as a given that Proposition 218 was never meant to apply to parking tickets.

But City Water's penalty rate theory is inconsistent with the Constitution. It would open up a loophole in article XIII D, section 6, subdivision (b)(3) so large it would virtually repeal it. All an agency supplying any service would need to do to circumvent article XIII D, section 6, subdivision (b)(3), would be to establish a low legal base use for that service, pass an ordinance to the effect that any usage above the base amount is illegal, and then decree that the penalty for such illegal usage equals the incrementally increased rate for that service. Such a methodology could easily yield rates that have no relation at all to the actual cost of providing the service at the penalty levels. And it would make a mockery of the Constitution.

IV. CONCLUSION

All of which leads us to the conclusion City Water's pricing violates the constitutional requirement that fees "not exceed the proportional cost of the service attributable to the parcel." (Art. XIII D, § 6, subd. (b)(3).) This is not to say City Water must calculate a rate for 225 Elm Street and then calculate another for the house across the street at 226. Neither the voters nor the Constitution say anything we can find that would prohibit tiered pricing.

(10) But the tiers must be based on usage, not budgets. City Water's article X, section 2 position kept it from explaining to us why it cannot anchor rates to usage. Nothing in our record tells us why, for example, they could not figure out the costs of given usage levels that require City Water to tap more expensive supplies, and then bill users in those tiers accordingly. Such computations would seem to satisfy Proposition 218, and City Water has not shown in this record it would be impossible to comply with the constitutional mandate in this way or some other. As the court pointed out in Howard Jarvis Taxpayers Ass'n. v. City of Fresno (2005) 127 Cal.App.4th 914, 923 [26 Cal.Rptr.3d 153], the calculations required by Proposition 218 may be "complex," but "such a process is now required by the California Constitution."

(11) Water rate fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII D, section 6, subdivision (b)(4). While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service — water service. And water service most assuredly is immediately available to City Water's customers now.

But, because the record is unclear whether low usage customers might be paying for a recycling operation made necessary only because of high usage customers, we must reverse the trial court's judgment that the rates here are necessarily inconsistent with subdivision (b)(4), and remand the matter for further proceedings with a view to ascertaining the portion of the cost of funding the recycling operation attributable to those customers whose additional, incremental usage requires its development.

(12) By the same token, we see nothing in article XIII D, section 6, subdivision (b)(3) that is incompatible with water agencies passing on the true, marginal cost of water to those consumers whose extra use of water forces water agencies to incur higher costs to supply that extra water. Precedent and common sense both support such an approach. However, we do hold that above-cost-of-service pricing for tiers of water service is not allowed by Proposition 218 and in this case, City Water did not carry its burden of proving its higher tiers reflected its costs of service. In fact it has practically admitted those tiers do not reflect cost of service, as shown by their tidy percentage increments and City Water's refusal to defend the calculations. And so, on the subdivision (b)(3) issue, we affirm the trial court's judgment.
Given the procedural posture the case now finds itself in, the issue of who is the prevailing party is premature. That question should be first dealt with by the trial court only after all proceedings as to City Water's rate structure are final. Accordingly, we do not make an appellate cost order now, but reserve that matter for future adjudication in the trial court. (See Neufeld v. Balboa Ins. Co. (2000) 84 Cal.App. 4th 759, 766 [101 Cal.Rptr.2d 151] [deferring question of appellate costs in case being remanded until litigation was final].)

Moore, J., and Thompson, J., concurred.


[3] Until Bighorn, there was a question as to whether Proposition 218 applied at all to water rates. In 2000, the appellate court in Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 85 Cal.App.4th 79, 83 [101 Cal.Rptr.2d 905] (Jarvis v. Los Angeles), held that a city's water rates were not subject to Proposition 218, reasoning that water rates are mere commodity charges. Bighorn, however, formally disapproved Jarvis v. Los Angeles and held that water rates are subject to article XIII D of the California Constitution. (Bighorn, supra, 39 Cal.4th at p. 217, fn. 5.)

[4] For reader convenience, we will occasionally refer in this opinion in shorthand to "subdivision (b)(1)," "subdivision (b)(2)," "subdivision (b)(3)," "subdivision (b)(4)," and "subdivision (b)(5)," and sometimes even just to "(b)(1)" "(b)(2)," "(b)(3)," "(b)(4)" or "(b)(5)." Each time those references refer to article XIII D, section 6, subdivision (b) of the California Constitution. Also, all references to any "article" are to the California Constitution.

[5] We requested supplemental briefing prior to oral argument to clarify the nature of the issues and precisely what was in, and not in, the administrative record. We are indebted to able counsel on all sides for giving us their best efforts to answer our questions.

[6] Such rate structures are sometimes called "inclining" as in the pre-Proposition 218 case, Brydon v. East Bay Mun. Utility Dist. (1994) 24 Cal.App.4th 178, 184 [29 Cal.Rptr.2d 128] (Brydon). Amici curiae ACWA estimates that over half its members now have some sort of tiered water rate system. As we will say numerous times in this opinion, tiered water rate structures and Proposition 218 are thoroughly compatible "so long as" — and that phrase is drawn directly from Palmdale — those rates reasonably reflect the cost of service attributable to each parcel. (Palmdale, supra, 198 Cal.App.4th at p. 936.)

[7] Ccf stands for one hundred cubic feet, which translates to 748 gallons. (See Brydon, supra, 24 Cal.App.4th at p. 184.)

[8] A precise figure for the usage is complicated by an attempt in the rate structure to distinguish indoor and outdoor use. Technically, tier 2 is tier 1 + 3 extra ccf's, plus an outdoor allocation that is supposed to average out to a total of 17 ccf's, i.e., 8 ccf's are allocated (on average) for outdoor use.

[9] Technically, tier 3 is defined as up to 200 percent of tiers 1 and 2, which, given City Water's projected 17 ccf average, works out to be 34 ccf.

[10] While the consultants distinguished between regular and large lot residential customers, the final structure made no distinction between the two.
In 2010, City Water was paying $719 per acre-foot for water from the Metropolitan Water District, and that cost was projected to increase incrementally each year until it reached $1,007 per acre-foot by 2014. One acre-foot equals 435.6 ccf.

With a minor qualification that, given our disposition, it need not be addressed in too much detail. A minor issue in the briefing is whether City Water should have made its consultants' report available for taxpayer scrutiny prior to the public hearing contemplated in article XIII D, section 6, subdivision (c). Since City Water is not able to show its price structure correlates with the actual cost of providing service at the various incremental levels even with the consultants' report, we need not get bogged down in this issue.

Government Code section 53756 provides in relevant part:

"An agency providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation, if it complies with all of the following:

"(a) It adopts the schedule of fees or charges for a property-related service for a period not to exceed five years pursuant to Section 53755." (Italics added.)

As described by the court, the fixed cost option was really a "fixed/variable" option, with fixed charges being 60 percent of total costs, the balance being variable. (Palmdale, supra, 198 Cal.App.4th at p. 929, capitalization omitted.)

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furthereance of the policy in this section contained."

"In order to have the beneficial use of less than one per cent of the maximum flow of the San Joaquin River on their riparian lands the plaintiffs are contending for the right to use the balance in such a way that, so far as they are concerned, over ninety-nine per cent of that flow is wasted. This is a highly unreasonable use or method of the use of water." (Herminghaus, supra, 200 Cal. at p. 123 (dis. opn. of Shenk, J.).)

Professor Gray's article is an exceptionally valuable source on the origins of article X, section 2.

It was recently noted that Santa Barbara is dusting off a desalinization plant built in the 1990's to provide additional water for the city in the current drought. (See Covarrubias, Santa Barbara Working to Reactivate Mothballed...
Two examples of early, post-Proposition 13 cases that took a strict constructionist view of the provision are Los Angeles County Transportation Com. v. Richmond (1982) 31 Cal.3d 197, 199 [182 Cal.Rptr. 324, 643 P.2d 941] (Los Angeles County v. Richmond) [strictly construing Prop. 13’s voting requirements to avoid finding a transportation commission was a "special district"]; City and County of San Francisco v. Farrell (1982) 32 Cal.3d 47, 54 [184 Cal.Rptr. 713, 648 P.2d 935] [strictly construing words "special tax"] used in § 4 of Prop. 13 as ambiguous to avoid finding municipal payroll and gross receipts tax was a "special tax"). Brydon expressly relied on Los Angeles County v. Richmond. (See Brydon, supra, 24 Cal.App.4th at p. 190.) Proposition 218 effectively reversed these cases with a liberal construction provision. (See Silicon Valley, supra, 44 Cal.4th at p. 445.)

Here is the relevant passage from Silicon Valley: "As the dissent below points out, a provision in Proposition 218 shifting the burden of demonstration was included in reaction to our opinion in Knox. The drafters of Proposition 218 were clearly aware of Knox and the deferential standard it applied based on Dawson [v. Town of Los Altos Hills (1976)] 16 Cal.3d 676 [129 Cal.Rptr. 97, 547 P.2d 1377]." (Silicon Valley, supra, 44 Cal.4th at p. 445.)

Here and there in City Water’s briefing there are references to a discretionary, legislative power in regard to local municipal water agencies conferred by article XI, section 9, which was a 1970 amendment to the Constitution, though one can trace it back to the Constitution of 1879. Basically, article XI, section 9, gives cities the right to go into the water supply business. We quote its text, unamended since 1970: "(a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent. [¶] (b) Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law."

Article XI, section 9 obviously does not require municipal corporations to establish fees in excess of their costs, so there is no incompatibility between it and the later enacted Proposition 218.

The relevant text from article XIII C, section 1, subdivision (e)(5) is: "(e) As used in this article, ‘tax’ means any levy, charge, or exaction of any kind imposed by a local government, except the following: [¶] ... [¶] (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.”

MICHAEL E. BOYD, Plaintiff and Appellant,

v.

SOQUEL CREEK WATER DISTRICT, et al., Defendants and Respondents.

No. H041389.

Court of Appeals of California, Sixth District.

Filed April 29, 2016.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
Plaintiff Michael Boyd, proceeding in propria persona, sued the Soquel Creek Water District (District) and the City of Santa Cruz (City) regarding expenditures on and advocacy of a proposed seawater desalination project. Boyd alleges that the District spent over $4 million advocating for the project between 2008 and 2012 and increased water rates in 2013, in part, to fund the project. Among other things, Boyd alleges the rate increase violated state constitutional constraints on taxation, while the expenditures violated his federal constitutional rights.

The City successfully moved for judgment on the pleadings and the District successfully moved for summary judgment. The trial court entered judgments in favor of the City and the District, from which Boyd now appeals. We will affirm the judgment in favor of the City. We will reverse the judgment in favor of the District and remand the matter to the trial court with directions.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Boyd

Boyd is a resident of Soquel, California. His wife, nonparty Pat Paramoure Boyd, has a water service account with the District.

B. The District's Search for an Alternative Water Supply

The District's aquifers are over-drafted. The District has investigated various potential alternative sources of water including a joint project with the City to build a desalination facility. In connection with that potential joint desalination project, the District and the City entered into a Memorandum of Agreement to Create a Joint Task Force to Pursue the Feasibility of Construction and Operation of a Seawater Desalination Facility (Joint Agreement) in September 2007.

In the Joint Agreement, the District and the City agreed to create a joint task force to investigate the construction of a seawater desalination facility. The Joint Agreement requires the District and the City to "contribute equal shares" toward the project. The District spent $4,248,216.27 on the desalination project between May 16, 2008 and December 7, 2012.

A draft Environmental Impact Report (EIR) was prepared for the proposed joint desalination facility. However, the Final EIR has not been certified, the proposed desalination project has not been approved, and no Notice of Determination under CEQA has been filed concerning the proposed project.

C. Santa Cruz Measure P

Boyd alleges that on November 6, 2012, voters in the City approved Measure P, a ballot measure requiring that City voters approve the plans for any desalination facility. Measure P allegedly provided that "no legislative action by the City that would authorize or permit the construction, operation, and/or acquisition of a desalination project, or that would incur any bonded or other indebtedness for that purpose, shall be valid or effective unless such action is
authorized by an affirmative vote of a majority of qualified electors in the City of Santa Cruz voting on the question at a statewide general, statewide primary, or regularly scheduled municipal election." Boyd further alleges that Measure P applies retroactively as of the date the measure qualified for placement on the ballot, July 2, 2012.

Boyd alleges that Measure P applies to and binds not only the City, but also the District "as an alleged agent of the City under the terms of [the Joint Agreement]" and as a "co-conspirator" with the City. No similar ballot measure regarding the District's funding of a desalination project has been placed on a ballot, let alone approved.

D. The District's Rates and the 2013 Rate Increase

The District has separate rates for single-family residential, multi-family residential, and commercial customers. The residential water quantity rates are tiered, meaning the price customers pay for water increases as they use more of the resource. Tiered rates are used to encourage customers to conserve water.

The District's Board of Directors stated its intent to adopt a resolution modifying water rates and service charges at regular meetings on December 11, 2012 and January 15, 2013. The District held a public hearing on the proposed rate increase on February 5, 2013. More than 45 days before that hearing, the District gave customers and property owners written notice of the proposed rate increase, the protest process, and the public hearing. At the hearing, the Board approved and adopted the rate increase.

The rate increase increased customers' bi-monthly service charge. With respect to water quantity rates, the rate increase altered both the tier structure and the rate charged for each tier. For example, prior to the rate increase, single-family residences were charged a rate of $3.51 for the first four units of water used (Tier 1), a rate of $6.70 for units 5 to 15 of water used (Tier 2), and a rate of $11.61 for units 16 and above (Tier 3). Immediately following the rate increase, single-family residences were charged a rate of $3.60 for the first six units of water (Tier 1), $5.80 for units 7 to 14 (Tier 2), $8.50 for units 15 to 30 (Tier 3), and $13.00 for units 31 and above (Tier 4).

In support of its motion for summary judgment, the District submitted the declaration of its Finance Manager, Michelle Boisen. She declared that "[funds from the Rate Increase will be used for District operations including the evaluation of alternative water sources and environmental review of the proposed desalination plant. The Rate Increase does not include funds to construct the proposed desalination plant."

Boyd's wife, Paramoure Boyd, submitted a protest to the rate increase. Boyd attached a copy of that protest to the complaint. In it, Paramoure Boyd protested that the rate increase constituted a new tax, and thus required voter approval under Proposition 26. She reasoned that "[t]he true but hidden purpose of the increases [is] so as to predetermine the approval of ratepayer subsidized debt financing incurred for a pro-desal project campaign activity which has understated [(miss-informed [sic] the public of)] the fact that two thirds of the proposed three year water rate and the service charge increases are for the Board's pet project." In the protest letter Paramoure Boyd "designated Boyd "as [her] agent for service in these matters."

E. Complaint and Proposed First Amended Complaint

Boyd filed suit against the District and the City in March 2013. The complaint, much like Boyd's appellate briefs, is difficult to follow. We parse it as best we can.

Boyd's first cause of action, asserted against the District only, alleges that the 2013 rate increase violates Article XIII D, section 6, subdivision (b)(3) of the California Constitution (subdivision (b)(3)). Elsewhere in the complaint, in paragraphs not incorporated into the first cause of action, Boyd alleges that "[the District's] monthly service charge is
arbitrary and not tied to the actual costs of providing identified services to each meter; (2) [the District's] commodity charge tiers are not proportional to the costs of providing water service; and (3) [the District's] water budget structure is not proportional to the costs of providing water service and fails to achieve its stated purpose." In portions of the complaint not incorporated into the first cause of action, Boyd also alleges that the District's expenditure of $4,248,216 violated subdivision (b)(3).

The second cause of action, also asserted against the District, alleges that the District's unspecified "actions" violated Article XIII D, section 6, subdivision (b)(4) of the California Constitution (subdivision (b)(4)). In portions of the complaint not incorporated into the second cause of action, Boyd alleges (1) "[the District's] new rates require users to pay for services[,] desalination water supplies[,] they cannot receive in violation of section 6, subdivision (b), paragraph (4) of article XIII D" and (2) "the District'[s] expenditure of $4,248,216 was not within the definition of a water fee or charge and was already expended for the proposed desal project; therefore, this violated Art. XIII D, sect. 6(b) . . . (4)."

The third cause of action, asserted against only the District, alleges that "[t]he District's expenditure of $4,248,216 between May 16, 2008 to December 7, 2012 on the Desal project was not an exception within the definition of Article XIII C, section 1.; because these services `exceed the reasonable costs to the local government of conferring the benefit'; nor do the expenditures qualify as `assessments and property-related fees imposed in accordance with the provisions of Article XIII D'." (Italics in original.) Elsewhere in the complaint, in paragraphs not incorporated into the third cause of action, Boyd alleges that "[t]he District's expenditure of $4,248,216 . . . is a `tax' subject to the requirements of Art. XIII C, sect. 1. . . ."

The fourth and final cause of action is asserted against both the District and the City and is labeled "First Amendment, Due Process Violations, and 42 USC [§] 1983." In it Boyd alleges that, by virtue of Measure P, "any expenditure by the [District] and the City [on the desalination project after July 2, 2012] were [sic] in violation of Plaintiff's rights to free speech and procedural due process rights which Plaintiff alleges violated Plaintiff's federal civil rights under color of state law in violation of 42 [U.S.C. §] 1983." The fourth cause of action also contains the allegation that Boyd "was the victim of a civil conspiracy by Defendants to violate his civil rights." Boyd further alleges that "Defendants' alleged advocacy for sole sourcing new water supply for seawater desalination . . . has placed in jeopardy the health and welfare of unascertained customers whose water is contaminated by the toxic Chromium 6." The alleged connection between the proposed desalination project and Chromium 6 contamination is puzzling.

The complaint also contains other allegations, which are not clearly tethered to any of the causes of action. For example, Boyd complains that the District provided notice of the public hearing on the proposed rate increase during the Christmas holiday. Boyd also alleges that the defendants failed to identify a "potentially feasible alternative that might avoid a significant impact" and that the proposed desalination project "is not the least cost environmentally preferred option." Finally, Boyd alleges that the District was required to file an application for extraterritorial services to the Local Agency Formation Commission (LAFCO) before purchasing desalination water supplies from the City.

The complaint seeks, among other relief, an injunction preventing the District from implementing the rate increase unless and until it is approved by voters; an injunction preventing the District from making any further expenditure on the desalination project unless and until it is approved by voters; damages equal to his share of the $4,248,216 already expended on the desalination project; and equitable damages from both defendants.

Boyd filed a motion to amend and a proposed first amended complaint in July 2013. The trial court denied Boyd's motion to amend on the ground that his proposed amendments failed to state a cause of action.

F. Defendants' Successful Motions, Entry of Judgments, and Appeal
The District moved for summary judgment or, in the alterative, summary adjudication on February 14, 2014. The City moved for judgment on the pleadings on April 23, 2014.

The court held a hearing on both motions on May 20, 2014. After hearing argument, the court granted the District's motion for summary judgment and the City's motion for judgment on the pleadings and ordered that judgment be entered for defendants. The court did not address whether Boyd was entitled to leave to amend the complaint as to the City. Court entered judgment in favor of the City on June 2, 2014 and entered judgment in favor of the District on June 6, 2014. Also on June 6, 2014, the court filed a written order granting summary judgment to the District. Boyd timely appealed on July 7, 2014.

II. DISCUSSION

A. General Rules of Appellate Review

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. (Denham v. Superior Court (1970) 2 Cal.3d 557, 564.) "All intендments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown." (Ibid.) Therefore, a party challenging a judgment or an appealable order "has the burden of showing reversible error by an adequate record." (Ballard v. Uribe (1986) 41 Cal.3d 564, 574.) "A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (Gee v. American Realty & Construction, Inc. (2002) 99 Cal.App.4th 1412, 1416.) Thus, where the appellant fails to provide an adequate record as to any issue the appellant has raised on appeal, the issue must be resolved against the appellant. (Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295.)

The appellant must also present argument supported by relevant legal authority as to each issue raised on appeal. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.'" (People v. Stanley (1995) 10 Cal.4th 764, 793 (Stanley)).

Boyd is not exempt from compliance with these rules because he is representing himself. A party who chooses to act as his or her own attorney "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1247.)

B. Issues Raised on Appeal

The trial court granted both motions on numerous grounds. On appeal, however, Boyd raises only four issues. As an initial matter, he accuses the trial court judge of bias. With respect to his claim against the City, he argues the trial court erred in concluding he lacked standing. As to the District, he challenges the court's conclusions that the rate increase does not violate subdivisions (b)(3) and (b)(4) as alleged in counts 1 and 2.

C. Judicial Bias

Boyd contends the trial court exhibited bias during the hearing on defendants' motions. In support of that contention, Boyd—without citation to the record—identifies three comments the trial court made at the hearing. In the first comment, the court noted that he saw in the morning paper that "there's a meeting tonight" at the District. The court went on to explain that, because "[t]here's no environmental impact report to challenge," "the body that you should be
dealing with will be meeting at 7:00 o'clock tonight at the Soquel Creek Water District." In the second comment on which Boyd relies, the court stated: "[t]here's no application pending before LAFCO. LAFCO doesn't fit in here as well. And I sat on the LAFCO board many years ago. This doesn't fit within that." Third, the court advised Boyd of its tentative ruling to grant defendants' motions and told him, "This is your opportunity to argue against my tentative ruling."

Boyd's claim of judicial bias fails for numerous reasons. First, Boyd forfeited the point by failing to cite the part of the record where the trial court made the complained-of statements. (In re Marriage of Falcone & Fyke (2012) 203 Cal.App.4th 964, 978.) Second, the opening brief cites no legal authority to support Boyd's claim, such that we may consider it waived. (Stanley, supra, 10 Cal.4th at p. 793 ["[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration."].) Third, Boyd forfeited this claim of error by failing to raise it below. (See People v. Farley (2009) 46 Cal.4th 1053, 1110 [claim of judicial bias forfeited where not asserted below]; Moulton Niguel Water Dist. v. Colombo (2003) 111 Cal.App.4th 1210, 1218 ["owners did not preserve their claim of judicial bias for review because they did not object to the alleged improprieties and never asked the judge to correct remarks made or recuse himself"]). Finally, were we to reach the merits of Boyd's judicial bias claim, we would reject it. We do not believe "[a] person aware of the facts might reasonably entertain a doubt that the judge [was] able to be impartial." (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

D. Judgment on the Pleadings in Favor of the City

1. Standard of Review

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein." (Dunn v. County of Santa Barbara (2006) 135 Cal.App.4th 1281, 1298 (Dunn).) We will not, however, credit the allegations in the complaint where they are contradicted by facts that either are subject to judicial notice or are evident from exhibits attached to the pleading. (Hill v. Roll Internat. Corp. (2011) 195 Cal.App.4th 1295, 1300 (Hill).) We review de novo whether a cause of action has been stated as a matter of law. (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125.) We do not review the validity of the trial court's reasoning, and therefore will affirm its ruling if it was correct on any theory. (Hill, supra, at p. 1300.)

"[I]t is an abuse of discretion to grant a motion for judgment on the pleadings without leave to amend "'if there is any reasonable possibility that the plaintiff can state a good cause of action.'" (Dudley v. Department of Transportation (2001) 90 Cal.App.4th 255, 260.) The appellant bears the burden of showing abuse of discretion and carries that burden by showing how the complaint can be amended to state a cause of action. (Ibid.)

2. Boyd Lacks Standing to Sue the City

As noted above, Boyd raises only one claim of error as to the court's order granting judgment on the pleadings to the City: he claims the trial court erroneously concluded that he lacks standing to sue the City. We perceive no error.

"'Standing' derives from the principle that '[e]very action must be prosecuted in the name of the real party in interest. . . .' (Code Civ. Proc, § 367.) A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action." (City of Santa Monica v. Stewart (2005) 126 Cal.App.4th 43, 59 (Stewart.) "[A] person who invokes the judicial process lacks "standing" if he [or she] . . . does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of
sufficient magnitude reasonably to ensure that all of the relevant facts and issues will be adequately presented." (Id. at p. 60.)

The thrust of Boyd's claim against the City is that any expenditures on or advocacy of the desalination project after July 2, 2012 violated Measure P and his federal constitutional rights to free speech and due process. As we understand it, Boyd's theory is two-fold. First, he contends that by expending public funds to advocate for the desalination project, defendants compelled him to support that project in violation of his First Amendment right not to be compelled to speak. Second, he maintains the use of public funds to advocate for the desalination project is unconstitutional under Stanson v. Mott (1976) 17 Cal.3d 206.

Boyd lacks standing to assert his claim against the City because "[t]he complaint does not specify any actual or threatened action which would injure [Boyd] or violate [his] rights." (Stewart, supra, 126 Cal.App.4th at p. 60.) Indeed, the complaint does not allege any actual or threatened action by the City at all. It alleges only that "to the degree Defendants [sic] City of Santa Cruz . . . are [sic] involved in such advocacy[,] this also allegedly violates Plaintiffs First Amendment Rights also." But speculation that the City might be involved in advocacy of the desalination plant is not sufficient to allege actual or threatened action.

Even if Boyd had alleged that the City made expenditures on and advocated for the desalination project after July 2, 2012 (or has plans to do so), we would conclude he lacks standing because that conduct is not injurious to Boyd or his rights. Boyd does not allege that he resides in the City, pays City taxes, or is registered to vote in the City. To the contrary, his complaint and its exhibits show he is a resident of Soquel. Thus, any improper expenditure of City funds cannot possibly have harmed Boyd, a nontaxpayer. (See Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1086 [taxpayers have standing to sue to prevent the illegal expenditure of municipal funds under Code of Civil Procedure section 526a]; Reynolds v. City of Calistoga (2014) 223 Cal.App.4th 865, 873 [nontaxpayer lacked standing to challenge alleged misuse of City funds under Civ. Proc. Code § 526a].) To the extent that the City improperly expended funds on advocacy, Boyd has no constitutional claim based on that conduct because the City could not have used his funds. Finally, any violation of Measure P, which confers rights on City voters, could not have harmed Boyd, a nonresident, nonvoter.

Boyd contends he alleged standing in his proposed first amended complaint by alleging he pays the water bills issued by the District despite the fact that his wife is the customer of record. At best, that allegation indicates that the District expended funds it received from Boyd on the desalination project. But the fact remains that Boyd does not allege the City expended funds on the project, let alone any funds it received from him. Accordingly, we conclude the trial court correctly granted the City's motion on lack of standing grounds.

3. Boyd Fails to State a Claim Against the City

We affirm the judgment in favor of the City for the additional reason that the complaint does not state a claim against it. As discussed above, the complaint does not allege that the City engaged in any wrongful conduct. (Okun v. Superior Court (1981) 29 Cal.3d 442, 457 [cause of action failed to state a claim against any defendant where there was "no allegation of wrongful conduct by any of the defendant[s]"].) It merely suggests that the City might have engaged in wrongful conduct, which is insufficient.

The complaint contains the conclusory allegation that Boyd "was the victim of a civil conspiracy by Defendants to violate his civil rights, all actionable under 42 U.S.C. § 1983, to redress violations of federal laws committed by Defendants, i.e. to inter alia compel the enforcement of federal laws, for Plaintiff[s]’s] and the public's interests, and to secure remedial relief for Plaintiff for damages caused by those violations." The complaint does not allege facts regarding the formation and operation of the conspiracy, the wrongful act or acts done pursuant to it, or the damage
resulting from such acts. "Conspiracy is . . . a doctrine imposing liability for a tort upon those involved in its commission." ([I-800 Contacts, Inc. v. Steinberg (2003) 107 Cal.App.4th 568, 590.) To the extent Boyd seeks to hold the City liable for the District's violations of his federal rights under a civil conspiracy theory (City of Monterey v. Del Monte Dunes at Monterey, Ltd. (1999) 526 U.S. 687, 709 ["claims brought pursuant to [42 U.S.C.] § 1983 sound in tort"], that attempt fails given the lack of well-pleaded factual allegations and our obligation to disregard conclusions of law contained in a complaint. (Nicholson v. McClatchy Newspapers (1986) 177 Cal.App.3d 509, 521 ["bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient" to state a cause of action based upon a conspiracy theory].)

The complaint also alleges that "at all times herein mentioned, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment." The Supreme Court has described such allegations as "egregious examples of generic boilerplate." (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 134, fn. 12.) Where, as here, a complaint "does not allege [that] any conduct on [the defendant's] part caused any harm, loss or damage on the plaintiff[s] part," the addition of such boilerplate agency allegations "do not result in the complaint[s] stating a cause of action against" the defendant. (Falahati v. Kondo (2005) 127 Cal.App.4th 823, 829.)

In sum, the complaint fails to state a cause of action against the City.

4. Leave to Amend

Boyd's appellate briefs do not address whether the trial court abused its discretion by granting the City's motion without providing him leave to amend. Based on our review of the complaint, the proposed first amended complaint, and Boyd's appellate briefs, we find no reasonable probability that Boyd could amend his complaint to state a viable cause of action against the City. Therefore, we conclude the trial court did not abuse its discretion in not granting leave to amend.

E. Summary Judgment in Favor of the District

1. Standard of Review

In reviewing an order granting summary judgment, we review the entire record de novo in the light most favorable to the nonmoving party to determine whether the moving and opposing papers show a triable issue of material fact. (Addy v. Bliss & Glennon (1996) 44 Cal.App.4th 205, 214.) "A defendant moving for summary judgment has the burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action." (Jones v. Wachovia Bank (2014) 230 Cal.App.4th 935, 945 (Jones).) A defendant cannot "simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence," (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854, fn. omitted), but "must support[ ] the 'motion' with evidence." (Id. at p. 855.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (Ibid.) "If a defendant's moving papers make a prima facie showing that justifies a judgment in its favor, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact." (Jones, supra, at p. 945.)

2. Proposition 218
On appeal, Boyd challenges the trial court's conclusions that the District's rate increase does not violate subdivisions (b)(3) and (b)(4) of Article XIII D, section 6 of the California Constitution. Article XIII D was adopted in 1996 as part of Proposition 218. "Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. "The purpose of Proposition 13 was to cut local property taxes."

To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. [Citations.] It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. [Citation.] Accordingly, a special assessment could be imposed without a two-thirds vote." (Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 836-837.) The electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution, in part to address that loophole in Proposition 13. (Id. at p. 837.)

"Article XIII C imposes restrictions on general and special property taxes in addition to those imposed under article XIII A, and requires voter approval for any general or special tax imposed by a local governmental entity. . . . Article XIII D, is addressed to `Assessment and Property-Related Fee Reform,' and it `undertakes to constrain the imposition by local governments of "assessments, fees and charges."'" (Paland v. Brooktrails Township Community Services Dist. Bd. of Directors (2009) 179 Cal.App.4th 1358, 1365.)

Subdivision (b) of section 6 of article XIII D imposes four limitations on fees and charges: "(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. [¶] (3) 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. [¶] (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. . . ."

Boyd contends that the District's increased water rates violate two of the foregoing limitations.


3. **Count 1: Article XIII D, Section 6, Subdivision (b)(3)**

On appeal, Boyd argues that the District's rate increase violates subdivision (b)(3) because the new tiered water rates do not correspond to the actual cost of providing service at a given level of water usage. He contends that the trial court's decision to the contrary is inconsistent with the Fourth Appellate District's decision in Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493 (Capistrano). The District's position is that its rates satisfy the proportionality requirement set forth in subdivision (b)(3) because the rates (1) employ different user classifications (residential, multi-residential, and commercial); (2) are based on the amount of water used; and (3) encourage conservation as authorized under Water Code § 31035. The District submitted no evidence regarding the cost to it of providing water service or how it calculated the rates.

Subdivision (b)(3) provides: "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] . . . (3) 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." To
address Boyd's challenge, we must first determine the meaning of subdivision (b)(3). "The principles of constitutional interpretation are similar to those governing statutory construction. In interpreting a constitution's provision, our paramount task is to ascertain the intent of those who enacted it. [Citation.] To determine that intent, we 'look first to the language of the constitutional text, giving the words their ordinary meaning.' [Citation.] If the language is clear, there is no need for construction. [Citation.] If the language is ambiguous, however, we consider extrinsic evidence of the enacting body's intent. [Citations.]" (Thompson v. Department of Corrections (2001) 25 Cal.4th 117, 122.)

The ordinary meaning of the word "proportional" is "having a size, number, or amount that is directly related to or appropriate for something." (Merriam-Webster.com (2016) [as of 4/29/16].) The ordinary meaning of the phrase "attributable to" is "capable of being attributed or ascribed." (Oxford English Dict. Online (2016) [as of 4/29/16].) "Ascribe" means "to refer to a supposed cause, source, or author." (Merriam-Webster.com (2016) [as of 4/29/16].) In view of the foregoing, we construe subdivision (b)(3) as requiring that a property-related charge not exceed an amount that is directly related to the cost of service caused by the parcel.

"[W]e may `test our construction against those extrinsic aids that bear on the enactors' intent' [citation], in particular the ballot materials accompanying Proposition [218] that place the initiative in historical context." (Hi-Voltage Wire Works, Inc. v. City of San Jose (2000) 24 Cal.4th 537, 560.) The Legislative Analyst's analysis of Proposition 218 informed voters that one of the measure's "proposed requirements for property-related fees" was that "[n]o property owner's fee may be more than the cost to provide service to that property owner's land." (Ballot Pamp. Gen. Elec. (1996) analysis of Prop. 218 by legislative analyst, p. 73, available at .) Thus, the ballot materials confirm that subdivision (b)(3) requires a nexus between a property-related charge (here, the water rate) and the cost of service associated with a parcel.

In view of the foregoing, compliance with Proposition 218 plainly requires a water district to charge customers based on the cost of providing water service to their parcel. ([6] (Accord Capistrano, supra, 235 Cal.App.4th at p. 1506 ['To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels']) The record is devoid of any evidence that the District undertook to determine the cost of providing water service or how that cost varies by parcel or by water consumption. Indeed, the District does not even mention the cost of service in justifying its rate. Accordingly, we conclude the District failed to carry its burden to show it is entitled to judgment on Boyd's subdivision (b)(3)-based claim.

The District stresses the importance of tiered rates to promote water conservation. We note that nothing in Proposition 218 is obviously incompatible with the use of tiered rates. Presumably, supplying excessive amounts of water increases the need for system maintenance and new water sources, thereby increasing the District's costs. (Brydon v. East Bay Mun. Utility Dist. (1994) 24 Cal.App.4th 178, 202 ['To the extent that certain consumers overutilize the resource, they contribute disproportionately to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water'].) If that is the case, subdivision (b)(3) allows the District to charge more to excessive water users to cover those higher costs. However, we cannot simply assume the District's tiered rates bear the requisite relationship to its costs.

The District also contends that this court's decision in Griffith, supra, 220 Cal.App.4th 586 supports the trial court's conclusion that the District's rates comply with subdivision (b)(3). In our view, Griffith is distinguishable. There, a water management agency imposed a ground water augmentation charge on all customers to cover the costs of purchasing, capturing, storing, and distributing supplemental water to a subset of those customers. (Griffith, supra, 220 Cal.App.4th at p. 598.) The water management agency submitted evidence showing it calculated the ground water augmentation charge "based on a revenue-requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users." (Ild. at p. 600.) In apportioning the revenue requirement, the water management agency
grouped similar users together and charged them according to usage, something this court deemed "a reasonable way to apportion the cost of service." (Id. at p. 601.)

*Griffith* is distinguishable because there, the water management agency submitted evidence showing how the augmentation charge was calculated. By contrast, here the District points us to no such record evidence. Therefore, it is impossible for us to conclude that the District's increased water rates bear the requisite relationship to its cost of providing water service.

"We affirm an order granting summary [judgment or] adjudication if it is legally correct on any ground raised in the trial court proceedings." ([Kight v. CashCall, Inc. (2011) 200 Cal.App.4th 1377, 1387; accord Securitas Security Services USA, Inc. v. Superior Court (2011) 197 Cal.App.4th 115, 120.]) Accordingly, before reversing the trial court's order as to count 1, we must consider the other grounds raised and addressed by the parties below. The District raised one other ground for summary judgment or adjudication of count 1—that Boyd is improperly engaging in the practice of law in violation of the Business & Professions Code by representing his wife in this action. Section 6125 of the California Business & Professions Code provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar." Thus, "persons may represent their own interests in legal proceedings, but may not represent the interests of another unless they are active members of the State Bar." ([Golba v. Dick's Sporting Goods, Inc. (2015) 238 Cal.App.4th 1251, 1261.])

For its contention that Boyd is acting as his wife's legal representative, the District relied on the following sentence in Boyd's complaint: "As stated in Plaintiff's Protest [Exhibit 1] dated January 30, 2013 as agent for the customer of record [my wife Pat [Paramoure] Boyd]; on the property's water account for 5439 Soquel Drive, Assessor's Parcel Number XXX-XXX-XX, SqWD Account#XXXXXXXX-XXX, in Santa Cruz County California; states 'I am protesting the proposed water rate and the service charge increases, as violating the provisions of Proposition 26, also known as the 'Supermajority Vote to Pass New Taxes and Fees Act' (2010)." Exhibit 1 to the complaint is the protest Boyd's wife submitted to the District regarding the rate increase in which she designated Boyd "as my agent for service in these matters."

The sentence on which the District relies certainly implies that Boyd's wife is the plaintiff or that Boyd is acting as her agent. However, the complaint's caption identifies Boyd as the sole plaintiff; the complaint refers to e-mails sent by Boyd as being sent by "Plaintiff"; and the complaint complains of violations of plaintiff's rights, not his wife's rights. We believe the complaint is best construed as asserting Boyd's own interests, not those of his wife, such that there is no violation of the Business & Professions Code. We offer no opinion as to whether Boyd has standing to sue the District, an issue not raised below.

For the foregoing reasons, we conclude the trial court erred in granting summary judgment to the District on count 1.

**4. Count 2: Article XIII D, Section 6, Subdivision (b)(4)**

Subdivision (b)(4) provides: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4." The District submitted evidence that funds from the rate increase will be used to evaluate alternative water sources, including the proposed desalination project. On appeal, Boyd contends that the rate increase violates subdivision (b)(4) because it funds the proposed desalination plant, water from which is not immediately available to property owners.
For Boyd to prevail, we must conclude that the exploration of desalinated water as a potential future water source is a distinct "service" that is not "immediately available to" property owners. Neither case law nor statutory authority supports such a conclusion.

"The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines `water' as `any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.' (Gov. Code, § 53750, subd. (m))." (Griffith, supra, 220 Cal.App.4th at p. 595.) In Griffith, this court concluded, based in part on Government Code section 53750, subdivision (m), that "water service [includes] more than just supplying water." (Griffith, supra, at p. 595.) Rather, it includes the production, purchase, capture, storage, treatment, and distribution of water. (Ibid.) Given that water service includes water production, purchase, and capture, this court further concluded that "identifying and determining future supplemental water projects . . . " is part of water service. (Id. at p. 602.) Under Griffith's reasoning, the District's evaluation of the proposed desalination project as a future, supplemental source of water is part of its traditional water service. There is no dispute that the District's water service is immediately available. Accordingly, the rate increase does not violate subdivision (b)(4).

Boyd's reliance on Capistrano is misplaced. At issue in Capistrano was whether the City could pass along the cost of a new water recycling plant to customers. Like the proposed desalination facility at issue here, the recycling plant was not yet "on line." (Capistrano, supra, 235 Cal.App.4th at p. 1501.) The court held that subdivision (b)(4) "allow[s] public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water—such as building a recycling plant." (Capistrano, supra, at p. 1497.) The court reasoned that there was no subdivision (b)(4) violation because the provision of traditional potable water and the provision of nonpotable recycled water were both components of the City's existing water service, which was already immediately available to all customers. (Capistrano, supra, at p. 1502.) Thus, with respect to whether the exploration of desalinated water as a potential future water source is a distinct "service" that is not "immediately available to" property owners under subdivision (b)(4), Capistrano supports the District, not Boyd.

The Capistrano court went on to conclude that Government Code section 53756 restricts a water district's ability to pass on the capital costs of improvements like recycling and desalinization facilities to customers. According to Capistrano, "[t]he upshot of Government Code section 53756 "is that within a five-year period, a water agency might develop a capital-intensive means of production of what is effectively new water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced." (Capistrano, supra, 235 Cal.App.4th at p. 1503.) The Capistrano court remanded the matter to the trial court to determine "whether charges to develop [the water district's] nascent recycling operation have been improperly allocated to users whose levels of consumption are so low that they cannot be said to be responsible for the need for that recycling." (Id. at p. 1504.)

On appeal, Boyd quotes (without citation) the Capistrano court's discussion of Government Code section 53756 and appears to assert that the District violated that provision by expending more than $4 million on the desalination project between "September 23, 2007 [and] December 7, 2012 . . . [, which is] a period longer than 5 years as specified by California Government Code § 53756." We decline to reverse the trial court's ruling that the District is entitled to judgment on count 2 on the basis of Government Code section 53756 for two reasons. First, the complaint makes no mention of Government Code section 53756. "[T]he pleadings set the boundaries of the issues to be resolved at summary judgment." (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648.) A " plaintiff cannot bring up new, unpleaded issues" in opposition to a motion for summary judgment or adjudication. (Ibid.) Because any claim that the District violated Government Code section 53756 was not alleged in the complaint, we decline to consider whether it creates a triable issue of material fact to defeat the District's summary judgment motion. Second, the allegations in the complaint do not support Boyd's new contention that the District's expenditures occurred over a period of more than five years. In his opening brief, Boyd contends that the District's desalination expenditures
began on September 23, 2007, which is the date on which the Mayor of Santa Cruz signed the Joint Agreement. But the complaint alleges that the District's $4 million in expenditures occurred between May 2008 and December 2012. A printout of the District's accounts payable, which is attached to the complaint as an exhibit, confirms that the expenditures at issue began on May 16, 2008.

In sum, the trial court did not err in concluding that the District's rate increase does not violate subdivision (b)(4).

III. DISPOSITION

The judgment in favor of the City is affirmed. The judgment in favor of the District is reversed and the matter is remanded to the trial court. On remand, the trial court is directed to vacate its order granting summary judgment to the District and to enter a new order denying the District summary adjudication on count 1 and granting the District summary adjudication on counts 2, 3, and 4.

The City shall recover its costs on appeal from Boyd. Boyd and the District shall bear their own costs on appeal.

BAMATTRE-MANOUKIAN, J. and MIHARA, J., concurs.


[2] One unit is equal to 748 gallons of water.

[3] Boyd alleges: "[B]ecause of the [District's] failure to carry out its duty to prevent the over drafting of the Aromas Red Sands Aquifer[, where water contaminated with Chromium 6 has been detected,] the [District's] alleged advocacy for desal coupled with their [sic] alleged failure to declare an emergency and a water hook-up moratorium on new connections; this allegedly exacerbated the chromium 6 problem . . . allegedly adding to the $4,248,216 for desal advocacy the amount of damages of at least $2.52 million' to the District's ratepayers that would have allegedly been avoided by Plaintiff and other like situated water ratepayers but for Defendant's alleged unlawful actions in unlawful alleged advocacy for their preferred water supply option, on matters that allegedly should be decided in an impartial unbiased manner based on the facts at hand by the voters." (Ellipsis in original.)

[4] We recognize that Boyd does not assert a claim pursuant to Code of Civil Procedure section 526a. Nevertheless, cases addressing taxpayer standing under Code of Civil Procedure section 526a are instructive. In that context, "courts have liberally construed the standing requirements for taxpayers." (Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1047.) However, even for purposes of a claim under Code of Civil Procedure section 526a, "a plaintiff must establish he or she is a taxpayer to invoke standing. . . ." (Torres, supra, at p. 1047.)

[5] The City raises this issue on appeal. Boyd responds that he "is alleging his equal protection and due process rights were violated by the City Defendants [sic] because even though Plaintiff paid the desalination facility tax in the City before and after the Proposition P election, he was disenfranchised from voting in the Proposition P election because he didn't reside in the City." Neither the complaint nor the opening brief refers to a "desalination facility tax" and the reply brief does not define that term. We find Boyd's response to be confusing and unpersuasive.

[6] This is not to say that Proposition 218 compels a parcel-by-parcel proportionality analysis, something this court rejected in Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586, 601 (Griffith). However, some nexus between costs and the charge is required.
Government Code section 53756 provides, in relevant part: "An agency providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation, if it complies with all of the following: (a) It adopts the schedule of fees or charges for a property-related service for a period not to exceed five years pursuant to Section 53755."

163 Cal. Rptr. 3d 243

HAROLD GRIFFITH, Plaintiff and Appellant,

v.

PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.

JOSEPH P. PENDRY et al., Plaintiffs and Appellants,

v.

PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.


Court of Appeals of California, Sixth District.

October 15, 2013.

Harold Griffith, in pro. per., for Plaintiff and Appellant Harold Griffith.

Johnson & James, and Robert K. Johnson, for Plaintiffs and Appellants Joseph P. Pendry, James Spain, Yuet-Ming Chu, William McGrath and Henry Schimpeler.


Aleshire & Wynder and Patricia J. Quilizapa for Association of California Water Agencies and California State Association of Counties as Amici Curiae on behalf of Defendant and Respondent.

OPINION

PREMO, J., —

After defendant Pajaro Valley Water Management Agency enacted ordinance No. 2010-02 that increased groundwater augmentation charges for the operation of wells within defendant's jurisdiction, plaintiff Harold Griffith challenged the ordinance on the grounds that the increase (1) was procedurally flawed because it was not approved in an election as
required by Proposition 218 (Cal. Const., art. XIII D, § 6), (2) did not conform to certain substantive requirements of Proposition 218, and (3) was to be used for a purpose not authorized by the law under which defendant was formed. Thereafter, plaintiffs Joseph P. Pendry, James Spain, Yuet-Ming Chu, William J. McGrath, and Henry Schepeler (Pendry) challenged the ordinance on similar grounds and on the ground that it was void because one of the directors who voted for the ordinance had a disqualifying conflict of interest within the meaning of the Political Reform Act of 1974 (PRA) (Gov. Code, § 87100 et seq.). They also challenged an ordinance passed in 2002, which imposed an augmentation charge, and a 1993 management-fee ordinance. The trial court rendered judgments for defendant. Plaintiffs have appealed and reiterate their challenges. We are considering the two appeals together for purposes of briefing, oral argument, and disposition. After conducting an independent review of the record (Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448 [79 Cal.Rptr.3d 312, 187 P.3d 37] (Silicon Valley)), we affirm the judgments.

GENERAL BACKGROUND

We have previously detailed an historical background to this case in Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal.App.4th 1364, 1370-1375 [59 Cal.Rptr.3d 484] (Amrhein). We therefore decline to repeat it and will instead begin with the trial court's succinct summary.

"The Pajaro Valley Groundwater Basin supplies most of the water used in the Pajaro Valley. The water is being extracted faster than it is being replenished by natural forces, which leads to saltwater intrusion, especially near the coast. Once the water table drops below sea level, seawater seeps into the groundwater basin. [Defendant] was created [in 1984 by the Pajaro Valley Water Management Agency Act (Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Ann. Wat. — Uncod. Acts (2008) Act 760, p. 681)] to deal with this issue. At present, the strategy is to use recycled wastewater, supplemental wells, captured storm runoff, and a coastal distribution system. The purpose is to reduce the amount of water taken from the groundwater basin (for example, the amount taken from wells), by supplying water to some [coastal] users. The cost of this process is borne by all users, on the theory that even those taking water from [inland] wells benefit from the delivery of water to [coastal users], as that reduces the amount of groundwater those [coastal users] will extract [from their own wells], thereby keeping the water in [all] wells from becoming too salty."

Ordinance No. 2010-02 describes "three supplemental water projects that work together to provide supplemental water to reduce overdraft, retard seawater intrusion, and improve and protect the groundwater basin supply: (1) Watsonville Recycled Water Project, which provides tertiary treated recycled water for agricultural use and includes inland wells that are used to provide cleaner well water that is blended with the treated water in order to improve the water quality so that it may be used for agricultural purposes; (2) Harkins Slough Project, which diverts excess wet-weather flows from Harkins Slough to a basin that recharges the groundwater, which then is available to be extracted and delivered for agricultural use; and (3) Coastal Distribution System (CDS), which consists of pipelines that deliver the blended recycled water and Harkins Slough Project water for agricultural use along the coast."

"The Act specifically empowers [defendant] to adopt ordinances levying 'groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within [defendant's boundaries].'" (Amrhein, supra, 150 Cal.App.4th at p. 1372; see Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Ann. Wat. — Uncod. Acts, supra, Act 760 (Act), § 1001.)

Ordinance No. 2010-02 states that the augmentation charge is necessary to cover the costs of "supplemental water service" described as follows: "(a) the purchase/acquisition, capture, storage and distribution of supplemental water
through the supplemental water projects [(Watsonville Recycled Water Project, Harkins Slough Project, and CDS)] and including the planning, design, financing, construction, operation, maintenance, repair, replacement and management of these project facilities, and (b) basin management monitoring and planning to manage the existing projects and to identify and determine future supplemental water projects that would further reduce groundwater overdraft and retard seawater intrusion. The cost of the service also includes ongoing debt payments related to the design and construction of the completed supplemental water projects."

**PROCEDURAL BACKGROUND**

In 2002, defendant approved ordinance No. 2002-02, which established an augmentation charge of $80 per acre-foot. Several citizens challenged the ordinance on the ground that the approval procedure did not comply with the notice, hearing, and voting requirements of Proposition 218. The trial court dismissed the case on the ground of a special statute of limitations, and the plaintiffs appealed to this court. We reversed the judgment after finding that part of the augmentation charge was not subject to the statute of limitations. (Scurich v. Pajaro Valley Water Management Agency (May 27, 2004, H025776) [nonpub. opn.] (Scurich); see Eiskamp v. Pajaro Valley Water Management Agency (2012) 203 Cal.App.4th 97, 100-101 [137 Cal.Rptr.3d 266] (Eiskamp)). We remanded the case for trial.

In 2003, defendant approved ordinance No. 2003-01, which increased the augmentation charge to $120 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. But it filed Amrhein as a validation proceeding[3] seeking a declaration as to the validity of the ordinance. The trial court declared the ordinance valid, and citizens who had objected appealed to this court.

In 2004, defendant approved ordinance No. 2004-02, which increased the augmentation charge to $160 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. Griffith challenged the ordinance and a 1993 management-fee ordinance. San Andreas Mutual Water Company and others also challenged the ordinance. The two actions were consolidated with Scurich (Consolidated Lawsuits) and the Consolidated Lawsuits were stayed pending our decision in Amrhein.

In May 2007, we reversed the judgment in Amrhein after holding that "the augmentation fee is a fee or charge `imposed ... as an incident of property ownership' and thus subject to [the Proposition 218] preconditions for the imposition of such charges." (Amrhein, supra, 150 Cal.App.4th at p. 1370.)


"In January 2008, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants wanted to resolve all disputes in the Amrhein Lawsuit and the Consolidated Lawsuits. They and [defendant] then entered into a stipulated agreement for entry of judgment (stipulated agreement). The stipulated agreement provided: `all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation") as to [defendant's] actions shall be resolved by entry of judgment in the Pending Litigation'; [defendant] would pay $1.8 million to the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants for legal fees, costs, and expenses; and the augmentation charges collected pursuant to ordinances Nos. 2003-01 and 2004-02 would be refunded. It also stated that the `settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any
Augmentation Charge or Management Fee ordinances currently in effect....' The stipulated agreement did not provide for either the repeal of [ordinance No. 2002-02] or the refund of augmentation charges imposed under [that] Ordinance.

"In February 2008, judgment was entered pursuant to the terms of the stipulated agreement." (Eiskamp, supra, 203 Cal.App.4th at p. 102.)

In May 2010, defendant mailed notice of a public hearing on a proposed three-tier augmentation charge increase to all parcel owners. At the hearing, defendant tallied 291 written protests from 1,930 eligible parcel owners. Defendant then enacted ordinance No. 2010-02, which imposed the increased augmentation charges.

In June 2010, defendant began an all-mail election on the ordinance. It mailed ballots to all owners of land parcels served by wells who would be subject to the augmentation charge. Each ballot was accorded weighted votes proportional to the parcel's financial obligation as measured by average annual water use over the prior five years. And each ballot stated its number of votes. The weighted votes approved the ordinance 72 percent to 28 percent. But, if counted one vote per parcel, 324 votes were in favor of the ordinance and 608 votes were against the ordinance. Plaintiffs then filed the instant actions to challenge ordinance No. 2010-02.

**CHALLENGES TO ORDINANCE NO. 2010-02**

"Proposition 218 was passed in 1996 by the electorate to plug certain perceived loopholes in Proposition 13. [Citations.] Specifically, by increasing assessments, fees, and charges, local governments tried to raise revenues without triggering the voter approval requirements in Proposition 13." (Silicon Valley Taxpayers' Assn. v. Garner (2013) 216 Cal.App.4th 402, 405-406 [156 Cal.Rptr.3d 703].)

Relevant here is the component of Proposition 218 that undertakes to constrain the imposition by local governments of "assessments, fees and charges." (§ 1.)

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*594 (1) Proposition 218 restricts "the power of public agencies to impose a `"[f]ee" or "charge,"' defined as 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.' [Citation.] The phrase `property-related service' is defined to mean `a public service having a direct relationship to property ownership.' [Citation.] `Property ownership' is defined to `include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.' [Citation.]

"Where a proposed fee or charge comes within this definition, [Proposition 218] requires the proposing agency to identify parcels upon which it will be imposed, and to conduct a public hearing. [Citation.] The hearing must be preceded by written notice to affected owners setting forth, among other things, a `calculation' of `[t]he amount of the fee or charge proposed to be imposed upon each parcel....' [Citation.] If a majority of affected owners file written protests at the public hearing, `the agency shall not impose the fee or charge.' [Citation.] Moreover, unless the charge is for `sewer, water, [or] refuse collection services,' `no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.'" (Amrhein, supra, 150 Cal.App.4th at pp. 1384-1385.)

(2) As mentioned, we have determined that a groundwater augmentation charge such as the one imposed by ordinance No. 2010-02 "is indeed imposed as an incident of property ownership [and] that it is subject to the restrictions imposed on such charges by [Proposition 218]." (Amrhein, supra, 150 Cal.App.4th at p. 1393.) We cautioned in Amrhein, however, that "We should not be understood to imply that the charge is necessarily subject to all of the restrictions..."
imposed by [Proposition 218] on charges incidental to property ownership. [Amrhein] presents no occasion to
determine whether this or a similar charge may fall within any of the express exemptions or partial exemptions set forth
in that measure." (Ibid. & fn. 21.)

This case, however, presents such an occasion.

Boiled to its essence, plaintiffs' challenge to the election is that the weighted vote was improper. But the challenge
necessarily fails if the augmentation charge falls within the express exemption set forth in Proposition 218 for sewer,
water, and refuse collection services. (§ 6, subd. (c) [vote
required to impose or increase property-related fee "[e]xcept for ... sewer, water, and refuse collection services."].)

Plaintiffs argue that defendant does not provide "water service" as that term is commonly understood. (See Howard
["The
average voter would envision ‘water service’ as the supply of water for personal, household, and commercial use...."]).
They urge that defendant provides "groundwater management," which may be a service "but that service is not ‘water
service.’" Plaintiffs, however, make a distinction without a difference.

(3) Domestic water delivery through a pipeline is a property-related water service within the meaning of Proposition
we have held that, for purposes of Proposition 218, the augmentation charge at issue here does not differ materially
"from a charge on delivered water." (Amrhein, supra, 150 Cal.App.4th at pp. 1388-1389.) If the charges for water
delivery and water extraction are akin, then the services behind the charges are akin. Moreover, the Legislature has
endorsed the view that water service means more than just supplying water. The Proposition 218 Omnibus
Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public
improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code,
§ 53750, subd. (m).) Thus, the entity that produces, stores, supplies, treats, or distributes water necessarily provides
water service. Defendant's statutory mandate to purchase, capture, store, and distribute supplemental water therefore
describes water service.

Plaintiffs' reliance on Salinas is erroneous. In Salinas, the question was whether a storm drainage fee was exempt from
the voter-approval requirement because it was a water or sewer service fee. Our point about the average voter
envisioning water service as meaning the supplying of water was a preface to distinguishing water service from storm
drainage rather than a definition of water service. The entire sentence reads "The average voter would envision ‘water
service’ as the supply of water for personal, household, and commercial use, not a system or program that monitors
storm water for pollutants, carries it away [from property], and discharges it into the nearby creeks, river, and
ocean." (Salinas, supra, 98 Cal.App.4th at p. 1358.)

(4) We therefore conclude that the augmentation charge at issue here is for water service within the meaning of
Proposition 218. As such, it was expressly exempt from the fee/charge voting requirement.

In a second procedural attack, Pendry urges that defendant transgressed Proposition 218 by enacting ordinance No.
2010-02 without giving notice of the protest hearing to tenants and public utility customers who indirectly pay the
augmentation charge. There is no merit to the claim.

"An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined
pursuant to this article, including, but not limited to, the following: [¶] (1) 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." (§ 6, subd. (a)(1), italics added.)

(5) In short, Proposition 218 requires that notice of the protest hearing be sent to record owners, not tenants or customers. (See Gov. Code, § 53750, subd. (j) ["For purposes of ... Article XIII D of the California Constitution... [¶] ... [¶] (j) 'Record owner' means the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency."].)

(6) It is true, as Pendry points out, that, in the definitions section of Proposition 218, the term "property ownership" is defined to include "tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (§ 2, subd. (g).) And it is true that "when a well [is] shown to be operated by a lessee or other occupant, that person could be billed...." (Amrhein, supra, 150 Cal.App.4th at p. 1383.) But the notice provision of section 6, subdivision (a), requires notice to record owners, not to those having property ownership. (Silicon Valley, supra, 44 Cal.4th at p. 444 ["The principles of constitutional interpretation are similar to those governing statutory construction.' [Citation.] If the language is clear and unambiguous, the plain meaning governs."].)

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*597 "Proposition 218 also imposes substantive limitations, including restrictions on the use of revenues derived from such charges." (Amrhein, supra, 150 Cal.App.4th at p. 1385.)

"A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

"(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

"(3) 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.

"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4 [(procedures and requirements for proposed assessments)].

"(5) No fee or charge may be imposed for general governmental services... where the service is available to the public at large in substantially the same manner as it is to property owners, [¶] ... In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." (§ 6, subd. (b).)

Plaintiffs argue that the augmentation charge transgresses each of the section 6, subdivision (b), substantive limitations. **Revenues shall not exceed the funds required to provide the property related service**
According to Griffith,[2] the revenues derived from the augmentation charge exceed the funds required to provide supplemental water service because some of the revenue is used to pay ongoing debt that was "incurred to build a now abandoned pipeline to bring water into the Valley."[3] There is no merit to the point.

(7) As noted above, the Act allows defendant to levy groundwater augmentation charges for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water. Such costs necessarily include debt service incurred to construct facilities to capture, store, and distribute supplemental water.

Revenues shall not be used for any purpose other than that for which the fee or charge was imposed

According to plaintiffs, the revenues derived from the augmentation charge are used for a purpose other than that for which the charge was imposed because some of the revenue is used to pay debt service and defendant's general expenses. Again, the Act allows an augmentation charge to cover debt service. And similar reasoning supports that the costs of purchasing, capturing, storing, and distributing supplemental water necessarily include general expenses to administer the purchasing, capturing, storing, and distributing of supplemental water.

Pendry, however, expands on this theme in a separate, detailed argument to the effect that the augmentation charge is unauthorized by the Act. He contends that ordinance No. 2010-02 is invalid because it allows the augmentation charge to be used for "supplemental water service," a purpose not authorized by the Act. Without specifically referring to the Watsonville Recycled Water Project that blends treated recycled water with well water for agricultural use, he complains that defendant "is using the funds generated by the augmentation charge imposed by Ordinance 2010-02 to extract groundwater from within the watershed and deliver that water to the coast...."

Pendry relies on the Act, which authorizes defendant to levy augmentation charges to pay the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency. From there, Pendry notes that the Act states that "'Supplemental water' means surface water or groundwater imported from outside the watershed or watersheds of the groundwater basin, flood waters that are conserved and saved within the watershed or watersheds which would otherwise have been lost or would not have reached the groundwater basin, and recycled water." (Act, § 316.) From this, Pendry concludes that the recycle/well blend is not supplemental water because the well portion of the blend is neither imported water, floodwater, nor recycled water. We disagree with Pendry's analysis.

Defendant's Rate Study (ante, fn. 8) explains that "The [Watsonville Recycled Water Facility] produces recycled water with salinity (Total Dissolved Solids or TDS concentration) between approximately 700 and 900 mg/L. The concentration of TDS varies seasonally as a result of the source water flowing into the Waste Water Treatment Plant. In order to reduce salinity and use the recycled water for irrigation purposes, the recycled water must be blended with higher quality (lower TDS) water. Therefore, the recycled water project includes the construction, operation, and maintenance of blend water from supplemental groundwater wells. The supplemental wells are described in the BMP [(Basin Management Plan)] as part of the recycled water project. The wells are a necessary component of the recycled water project, which reduces coastal pumping and thus increases the sustainable yield of the overall groundwater basin. These wells also off-set and reduce the adverse water quality wells located closer to the coast."
"Recycled water' means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource." (Wat. Code, § 13050, subd. (n).)

Given this definition, it is apparent that the Watsonville Recycled Water Facility does not produce recycled water because the water it produces is not suitable for the beneficial use of coastal agriculture. The water only becomes recycled water when blended with the well water. Thus, the recycle/well blend water delivered to the coast is supplemental water.

We are constrained to add that the Act unquestionably allows defendant to extract groundwater for the purpose of capturing recycled water. The Act generally provides that defendant "should, in an efficient and economically feasible manner, utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future needs of the basin." (Act, § 102, subd. (g).) It specifically provides that defendant, "in order to improve and protect the quality of water supplies may treat, inject, extract, or otherwise control water, including, but not limited to, control of extractions, and construction of wells and drainage facilities." (Id., § 711.) And it also provides that defendant "shall have the power to take all affirmative steps necessary to replenish and augment the water supply within its territory." (Id., § 714.)

The amount imposed as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel

According to Griffith, the amount imposed on his parcel was disproportionate because he uses no services. But this overlooks that "the management of the water resources ... for agricultural, municipal, industrial, and other beneficial uses is in the public interest ..." and defendant was created to manage the resources "for the common benefit of all water users." (Act, § 101.) It also overlooks that the augmentation charge pays for "the activities required to prepare or implement any groundwater management program." (Id., § 1002, subd. (a).)

Pendry similarly grounds his argument on the erroneous premise that "The only property owners receiving § 6(b) services from [defendant] are the coastal landowners receiving delivered water."

Pendry specifically complains that defendant "established the augmentation charge by calculating the amount needed for its project, and then subtracting its sources of revenue other than the augmentation charge, with the remainder being the amount of the augmentation charge." He urges that defendant improperly "worked backwards." According to Pendry, "the proportional cost of service must be calculated ... before setting the rate for the augmentation charge."

Defendant indeed established its augmentation charge based on a revenue-requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users. The American Water Works Association Manual of Water Supply Practices: Principles of Water Rates, Fees, and Charges, in evidence below and relied on by defendant's ratemaking consultant, recommends this methodology ("The total annual cost of providing water service is the annual revenue requirements that apply to the particular utility...."). Pendry does not explain why this approach offends Proposition 218 proportionality. He cites Silicon Valley, supra, 44 Cal.4th at page 457 ("an assessment calculation that works backward by starting with an amount taxpayers are likely to pay, and then determines an annual spending budget based thereon, does not comply with the law governing assessments..."). Unlike Silicon Valley, however, this case neither involves an assessment nor a what-will-the-market-bear methodology. Pendry also cites Howard Jarvis Taxpayers Assn. v. City of Fresno (2005) 127 Cal.App.4th 914, 923 [26 Cal.Rptr.3d 153]. But that case says nothing
more than that costs should be determined and apportioned ("Together, subdivision (b)(1) and (3) of article XIII D, section 6, makes it necessary — if Fresno wishes to recover all of its utilities costs from user fees — that it reasonably determine [citation] the unbudgeted costs of utilities enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel."). (Ibid.)

Pendry acknowledges that defendant apportioned the augmentation charge among different categories of users (metered wells, unmetered wells, and wells within the delivered water zone). But he argues that City of Palmdale v. Palmdale Water Dist. (2011) 198 Cal.App.4th 926 [131 Cal.Rptr.3d 373] (Palmdale), holds that Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis. We disagree with Pendry.

In Palmdale, the court reversed a judgment that had upheld tiered categories of water rates. It held that the water district had failed to carry its burden to justify disparate treatment of the customer classes. The case did not hold that parcel-by-parcel analysis was required. It held that the water district charged categories disproportionately "without a corresponding showing in the record that such impact is justified under [Proposition 218]." (Palmdale, supra, 198 Cal.App.4th at p. 937.)

(8) Apportionment is not a determination that lends itself to precise calculation. (White v. County of San Diego (1980) 26 Cal.3d 897, 903 [163 Cal.Rptr. 640, 608 P.2d 728].) In the context of determining the validity of a fee imposed upon water appropriators by the State Water Resources Control Board, the Supreme Court has recently held that "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payers." (California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421, 438 [121 Cal.Rptr.3d 37, 247 P.3d 112].)

Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than that the amount shall not exceed the proportional cost of the service attributable to the parcel, defendant's method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render defendant's method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

**No fee or charge may be imposed unless it is immediately available and not for future services**

Plaintiffs argue that the augmentation charge will be used for future services because ordinance No. 2010-02 states that the charge will be used "to identify and determine future supplemental water projects ...." There is no merit to the point.

Defendant's water service consists of more than just delivering water. As mentioned, the Act authorizes defendant to levy groundwater augmentation charges to pay for purchasing, capturing, storing, and distributing supplemental water. Since one cannot rationally purchase supplemental water without identifying and determining one's needs, identifying and determining future supplemental water projects is part of defendant's present-day water service.

Pendry also complains that delivered water is one of the services and delivered water is not immediately available except to coastal properties within the delivered water zone. But, again, Pendry's complaint stems from his erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water and his failure to acknowledge that the augmentation charge pays for the activities required to prepare or implement the groundwater management program for the common benefit of all water users.
Plaintiffs reason that, since everyone is a water user, everyone benefits from the services charged to property owners via the augmentation charge. They conclude that the augmentation charge is imposed for general governmental services. We disagree with plaintiffs’ analysis.

(9) The language of section 6, subdivision (b)(5), concerns the purpose of fees and charges. (Golden Hill Neighborhood Assn., Inc. v. City of San Diego (2011) 199 Cal.App.4th 416, 434, fn. 17 [130 Cal.Rptr.3d 865].) "The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service." (Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal.App.4th 637, 648 [119 Cal.Rptr.2d 91].) Defendant is not using money from the augmentation charge for "general governmental services." (§ 6, subd. (b)(5).) Rather, it is using the money to pay for the water service provided.

CONFLICT OF INTEREST

Pendry contends that defendant's board member Michael Dobler, who voted for ordinance No. 2010-02, had a disqualifying financial interest in the decision, and that his participation renders the ordinance void under the PRA. He points out that defendant's board of directors consists of seven members (Act, § 402) and ordinances must pass by "the affirmative vote of the majority of the members of the board" (id., § 410). He notes that the vote count to pass ordinance No. 2010-02 was four to one and, thus, insufficient

without Dobler's vote. He complains that Dobler has an interest in entities that farm in the delivered water zone. We disagree with Pendry's contention.

(10) The PRA was enacted by initiative in June 1974. It prohibits any public official from participating in a governmental decision in which he knows or has reason to know he has a financial interest. (Gov. Code, § 87100.) It allows a person to sue for injunctive relief and, "If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void." (Id., § 91003, subd. (b).) It also established the Fair Political Practices Commission (id., § 83100), which is authorized to adopt regulations to carry out the purposes and provisions of the PRA (Gov. Code, § 83112).

"A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official ...." (Gov. Code, § 87103.)

"The financial effect of a governmental decision on the official's economic interest is indistinguishable from the decision's effect on the public generally if ...: [¶] ... [¶] (c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (Cal. Code Regs., tit. 2, § 18707.2, subd. (c) (regulation).)

Here, there is no serious question that (1) defendant is a water, irrigation, or similar district, and (2) the decision effected an adjustment to charges or rates.
Pendry disputes that the ordinance applies the charges proportionally and across the board to persons receiving services from defendant. He urges that the augmentation charge is imposed upon approximately 2,400 parcels located within defendant's boundaries, but only a handful of those properties receive the delivered water service (Dobler included) and can expect to benefit from the greater service, reliability, and improved water quality from the delivered water supply. This, however, is merely another variant of Pendry's erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water.

The augmentation charge affects those on whom it is imposed by burdening them with an expense they will bear proportionately to the amount of groundwater they extract at a rate depending on which of three rate classes applies. It is imposed "across-the-board" on all water extractors. All persons extracting water — including any coastal users who choose to do so — will pay an augmentation charge per acre-foot extracted. All persons extracting water and paying the charge will benefit in the continued availability of usable groundwater. That there is a separate charge for delivered water has no tendency to establish that the augmentation charge is applied to the interests of extractors in a manner that is anything other than proportional and across-the-board. It is plain that the ordinance satisfies the terms of regulation section 18707.2, subdivision (c), such that the "public generally" exception in the PRA applies to Dobler's vote. (See Amrhein, supra, 150 Cal.App.4th at pp. 1395-1396 (conc. opn. of Bamattre-Manoukian, J.).)

ORDINANCE NO. 2002-02 AND 1993 MANAGEMENT FEE

In Eiskamp, the plaintiff challenged ordinance No. 2002-02 on the ground that it was invalid because defendant did not comply "with the notice, hearing, and voting requirements of [Proposition 218]." (Eiskamp, supra, 203 Cal.App.4th at p. 102.) We concluded that the challenge was barred by the doctrine of res judicata because the 2008 stipulated judgment in the pending litigation resolved the issue against all persons. We specifically held that "Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was `binding and conclusive ... against [defendant] and against all other persons' (Code Civ. Proc., § 870, subd. (a)), including Eiskamp." (Id. at p. 106.) Since Pendry raises the same claim as the plaintiff in Eiskamp, his challenge is also barred.

Pendry disagrees. He asserts that Eiskamp was wrongly decided because "the in pro per plaintiff in Eiskamp did not properly present the correct facts or law to this Court." According to Pendry, the Consolidated Lawsuits were not in rem validation proceedings insofar as ordinance No. 2002-02 was concerned because, in Scurich (the case that challenged that ordinance via a reverse validation action), our reversal upheld the trial court's dismissal of the in rem validation cause of action and remanded for trial an in personam declaratory-relief cause of action. From this, Pendry reasons that ordinance No. 2002-02 was "not under attack" such that there was in rem jurisdiction in the Consolidated Lawsuits. Pendry concludes that the stipulated judgment only binds parties to the stipulated agreement and, since he was not a party, he is free to relitigate. Pendry's analysis is erroneous.

The settlement agreement served to resolve "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation")." (Eiskamp, supra, 203 Cal.App.4th at p. 102, italics added.) Specifically, the parties extinguished "any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect...." (Ibid., italics added.)

In the pending litigation, the "judgment was entered pursuant to the terms of the stipulated agreement." (Eiskamp, supra, 203 Cal.App.4th at p. 102.) Since the Amrhein lawsuit was a validation proceeding and part of the pending
litigation, all persons are bound by the judgment. (Code Civ. Proc., § 870, subd. (a).) And since the judgment extinguished all claims that the parties, which includes all persons given that validation character of Amrhein, had made concerning any augmentation charge or management fee then in effect, Pendry cannot relitigate the claims here. Pendry concedes as much by recognizing that "the plaintiffs and defendants in Scurich and Amrhein [(all persons)] stipulated in private settlement discussions to accept money in exchange for foregoing their individual right to attack Ordinance 2002-02 in the future." That ordinance No. 2002-02 was not technically under attack at the time of the judgment does not detract from that the pending litigation was a validation proceeding that comprehensively extinguished all claims that had been made, or could have been made, about the validity of any augmentation charge or management fee then in effect. This necessarily includes claims against ordinance No. 2002-02 and the 1993 management fee. [13]

Pendry claims that applying res judicata against him transgresses due process. However, his argument is premised on the trial court's conclusion that res judicata applied because he was in privity with the parties in the pending litigation. Our conclusion is that res judicata applies because, by virtue of the validation character of the pending litigation, he was a party to the pending litigation.

**DISPOSITION**

The judgment in H038087 (Super. Ct. Santa Cruz County, No. CV168936-Griffith) is affirmed.

The judgment in H038264 (Super. Ct. Santa Cruz County, No. CV169080-Pendry) is affirmed.

Rushing, P. J., and Elia, J., concurred.

[1] Further unspecified section references are to California Constitution, article XIII D.

[2] Plaintiffs also asserted other grounds that they do not advance on appeal.

[3] In rem proceeding by public agency against all persons interested in validity of matter determined. (Code Civ. Proc., § 860 et seq.)

[4] Defendant proposed $195 per acre-foot for metered wells inside the coastal delivered water zone, $162 per acre-foot for metered wells outside the delivered water zone (primarily municipal, industrial, and agricultural users), and $156 per acre-foot for unmetered wells (primarily rural residential). It also proposed $306 per acre-foot for delivered water charges.

[5] The parties differ immaterially on the one-for-one vote count.

[6] According to defendant, the election was unnecessary but held nevertheless in an abundance of caution "because no case has explicitly reached the issue, and because of the near certainty of suit."

[7] Pendry does not challenge compliance with section 6, subdivision (b)(1).

[8] Defendant's Proposition 218 service charge report (Rate Study), in evidence below, explains that a previously recommended import pipeline was no longer feasible "[d]ue to changes in the availability of Central Valley Project water supplies."
"Agricultural uses shall have priority over other uses under this act within the constraints of state law." (Act, § 102, subd. (d).)

Pendry claims that the trial court did not find that the "public generally" exception applies in this case. It is true that the trial court's reasoning is ambiguous. The trial court's statement of decision finds against "a conflict of interest which could support the voiding of the subject Ordinance." The finding could be construed to mean that (1) Dobler had no disqualifying financial interest, (2) the "public generally" exception applied to Dobler's financial interest, or (3) Dobler's financial interest did not justify the discretionary remedy to void the ordinance. Pendry's point is of no moment. The parties argued the "public generally" exception to the trial court. The salient facts are undisputed. And Pendry urges us to review the PRA issue de novo because it involves statutory interpretation on undisputed facts.

The plaintiff in Eiskamp did not challenge the 1993 management-fee ordinance as does Pendry, but the management-fee ordinance stands on the same footing as the augmentation-charge ordinance since it was part of the stipulated judgment.

Plaintiff McGrath was a party to the stipulated agreement but he excepted himself from the causes of action herein that challenge ordinance No. 2002-02 and the management-fee ordinance.

Defendant's request to take judicial notice of three letters requesting depublication of Eiskamp and four letters supporting a petition for review of Eiskamp is denied.

59 Cal.Rptr.3d 484 (2007)
150 Cal.App.4th 1364

PAJARO VALLEY WATER MGMT. AGENCY, Plaintiff and Respondent,

v.

Ray AMRHEIN et al., Defendants and Appellants.

No. H027817.

Court of Appeal, Sixth District.

May 21, 2007.

Rehearing Denied June 14, 2007.


*485 Johnson & James, Robert K. Johnson, Aptos, for Defendants and Appellants Ray Amrhein et al.

Harold Griffith, Amicus Curiae for Appellants Ray Amrhein et al.

Maria Luisa Menchaca, Amicus Curiae for Appellants Fair Political Practices Commission.
RUSHING, P.J.

Plaintiff and respondent Pajaro Valley Water Management Agency (Agency) brought this validation proceeding to ascertain the validity of its 2003 ordinance increasing the groundwater augmentation fee to be charged to operators of wells within its jurisdiction. Defendants and appellants Ray Amrhein, Guy George, Mark Pista, San Andreas Mutual Water Company, Patrick Layhee, and John Sheffield (Objectors) appeared in opposition to the requested decree. After taking evidence, the trial court held the ordinance valid, ruling that the matter was proper for a validation proceeding, that two Agency board members did not have disqualifying conflicts of interest, and that the ordinance did not contravene constitutional limitations on the power of local entities to impose property taxes, assessments, and property-related charges. Objectors brought this appeal, contending that the court erred in each of these determinations.

We originally issued an opinion finding no error and affirming the judgment. We granted rehearing, however, to consider the effect of Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220 (Bighorn). In light of that decision we are now compelled to conclude that the augmentation fee is a fee or charge "imposed ... as an incident of property ownership" and thus subject to constitutional preconditions for the imposition of such charges. (Cal. Const., art. XIII D, § 2, subd. (e), added by initiative, Gen. Elec. (Nov. 5, 1996); see id., § 6.) Since the Agency made no attempt to comply with those conditions, we must reverse the judgment validating the charge.

BACKGROUND

The area subject to the Agency's jurisdiction is home to around 80,000 persons, about half of whom reside in Watsonville. This area lies atop the Pajaro Valley Groundwater Basin, which the trial court found to be "a single, interconnected basin of fresh groundwater to supply the whole region." Extraction of groundwater through wells supplies slightly over 95 percent of the water used in the basin. The remainder comes from a variety of surface sources including sloughs, rivers, creeks, and springs. About 86 percent of the water used within the basin goes to agriculture.

Since the 1950's the basin's groundwater supply has been subjected to chronic overuse, resulting in overdraft and seawater intrusion. Overdraft directly depletes supply by extracting more water than is replenished (recharged) by natural processes. Recent annual extractions from the basin total about 70,000 acre-feet, which reflects an overdraft of about 9,000 acre-feet. This in turn leads to seawater intrusion, which occurs when fresh groundwater is drawn below sea level, causing seawater to flow into the neighboring freshwater, rendering it too saline for use. Freshwater has been drawn to below sea level throughout much of the basin. An Agency witness testified that if seawater were allowed to intrude unimpeded into the areas of declining ground water elevation, "it would eventually fill that void with seawater. The entire basin would be impacted." As it is, seawater intrusion renders unusable 11,000 additional acre-feet of fresh groundwater every year.

Because of the depletion that has already occurred, seawater intrusion would not be halted merely by reducing extractions by the 9,000 acre-feet per year of overdraft, or even the 20,000 acre-feet of overdraft plus water lost to increased salinity. Rather, the Agency estimates that to achieve seawater exclusion by reduced extractions alone would require a reduction of about 44,000 acre-feet per year.
The Agency was created in 1984 through the Legislature's enactment, as an urgency measure, of the Pajaro Valley Water Management Agency Act. (Stats.1984, ch. 257, §§ 1 et seq., pp. 798 et seq., West's Ann. Wat.-Appen. (1995 ed.) ch. 124, §§ 124-1 et seq. (Act.).) It established an agency composed of a seven-member board of directors, each of whom must be a voter and resident of the basin. (Stats.1984, ch. 257, § 402, p. 805.) In creating the Agency, the Legislature found that "the management of the water resources within the Pajaro Valley Water Management Agency for agricultural, municipal, industrial, and other beneficial uses is in the public interest and that the creation of a water agency pursuant to this act is for the common benefit of all water users within the agency." (Stats.1984, ch. 257, § 101, p. 798.) It declared the Agency's purpose as "to efficiently and economically manage existing and supplemental water supplies in order to prevent further increase in, and to accomplish continuing reduction of, long-term overdraft and to provide and insure sufficient water supplies for present and anticipated needs within the boundaries of the agency." (Id., § 102, subd. (f), p. 799.) It decreed that the Agency "should, in an efficient and economically feasible manner, utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future needs of the basin." (Id., § 102, subd. (g), p. 799.) It directed that the

management of water resources under the Act be carried out in light of a number of objectives, including "the avoidance and eventual prevention of conditions of long-term overdraft, land subsidence, and water quality degradation" (id., § 102, subd. (a), p. 799), the establishment of "reliable, long-term supplies" rather than "long-term overdraft as a source of water supply" (id., § 102, subd. (b), p. 799), the reduction of long-term overdraft "realizing that an immediate reduction in long-term overdraft may cause severe economic loss and hardship" (id., § 102, subd. (c), p. 799), and the achievement of economic efficiency by "requir[ing] that water users pay their full proportionate share of the costs of developing and delivering water" (id., § 102, subd. (d), p. 799). The Legislature anticipated that "long-term overdraft problems may not be solved unless supplemental water supplies are provided." (Id., § 102, subd. (g), p. 799.) Accordingly it declared that the Agency could appropriately "acquire, buy, and transfer water and water rights in the furtherance of its purposes." (Id., § 102, subd. (e), p. 799.) It declared that "[a]gricultural uses shall have priority over other uses under this act within the constraints of state law." (Id., § 102, subd. (d), p. 799.)

The Act specifically empowers the Agency to adopt ordinances levying "groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency." (Stats. 1984, ch. 257, § 1001, p. 815.) It also authorizes the Agency to "regulate, limit, or suspend extractions from extraction facilities" (id., § 711, p. 811), and provides criteria for the allocation of rights to use available groundwater (id., § 712, pp. 809-810).

The Act also empowers the Agency to commence a "groundwater rights adjudication" (Stats.1984, ch. 257, § 1106, p. 817), which would effect "the determination of substantially all rights in the groundwater basin or the area subject to the adjudication" (id., § 310, p. 804). An economist testified about the effects on the local economy of a "worst case scenario" in which a groundwater rights adjudication would reduce groundwater extractions to 24,000 acre-feet per year, of which 12,000 would be allocated to residential use, leaving about 0.4 acre-feet per acre for farmers. He testified that this scenario would result in the loss of 9,000 jobs and an annual reduction in agricultural production of $360 million.[3]

In 2002, the Agency enacted, by unanimous vote, a Revised Basin Management Plan (BMP), which evaluated the problems of overdraft and seawater intrusion, examined a variety of potential solutions, identified a preferred solution, and recommended specific projects to implement it. The result was a plan whose primary components were (1) construction of a 23-mile
pipeline from San Benito County to the coast; (2) construction of a coastal distribution system for delivery of water to the area west of Highway 1 within the Basin; (3) procurement of water, or water rights, from owners in the Central Valley; (4) development of additional water supplies from local sources; and (5) eventual delivery of the resulting supplies to coastal farmers as well as some farmers along the pipeline route.

An Agency expert opined that the plan represents a reasonable engineering approach to achieving Agency goals, and is the most reasonable of many alternatives considered in terms of cost, environmental effects, and ability to meet those goals. The plan would bring in a total of about 18,500 acre-feet composed of 1,000 from Harkins Slough, 4,000 in recycled Watsonville water, and 13,400 in pipeline imports. The plan also sought to achieve savings of about 5,000 acre-feet through conservation. An Agency witness opined that these measures would solve the problems of overdraft and seawater intrusion, even though they fall well short of the amount by which extractions exceed the safe yield. He gave two reasons for this conclusion, the first of which seemed to be that by eliminating coastal extractions and replacing them with irrigation from outside sources, the plan would raise the groundwater level along the coast, which in turn would retard seawater intrusion. The second reason is unintelligible as stated in testimony, having been rendered so, we surmise, by mistranscription. In any event, the witness testified that if the projected solution "does not work," the plan will have put the infrastructure in place to "expand the existing system." Another expert witness testified that the application of 18,500 acre-feet at the coast would produce a hydraulic gradient equivalent, for purposes of excluding seawater, to reducing overall extraction by 45,000 acre-feet.

Funding for the project was expected to come from groundwater augmentation charges, such as that at issue here, along with (higher) charges on imported water, grants, and some public funds. More precisely, those portions not funded by grants or public funds would be financed by certificates of participation or selling bonds to be paid off from augmentation and delivery charges.

The Agency first collected a groundwater augmentation charge in 1994. The charge was increased from time to time by ordinance. At issue here is the Agency's Ordinance 2003-01, which increased the charge from $80 to $120 per acre-foot. An Agency witness testified that this was not sufficient to implement the BMP and that the charge would eventually rise to $158 per acre-foot. The water delivery charge would be $316 per acre-foot.

The augmentation charge is assessed against all extractors of groundwater. Although the evidence on this point is not entirely clear, there are apparently some 660 non-residential wells, most of them operated for farming purposes, and approximately 3,000 residential wells. Many large users have metered wells; in those cases the owner of the well is charged according to actual consumption. Few if any residential well users have meters; they are charged an "estimated use rate per dwelling" of 0.6 acre-feet per year, which is the estimated average rate of consumption. For unmetered agricultural use, the Agency estimates consumption based on a number of factors. For example, the Agency assumes that an apple orchard consumes one acre-foot per year per cultivated acre of land. The Agency can adjust estimated charges if a well owner shows that estimated consumption does not accurately reflect the amount extracted. While Agency witnesses knew of no cases where this had occurred with residential well users, it has occurred with other users billed on an estimated basis.

The Agency bills these charges to the owner, as identified in parcel records, of the land on which a well appears. Upon request, the Agency will bill a tenant, but it will send a duplicate bill to the owner, whom it considers ultimately responsible. The Agency has pursued collection proceedings against tenants and has entered into payment arrangements with tenants in arrears. The general manager testified that if a case arose in which a well were shown to belong to a person other than the landowner, the Agency would bill the well owner.
On July 1, 2003, the Agency brought this action for a declaration of the validity of the ordinance increasing the augmentation charge to $120 per acre-foot. Pursuant to Code of Civil Procedure section 860 et sequitur, the Agency named as defendants all persons interested in the validity of the ordinance. Objectors filed an answer generally denying the allegations of the complaint and asserting a number of grounds for invalidating the ordinance, including that (1) the charge constitutes "a property based tax or assessment" not enacted in compliance with governing law including Proposition 218; (2) the charge is invalid "inasmuch as certain members of the Board of Directors who voted on the Augmentation Charge Increase had a conflict of interest within the law, including but not limited to the provisions of Government Code section 87100, et seq."; and (3) the Agency is estopped to deny that the charge is an assessment on "rural domestic wells" in view of its own prior directive to the tax collectors of the affected counties to collect the charge as an assessment. A separate answer was filed by Pajaro Valley Citizens for Long Term Water Solution [sic], a nonprofit corporation, supporting the Agency's position.

After hearing testimony from witnesses for the Agency and Objectors, the trial court entered a judgment declaring the ordinance valid. Objectors moved to set aside the judgment on the ground that the court had allowed insufficient time for them to propose contents for, and object to, the requested statement of decision. The trial court granted that motion and filed a new judgment and statement of decision. Objectors filed this timely appeal.

I. Jurisdiction

Objectors assert that the trial court lacked jurisdiction "to decide the validity of the augmentation charge in a validation action." The argument apparently proceeds as follows: (1) a validation proceeding will only lie to determine the validity of official action where authorized "under any other law" (Code Civ. Proc., § 860); (2) the Agency predicated its complaint here on Government Code section 66022, which authorizes a validation proceeding "to ... review ... an ordinance ... modifying or amending an existing fee or service charge, adopted by a local agency"; (3) for purposes of this statute, "fee or service charge" means a capacity charge; (4) the augmentation charge at issue here is only partly a "capacity charge" subject to a validation proceeding under these provisions; and (5) the trial court therefore lacked jurisdiction to render a validation judgment with respect to those portions of the charge that are not a "capacity charge."

We fail to discern how this argument can affect the outcome of this appeal. Objectors raised the point below in a trial brief alluding to another lawsuit, which was then on appeal before this court, challenging an Agency augmentation charge by reverse validation action. The trial court there had dismissed the matter for failure to comply with the special limitations period applicable to such proceedings. (Code Civ. Proc., § 863.) After this matter was tried, but before judgment entered, a panel of this court rendered an unpublished decision in that case, holding that the augmentation fee was only partly a "capacity charge" and that insofar as it was not such a charge, the plaintiffs' objections were not subject to the special statute of limitations. (Scurich v. Pajaro Valley Water Management Agency (May 27, 2004, No. H025776), 2004 WL 1191948 [nonpub. opn.] (Scurich).)

Objectors cited that decision to the court below, arguing that it affected the outcome here in some way. However, they later entered into a stipulation declaring that "[i]nsofar as there is any portion of the augmentation charge ... that is not within the jurisdiction of this court for a validation action, the complaint may be deemed to have been amended to state a second cause of action among the defendants who have appeared, and the plaintiff, for declaratory relief as to the validity of Ordinance 2003-01. Nothing contained in this stipulation shall prevent the parties from raising any issue on appeal which was part of the proceedings in this case." The stipulation was executed by the Agency, Objectors, other appearing defendants, and the trial judge.
Despite this stipulation, Objectors persist in arguing that the trial court lacked jurisdiction to adjudicate the matter as a validation proceeding. The intended effect of this assertion is left to surmise. The point was offered below as a defense to the action, i.e., that the trial court lacked subject matter jurisdiction. As far as we can tell, no authority was ever provided for this proposition. In any event it would provide at most a partial defense, because Objectors do not appear to claim that the conditions for a validation proceeding are entirely lacking, only that part of the fee is not subject to adjudication in such a proceeding. The practical significance of this proposition, were we to accept it, is obscure at best. In the unpublished decision cited by Objectors, the question had the practical effect of resurrecting part of a lawsuit that the trial court had completely terminated. Here the error, if any, was the opposite — the court tried too much of the action as a validation proceeding, when only part of it was subject to such treatment. Since all parties before the court actively sought such an adjudication, this hypothetical error had no apparent effect on them. The record fails to establish, and Objectors make no attempt to demonstrate, that their argument entitles them to any particular relief.

This would follow even if Objectors had not stipulated away whatever objection they otherwise had. If a complaint contains allegations that would otherwise oust the trial court of jurisdiction, but the facts alleged would support a declaratory judgment, the complaint may be construed — even without a stipulation — to pray for such relief. (See Minor v. Municipal Court (1990) 219 Cal.App.3d 1541, 1547-1548, 268 Cal.Rptr. 919.) Here the Agency's right to seek declaratory relief is reinforced by Code of Civil Procedure section 869, which declares that an agency's entitlement to pursue a validation proceeding "shall not be construed to preclude the use by such public agency ... of mandamus or any other remedy to determine the validity of any thing or matter." Thus, assuming that some or all of the augmentation fee could not properly be adjudicated in a validation proceeding, the trial court's jurisdiction could, and as far as this record shows should, be saved by viewing the judgment as one in declaratory relief.

Under the circumstances here, the only apparent distinction between a validation judgment and a declaratory judgment is its effect on absent persons. A validation proceeding is in rem (Code Civ. Proa, § 860), and yields a judgment that is "forever binding and conclusive ... against the agency and against all other persons" (id., § 870, subd. (a)). A declaratory judgment, on the other hand, is in personam (Mills v. Mills (1956) 147 Cal. App.2d 107, 116, 305 P.2d 61), and generally has preclusive effect only on those who were joined or represented in the action (Campbell v. Scripps Bank (2000) 78 Cal. App.4th 1328, 1334, 93 Cal.Rptr.2d 635).[2] Thus if someone other than Objectors sought to relitigate some of the issues concerning the validity of the charge, it might be open to that person to contend that some aspects of the present judgment are not conclusive on the world but only on the parties appearing here. In no sense does it appear that the court lacked fundamental jurisdiction to adjudicate the issues before it or to issue a judgment binding on the parties now before us. This makes it unnecessary to consider the Agency's arguments that the reasoning in Scurich, supra, H025776, does not pertain here.[3]

II. Tax, Assessment, or Property-Related Charge

A. Introduction

Objectors contend that the groundwater augmentation charge could not validly be imposed without complying with the provisions of Propositions 218 (Cal. Const., arts. XIII C & XIII D, § 3) and 62 (Gov. Code, §§ 53720-53730), under which it constituted a tax, property assessment, or charge incidental to property ownership. In our previous decision we concluded, on the basis of then-extant authority, that the charge did not fall within any of these descriptions. We have now concluded that while the charge is not a tax or assessment, it must be considered a property-related fee and, as such, is subject to the relevant provisions of Proposition 218.
As relevant here, Proposition 62 added provisions to the Government Code prohibiting any "local government or district" from imposing any "general tax" or "special tax" without voter approval. (Gov. Code, §§ 53722, 53723.) Article XIII C of the California Constitution (Art. 13C), which was enacted as part of Proposition 218, adopted by initiative in November 1996, similarly limits the power of local governments, which are broadly defined to include "any special district, or any other local or regional governmental entity" (Art. 13C, § 1, subd. (b)) to impose taxes, all of which are classified for purposes of the article as either general or special. (Art. 13C, § 2, subd. (a).) A general tax is "any tax imposed for general governmental purposes." (Art. 13C, § 1, subd. (a).) A special tax is "any tax imposed for specific purposes...." (Art. 13C, § 1, subd. (d).) No general tax may be imposed, increased, or extended without the approval of a majority of the voters. (Art. 13C, § 2, subd. (b).) "Special purpose districts [and] agencies" are altogether barred from imposing general taxes. [10] (Art. 13C, § 2, subd. (a).) No special tax may be imposed without two-thirds voter approval. (Art. 13C, § 2, subd. (d).) Article 13C also attempts to guarantee to the electorate the power to reduce or "affect" local taxes, assessments, and charges by initiative. (Art. 13C, § 3.)

The second component of Proposition 218 is Article XIII D of the California Constitution (Art. 13D), which undertakes to constrain the imposition by local governments of "assessments, fees and charges." (Art. 13D, § 1.) An "[a]ssessment" is "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." (Art. 13D, § 2, subd. (b).) "Special benefit" means "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." (Art. 13D, § 2, subd. (i).) "Fee" and "charge" are defined interchangeably as "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." (Art. 13D, § 2, subd. (e).)

Article XIII D imposes procedural requirements on the levying of assessments, including a noticed public hearing and balloting of all affected landowners, who may veto the assessment by a majority negative vote, determined in proportion to the proposed assessment on each property. (Art. 13D, § 4, subsd. (c)-(e).) A "[p]roperty [r]elated [f]ee[ ] [or] [c]harge[ ]" may only be imposed or increased after identification of affected parcels, notice to their owners, a public hearing an opportunity for protest, and with certain exceptions, approval by a majority of property owners or by two thirds of voters within the district. (Art. 13D, § 6.)

*493 It is undisputed that the Agency did not comply with the procedures prescribed under Propositions 62 and 218 for general taxes, special taxes, assessments, or property-related charges. Therefore, if the groundwater augmentation charge falls within any of these categories, it must be invalidated.

B. Special Tax

There is no question that if the charge here is a "tax," it is a special tax. Objectors argue that it is precisely that. They cite Proposition 218's definition of a "[s]pecial tax" as a "tax imposed for specific purposes...." (Art. 13C, § 1, subd. (d); Gov.Code, § 53721 [to same effect].) They thus focus on the benefit to be derived from the charge and its relationship to the manner in which the charge is distributed. In essence they contend that, with the exception of coastal farmers who will receive imported water, those paying the charge will receive no benefit beyond that enjoyed by the general public. In Objectors' view, this makes the charge a tax, not a fee. The Agency focuses on the relationship between the amount of the charge and the cost of the services it is earmarked to finance, contending that since the charge does not exceed the costs of groundwater remediation, it is not a tax.

We need not choose between these methodologies because they both beg the question whether the charge is a "tax" at all. It is evident on the face of Propositions 62 and 218 that not all charges are taxes. Proposition 218 classifies regulated public levies into four categories: general taxes, special taxes, assessments, and property-related charges.
Objectors' concern with the "special" or "general" nature of the benefit to be financed by the groundwater augmentation charge appears to have little bearing on whether the charge is a tax in the first instance.

Objectors cite several cases in connection with their contention that the charge here is a tax, but none supports the conclusion they seek. In *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1182, 132 Cal. Rptr.2d 1, the court considered a local ballot measure that sought to ratify a preexisting "utility user's tax" and to earmark its proceeds for police, fire, parks, recreation, or library services. There was no question about the charge's status as a "tax"; the only question was whether it was a "general tax," that could be imposed by a majority of the voters, or a "special tax," requiring a two-thirds vote. (See *id.* at pp. 1183-1184, 1186, 132 Cal.Rptr.2d 1.) In *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 232, 45 Cal.Rptr.2d 207, 902 P.2d 225, the court held, unremarkably, that a sales tax earmarked for transportation projects was a "special tax" subject to the two-thirds requirement. Indeed the point was scarcely contested; the only real issue was whether the taxing authority was a "district" for purposes of Government Code section 53722. (Santa Clara County Local Transportation Authority v. Guardino, supra, 11 Cal.4th at pp. 232-233, 45 Cal.Rptr.2d 207, 902 P.2d 225.) In *San Marcos Water Dist. v. San Marcos Unified School District* (1986) 42 Cal.3d 154, 158, 165, 168, 228 Cal.Rptr. 47, 720 P.2d 935, the court held that a one-time "sewer capacity fee" was a "special assessment" for purposes of a rule exempting publicly entities from paying such assessments, rather than a "user fee" which such an entity could be required to pay. In *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 597, 77 Cal.Rptr.2d 752, the court held that a "utility lien" imposed by a city to aid in collecting unpaid utility charges was not a special tax, special assessment, regulatory fee, or development fee, but "[a]t most ... a user fee...."

Under modern law, the central distinction between a tax and a fee appears to be that a tax is "imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.]" (Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866, 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350; Barratt American Inc. v. City of Rancho Cucamonga (2005) 37 Cal.4th 685, 700, 37 Cal. Rptr.3d 149, 158, 124 P.3d 719, 727.) The augmentation charge here exposes the falseness of this supposed dichotomy. While it is intended to finance improvements, and thus to raise "revenue," it is also charged in return for the benefit of ongoing groundwater extraction and the service of securing the water supply for everyone in the basin. Indeed, if not for the prohibitive cost of metering smaller wells, which necessitates charging those extractors on the basis of estimated usage, the fee might well be justified on regulatory grounds, as bringing the actual cost of groundwater nearer its true replacement cost and thus subjecting it to the regulation of the marketplace. This rationale might still be readily invoked with respect to metered extractions and
perhaps those estimated based upon particular facts such as the nature of crops grown. In any event we are far from persuaded that the charge can be characterized as a "tax."

C. Special Assessment

Objectors contend that if the groundwater augmentation charge is not a tax it is a "special assessment." But Proposition 218 defines an "assessment" as a

*495 "levy or charge upon real property ...." (Art. 13D, § 2, subd. (b).) This reflects the central characteristic of a "special assessment" as a charge on land. Thus in Trumbo v. Crestline-Lake Arrowhead Water Agency (1967) 250 Cal.App.2d 320, 58 Cal.Rptr. 538, a "standby water charge" assessed by a water agency against certain properties whether or not water was used constituted not a tax but a "special assessment to be levied upon land according to the availability of water." (Id. at p. 322, 58 Cal.Rptr. 538.)

The augmentation charge is not a charge "upon real property," but one upon an activity — the extraction of groundwater. It is imposed under the authority of article 10, section 1001 of the Act, which provides that the Agency "may, by ordinance, levy groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency." (Stats.1984, ch. 257, § 1001, p. 815, italics added.) This stands in contrast to the authority granted the Agency to "fix charges upon land within the agency for the purpose of paying the costs of initiating, carrying on, and completing any of the powers, projects, and purposes for which the agency is organized." (Stats.1984, ch. 257, § 902, p. 814.) The latter provision arguably contemplates an "assessment" as defined in Article 13D, section 2, subdivision (b). The former does not; rather it contemplates a charge for an activity, to wit, the extraction of groundwater. (Stats.1984, ch. 257, § 1001, p. 815.) In adopting the ordinance here at issue, the Agency was manifestly acting under this statute and not under the statute authorizing charges on land.

The nature of an assessment as a charge on land is commonly reflected in its being secured by a lien on the charged property. (See Gov.Code, § 53931 ["All special assessments in which the amount thereof is apportioned among the several parcels of land assessed shall constitute a lien in said respective amounts upon the several parcels assessed...."]; Gov.Code, § 54718, subd. (a) [stating circumstances under which benefit assessment will not give rise to lien, but will be "transferred to the unsecured roll!"]; Civ.Code, § 2911 [duration of liens, including those "to secure the payment of a public improvement assessment"]).) In contrast to these provisions and to enforcement mechanisms for other charges, as discussed more fully in the following section, the augmentation charge is not secured by real property. As discussed more fully below, the charge differs from many other levies in that no mechanism exists for reducing delinquent payments to a lien short of filing suit, obtaining a judgment, and executing the judgment on real property belonging to the debtor — a remedy available to any creditor. (See Stats.1984, ch. 257, § 1004, p. 816; Wat.Code, §§ 75630 et seq.; Pajaro Valley Groundwater Agency Ordinance No. 2003-01, § 6.03.)

Objectors contend that whatever its intentions, the Agency in fact assessed the augmentation charge on real property because (1) it identified the presumptive owners and operators of wells by consulting parcel tax records to determine who owned the land on which wells were situated; and (2) in at least some cases the Agency billed these owners through county taxing authorities, who included augmentation charges with their property tax mailings. Neither of these facts establishes that the charge was assessed on real property.

The Agency's manager testified in essence that tax rolls were a convenient and reliable means of identifying the person responsible for extraction on the assumption
that this was likely to be the owner of the land on which extraction was occurring. The fact that property owners are presumed to be the operators and beneficiaries of wells situated on their premises does not convert a charge based on conduct into one assessed against land. The situation may be analogized to one in which an automobile is operated in a manner constituting a toll violation under Vehicle Code sections 40250 et sequitur. In general, the vehicle's owner is jointly liable with its operator unless he can show that the vehicle was used without his consent. (Veh.Code, § 40250, subd. (b).) This does not convert the resulting fine into a vehicle registration fee. It remains a charge based upon conduct. It is assessed against the person most likely to be responsible for and to have control over the conduct, on the supposition that if he is not primarily responsible, he can obtain recompense from those who are. (See Veh. Code, § 40250, subd. (b) ["Any person who pays any toll evasion penalty, civil judgment, costs, or administrative fees pursuant to this article shall have the right to recover the same from the driver, rentee, or lessee"].) Here Agency witnesses testified that when a well was shown to be operated by a lessee or other occupant, that person could be billed; the Agency had even entered into payment arrangements with lessees in lieu of collection proceedings. We have never heard of a county tax collector who was willing to look to anyone other than the record owner for payment of property taxes or assessments. The Agency's willingness to do so here lends strong support to its contention that the augmentation charge is in fact and in law an activities-related charge and not a property assessment.

Nor does the former inclusion of augmentation charges with tax bills lead to a different conclusion. The Agency's manager testified that prior to 2003, some or all extractors had been billed for augmentation charges along with their property taxes. In 2003, however, the Agency adopted two ordinances "rescinding" this practice after receiving a letter from the office of the Santa Cruz County Counsel expressing the view that "it was inappropriate to be using the tax rolls for the collection of the augmentation charge." The practice would apparently continue only with respect to the Agency's property management fee, which is not at issue here, and which the manager acknowledged to be "a property related fee" intended to fund administrative expenses.

Objectors argued below that the Agency's practice of including the bill for groundwater augmentation with county property tax bills gave rise to an estoppel. On appeal Objectors appear to have abandoned this argument, which lacked substance in any event. In their brief below Objectors quoted some very general statements about the availability of estoppel against public entities, but made no attempt to establish the presence of the actual elements of that doctrine. As the cited source notes, the essential ingredient of an estoppel is detrimental reliance on misleading words or acts. (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, pp. 527-528.) In other words, the person asserting the estoppel must have been induced to act by some deceptive or inequitable statement or conduct on the part of the person to be estopped. Objectors have never suggested any way in which they or others were misled to their injury by the Agency's conduct in this or any other respect.

Objectors also argue that the charge must be a property assessment because it is a "capacity charge." As noted in part I, ante, Objectors argue in a different context that the charge is only partly a "capacity charge." Here they seem to imply that it is entirely a capacity charge, which

in turn makes it a special assessment. We reject the notion that problems of this kind can be usefully addressed using this sort of lightfooted taxonomical reasoning. In any event it is flatly untrue that capacity charges are always or even "usually," as Objectors assert, special assessments for purposes of Proposition 218. Both of the cases cited by Objectors concerned the classification of certain utility charges as "special assessments" for purposes entirely foreign to the present controversy. (Utility Cost Management v. Indian Wells Valley Water District (2001) 26 Cal.4th 1185, 114 Cal.Rptr.2d 459, 36 P.3d 2; California Psychiatric Transitions, Inc. v. Delhi County Water Dist. (2003) 111 Cal. App. 4th 1156, 4 Cal.Rptr.3d 503.) As the California Supreme Court has acknowledged with respect to a case central to both of those decisions, the application of the term "assessment" in other contexts is of little value in discerning its correct application in the present context. (Richmond v. Shasta Community Services Dist. (2004) 32 Cal.4th 409, 422, 9 Cal.Rptr.3d 121, 83 P.3d 518 (Richmond), distinguishing San Marcos Water Dist. v. San Marcos Unified School Dist,
In the present setting, as previously noted, the term "assessment" (or "special assessment") intrinsically implies a charge on real estate. (See Art. 13D, § 2, subd. (b).) In contrast, "[t]he characteristic that [the Supreme Court] found determinative for identifying assessments in San Marcos — that the proceeds of the fee were used for capital improvements — forms no part of article XIII D's definition of assessments.... San Marcos is not helpful, much less controlling, in this strikingly different context." (Richmond, supra, 32 Cal.4th at p. 422, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

We conclude that the augmentation charge was not a property assessment.

**D. Charge Incidental to Property Ownership**

The most difficult of the issues raised by Objectors is whether the augmentation charge falls within the provisions of Proposition 218 restricting the power of public agencies to impose a "[f]ee or `charge,'" defined as 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." (Art. 13D, § 2, subd. (e); italics added.) The phrase "[p]roperty-related service" is defined to mean "a public service having a direct relationship to property ownership." (Art. 13D, § 2, subd. (h).) "Property ownership" is defined to "include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (Art. 13D, § 2, subd. (g).)

Where a proposed fee or charge comes within this definition, Article 13D requires the proposing agency to identify parcels upon which it will be imposed, and to conduct a public hearing. (Art. 13D, § 6, subd. (a)(1).) The hearing must be preceded by written notice to affected owners setting forth, among other things, a "calculat[ion]" of "[t]he amount of the fee or charge proposed to be imposed upon each parcel...." (Ibid.) If a majority of affected owners file written protests at the public hearing, "the agency shall not impose the fee or charge." (Art. 13D, § 6, subd. (a)(2).) Moreover, unless the charge is for "sewer, water, [or] refuse collection services," "no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Art. 13D, § 6, subd. (c).)

Objectors contend that the groundwater augmentation fee is subject to these requirements and that, because the Agency did not comply with them, it is invalid. In our original decision, we concluded that the charge is not "imposed ... as an incident of property ownership" (Art. 13D, § 2, subd. (e)) because it is imposed not on property owners as such, or even well owners as such, but on persons extracting groundwater from the basin. We acknowledged that the Agency considers the landowner ultimately responsible, but noted that the charge had sometimes been billed to, and collected from, tenants. Relying primarily upon Richmond, supra, 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, and Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 102 Cal.Rptr.2d 719, 14 P.3d 930 (Apartment Association), we reasoned that the charge was not incidental to property ownership because (1) it was incurred only through voluntary action, i.e., the pumping of groundwater, and could be mitigated or avoided altogether by refraining from that activity; (2) it would never be possible for the Agency to comply with Article 13D's requirement that it calculate in advance the amount to be charged on a given well; and (3) the charge burdens those on whom it is imposed not as landowners but as water extractors. [12]

We have been compelled to reexamine this rationale, and ultimately to abandon it, in light of Bighorn, supra, 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220. At issue there was the validity of a proposed initiative reducing certain charges by a water agency. In the portion of the opinion relevant here, the question was whether the charges constituted...
"fee[s] or charge[s]" subject to the power guaranteed to voters by Article 13C, section 3, to "reduc[e] or repeal[ ]," by initiative, "any local tax, assessment, fee or charge." The court did not attempt to determine the precise outlines of the class of fees and charges covered by Article 13C, because it reasoned that (1) any fee or charge falling within Article 13D necessarily came within Article 13C as well; (2) the charges at issue all fell within Article 13D; (3) the charges therefore fell within Article 13C and were subject to the initiative power.[13] (Bighorn, supra, 39 Cal.4th at pp. 215-216, 46 Cal. Rptr.3d 73, 138 P.3d 220.)

The point critical to our inquiry is the second one, i.e., that the charges came within Article 13D. The court cited Richmond for the proposition that "a public water agency's charges for ongoing water delivery ... are fees and charges within the meaning of article XIII D." (Bighorn, supra, 39 Cal.4th at p. 216, 46 Cal.Rptr.3d 499, 138 P.3d 220, citing Richmond, supra, 32 Cal.4th at pp. 426-427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court quoted at length a passage in Richmond where it explained its "agree[ment]" with the challengers that "supplying water is a `property-related service' within the meaning of article XIII D's definition of a fee or charge...." (Richmond, supra, 32 Cal.4th at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518; see Bighorn, supra, 39 Cal.4th at pp. 214-215, 46 Cal.Rptr.3d 73, 138 P.3d 220.) The quoted passage opens with the Legislative Analyst's explicitly tentative opinion, as stated in the ballot pamphlet containing Proposition 218, that "[f]ees for water, sewer, and refuse collection service probably meet the measure's definition of a property-related fee." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73; Richmond, supra, at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court attributed this opinion to the Legislative Analyst's "apparent[ ] conclu[sion]" that "water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges (see Gov.Code, §§ 61621, 61621.3)." (Richmond, supra, 32 Cal.4th at pp. 426-427, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

The Richmond court found support for this imputed conclusion in "several provisions" of Article 13D, of which it cited two: (1) the declaration that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership" (Art. 13D, § 3, subd. (b)); and (2) the exemption of "fees or charges for sewer, water, and refuse collection services" from the voter approval requirements otherwise imposed by Article 13D on covered fees and charges (Art. 13D, § 6, subd. (c)). Accordingly, the court "agree[d]," some "water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D." (Richmond, supra, 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) However, the court acknowledged, a fee will fall within the provisions of that measure "if, but only if, it is imposed `upon a person as an incident of property ownership.'" (Ibid., quoting Art. 13D, § 2, subd. (e).) The court then issued the pronouncement of greatest relevance here: "A fee for ongoing water service through an existing connection is imposed `as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed `as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection." (Richmond, supra, 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court reiterated that Proposition 218 should not be read to absolutely prohibit new connection fees, an effect it would have if agencies were compelled to comply with its requirement that they identify and give notice to those on whom the fee is to be imposed. (Richmond, supra, 32 Cal.4th at pp. 427-428, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

In our original opinion we reasoned that in holding ongoing service fees to be within the purview of Article 13D, the Richmond court must have been speaking of flat fees, as opposed to those based on the amount of water (or similar commodity) consumed. Otherwise, it seemed to us, its rationale for holding the connection fee outside of Article 13D would apply with equal force to ongoing service fees. Where a fee is predicated on consumption it may be impossible
Moreover, it quite probably will be impossible to predict the quantity to be consumed, and thus to forecast the precise "amount of the fee or charge proposed to be imposed," as is required by Article 13D, section 6, subdivision (1). Further, a consumption-based fee would be incurred only through the occupant's "voluntary decision" to consume water delivered by the provider. The occupant has at least the theoretical alternative of securing water elsewhere, or not using it at all. We therefore applied Richmond's analysis of the connection fee to the Agency's consumption-based groundwater augmentation charge, concluding that the latter, like the former, falls outside Article 13D.

In Bighorn, supra, 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220, the court flatly rejected the view that consumption-based delivery fees are beyond the reach of Article 13D. What had begun in Richmond as a tentative surmise attributed to the Legislative Analyst now ripened into a broad categorical rule: "As we explained in Richmond, supra, 32 Cal.4th 409[, 9 Cal.Rptr.3d 121, 83 P.3d 518] ..., domestic water delivery through a pipeline is a property-related service within the meaning of this definition. (Id. at pp. 426-427[, 9 Cal.Rptr.3d 121, 83 P.3d 518] ...) Accordingly, once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. Consumption-based water delivery charges also fall within the definition of user fees, which are "amounts charged to a person using a service where the amount of the charge is generally related to the value of the services provided." (Utility Audit Co., Inc. v. City of Los Angeles (2003) 112 Cal.App.4th 950, 957[, 5 Cal.Rptr.3d 520]....) Because it is imposed for the property-related service of water delivery, the Agency's water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D...." (Id. at p. 217, 46 Cal.Rptr.3d 73, 138 P.3d 220, fn. omitted.)

It would appear that the only question left for us by Bighorn is whether the charge on groundwater extraction at issue here differs materially, for purposes of Article 13D's restrictions on fees and charges, from a charge on delivered water. We have failed to identify any distinction sufficient to justify a different result, and the Agency points us to none. The Agency contends that the charge is not a "service fee," but that proposition seems beside the point if the charge is imposed as an incident of property ownership. The Agency's only argument on this point appears to be that the charge resembles those upheld by the Supreme Court in a still earlier decision, Apartment Association, supra, 24 Cal.4th 830, 102 Cal. Rptr.2d 719, 14 P.3d 930. In that case the court held that an "inspection fee" charged to residential landlords was not subject to the provisions of Article 13D. That measure, wrote Justice Mosk, "only restricts fees imposed directly on property owners in their capacity as such," whereas the fee there was imposed not because "a person owns property," but "because the property is being rented." (Apartment Association, supra, 24 Cal.4th at p. 838, 102 Cal. Rptr.2d 719, 14 P.3d 930.) He noted that the fee "ceases along with the business operation, whether or not ownership remains in the same hands." (Ibid.) He reasoned that the fee was "imposed on landlords not in their capacity as landowners, but in their capacity as business owners." (Id. at p. 840, 102 Cal.Rptr.2d 719, 14 P.3d 930.) Comparing the fee to one charged for a business license, Justice Mosk wrote that "[i]t is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business." (Ibid.) Proposition 218, he continued, governs "taxes, assessments, fees, and charges ... when they burden landowners as landowners. The ordinance ... imposes a fee on its subjects by virtue of their ownership of a business — i.e., because they are landowners. What plaintiffs ask us to do is to alter the foregoing language — changing 'as an incident of property ownership' to 'on an incident of property ownership.' But to do so would be to ignore its plain meaning — namely, that it applies only to exactions levied solely by virtue of property ownership." (Id. at p. 842, 102 Cal. Rptr.2d 719, 14 P.3d 930, fn. omitted.)

As we noted in our prior opinion, the Supreme Court cited Apartment Association with apparent approval in Richmond, supra, 32 Cal.4th at pages 414-415, 9 Cal. Rptr.3d 121, 83 P.3d 518. In Bighorn, however, it did not mention the case at all, even though it seems highly relevant to the question whether monthly delivery charges, and especially
consumption-based charges, fall within Article 13D. This omission raises questions about the reach, if not the vitality, of Apartment Association. The juxtaposition of that decision with Bighorn suggests the possibility that a fee falls outside Article 13D to the extent it is charged for consumption of a public service for purposes or in quantities exceeding what is required for basic (i.e., residential) use of the property. In Richmond and Bighorn the court was clearly concerned only with charges for water for "domestic" use. (See Bighorn, supra, 39 Cal.4th at p. 217, 46 Cal.Rptr.3d 73, 138 P.3d 220, italics added ["As we explained in Richmond, ..., domestic water delivery through a pipeline is a property-related service within the meaning of this definition"]) This leaves open the possibility that delivery of water for irrigation or other nonresidential purposes is not a property-based service, and that charges for it are not incidental to the ownership of property.\[16\] A finding that such a fee is not imposed as an incident of property ownership might be further supported by a clearly established regulatory purpose, e.g., to internalize the costs of the burdened activity or to conserve a supplied resource by structuring the fee in a manner intended to deter waste and encourage efficiency.

We need not decide the soundness of these theories in the wake of Bighorn, because they cannot sustain the charge before us in any event. The charge is assessed on all persons extracting water, a large majority of whom are using it for residential or domestic purposes. Therefore even if a charge on nonresidential uses would fall outside the rationale of Bighorn, the present charge does not. Further, even if a predominantly regulatory purpose would save the charge, it is difficult to see how it might do so here, where the majority of users are charged on the basis not of actual but of estimated or presumptive use. Thus, while the augmentation charge may have some tendency to inhibit consumption and provide an incentive for efficient use by metered users, it can have little if any effect on the residential users who make up the majority of persons paying it. Nor is there any attempt to graduate the charge to further discourage the most intensive uses and encourage conversion to less intensive ones.\[17\]

Similarly, assuming Apartment Association's capacity-based analysis retains vitality, we fail to see how it can validate the augmentation charge here. The charge is imposed not only on persons using water in a business capacity but also on those using water for purely domestic purposes. The extension of the charge to domestic wells cannot be attributed to unavoidable regulatory overbreadth. The Agency appears to have a good idea of who is extracting water for residential purposes and who is extracting it for irrigation purposes. Under Bighorn, a homeowner or tenant who uses extracted water for bathing, drinking, and other domestic purposes cannot be compared to a businessman who, as described in Apartment Association, elects to go into the residential landlord business.

In our previous opinion we adopted the view that one who incurred the charge did so not in the capacity of landowner, but in that of water user. We do not believe this view can be reconciled with Bighorn where the court held water delivery fees to be imposed as an incident of property ownership, whether or not based on usage, even though it might have been argued under Apartment Association that affected persons incurred delivery charges not as owners but as voluntary consumers of water.\[18\]

Moreover the charge here is not actually predicated upon the use of water but on its extraction, an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water. The precise nature of a property owner's interest in underlying groundwater, and whether it constitutes a kind of real property ownership, is an esoteric and nuanced subject. (See Wat.Code, § 102 ["All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law"]; cf. State v. Superior Court of Riverside County (2000) 78 Cal.App.4th 1019, 1030, 93 Cal.Rptr.2d 276 (Riverside), fn. omitted ["the State's power under the Water Code is the power to control and regulate use; such a power is distinct from the concept of `ownership' as used in the Civil Code and in common usage"]; Joslin v. Marin Municipal Water Dist. (1967) 67 Cal.2d 132, 149, 60 Cal.Rptr. 377, 429 P.2d 889
[claim by purported riparian owners to unreasonable use of creek waters "does not constitute a compensable property right" when interfered with by appropriative user]; see generally Rossman & Steel, Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights (1982) 33 Hastings L.J. 903.) There appears to be no doubt, however, that an overlying owner possesses "special rights" to the reasonable use of groundwater under his land. (City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224,1237, fn. 7, 99 Cal.Rptr.2d 294, 5 P.3d 853.) These rights are said to be "based on the ownership of the land and ... appurtenant thereto." (California Water Service Co. v. Edward Sidebotham & Son, Inc. (1964) 224 Cal.App.2d 715, 725, 37 Cal. Rptr. 1, fn. omitted; see Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal.App.3d 992, 1001-1002, 122 Cal.Rptr. 918.) Thus, even if an overlying landowner does not strictly "own" the water under his land, his extraction of that water (or its extraction by his tenant) represents an exercise of rights derived from this ownership of land. In that respect a charge imposed on that activity is at least as closely connected to the ownership of property as is a charge on delivered water.

As against these factors tending to show that the charge is incidental to property ownership as that concept is elaborated in Bighorn and Richmond, only one feature cited by the Supreme Court appears to be lacking. In both of those cases the court alluded to the fact that the agencies there could, "by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges (see Gov.Code, §§ 61621, 61621.3)...." (Richmond, supra, 32 Cal.4th at pp. 426-427, 9 Cal. Rptr.3d 121, 83 P.3d 518; Bighorn, supra, 39 Cal.4th at p. 214, 46 Cal.Rptr.3d 73, 138 P.3d 220.) (Italics added.) The cited provisions of the Government Code, which have since been repealed and reenacted elsewhere, authorize community service districts to adopt various collection mechanisms, including the recording of a certificate of arrearage, which automatically constitutes a lien. (See Gov.Code, §§ 61115, subd. (c).) Thus, even if an overlying landowner does not strictly "own" the water under his land, his extraction of that water (or its extraction by his tenant) represents an exercise of rights derived from this ownership of land. In that respect a charge imposed on that activity is at least as closely connected to the ownership of property as is a charge on delivered water.

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*504 find any authorization elsewhere for the Agency to unilaterally impose a lien based on an unpaid groundwater augmentation charge. The Act authorizes the Agency to collect interest on a delinquent charge and to "exercise any of the provisions of Article 5 (commencing with Section 75630) of Chapter 3 of Part 9 of Division 21 of the Water Code for the purpose of collecting delinquent groundwater charges." (Stats. 1984, ch. 257, § 1004, p. 816.) The cited provisions authorize the Agency to obtain, from a court, an injunction against operation of the offending "water-producing facility" (Wat.Code, § 75631; see id., § 75630 [temporary restraining order]) and to bring a civil suit for delinquent charges, interest, and penalties (Wat.Code, § 75633). They do not grant the Agency a lien, or the power to impose a lien. The Agency is thus relegated to the remedies available to any other creditor. These may of course include reducing the debt to judgment and then obtaining a lien on the property as an aid in execution of the judgment. But this no more makes the charge incidental to property ownership than is a credit card debt.

While the automatic or summary creation of a lien for unpaid charges would tend to support a determination that a charge is imposed as an incident of property ownership, the failure to provide such a mechanism does not appear determinative here. In every other respect the charge appears as closely related to property ownership as the charges at issue in Bighorn. Indeed, in at least one respect — the nature of the right burdened by the charge — it appears more closely related. Given the Bighorn decision, and its reading of the Richmond decision, we see no basis to conclude that the charge here should be viewed any differently from the charges held to be incidental to property ownership there. We thus conclude that the groundwater augmentation charge is indeed imposed as an incident of property ownership, that it is subject to the restrictions imposed on such charges by Article 13D, and that since the Agency did not conform to those restrictions the ordinance under review must be declared invalid. [21]

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*505 DISPOSITION
The judgment is reversed.

PREMO, J., concurs.

BAMATTRE-MANOUKIAN, J., Concurring.

In 2003, the Pajaro Valley Water Management Agency (the Agency) passed an ordinance increasing a groundwater augmentation fee for all groundwater extractions within its boundaries. In this action by the Agency under Code of Civil Procedure section 860 to validate the ordinance, the trial court heard testimony and issued a comprehensive statement of decision setting forth its findings of fact and conclusions of law regarding the three issues argued below and raised again here on appeal: 1) whether jurisdiction was proper under Code of Civil Procedure section 860; 2) whether two members of the Agency's Board of Directors had disqualifying conflicts of interest; and 3) whether the augmentation charge was invalid for failure to comply with provisions of articles XIII C and XIII D of the California Constitution. The trial court decided all three issues in favor of the Agency and judgment was entered validating the ordinance.

I concur in the result the majority reaches, to reverse the judgment on the ground that the augmentation charge is subject to the provisions of article XIII D of the Constitution. I write separately for three reasons: First, I wish to emphasize the standards that guide and govern our review and that are the "threshold issue" in every appeal. (Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal.App.3d 605, 611, 236 Cal.Rptr. 605.) Second, I would address appellants' second argument — that the ordinance at issue was void due to disqualifying conflicts of interest of two members of the Agency's Board — before reaching the constitutional issues. And last, as I wrote previously in my original concurrence in this case, I believe the question whether the augmentation charge at issue here was a fee imposed "as an incident of property ownership," within the meaning of the California Constitution, is a close and important issue. (Cal. Const., art. XIII D, § 2, subd. (e).) Our Supreme Court in Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220 (Bighorn) has now provided further guidance in this area of the law, thus clarifying the views it expressed in Richmond v. Shasta Community Services Dist. (2004) 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518 (Richmond). These two cases support the conclusion reached here, that the augmentation charge is a fee imposed "as an incident of property ownership," within the meaning of article XIII D of the Constitution.

As to the jurisdictional issue, the trial court made specific findings based on the evidence and supporting its conclusion that the augmentation charge was a capacity charge within the scope of Government Code section 66013, which made it a proper subject of a validation procedure under Code of Civil Procedure section 860. We defer to the trial court's findings resolving factual issues if supported by substantial evidence. (Winograd v. American Broadcasting Co. (1998) 68 Cal.App.4th 624, 632, 80 Cal.Rptr.2d 378.) In addition, as the majority notes, the parties stipulated in the trial court that if any portion of the augmentation charge was found not to be

*506 within the jurisdiction of the court under Code of Civil Procedure section 860, the complaint would be deemed to be amended to include a declaratory relief cause of action, so that all issues relating to the augmentation charge could be addressed and preserved for appeal. I believe this record demonstrates that jurisdiction was proper.

Appellants next assert that a conflict of interest on the part of two of the Agency's board members disqualified them, rendering the ordinance null and void. Here again, the trial court made factual findings, based on the evidence at the hearing, and applied the relevant law, namely the Political Reform Act (Gov.Code, § 87100, et seq.) and the pertinent regulations (Cal. Code Regs., tit. 2, § 18700, et seq.). The trial court concluded that there was no disqualifying conflict of interest because the effect of the ordinance in question on the two directors was not distinguishable from its effect on
the "public generally," as that exception is defined in the Government Code and the corresponding regulations. (See Gov.Code, § 87103, Cal.Code Regs., tit. 2, § 18707.2.) I believe this presents mixed questions of fact and law for our review. (Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 800, 35 Cal.Rptr.2d 418, 883 P.2d 960.) Where the trial court has made factual determinations, such as those underlying the questions whether the financial burden and beneficial effect of the increased augmentation charge were "proportional," I believe we defer to those findings if they are supported by substantial evidence. To the extent that the court interpreted and applied the relevant statutes and regulations to the facts as found, or to those that were uncontroverted, we conduct independent review, as appellants contend. (See Finnegan v. Schrader (2001) 91 Cal.App.4th 572, 579, 110 Cal. Rptr.2d 552.)

Applying these rules, I would agree in general with the conclusions of the trial court: that the Agency is a "water, irrigation, or similar district" (Cal.Code Regs., tit. 2, § 18707.2, subd. (c)); that the evidence supported a finding that the augmentation charge is "applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent" of the affected property owners (Cal. Code Regs., tit. 2, § 18707.2, subd. (c)); that the evidence supported a finding that the "public generally" exceptions in the Political Reform Act and the regulations applied (Gov.Code, § 87103; Cal. Code Regs., tit. 2, § 18707.2, subs. (a) & (c)); and that the evidence supported a finding that agriculture is a "predominant industry" throughout the Agency's district (Cal.Code Regs., tit. 2, § 18707.7, subd. (b)). Further, I would reject appellants' contentions that the regulations are in conflict with the statutory provisions in the Political Reform Act and that there was a common law conflict of interest. Therefore, based on the trial court's statement of decision, the record, and legal authority, and applying the relevant standards of review, I would find that the two directors did not have a disqualifying conflict of interest.

As to the constitutional issues, appellants contend that the question whether the augmentation charge complied with constitutional requirements is a question of law for this court to decide after independently reviewing the facts. I agree that as, a general rule, we conduct de novo review when we are asked to interpret constitutional provisions and their application to a particular ordinance. (Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866, 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350; Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 102 Cal.Rptr.2d 719, 14 P.3d 930.) In the case before us, however, the trial court made findings based upon the evidence. To the extent that these are findings of fact, I believe we defer to the trial court's findings resolving disputed factual issues if they are supported by substantial evidence in the record. The application of the law to the undisputed facts, or to the facts as found, is then de novo.

As the majority points out, the key constitutional issue in this case is whether the augmentation charge complied with constitutional requirements is a question of law for this court to decide after independently reviewing the facts. I agree that as, a general rule, we conduct de novo review when we are asked to interpret constitutional provisions and their application to a particular ordinance. In Richmond, supra, 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, the Supreme Court held that a capacity charge imposed as a condition of a new water hookup was not a charge "on real property as such," but was a charge against the individual for hooking up to water service. (Id. at p. 420, 9 Cal.Rptr.3d 121, 83 P.3d 518.) It was therefore not a special assessment, which is a levy "upon real property." (Cal. Const., art. XIII D, § 2, subd. (b).) The court distinguished this from a fee or charge, which could be imposed either on the property itself or upon the owner "as an incident of property ownership." (Id. § 2, subd. (h).)

In Richmond, supra, 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, the Supreme Court held that a capacity charge imposed as a condition of a new water hookup was not a charge "on real property as such," but was a charge against the individual for hooking up to water service. (Id. at p. 420, 9 Cal.Rptr.3d 121, 83 P.3d 518.) It was therefore not a special assessment, which is a levy "upon real property." (Cal. Const., art. XIII D, § 2, subd. (b).) The court distinguished this from a fee or charge, which could be imposed either on the property itself or upon the owner "as an incident of property ownership." (Richmond, supra, 32 Cal.4th at p. 420, fn. 2, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court also addressed a fire suppression charge, which it found was not a fee imposed "as an incident of property ownership" because it was "not imposed simply by virtue of property ownership, but instead it is imposed as an incident of the voluntary act of the property owner in applying for a service connection." (Id. at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.)
(518) The court explained that if the same fee were imposed as part of ongoing water service, it would be "an incident of property ownership" because it would require "nothing other than normal ownership and use of property." (Id. at p. 427, 9 Cal. Rptr.3d 121, 83 P.3d 518.) The court relied in part on the Legislative Analyst's conclusion, in the ballot materials for Proposition 218, that water service "is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property." (Ibid.)

Recently in Bighorn, supra, 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220, the high court reaffirmed its reasoning in Richmond, finding that the water service charge at issue in Bighorn was a fee or charge within the meaning of article XIII D, and thus article XIII C, of the Constitution. Further, the court rejected an argument based on the distinction made in Richmond, namely that charges that are "consumption based" do not come within the definition in article XIII D, because such charges involve a voluntary decision on the part of the water customer as to how much water to use. (Bighorn, supra, 39 Cal.4th at p. 216, 46 Cal.Rptr.3d 73, 138 P.3d 220.) The court clarified that "once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (Id. at p. 217, 46 Cal.Rptr.3d 73, 138 P.3d 220.)

*508 Bighorn thus addressed a concern I had previously expressed in a separate concurring opinion in this case. It appeared from the record here that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible. In these circumstances, I was concerned whether the continued use of this water should be characterized as part of the "normal ownership and use of property" (Richmond, supra, 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518) rather than as a "voluntary act of the property owner." (Id. at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.) Bighorn has resolved this issue. Under the authority of Richmond and Bighorn, and mindful of our role as an intermediate appellate court (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937), I conclude that the augmentation charge imposed by the ordinance here, even though it is a "consumption based" charge imposed per acre-foot for groundwater extractions within the Agency's boundaries, is a fee or charge imposed "as an incident of property ownership," within the meaning of article XIII D of the California Constitution. The augmentation charge is thus subject to the restrictions and requirements of article XIII D, which concededly were not followed by the Agency. I would therefore reverse the judgment.

[1] This characterization was disputed by an expert testifying for objectors, but the trial court's resolution of that conflict in favor of the Agency is not cogently challenged on appeal.

[2] We will use the term "basin" to describe the area subject to the Agency's jurisdiction although the groundwater basin as geologically defined is only imperfectly contiguous with that area.

[3] According to the Basin Management Plan, strawberries and raspberries require 2.8 and 3.7 acre-feet per acre of applied water, respectively, while deciduous crops — apparently meaning orchard crops other than citrus — require 0.7 acre-feet per year. In 1997, about 8,700 acres were devoted to strawberries and vine crops, while deciduous crops took up about 3,900 acres. Another 14,000 acres bore vegetable row crops while assorted other agricultural uses took up about 8,000 acres. The BMP did not set out the water demands for each of these other uses but noted a general trend toward more water-intensive crops and a corresponding movement away from the less water-intensive deciduous crops. These figures, coupled with the cited testimony, however, appear to support a finding that even deciduous crops could not be reliably sustained under the "worst case scenario" described in the testimony.

[4] These sources would include recycled wastewater from Watsonville and water from the Harkins Slough project, already in place. The Agency would also establish supplemental wells to help maintain water deliveries in drier years. In addition it would seek to promote conservation.
The plan apparently contemplates at least three phases. Phase One was mainly the Harkins Slough project, with additional minor elements including the acquisition of an assignment of water rights at Mercy Springs, which would supply 25 to 30 percent of the anticipated water imports. The current phase is Phase Two, consisting largely of the coastal distribution system, Watsonville wastewater recycling facilities, and acquisition of additional water rights. Phase Three apparently consists of an "inland distribution system," providing water to inland farms at greater distances from the pipeline. As presently designed, however, the plan will supply imported water to inland farmers only when supply exceeds the coastal demand. However, depending on the Agency's success in arranging secure water supplies, there could be many years when this condition was present.

According to the transcript, the witness said, "The second thing that occurs in that respect is that the groundwater table declined and the cost is reduced and, therefore, water is not flowing as well through the coast so, therefore, more water is available." It is doubtful that the witness used the word "declined," highly unlikely that he said "cost is reduced," and all but certain that he did not utter the string of words here rendered. The transcript contains numerous other probable mistranscriptions, e.g., the probable phrase "lease of a parcel upon which the facility is located" appears as the nonsensical "lease of a partial fund which the facilities located...." Such transcription errors, which are by no means unique to this case, support an argument for entitling litigants to electronically record court proceedings on which their rights depend.

That is to say, other parties are not bound by the preclusive doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion). The precedential effect of an appellate decision on the same issues presents a separate question.

It also makes it unnecessary to consider whether the parties' mutual citation and discussion of Scurich violated former rule 977 of the California Rules of Court. (See now, Cal. Rules of Court, rule 8.1115.)

In our previous decision we necessarily considered, and rejected, Objectors' contention that the decision to increase the extraction charge was invalid because two directors acted under a disabling conflict of interest. The Fair Political Practices Commission has filed an eleventh-hour brief objecting rather obliquely to a portion of our analysis on that issue. Because we now find it unnecessary to reach the issue at all, we have excised the entire discussion.

This use of the term "special purpose district" illustrates the questionable draftsmanship that pervades the measure, for while it contains a definition for "special district" (Art. 13C, § 1, subd. (c)), it does not define the phrase "special purpose district."

Although the Agency does not appear to argue the point, it might be suggested that the augmentation charge operates in part to secure the "privilege" of avoiding more draconian measures, such as dramatic adjudicated reductions in permitted extractions. The Legislature has granted the Agency broad powers to restrict or suspend extractions if that becomes necessary to carry out its functions. (See 1984 Stats., ch. 257, §§ 712-714, pp. 811-812.)

We also placed considerable reliance on Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 85 Cal.App.4th 79, 83, 101 Cal.Rptr.2d 905 (HJTA v. Los Angeles), which rejected a contention that water rates "based primarily on the amount consumed" were subject to Proposition 218. The Supreme Court disapproved that decision in Bighorn insofar as it is inconsistent with the court's conclusion that "all charges for water delivery" incurred after a water connection is made are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. (Bighorn, supra, 39 Cal.4th at p. 217, fn. 5, 46 Cal.Rptr.3d 73, 138 P.3d 220, and accompanying text.)
The court nonetheless held the initiative invalid because it attempted to impose certain voter approval requirements on future rate increases that the court held beyond the proper scope of a local initiative. (*Bighorn, supra*, 39 Cal.4th at pp. 221-222, 46 Cal.Rptr.3d 73, 138 P.3d 220.)

Elsewhere in the opinion the court itself implicitly acknowledged the voluntary nature of water consumption when it pointed out that not all new service connections will necessarily be associated with new development, because "a property owner may request a new service connection without proposing any new development, such as when the owner of a previously developed residential parcel decides to use the District's water instead of water from an existing well on the property." (*Richmond, supra*, 32 Cal.4th at pp. 424-425, 9 Cal.Rptr.3d 121, 83 P.3d 518; italics added.) Of course, any occupant in a position to make such a choice is at least theoretically in a position to stop using the District's water and return to the existing well. Such an occupant is certainly acting "voluntarily" when he elects to use delivered water.

We assumed that the drafters of Article 13D used the term "amount," in deliberate contradistinction to "rate," to mean the actual sum to be charged to the owner of a given property. Unlike a rate, a consumption-driven charge cannot be determined until the amount consumed is known, i.e., after the fact. The holding in *Bighorn* appears incompatible with this view, compelling the conclusion that the notice requirements of Article 13D are satisfied if the agency apprises the owner of the proposed rate to be charged. Otherwise, the court's distinction between connection fees and ongoing service charges appears difficult, if not impossible, to defend.

Objectors have not suggested that a charge on water imported for irrigation or other non-domestic purposes would fall within Proposition 218.

Indeed, the Agency all but concedes that the charge is not truly "regulatory," ultimately sidestepping the point by attacking the straw-man premise that the fee is only brought within Article 13D by its consumption-based nature. We agree that a given fee does not become incidental to property ownership merely because it is based on consumption. No one has suggested that it does. The court in *Bighorn* held only that if a fee is otherwise incidental to ownership, its assessment based on consumption does not ipso facto take it outside of Article 13D.

We continue to believe that the distinction is far from frivolous. A charge may be imposed on a person because he owns land, or it may be imposed because he engages in certain activity on his land. A charge of the former type is manifestly imposed as an incident of property ownership. A charge of the latter may not be. This appears to be the distinction Justice Mosk sought to articulate for the court in *Apartment Association*. We doubt that it is satisfactorily captured by a distinction between business and domestic uses or purposes. For example, a water conservation agency might assess a charge on the filling of swimming pools both to defray the cost of the water so used and to inhibit what it might view as a wasteful use. Such a use might be characterized as "domestic," but it is far from self-evident that a charge on it would be incidental to the ownership of property, or to the provision of a property-related service.

A "community services district" is one created to provide any of a number of specified services. (See Gov.Code, § 61100.) The enumerated purposes include "[s]upply[ing] water for any beneficial uses, in the same manner as a municipal water district...." (Gov. Code, § 61100, subd. (a).) They do not include groundwater management. (Gov.Code, § 61100.) Moreover, the formation of such a district originates with a petition by voters (Gov.Code, § 61011) or a "resolution of application" by a local legislative body or special district (Gov.Code, § 61013). The Agency was created by act of the California Legislature.

Curiously, the Legislature has created an automatic lien for unpaid "groundwater extraction charge[s]" imposed by other, seemingly similar agencies, and has also authorized those agencies to collect such charges on the property tax rolls. (See Sierra Valley and Long Valley Groundwater Basins Act (Stats. 1983, ch. 1109, § 808, p. 4195, 72B West's

[21] We should not be understood to imply that the charge is necessarily subject to all of the restrictions imposed by Article 13D on charges incidental to property ownership. This case presents no occasion to determine whether this or a similar charge may fall within any of the express exemptions or partial exemptions set forth in that measure. (See, e.g., Art. 13D, § 6, subd. (c) ["Except for... sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area"].)

203 Cal.App.4th 97 (2012) 137 Cal.Rptr.3d 266

JOHN G. EISKAMP, Plaintiff and Appellant, v. PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.

No. H036624.

Court of Appeals of California, Sixth District.


*99 John G. Eiskamp, in pro. per., for Plaintiff and Appellant.
Richards, Watson & Gershon, James L. Markman and Ginetta L. Giovinco for Defendant and Respondent.

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*100 OPINION

MIHARA, Acting P. J. —

After respondent Pajaro Valley Water Management Agency (Agency) enacted three ordinances (ords. Nos. 2002-02, 2003-01, 2004-02) that increased groundwater augmentation charges for the operators of wells in the Agency's
jurisdiction, several lawsuits challenging the constitutionality of the ordinances were filed. In 2008, these lawsuits were resolved by a stipulated agreement for entry of judgment. In 2010, appellant John G. Eiskamp filed a complaint against the Agency seeking a declaration that ordinance No. 2002-02 (Ordinance) was invalid, a refund of augmentation charges, and an order directing the Agency to cease collection of the augmentation charges. The trial court sustained the Agency's demurrer to the complaint without leave to amend and entered judgment in favor of the Agency. We hold that the doctrine of res judicata bars relitigation of the causes of action in Eiskamp's complaint and affirm the judgment.

I. Factual and Procedural Background

On May 31, 2002, the Agency's board of directors (Board of Directors) approved the Ordinance, which established an augmentation charge of $80 per acre-foot for the extraction of groundwater from facilities within the Agency's boundaries. The Board of Directors did not comply with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution. Eiskamp is presently a member of the Board of Directors, and was a member when the Ordinance was approved.

In October 2002, several citizens filed a reverse validation action (Scurich Lawsuit) in which they challenged the validity of the Ordinance. After the Agency's motion to dismiss was granted, the Scurich plaintiffs appealed.

In May 2003, the Board of Directors approved ordinance No. 2003-01, which increased the augmentation charge to $120 per acre-foot. The Board of Directors did not comply with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution.

In July 2003, the Agency filed an action entitled *Pajaro Valley Water Management Agency v. All Persons Interested in the Matter of the Validity of Pajaro Valley Water Management Ordinance 2003-01* (Amrhein Lawsuit). (Italics added.) In February 2004, the Amrhein Lawsuit came on for trial.

In May 2004, this court held in an unpublished decision "that the augmentation fee was only partly a `capacity charge' and that insofar as it was not such a charge, the plaintiffs' objections were not subject to the special statute of limitations." (*Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1376 [59 Cal.Rptr.3d 484] (Amrhein).) Thus, this court reversed the judgment to allow the plaintiffs to challenge that portion of the augmentation charges that were not used to fund capital facilities construction. The Scurich Lawsuit was then stayed pending the outcome of the Amrhein Lawsuit.

In August 2004, the trial court entered judgment in the Amrhein Lawsuit in favor of the Agency. Shortly thereafter, the Amrhein defendants filed an appeal in this court.

In November 2004, the Board of Directors adopted ordinance No. 2004-02, which increased the augmentation charge to $160 per acre-foot. The Board of Directors did not comply with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution.

The Griffith and San Andreas Lawsuits were consolidated with the Scurich Lawsuit under case No. 144843 (Consolidated Lawsuits).

In July 2006, this court affirmed the judgment in the Amrhein Lawsuit. After the Amrhein defendants filed a petition for rehearing, this court granted the petition to consider the effect of *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 [46 Cal.Rptr.3d 73, 138 P.3d 220]. In May 2007, this court reversed the judgment, finding that "the augmentation fee is a fee or charge `imposed ... as an incident of property ownership' and thus subject to constitutional preconditions for the imposition of such charges ... (Cal. Const., art. XIII D, § 2, subd. (e), added by initiative, Gen. Elec. (Nov. 5, 1996) ...)," and that the Agency had failed to comply with these preconditions. (*Amrhein, supra*, 150 Cal.App.4th at p. 1370, citation omitted.)

In October 2007, the Board of Directors repealed ordinances Nos. 2003-01 and 2004-02.

In January 2008, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants wanted to resolve all disputes in the Amrhein Lawsuit and the Consolidated Lawsuits. They and the Agency then entered into a stipulated agreement for entry of judgment (stipulated agreement). The stipulated agreement provided: "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the 'Pending Litigation') as to the Agency's actions shall be resolved by entry of judgment in the Pending Litigation"; the Agency would pay $1.8 million to the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants for legal fees, costs, and expenses; and the augmentation charges collected pursuant to ordinances Nos. 2003-01 and 2004-02 would be refunded. It also stated that the "settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect ...." The stipulated agreement did not provide for either the repeal of the Ordinance or the refund of augmentation charges imposed under the Ordinance.

In February 2008, judgment was entered pursuant to the terms of the stipulated agreement.

In August 2010, Eiskamp filed a complaint against the Agency for declaratory relief and a petition for writ of mandate. The complaint alleged that Eiskamp was a member of the public and the owner of three parcels of real property within the Agency's jurisdiction. The complaint further alleged that the Board of Directors established the augmentation charge of $80 per acre-foot without complying with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution, thus rendering the Ordinance void. In May 2009, Eiskamp paid $9,024.39 and $5,516.96 that had been levied pursuant to the Ordinance in connection with two parcels of his real property. He then submitted written claims to the Agency for refunds of these amounts. These claims were deemed denied. In July 2010, the Agency sent bills to Eiskamp for augmentation charges for three parcels of his real property. The complaint sought refund of the amounts that Eiskamp had paid and an order directing the Agency to cease collecting the augmentation charges under the Ordinance.

The Agency filed a demurrer to the complaint and a request for judicial notice in support of the demurrer. Following a hearing, the trial court *sustained the demurrer without leave to amend. Judgment was then entered in favor of the Agency, and Eiskamp filed a timely appeal.*

II. Discussion
In reviewing an order sustaining a demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]" (McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) We may also consider matters that have been judicially noticed. [Citations.]" (Committee for Green Foothills v. Santa Clara County Bd. of Supervisors (2010) 48 Cal.4th 32, 42 [105 Cal.Rptr.3d 181, 224 P.3d 920].) "Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.]") (Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406].)

The Agency contends that the trial court properly sustained the demurrer on the ground that Eiskamp lacked standing to maintain an action for a writ of mandate. Relying on Carsten v. Psychology Examining Com. (1980) 27 Cal.3d 793 [166 Cal.Rptr. 844, 614 P.2d 276] (Carsten) and Braude v. City of Los Angeles (1990) 226 Cal.App.3d 83 [276 Cal.Rptr. 256] (Braude), the Agency asserts that Eiskamp forfeited his right as a citizen-taxpayer to maintain the present action because he is as a member of the Board of Directors.

(1) In Carsten, the appellant was a member of the psychology examining committee of the Board of Medical Quality Assurance (board). (Carsten, supra, 27 Cal.3d at p. 795.) She filed a petition for writ of mandate in which she sought to challenge the legality of the board's action in adopting a new method for testing license applicants. (Ibid.) Carsten recognized that under Code of Civil Procedure section 1086, "[t]he requirement that a petitioner be `beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. [Citations.]" As Professor Davis states the rule: 'One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable.' (Davis, 3 Administrative Law Treatise (1958) p. 291.)" (Carsten, at pp. 796-797.) Carsten concluded that since the appellant was "neither seeking a psychology license, nor in danger of losing any license she possess[ed] under the rule adopted by the board, she [was] not a beneficially interested person within the meaning of the statute." (Id. at p. 797.)

(2) Carsten also acknowledged that taxpayers have standing to challenge a governmental agency's expenditure of public funds, but concluded that the appellant lacked standing under this theory. (Carsten, supra, 27 Cal.3d at p. 798.) Carsten observed that since the appellant did not have a beneficial interest in the litigation, the court would be providing an advisory opinion. (Ibid.)

(3) The court further pointed out that when a party sues a governmental agency for which she is a board member, she is "both plaintiff and defendant in the same litigation." (Ibid.) Carsten then focused on the "policy issues which militate against permitting disgruntled governmental agency members to seek extraordinary writs from the courts. Unquestionably the ready availability of court litigation will be disruptive to the administrative process and antithetical to its underlying purpose of providing expeditious disposition of problems in a specialized field without recourse to the judiciary. Board members will be compelled to testify against each other, to attack members with conflicting views and justify their own positions taken in administrative hearings, and to reveal internal discussions and deliberations." (Id. at p. 799.) Thus, Carsten held that "a board member is not a citizen-taxpayer for the purpose of having standing to sue the very board on which she sits." (Id. at p. 801.)

In Braude, the appellant was a member of the respondent city council, a taxpayer, and a commuter on the respondent's freeways. (Braude, supra, 226 Cal.App.3d at p. 86.) The appellant brought a petition for writ of mandate to order the respondent to set aside an ordinance approving a project to build two office buildings. (Ibid.) He argued that he was a beneficially interested person for purposes of standing because he would be detrimentally affected in his daily commute
by increased traffic on the Harbor Freeway as a result of the project. (*Id.* at p. 88.) *Braude* rejected this argument, noting that the appellant shared "his beneficial interest with hundreds of thousands of people who use the Harbor Freeway everyday ... [and] several more hundreds of thousands of people [who] use this route on an occasional basis," and thus he did "not have a beneficial interest over and above the public at large." (*Id.* at pp. 88-89.) Relying on *Carsten, supra, 27 Cal.3d 793*, *Braude* also held that the appellant, as a member of the respondent's city council, had forfeited his right to bring an action as a citizen-taxpayer. (*Braude*, at p. 91.)

Here, unlike the appellants in *Carsten* and *Braude*, Eiskamp has a "direct and substantial" beneficial interest to be protected. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166 [127 Cal.Rptr.3d 710, 254 P.3d 1005].) He is the owner of three parcels of real property within the Agency's jurisdiction, and the Agency has imposed augmentation charges in connection with each of these parcels. Thus, though Eiskamp is a member of the Board of Directors, he has standing to pursue the present writ of mandate.

The Agency contends, however, that the present action is barred by the doctrine of res judicata. We agree.

(4) "'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 [123 Cal.Rptr.2d 432, 51 P.3d 297].)

(5) In considering this issue, we note that "[a] validation action implements important policy considerations. `[A] central theme in the validating procedures is speedy determination of the validity of the public agency's action.' [Citation.] 'The text of section 870 and cases which have interpreted the validation statutes have placed great importance on the need for a single dispositive final judgment.' [Citation.]" (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842 [73 Cal.Rptr.2d 427].)

(6) A validation proceeding is "in the nature of a proceeding in rem." (*Code Civ. Proc., § 860.*) Thus, "'[t]he judgment in a proceeding brought under the general validation procedure is `binding and conclusive ... against the agency and against all other persons ....' * (Code Civ. Proc., § 870, subd. (a), italics added.) Because the proceeding is in the nature of an action against the entire world, `[j]urisdiction of all interested parties may be had by [newspaper] publication of summons ....' and such other notice as the court may order. (*Id.*, § 861.) More importantly, the general validation procedure is broad enough to include actions to *invalidate* public agency matters (sometimes called reverse validation actions). *Code of Civil Procedure* section 863 permits `*any interested person* [to] bring an action ... to determine the validity of [the] matter' (italics added), and the phrase `*any interested person* might of course include a party contesting the matter in question." (*Bonander v. Town of Tiburon* (2009) 46 Cal.4th 646, 656 [94 Cal.Rptr.3d 403, 208 P.3d 146].)

(7) Here, the Scurich plaintiffs filed a reverse validation action in 2002 in which they challenged the validity of the Ordinance. This court "validat[ed] the $80 Augmentation Charge ... to the extent that the charge [was] used to fund capital facilities construction," but held that the statute of limitations did not bar the Scurich plaintiffs from challenging the Ordinance to the extent

*106* that the charges were used for other expenditures. Eiskamp is now seeking to challenge all of the augmentation charges imposed under the Ordinance. We will assume that Eiskamp could amend the complaint to challenge only that portion of the augmentation charges that were used for other expenditures, thereby avoiding the statute of limitations. If no other litigation involving the augmentation charges imposed by the Agency had occurred, res judicata would not apply and the amended complaint would state facts sufficient to constitute a cause of action.
However, in 2003, the Agency filed a validation proceeding (the Amrhein Lawsuit) to determine whether ordinance No. 2003-01 was valid. The Scurich Lawsuit was then stayed pending the outcome of the Amrhein Lawsuit. After the judgment in the Amrhein Lawsuit was reversed on the ground that the Agency failed to comply with constitutional requirements, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, the Amrhein defendants, and the Agency entered into a stipulated agreement that provided that "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the 'Pending Litigation')" would be resolved by entry of judgment. The stipulated agreement also stated that "this settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect...." The stipulated agreement did not require either the repeal of the Ordinance or the refund of augmentation charges imposed under the Ordinance. Thus, the stipulated agreement resolved the issue that Eiskamp now raises, that is, the validity of the augmentation charges imposed under the Ordinance, in favor of the Agency. Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was "binding and conclusive ... against the agency and against all other persons" (Code Civ. Proc., § 870, subd. (a)), including Eiskamp. Accordingly, Eiskamp is barred from relitigating the same issues that were resolved in the pending litigation.

In sum, the trial court properly sustained the demurrer to the complaint and entered judgment in favor of the Agency.

**III. Disposition**

The judgment is affirmed.

Duffy, J., and Walsh, J., concurred.

A petition for a rehearing was denied February 2, 2012, and appellant's petition for review by the Supreme Court was denied May 9, 2012, S200039.

[1] The plaintiffs in this lawsuit were James P. Scurich, John E. Eiskamp (appellant's son), Vincent J. Gizdich III, Dick Peixoto, and William J. McGrath.


[3] Eiskamp does not contend that the Agency failed to comply with the notification requirements for a validation proceeding (Code Civ. Proc., § 861).

[4] Eiskamp cites several federal cases on res judicata, collateral estoppel, privity, and stare decisis for the proposition that he is entitled to challenge the Agency's collection of the augmentation charges that were held invalid in *Amrhein*, supra, 150 Cal.App.4th 1364. However, his contentions rely on the premise that the judgment in the pending litigation did not apply to him.

[*] Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[†] Judge of the Santa Clara Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
HAROLD GRIFFITH, Plaintiff and Appellant,

v.

PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.

JOSEPH P. PENDRY et al., Plaintiffs and Appellants,

v.

PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.

Nos. H038087, H038264

Court of Appeals of California, Sixth District.

Filed October 15, 2013.

In pro. per. Counsel for Plaintiff/Appellant. Harold Griffith.


Aleshire & Wynder, Patricia J. Quilizapa. Amicus Curiae on behalf of Respondents for Association of California Water Agencies and California State Association of Counties.

CERTIFIED FOR PUBLICATION

PREMO, J.

After defendant Pajaro Valley Water Management Agency enacted ordinance No. 2010-02 that increased groundwater augmentation charges for the operation of wells within defendant's jurisdiction, plaintiff Harold Griffith challenged the ordinance on the grounds that the increase (1) was procedurally flawed because it was not approved in an election required by Proposition 218 (Cal. Const., art. XIII D, § 6), (2) did not conform to certain substantive requirements of Proposition 218, and (3) was to be used for a purpose not authorized by the law under which defendant was formed. Thereafter, plaintiffs Joseph Pendry, James Spain, Yuet-Ming Chu, William J. McGrath, and Henry Schepeler (Pendry) challenged the ordinance on similar grounds and on the ground that it was void because one of the directors who voted for the ordinance had a disqualifying conflict of interest within the meaning of the Political Reform Act (PRA) (Gov. Code, § 87100 et seq.). They also challenged an ordinance passed in 2002, which imposed an augmentation charge, and a 1993 management-fee ordinance. The trial court rendered judgments for defendant. Plaintiffs have appealed and reiterate their challenges. We are considering the two appeals together for purposes of briefing, oral argument, and disposition. After conducting an independent review of the record (Silicon Valley
We have previously detailed an historical background to this case in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1370-1375 (*Amrhein*). We therefore decline to repeat it and will instead begin with the trial court's succinct summary.

"The *Pajaro Valley* Groundwater Basin supplies most of the *water* used in the *Pajaro Valley*. The *water* is being extracted faster than it is being replenished by natural forces, which leads to saltwater intrusion, especially near the coast. Once the *water* table drops below sea level, seawater seeps into the groundwater basin. [Defendant] was created [in 1984 by the *Pajaro Valley Water Management Agency* Act (Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Wat.—Uncod. Acts (2008) Act 760, p. 681 (Act))] to deal with this issue. At present, the strategy is to use recycled wastewater, supplemental wells, captured storm runoff, and a coastal distribution system. The purpose is to reduce the amount of *water* taken from the groundwater basin (for example, the amount taken from wells), by supplying *water* to some [coastal] users. The cost of this process is borne by all users, on the theory that even those taking *water* from [inland] wells benefit from the delivery of *water* to [coastal users], as that reduces the amount of groundwater those [coastal users] will extract [from their own wells], thereby keeping the *water* in [all] wells from becoming too salty."

Ordinance No. 2010-02 describes "three supplemental *water* projects that work together to provide supplemental *water* to reduce overdraft, retard seawater intrusion, and improve and protect the groundwater basin supply: (1) Watsonville Recycled *Water* Project, which provides tertiary treated recycled *water* for agricultural use and includes inland wells that are used to provide cleaner well *water* that is blended with the treated *water* in order to improve the *water* quality so that it may be used for agricultural purposes; (2) Harkins Slough Project, which diverts excess wet-weather flows from Harkins Slough to a basin that recharges the groundwater, which then is available to be extracted and delivered for agricultural use; and (3) Coastal Distribution System (`CDS`), which consists of pipelines that deliver the blended recycled *water* and Harkins Slough Project *water* for agricultural use along the coast."

"The Act specifically empowers [defendant] to adopt ordinances levying `groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the *agency* for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental *water* for use within [defendant's] boundaries.'" (*Amrhein, supra, 150 Cal.App.4th at p. 1372; see Act, § 1001.)

Ordinance No. 2010-02 describes that the augmentation charge is necessary to cover the costs of "supplemental *water* service" described as follows: "(a) the purchase/acquisition, capture, storage and distribution of supplemental *water* through the supplemental *water* projects [Watsonville Recycled *Water* Project; Harkins Slough Project; CDS] and including the planning, design, financing, construction, operation, maintenance, repair, replacement and management of these project facilities, and (b) basin management monitoring and planning to manage the existing projects and to identify and determine future *water* projects that would further reduce groundwater overdraft and retard seawater intrusion. The cost of the service also includes ongoing debt payments related to the design and construction of the completed supplemental *water* projects."

**PROCEDURAL BACKGROUND**

In 2002, defendant approved ordinance No. 2002-02, which established an augmentation charge of $80 per acre-foot. Several citizens challenged the ordinance on the ground that the approval procedure did not comply with the notice,
hearing, and voting requirements of Proposition 218. The trial court dismissed the case on the ground of a special statute of limitations, and the plaintiffs appealed to this court. We reversed the judgment after finding that part of the augmentation charge was not subject to the statute of limitations. (Scurich v. Pajaro Valley Water Management Agency (May 27, 2004, H025776) [nonpub. opn.] (Scurich); see Eiskamp v. Pajaro Valley Water Management Agency (2012) 203 Cal.App.4th 97, 100-101 (Eiskamp).) We remanded the case for trial.

In 2003, defendant approved ordinance No. 2003-01, which increased the augmentation charge to $120 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. But it filed Amrhein as a validation proceeding[3] seeking a declaration as to the validity of the ordinance. The trial court declared the ordinance valid, and citizens who had objected appealed to this court.

In 2004, defendant approved ordinance No. 2004-02, which increased the augmentation charge to $160 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. Griffith challenged the ordinance and a 1993 management-fee ordinance. San Andreas Mutual Water Company and others also challenged the ordinance. The two actions were consolidated with Scurich (Consolidated Lawsuits) and the Consolidated Lawsuits were stayed pending our decision in Amrhein.

In May 2007, we reversed the judgment in Amrhein after holding that "the augmentation fee is a fee or charge `imposed . . . as an incident of property ownership' and thus subject to [the Proposition 218] preconditions for the imposition of such charges." (Amrhein, supra, 150 Cal.App.4th at p. 1370.)


"In January 2008, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants wanted to resolve all disputes in the Amrhein Lawsuit and the Consolidated Lawsuits. They and [defendant] then entered into a stipulated agreement for entry of judgment (stipulated agreement). The stipulated agreement provided: `all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation") as to [defendant's] actions shall be resolved by entry of judgment in the Pending Litigation'; [defendant] would pay $1.8 million to the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants for legal fees, costs, and expenses; and the augmentation charges collected pursuant to ordinance Nos. 2003-01 and 2004-02 would be refunded. It also stated that the `settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect. . . .' The stipulated agreement did not provide for either the repeal of [ordinance No. 2002-02] or the refund of augmentation charges imposed under [that] Ordinance.

"In February 2008, judgment was entered pursuant to the terms of the stipulated agreement." (Eiskamp, supra, 203 Cal.App.4th at p. 102.)

In May 2010, defendant mailed notice of a public hearing on a proposed three-tier augmentation charge increase to all parcel owners.[4] At the hearing, defendant tallied 291 written protests from 1,930 eligible parcel owners. Defendant then enacted ordinance No. 2010-02, which imposed the increased augmentation charges.

In June 2010, defendant began an all-mail election on the ordinance. It mailed ballots to all owners of land parcels served by a well who would be subject to the augmentation charge. Each ballot was accorded weighted votes proportional to the parcel's financial obligation as measured by average annual water use over the prior five years. And each ballot stated its number of votes. The weighted votes approved the ordinance 72 percent to 28 percent. But, if
counted one vote per parcel, 324 votes were in favor of the ordinance and 608 votes were against the ordinance. 

Plaintiffs then filed the instant actions to challenge ordinance No. 2010-02.

**CHALLENGES TO ORDINANCE NO. 2010-02**

"Proposition 218 was passed in 1996 by the electorate to plug certain perceived loopholes in Proposition 13. Specifically, by increasing assessments, fees, and charges, local governments tried to raise revenues without triggering the voter approval requirements in Proposition 13." (Silicon Valley Taxpayers’ Assn. v. Garner (2013) 216 Cal.App.4th 402, 405-406.)

Relevant here is the component of Proposition 218 that undertakes to constrain the imposition by local governments of "assessments, fees and charges." (§ 1.)

Proposition 218 restricts "the power of public agencies to impose a "[f]ee" or "charge," defined as 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.' [Citation.] The phrase 'property-related service' is defined to mean 'a public service having a direct relationship to property ownership.' [Citation.] 'Property ownership' is defined to 'include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.' [Citation.]

"Where a proposed fee or charge comes within this definition, [Proposition 218] requires the proposing agency to identify parcels upon which it will be imposed, and to conduct a public hearing. [Citation.] The hearing must be preceded by written notice to affected owners setting forth, among other things, a 'calculation' of 'the amount of the fee or charge proposed to be imposed upon each parcel. . . .' [Citation.] If a majority of affected owners file written protests at the public hearing, 'the agency shall not impose the fee or charge.' [Citation.] Moreover, unless the charge is for 'sewer, water, [or] refuse collection services,' 'no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.'" (Amrhein, supra, 150 Cal.App.4th at pp. 1384-1385.)

As mentioned, we have determined that a groundwater augmentation charge such as the one imposed by ordinance No. 2010-02 "is indeed imposed as an incident of property ownership [and] that it is subject to the restrictions imposed on such charges by [Proposition 218]." (Amrhein, supra, 150 Cal.App.4th at p. 1393.) We cautioned in Amrhein, however, that "We should not be understood to imply that the charge is necessarily subject to all of the restrictions imposed by [Proposition 218] on charges incidental to property ownership. [Amrhein] presents no occasion to determine whether this or a similar charge may fall within any of the express exemptions or partial exemptions set forth in that measure." (Ibid. & fn. 21.)

This case, however, presents such an occasion.

Boiled to its essence, plaintiffs' challenge to the election is that the weighted vote was improper. But the challenge necessarily fails if the augmentation charge falls within the express exemption set forth in Proposition 218 for sewer, water, and refuse collection services. (§ 6, subd. (c) [vote required to impose or increase property-related fee "Except for . . . sewer, water, and refuse collection services."].) 

Plaintiffs argue that defendant does not provide "water service" as that term is commonly understood. (See Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 Cal.App.4th 1351, 1358 ["The average voter would envision `water service' as the supply of water for personal, household, and commercial use. . . ."] (Salinas.) They urge that defendant
provides "groundwater management," which may be a service "but that service is not water service." Plaintiffs, however, make a distinction without a difference.

Domestic water delivery through a pipeline is a property-related water service within the meaning of Proposition 218. (Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 217.) And we have held that, for purposes of Proposition 218, the augmentation charge at issue here does not differ materially "from a charge on delivered water." (Amrhein, supra, 150 Cal.App.4th at pp. 1388-1389.) If the charges for water delivery and water extraction are akin, then the services behind the charges are akin. Moreover, the Legislature has endorsed the view that water service means more than just supplying water. The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) Thus, the entity who produces, stores, supplies, treats, or distributes water necessarily provides water service. Defendant's statutory mandate to purchase, capture, store, and distribute supplemental water therefore describes water service.

Plaintiffs' reliance on Salinas is erroneous. In Salinas, the question was whether a storm drainage fee was exempt from the voter-approval requirement because it was a water or sewer service fee. Our point about the average voter envisioning water service as meaning the supplying of water was a preface to distinguishing water service from storm drainage rather than a definition of water service. The entire sentence reads "The average voter would envision 'water service' as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away [from property], and discharges it into the nearby creeks, river and ocean." (Salinas, supra, 98 Cal.App.4th at p. 1358.)

We therefore conclude that the augmentation charge at issue here is for water service within the meaning of Proposition 218. As such, it was expressly exempt from the fee/charge voting requirement.

In a second procedural attack, Pendry urges that defendant transgressed Proposition 218 by enacting ordinance No. 2010-02 without giving notice of the protest hearing to tenants and public utility customers who indirectly pay the augmentation charge. There is no merit to the claim.

"An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following: [¶] (1) 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 proposed fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge." (§ 6, subd. (a)(1), italics added.)

In short, Proposition 218 requires that notice of the protest hearing be sent to record owners, not tenants or customers. (See Gov. Code, § 53750, subd. (j) ["For purposes of . . . Article XIII D of the California Constitution . . . [¶] . . . [¶] (j) 'Record owner' means the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency."].)

It is true, as Pendry points out, that, in the definitions section of Proposition 218, the term "property ownership" is defined to include "tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (§ 2, subd. (g).) And it is true that "when a well [is] shown to be operated by a lessee or other occupant, that person could be billed." (Amrhein, supra, 150 Cal.App.4th at p. 1383.) But the notice provision of section 6,
subdivision (a), requires notice to record owners, not to those having property ownership. (Silicon Valley, supra, 44 Cal.4th at p. 444 ["'The principles of constitutional interpretation are similar to those governing statutory construction.' [Citation.] If the language is clear and unambiguous, the plain meaning governs."].)

"Proposition 218 also imposes substantive limitations, including restrictions on the use of revenues derived from such charges." (Amrhein, supra, 150 Cal.App.4th at p. 1385.)

"A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

"(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

"(3) 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.

"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4 [procedures and requirements for proposed assessments].

"(5) No fee or charge may be imposed for general governmental services . . . where the service is available to the public at large in substantially the same manner as it is to property owners. . . . In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." (§ 6, subd. (b.).)

Plaintiffs argue that the augmentation charge transgresses each of the section 6, subdivision (b), substantive limitations.

**Revenues shall not exceed the funds required to provide the property related service**

According to Griffith, the revenues derived from the augmentation charge exceed the funds required to provide supplemental water service because some of the revenue is used to pay ongoing debt that was "incurred to build a now abandoned pipeline to bring water into the Valley." There is no merit to the point.

As noted above, the Act allows defendant to levy groundwater augmentation charges for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water. Such costs necessarily include debt service incurred to construct facilities to capture, store, and distribute supplemental water.

**Revenues shall not be used for any purpose other than that for which the fee or charge was imposed**

According to plaintiffs, the revenues derived from the augmentation charge are used for a purpose other than that for which the charge was imposed because some of the revenue is used to pay debt service and defendant's general expenses. Again, the Act allows an augmentation charge to cover debt service. And similar reasoning supports that the costs of purchasing, capturing, storing, and distributing supplemental water necessarily include general expenses to administer the purchasing, capturing, storing, and distributing of supplemental water.
Pendry, however, expands on this theme in a separate, detailed argument to the effect that the augmentation charge is unauthorized by the Act. He contends that ordinance No. 2010-02 is invalid because it allows the augmentation charge to be used for "supplemental water service," a purpose not authorized by the Act. Without specifically referring to the Watsonville Recycled Water Project that blends treated recycled water with well water for agricultural use, he complains that defendant "is using the funds generated by the augmentation charge imposed by Ordinance 2010-02 to extract groundwater from within the watershed and deliver that water to the coast. . . ."

Pendry relies on the Act, which authorizes defendant to levy augmentation charges to pay the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency. From there, Pendry notes that the Act states that "'Supplemental water' means surface water or groundwater imported from outside the watershed or watersheds of the groundwater basin, flood waters that are conserved and saved within the watershed or watersheds which would otherwise have been lost or would not have reached the groundwater basin, and recycled water." (Act, § 316.) From this, Pendry concludes that the recycle/well blend is not supplemental water because the well portion of the blend is neither imported water, flood water, nor recycled water. We disagree with Pendry's analysis.

Defendant's Rate Study (ante, fn. 8) explains that "The [Watsonville Recycled Water Facility] produces recycled water with salinity (Total Dissolved Solids or TDS concentration) between approximately 700 and 900 mg/L. The concentration of TDS varies seasonally as a result of the source water flowing into the Waste Water Treatment Plant. In order to reduce salinity and use the recycled water for irrigation purposes, the recycled water must be blended with higher quality (lower TDS) water. Therefore, the recycled water project includes the construction, operation, and maintenance of blend water from supplemental groundwater wells. The supplemental wells are described in the BMP [Basin Management Plan] as part of the recycled water project. The wells are a necessary component of the recycled water project, which reduces coastal pumping and thus increases the sustainable yield of the overall groundwater basin. These wells also off-set and reduce the adverse water quality wells located closer to the coast."

"'Recycled water' means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource." (Wat. Code, § 13050, subd. (n).)

Given this definition, it is apparent that the Watsonville Recycled Water Facility does not produce recycled water because the water it produces is not suitable for the beneficial use of coastal agriculture. The water only becomes recycled water when blended with the well water. Thus, the recycle/well blend water delivered to the coast is supplemental water.

We are constrained to add that the Act unquestionably allows defendant to extract groundwater for the purpose of capturing recycled water. The Act generally provides that defendant "should, in an efficient and economically feasible manner, utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future needs of the basin." (Act, § 102, subd. (g).) It specifically provides that defendant, "in order to improve and protect the quality of water supplies may treat, inject, extract, or otherwise control water, including, but not limited to, control of extractions, and construction of wells and drainage facilities." (Id. § 711.) And it also provides that defendant "shall have the power to take all affirmative steps necessary to replenish and augment the water supply within its territory." (Id. § 714.)

The amount imposed as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel
According to Griffith, the amount imposed on his parcel was disproportionate because he uses no services. But this overlooks that "the management of the water resources . . . for agricultural, municipal, industrial, and other beneficial uses is in the public interest" and defendant was created to manage the resources "for the common benefit of all water users." (Act, § 101.) It also overlooks that the augmentation charge pays for "the activities required to prepare or implement any groundwater management program." (Id. § 1002, subd. (a).)

Pendry similarly grounds his argument on the erroneous premise that "The only property owners receiving § 6(b) services from [defendant] are the coastal landowners receiving delivered water."

Pendry specifically complains that defendant "established the augmentation charge by calculating the amount needed for its project, and then subtracting its sources of revenue other than the augmentation charge, with the remainder being the amount of the augmentation charge." He urges that defendant improperly "worked backwards." According to Pendry, "the proportional cost of service must be calculated . . . before setting the rate for the augmentation charge."

Defendant indeed established its augmentation charge based on a revenue-requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users. The American Water Works Association Manual of Water Supply Practices, in evidence below and relied on by defendant's rate-making consultant, recommends this methodology ("The total annual cost of providing water service is the annual revenue requirements that apply to the particular utility"). Pendry does not explain why this approach offends Proposition 218 proportionality. He cites Silicon Valley, supra, 44 Cal.4th at page 457 ("an assessment calculation that works backward by starting with an amount taxpayers are likely to pay, and then determines an annual spending budget based thereon, does not comply with the law governing assessments."). Unlike Silicon Valley, however, this case neither involves an assessment nor a what-will-the-market-bear methodology. Pendry also cites Howard Jarvis Taxpayers Assn. v. City of Fresno (2005) 127 Cal.App.4th 914, 923. But that case says nothing more than that costs should be determined and apportioned ("Together, subdivision (b)(1) and (3) of article XIII D, section 6, makes it necessary—if Fresno wishes to recover all of its utilities costs from user fees—that it reasonably determine [citation] the unbudgeted costs of utilities enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel."). (Ibid.)

Pendry acknowledges that defendant apportioned the augmentation charge among different categories of users (metered wells, unmetered wells, wells within the delivered water zone). But he argues that City of Palmdale v. Palmdale Water Dist. (2011) 198 Cal.App.4th 926 (Palmdale), holds that Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis. We disagree with Pendry.

In Palmdale, the court reversed a judgment that had upheld tiered categories of water rates. It held that the water district had failed to carry its burden to justify disparate treatment of the customer classes. The case did not hold that parcel-by-parcel analysis was required. It held that the water district charged categories disproportionately "without a corresponding showing in the record that such impact is justified under [Proposition 218]." (Palmdale, supra, 198 Cal.App.4th at p. 937.)

Apportionment is not a determination that lends itself to precise calculation. (White v. County of San Diego (1980) 26 Cal.3d 897, 903.) In the context of determining the validity of a fee imposed upon water appropriators by the State Water Resources Control Board, the Supreme Court has recently held that "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payers." (California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421, 438.)

Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than the amount shall not exceed the proportional cost of the service attributable to the parcel, defendant's method of grouping similar users
together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render defendant's method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

**No fee or charge may be imposed unless it is immediately available and not for future services**

Plaintiffs argue that the augmentation charge will be used for future services because ordinance No. 2010-02 states that the charge will be used "to identify and determine future supplemental water projects. . . ." There is no merit to the point.

Defendant's water service consists of more than just delivering water. As mentioned, the Act authorizes defendant to levy groundwater augmentation charges to pay for purchasing, capturing, storing, and distributing supplemental water. Since one cannot rationally purchase supplemental water without identifying and determining one's needs, identifying and determining future supplemental water projects is part of defendant's present-day water service.

Pendry also complains that delivered water is one of the services and delivered water is not immediately available except to coastal properties within the delivered water zone. But, again, Pendry's complaint stems from his erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water and his failure to acknowledge that the augmentation charge pays for the activities required to prepare or implement the groundwater management program for the common benefit of all water users.

**Revenues may not be imposed for general governmental services where the service is available to the public at large in substantially the same manner as it is to property owners**

Plaintiffs reason that, since everyone is a water user, everyone benefits from the services charged to property owners via the augmentation charge. They conclude that the augmentation charge is imposed for general governmental services. We disagree with plaintiffs' analysis.

The language of article XIII D, section 6, subdivision (b)(5), concerns the purpose of fees and charges. (Golden Hill Neighborhood Assn., Inc. v. City of San Diego (2011) 199 Cal.App.4th 416, 434, fn. 17.) "The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service." (Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal.App.4th 637, 648.) Defendant is not using money from the augmentation charge for "general governmental service." (§ 6, subd. (b)(5).) Rather, it is using the money to pay for the water service provided.

**CONFLICT OF INTEREST**

Pendry contends that defendant's board member, Michael Dobler, who voted for ordinance No. 2010-02, had a disqualifying financial interest in the decision, and that his participation renders the ordinance void under the PRA. He points out that defendant's board of directors consists of seven members (Act, § 402) and ordinances must pass by "the affirmative vote of the majority of the members of the board" (id. § 410). He notes that the vote count to pass ordinance No. 2010-02 was 4 to 1 and, thus, insufficient without Dobler's vote. He complains that Dobler has an interest in entities that farm in the delivered water zone. We disagree with Pendry's contention.

The PRA was enacted by initiative in June 1974. It prohibits any public official from participating in a governmental decision in which he knows or has reason to know he has a financial interest. (Gov. Code, § 87100.) It allows a person to sue for injunctive relief and, "If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void." (Id. § 91003,
subd. (b).) It also establishes the Fair Political Practices Commission (id. § 83100), which is authorized to adopt regulations to carry out the purposes and provisions of the PRA (id. § 83112).

"A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official. . . ." (Gov. Code, § 87103.)

"The financial effect of a governmental decision on the official's economic interest is indistinguishable from the decision's effect on the public generally if . . .: [¶] . . . [¶] (c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (Cal. Code Regs., tit. 2, § 18707.2, subd. (c) (regulation).)

Here, there is no serious question that (1) defendant is a water, irrigation, or similar district, and (2) the decision effected an adjustment to charges or rates.

Pendry disputes that the ordinance applies the charges proportionally and across the board to persons receiving services from defendant. He urges that the augmentation charge is imposed upon approximately 2400 parcels located within defendant's boundaries but only a handful of those properties receive the delivered water service (Dobler included) and can expect to benefit from the greater service, reliability, improved water quality from the delivered water supply. This, however, is merely another variant of Pendry's erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water.

The augmentation charge affects those on whom it is imposed by burdening them with an expense they will bear proportionately to the amount of groundwater they extract at a rate depending on which of three rate classes applies. It is imposed "across-the-board" on all water extractors. All persons extracting water—including any coastal users who choose to do so—will pay an augmentation charge per acre-foot extracted. All persons extracting water and paying the charge will benefit in the continued availability of usable groundwater. That there is a separate charge for delivered water has no tendency to establish that the augmentation charge is applied to the interests of extractors in a manner that is anything other than proportional and across-the-board. It is plain that the ordinance satisfies the terms of regulation section 18707.2, subdivision (c), such that the "public generally" exception in the PRA applies to Dobler's vote.[10] (See Amrhein, supra, 150 Cal.App.4th at pp. 1395-1396 (conc. opn. of Bamattre-Manoukian, J.).)

ORDINANCE NO. 2002-02 AND 1993 MANAGEMENT FEE

In Eiskamp, the plaintiff challenged ordinance No. 2002-02 on the ground that it was invalid because defendant did not comply "with the notice, hearing, and voting requirements of [Proposition 218]." (Eiskamp, supra, 203 Cal.App.4th at p. 102.) We concluded that the challenge was barred by the doctrine of res judicata because the 2008 stipulated judgment in the Pending Litigation resolved the issue against all persons. We specifically held that "Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was 'binding and conclusive . . . against [defendant] and against all other persons' (Code Civ. Proc., § 870, subd. (a)), including Eiskamp." (Id. at p. 106.) Since Pendry raises the same claim as the plaintiff in Eiskamp,[11] his challenge is also barred.

Pendry disagrees. He asserts that Eiskamp was wrongly decided because "the in pro per plaintiff in Eiskamp did not properly present the correct facts or law to this Court." According to Pendry, the Consolidated Lawsuits were not in rem validation proceedings insofar as ordinance No. 2002-02 was concerned because, in Scurich (the case that challenged that ordinance via a reverse validation action), our reversal upheld the trial court's dismissal of the in rem validation
cause of action and remanded for trial an in personam declaratory-relief cause of action. From this, Pendry reasons that ordinance No. 2002-02 was "not under attack" such that there was in rem jurisdiction in the Consolidated Lawsuits. Pendry concludes that the stipulated judgment only binds parties to the stipulated agreement and, since he was not a party, he is free to relitigate. Pendry's analysis is erroneous.

The settlement agreement served to resolve "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation")." (Eiskamp, supra, 203 Cal.App.4th at p. 102, italics added.) Specifically, the parties extinguished "any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect. . . ." (Ibid., italics added.)

In the Pending Litigation, the "judgment was entered pursuant to the terms of the stipulated agreement." (Eiskamp, supra, 203 Cal.App.4th at p. 102.) Since the Amrhein Lawsuit was a validation proceeding and part of the Pending Litigation, all persons are bound by the judgment. (Code Civ. Proc., § 870, subd. (a).) And since the judgment extinguished all claims that the parties, which includes all persons given that validation character of Amrhein, had made concerning any augmentation charge or management fee then in effect, Pendry cannot relitigate the claims here. Pendry concedes as much by recognizing that "the plaintiffs and defendants in Scurich and Amrhein [all persons] stipulated in private settlement discussions to accept money in exchange for foregoing their individual right to attack Ordinance 2002-02 in the future." That ordinance No. 2002-02 was not technically under attack at the time of the judgment does not detract from that the Pending Litigation was a validation proceeding that comprehensively extinguished all claims that had been made, or could have been made about the validity of any augmentation charge or management fee then in effect. This necessarily includes claims against ordinance No. 2002-02 and the 1993 Management Fee.

Pendry claims that applying res judicata against him transgresses due process. However, his argument is premised on the trial court's conclusion that res judicata applied because he was in privity with the parties in the Pending Litigation. Our conclusion is that res judicata applies because, by virtue of the validation character of the Pending Litigation, he was a party to the Pending Litigation.

**DISPOSITION**

The judgment in H038087 (Santa Cruz County Superior Court case No. CV168936-Griffith) is affirmed. The judgment in H038264 (Santa Cruz County Superior Court case No. CV169080-Pendry) is affirmed.

Rushing, P.J. and Elia, J., concurs.

[1] Further unspecified section references are to the California Constitution, article XIII D.

[2] Plaintiffs also asserted other grounds that they do not advance on appeal.

[3] In rem proceeding by public agency against all persons interested in validity of matter determined. (Code Civ. Proc., § 860 et seq.)

[4] Defendant proposed $195 per acre-foot for metered wells inside the coastal delivered-water zone, $162 per acre-foot for metered wells outside the delivered-water zone (primarily municipal, industrial, and agricultural users), and $156 per acre-foot for unmetered wells (primarily rural residential). It also proposed $306 per acre-foot for delivered water charges.
The parties differ immaterially on the one-for-one vote count.

According to defendant, the election was unnecessary but held nevertheless in an abundance of caution "because no case has explicitly reached the issue, and because of the near certainty of suit."

Pendry does not challenge compliance with section 6, subdivision (b)(1).

 Defendant's Proposition 218 Service Charge Report (Rate Study), in evidence below, explains that a previously recommended import pipeline was no longer feasible "[d]ue to changes in the availability of Central Valley Project water supplies."

"Agricultural uses shall have priority over other uses under this act within the constraints of state law." (Act, § 102, subd. (d).)

Pendry claims that the trial court did not find that the "public generally" exception applies in this case. It is true that the trial court's reasoning is ambiguous. The trial court's statement of decision finds against "a conflict of interest which could support the voiding of the subject Ordinance." The finding could be construed to mean that (1) Dobler had no disqualifying financial interest, (2) the "public generally" exception applied to Dobler's financial interest, or (3) Dobler's financial interest did not justify the discretionary remedy to void the ordinance. Pendry's point is of no moment. The parties argued the "public generally" exception to the trial court. The salient facts are undisputed. And Pendry urges us to review the PRA issue de novo because it involves statutory interpretation on undisputed facts.

The plaintiff in Eiskamp did not challenge the 1993 management-fee ordinance as does Pendry, but the management-fee ordinance stands on the same footing as the augmentation-charge ordinance since it was part of the stipulated judgment.

Plaintiff McGrath was a party to the stipulated agreement but he excepted himself from the causes of action herein that challenge ordinance No. 2002-02 and the management fee ordinance.

 Defendant's request to take judicial notice of three letters requesting depublication of Eiskamp and four letters supporting a petition for review of Eiskamp is denied.

NEWHALL COUNTY WATER DISTRICT, Plaintiff and Respondent,

v.

CASTAIC LAKE WATER AGENCY et al., Defendants and Appellants.

No. B257964.

Court of Appeals of California, Second District, Division Eight.

January 19, 2016.
Colantuono, Highsmith & Whatley, Michael G. Colantuono, David J. Ruderman, Jon R. di Cristina; Lagerlof, Senecal, Gosney & Kruse and Thomas S. Bunn III for Plaintiff and Respondent.

OPINION

GRIMES, J.—

SUMMARY

Plaintiff Newhall County Water District (Newhall), a retail water purveyor, challenged a wholesale water rate increase adopted in February 2013 by the board of directors of defendant Castaic Lake Water Agency (the Agency), a government entity responsible for providing imported water to the four retail water purveyors in the Santa Clarita Valley. The trial court found the Agency's rates violated article XIII C of the California Constitution (Proposition 26). Proposition 26 defines any local government levy, charge or exaction as a tax requiring voter approval, unless (as relevant here) it is imposed "for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., art. XIII C, § 1, subd. (e)(2).) The challenged rates did not comply with this exception, the trial court concluded, because the Agency based its wholesale rate for imported water in substantial part on Newhall's use of groundwater, which was not supplied by the Agency. Consequently, the wholesale water cost allocated to Newhall did not, as required, "bear a fair or reasonable relationship to [Newhall's] burdens on, or benefits received from, the [Agency's] activity." (Art. XIII C, § 1, subd. (e), final par.) We affirm the trial court's judgment.

FACTS

We base our recitation of the facts in substantial part on the trial court's lucid descriptions of the background facts and circumstances giving rise to this litigation.

1. The Parties

The Agency is a special district and public agency of the state established in 1962 as a wholesale water agency to provide imported water to the water purveyors in the Santa Clarita Valley. It is authorized to acquire water and water rights, and to provide, sell and deliver that water "at wholesale only" for municipal, industrial, domestic and other purposes. (72A West's Ann. Wat. Code—Appen. (1999 ed.) foll. § 103-15, p. 500.) The Agency supplies imported water, purchased primarily from the State Water Project, to four retail water purveyors, including Newhall. Newhall is also a special district and public agency of the state. Newhall has served its customers for over 60 years, providing treated potable water to communities near Santa Clarita, primarily to single-family residences. Newhall owns and operates distribution and transmission mains, reservoirs, booster pump stations, and 11 active groundwater wells.
Two of the other three retail water purveyors are owned or controlled by the Agency: Santa Clarita Water Division (owned and operated by the Agency) and Valencia Water Company (an investor-owned water utility controlled by the Agency since Dec. 21, 2012). Through these two retailers, the Agency supplies about 83 percent of the water demand in the Santa Clarita Valley. The Agency's stated vision is to manage all water sales in the Santa Clarita Valley, both wholesale and retail.

The fourth retailer is Los Angeles County Waterworks District No. 36 (District 36), also a special district and public agency, operated by the county Department of Public Works. It is the smallest retailer, accounting for less than 2 percent of the total water demand.

2. Water Sources

The four retailers obtain the water they supply to consumers from two primary sources, local groundwater and the Agency's imported water.

The only groundwater source is the Santa Clara River Valley Groundwater Basin, East Subbasin (the Basin). The Basin is comprised of two aquifer systems, the Alluvium and the Saugus Formation. This groundwater supply alone cannot sustain the collective demand of the four retailers. (The Basin's operational yield is estimated at 37,500 to 55,000 acre-feet per year (AFY) in normal years, while total demand was projected at 72,343 AFY for 2015, and 121,877 AFY in 2050.)

The Basin, so far as the record shows, is in good operating condition, with no long-term adverse effects from groundwater pumping. Such adverse effects (known as overdraft) could occur if the amount of water extracted from an aquifer were to exceed the amount of water that recharges the aquifer over an extended period. The retailers have identified cooperative measures to be taken, if needed, to ensure sustained use of the aquifer. These include the continued "conjunctive use" of imported supplemental water and local groundwater supplies, to maximize water supply from the two sources. Diversity of supply is considered a key element of reliable water service during dry years as well as normal and wet years.

In 1997, four wells in the Saugus Formation were found to be contaminated with perchlorate, and in 2002 and 2005, perchlorate was detected in two wells in the Alluvium. All the wells were owned by the retailers, one of them by Newhall. During this period, Newhall and the two largest retailers (now owned or controlled by the Agency) increased their purchases of imported water significantly.

3. Use of Imported Water

Until 1987, Newhall served its customers relying only on its groundwater rights.[2] Since 1987, it has supplemented its groundwater supplies with imported water from the Agency.

The amount of imported water Newhall purchases fluctuates from year to year. In the years before 1998, Newhall's water purchases from the Agency averaged 11 percent of its water demand. During the period of perchlorate contamination (1998 to 2009), its imported water purchases increased to an average of 52 percent of its total demand. Since then, Newhall's use of imported water dropped to 23 percent, and as of 2012, Newhall received about 25 percent of its total water supply from the Agency. The overall average since it began to purchase imported water in 1987, Newhall tells us, is 30 percent.
The other retailers, by contrast, rely more heavily on the Agency's imported water. Agency-owned Santa Clarita Water Division is required by statute to meet at least half of its water demand using imported water. (See 72A West's Ann. Wat. Code-Appen. (2012 supp.) foll. § 103-15.1, subd. (d), p. 9 (West's Ann. Wat. Code).) Agency-controlled Valencia Water Company also meets almost half its demand with imported water.

4. The Agency's Related Powers and Duties

As noted above, the Agency's primary source of imported water is the State Water Project. The Agency purchases that water under a contract with the Department of Water Resources. The Agency also acquires water under an acquisition agreement with the Buena Vista Water Storage District and the Rosedale-Rio Bravo Water Storage District, and other water sources include recycled water and water stored through groundwater banking agreements. Among the Agency's powers are the power to "[s]tore and recover water from groundwater basins" (West's Ann. Wat. Code, supra, foll. § 103-15.2, subd. (b), p. 505), and "[t]o restrict the use of agency water during any emergency caused by drought, or other threatened or existing water shortage, and to prohibit the wastage of agency water" (West's Ann. Wat. Code, supra, foll. § 103-15, subd. (k), p. 502).

In addition, and as pertinent here, the Agency may "[d]evelop groundwater management plans within the agency which may include, without limitation, conservation, overdraft protection plans, and groundwater extraction charge plans. . . ." (West's Ann. Wat. Code, supra, foll. § 103-15.2, subd. (c), p. 505.) The Agency has the power to implement such plans "subject to the rights of property owners and with the approval of the retail water purveyors and other major extractors of over 100 acre-feet of water per year." (Ibid.)

In 2001, the Legislature required the Agency to begin preparation of a groundwater management plan, and provided for the formation of an advisory council consisting of representatives from the retail water purveyors and other major extractors. (West's Ann. Wat. Code, supra, foll. § 103-15.1, subd. (e)(1) & (2)(A), p. 9.) The Legislature required the Agency to "regularly consult with the council regarding all aspects of the proposed groundwater management plan." (Id., subd. (e)(2)(A).)

Under this legislative authority, the Agency spearheaded preparation of the 2003 Groundwater Management Plan for the Basin, and more recently the 1437

*1437 2010 Santa Clarita Valley urban water management plan. These plans were approved by the retailers, including Newhall.

The 2003 Groundwater Management Plan states the overall management objectives for the Basin as (1) development of an integrated surface water, groundwater, and recycled water supply to meet existing and projected demands for municipal, agricultural and other water uses; (2) assessment of groundwater basin conditions "to determine a range of operational yield values that will make use of local groundwater conjunctively with [State Water Project] and recycled water to avoid groundwater overdraft"; (3) preservation of groundwater quality; and (4) preservation of interrelated surface water resources. The 2010 Santa Clarita Valley urban water management plan, as the trial court described it, is "an area-wide management planning tool that promotes active management of urban water demands and efficient water usage by looking to long-range planning to ensure adequate water supplies to serve existing customers and future demands. . . ."

5. The Agency's Wholesale Water Rates

The board of directors of the Agency fixes its water rates, "so far as practicable, [to] result in revenues that will pay the operating expenses of the agency, . . . provide for the payment of the cost of water received by the agency under the
State Water Plan, provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of that bonded debt. . ." (West's Ann. Wat. Code, supra, foll. § 103-24, subd. (a), p. 509.) The Agency's operating costs include costs for management, administration, engineering, maintenance, water quality compliance, water resources, water treatment operations, storage and recovery programs, and studies.

Before the rate changes at issue here, the Agency had a "100 percent variable" rate structure. That means it charged on a per acre-foot basis for the imported water sold, known as a "volumetric" rate. Thus, as of January 1, 2012, retailers were charged $487 per acre-foot of imported water, plus a $20-per-acre-foot charge for reserve funding.

Because of fluctuations in the demand for imported water (such as during the perchlorate contamination period), the Agency's volumetric rates result in fluctuating, unstable revenues. The Agency engaged consultants to perform a comprehensive wholesale water rate study, and provide recommendations on rate structure options. The objective was a rate structure that would provide revenue sufficiency and stability to the Agency, provide cost equity and certainty to the retailers, and enhance conjunctive use of the sources of water supply and encourage conservation. As the Agency's consultants put it, "[t]wo of the primary objectives of cost of service water rates are to ensure the utility has sufficient revenue to cover the costs of operating and maintaining the utility in a manner that will ensure long term sustainability and to ensure that costs are recovered from customers in a way that reflects the demands they place on the system."

The general idea was a rate structure with both volumetric and fixed components. Wholesale rate structures that include both a fixed charge component (usually calculated to recover all or a portion of the agency's fixed costs of operating, maintaining and delivering water) and a volumetric component (generally calculated based on the cost of purchased water, and sometimes including some of the fixed costs) are common in the industry.

6. The Challenged Rates

The Agency's consultants presented several rate structure options. In the end, the option the Agency chose (the challenged rates) consisted of two components. The first component is a fixed charge based on each retailer's three-year rolling average of total water demand (that is, its demand for the Agency's imported water and for groundwater not supplied by the Agency). This fixed charge is calculated by "divid[ing] the Agency's total fixed revenue for the applicable fiscal year . . . by the previous three-year average of total water demand of the applicable Retail Purveyor to arrive at a unit cost per acre foot." The Agency would recover 80 percent of its costs through the fixed component of the challenged rates. The second component of the Agency's rate is a variable charge, based on a per acre-foot charge for imported water.

The rationale for recovering the Agency's fixed costs in proportion to the retailers' total water demand, rather than their demand for imported water, is this (as described in the consultants' study): "This rate structure meets the Agency's objective of promoting resource optimization, conjunctive use, and water conservation. Since the fixed cost is allocated on the basis of each retail purveyor's total demand, if a retail purveyor conserves water, then its fixed charge will be reduced. Additionally, allocating the fixed costs based on total water demand recognizes that imported water is an important standby supply that is available to all retail purveyors, and is also a necessary supply to meet future water demand in the region, and that there is a direct nexus between groundwater availability and imported water use—i.e., it allocates the costs in a manner that bears a fair and reasonable relationship to the retail purveyors'
*1439 burdens on and benefits from the Agency's activities in ensuring that there is sufficient water to meet the demands of all of the retail purveyors and that the supply sources are responsibly managed for the benefits of all of the retail purveyors."

The rationale continues: "Moreover, the Agency has taken a leadership role in maintaining the health of the local groundwater basin by diversifying the Santa Clarita Valley's water supply portfolio, as demonstrated in the 2003 Groundwater Management Plan and in resolving perchlorate contamination of the Saugus Formation aquifer. Thus, since all retail purveyors benefit from imported water and the Agency's activities, they should pay for the reasonable fixed costs of the system in proportion to the demand (i.e. burdens) they put on the total water supply regardless of how they utilize individual sources of supply."

The Agency's rate study showed that, during the first year of the challenged rates (starting July 1, 2013), Newhall would experience a 67 percent increase in Agency charges, while Agency controlled retailers Valencia Water Company and Santa Clarita Water Division would see reductions of 1.9 percent and 10 percent, respectively. District 36 would have a 0.8 percent increase. The rate study also indicated that, by 2050, the impact of the challenged rates on Newhall was expected to be less than under the then-current rate structure, while Valencia Water Company was expected to pay more.

Newhall opposed the challenged rates during the ratemaking process. Its consultant concluded the proposed structure was not consistent with industry standards; would provide a nonproportional, cross-subsidization of other retailers; and did not fairly or reasonably reflect the Agency's costs to serve Newhall. Newhall contended the rates violated the California Constitution and other California law. It proposed a rate structure that would base the Agency's fixed charge calculation on the annual demand for imported water placed on the Agency by each of its four customers, using a three-year rolling average of past water deliveries to each retailer.

In February 2013, the Agency's board of directors adopted the challenged rates, effective July 1, 2013.

7. This Litigation

Newhall sought a writ of mandate directing the Agency to rescind the rates, to refund payments made under protest, to refrain from charging Newhall for its imported water service "with respect to the volume of groundwater Newhall uses or other services [the Agency] does not provide Newhall," and to adopt a new, lawful rate structure. Newhall contended the rates were not proportionate to Newhall's benefits from, and burdens on, the Agency's service, and were therefore invalid under Proposition 26, Proposition 13, Government Code section 54999.7, and the common law of utility ratemaking.

The trial court granted Newhall's petition, finding the rates violated Proposition 26. The court concluded the Agency had no authority to impose rates based on the use of groundwater that the Agency does not provide, and that conversely, Newhall's use of its groundwater rights does not burden the Agency's system for delivery of imported water. Thus the rates bore no reasonable relationship to Newhall's burden on, or benefit received from, the Agency's service. The trial court also found the rates violated Government Code section 54999.7 (providing that a fee for public utility service "shall not exceed the reasonable cost of providing the public utility service" (Gov. Code, § 54999.7, subd. (a))), and violated common law requiring utility charges to be fair, reasonable and proportionate to benefits received by ratepayers. The court ordered the Agency to revert to the rates previously in effect until the adoption of new lawful rates, and ordered it to refund to Newhall the difference between the monies paid under the challenged rates and the monies that would have been paid under the previous rates.
Judgment was entered on July 28, 2014, and the Agency filed a timely notice of appeal.

**DISCUSSION**

The controlling issue in this case is whether the challenged rates are a tax or a fee under Proposition 26.

1. **The Standard of Review**

   We review de novo the question whether the challenged rates comply with constitutional requirements. (Griffith v. City of Santa Cruz (2012) 207 Cal.App.4th 982, 989-990 [143 Cal.Rptr.3d 895] (Griffith I).) We review the trial court's resolution of factual conflicts for substantial evidence. (Morgan v. Imperial Irrigation Dist. (2014) 223 Cal.App.4th 892, 916 [167 Cal.Rptr.3d 687].)

2. **The Governing Principles**

   (1) All taxes imposed by any local government are subject to voter approval. (Art. XIII C, § 2.) Proposition 26, adopted in 2010, expanded the definition of a tax. A "tax" now includes "any levy, charge, or exaction of any kind imposed by a local government," with seven exceptions. (Art. XIII C, § 1, subd. (e).) This case concerns one of those seven exceptions.

   (2) Under Proposition 26, the challenged rates are not a tax, and are not subject to voter approval, if they are "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Art. XIII C, § 1, subd. (e)(2).) The Agency "bears the burden of proving by a preponderance of the evidence" that its charge "is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Id., subd. (e), final par.)

3. **This Case**

   It is undisputed that the Agency's challenged rates are designed "to recover all of its fixed costs via a fixed charge," and not to generate surplus revenue. Indeed, Newhall recognizes the Agency's right to impose a fixed water-rate component to recover its fixed costs. The dispute here is whether the fixed rate component may be based in significant part on the purchaser's use of a product—groundwater—not provided by the Agency.

   (3) We conclude the Agency cannot, consistent with Proposition 26, base its wholesale water rates on the retailers' use of groundwater, because the Agency does not supply groundwater. Indeed, the Agency does not even have the statutory authority to regulate groundwater, without the consent of the retailers (and other major groundwater extractors). As a consequence, basing its water rates on groundwater it does not provide violates Proposition 26 on two fronts.

   First, the rates violate Proposition 26 because the method of allocation does not "bear a fair or reasonable relationship to the payor's burdens on, or benefits received from," the Agency's activity. (Art. XIII C, § 1, subd. (e), final par.) (We will refer to this as the reasonable cost allocation or proportionality requirement.)

   Second, to the extent the Agency relies on its groundwater management activities to justify including groundwater use in its rate structure, the benefit to the retailers from those activities is at best indirect. Groundwater management activities are not a "service . . . provided directly to the payor that is not provided to those not charged" (art. XIII C, § 1,
subd. (e)(2)), but rather activities that benefit the Basin as a whole, including other major groundwater extractors that are not charged for those services.

For both these reasons, the challenged rates cannot survive scrutiny under Proposition 26. The Agency resists this straightforward conclusion, proffering two principal arguments, melded together. The first is that the proportionality requirement is measured "collectively," not by the burdens on or benefits received by the individual purveyor. The second is that the "government service or product" the Agency provides to the four water retailers consists not just of providing wholesale water, but also of "managing the Basin water supply," including "management . . . of the Basin's groundwater." These responsibilities, the Agency argues, make it reasonable to set rates for its wholesale water service by "tak[ing] into account the entire Valley water supply portfolio and collective purveyor-benefits of promoting conjunctive use, not just the actual amount of imported water purchased by each Purveyor. . . ."

Neither claim has merit, and the authorities the Agency cites do not support its contentions.

a. Griffin I and the proportionality requirement

It seems plain to us, as it did to the trial court, that the demand for a product the Agency does not supply—groundwater—cannot form the basis for a reasonable cost allocation method: one that is constitutionally required to be proportional to the benefits the rate payor receives from (or the burden it places on) the Agency's activity. The Agency's contention that it may include the demand for groundwater in its rate structure because the proportionality requirement is measured "collectively," not by the burdens on or benefits to the individual retail purveyor, is not supported by any pertinent authority.

In contending otherwise, the Agency relies on, but misunderstands, Griffin I and other cases stating that proportionality "is not measured on an individual basis," but rather "collectively, considering all rate payors," and "need not be finely calibrated to the precise benefit each individual fee payor might derive." (Griffin I, supra, 207 Cal.App.4th at p. 997, quoting California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421, 438 [121 Cal.Rptr.3d 37, 247 P.3d 112] [discussing regulatory fees under the Wat. Code and Prop. 13].) As discussed post, these cases do not apply here, for one or more reasons. Griffin I involves a different exemption from Proposition 26, and other cases involve Proposition 218, which predated Proposition 26 and has no direct application here. In addition to these distinctions—which do make a difference—the cases involved large numbers of payors, who could rationally be (and were) placed in different usage categories, justifying different fees for different classes of payors.

In Griffin I, the defendant city imposed an annual inspection fee for all residential rental properties in the city. The court rejected a claim that the inspection fee was a tax requiring voter approval under Proposition 26. (Griffin I, supra, 207 Cal.App.4th at p. 987.) Griffin I involves another of the seven exemptions in Proposition 26, the exemption for regulatory fees—charges imposed for the regulatory costs of issuing licenses, performing inspections, and the like. (Art. XIII C., § 1, subd. (e)(3) [expressly excepting, from the "tax" definition, a "charge imposed for the reasonable regulatory costs to a local government for . . . performing . . . inspections"]).

The inspection fees in Griffin I met all the requirements of Proposition 26. The city's evidence showed the fees did not exceed the approximate cost of the inspections. (Griffin I, supra, 207 Cal.App.4th at p. 997.) And the proportionality requirement of Proposition 26 was also met: "The fee schedule itself show[ed] the basis for the apportionment," setting an annual registration fee plus a $20 per unit fee, with lower fees for "self-certifications" that cost the city less to administer, and greater amounts charged when reinspections were required. (Griffin I, at p. 997.) The court concluded:
"Considered collectively, the fees are reasonably related to the payors' burden upon the inspection program. The largest fees are imposed upon those whose properties require the most work." (Ibid., italics added.)

Griffith I did, as the Agency tells us, state that "'[t]he question of proportionality is not measured on an individual basis'" but rather "'collectively, considering all rate payors.'" (Griffith I, supra, 207 Cal.App.4th at p. 997.) But, as mentioned, Griffith I was considering a regulatory fee, not, as here, a charge imposed on four ratepayers for a "specific government service or product." As Griffith I explained, "'[t]he scope of a regulatory fee is somewhat flexible'" and "'must be related to the overall cost of the governmental regulation,'" but "'need not be finely calibrated to the precise benefit each individual fee payor might derive.'" (Ibid.) That, of course, makes perfect sense in the context of a regulatory fee applicable to numerous payors; indeed, it would be impossible to assess such fees based on the individual payor's precise burden on the regulatory program. But the inspection fees were allocated by categories of payor, and were based on the burden on the inspection program, with higher fees where more city work was required.

(4) Here, there are four payors, with no need to group them in classes to allocate costs. The Griffith I concept of measuring proportionality "collectively" simply does not apply. Where charges for a government service or product are to be allocated among only four payors, the only rational method of evaluating their burdens on, or benefits received from, the governmental activity, is individually, payor by payor. And that is particularly appropriate considering the nature of the Proposition 26 exemption in question: charges for a product or service that is (and is required to be) provided "directly to the payor." Under these circumstances, allocation of costs "collectively," when the product is provided directly to each of the four payors, cannot be, and is not, a "fair or reasonable" allocation method. (Art. XIII C, § 1, subd. (e), final par.)

b. Griffith II—the proportionality requirement and related claims

In Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586 [163 Cal.Rptr.3d 243] (Griffith II), the court concluded, among other things, that a groundwater augmentation charge complied with the proportionality requirement of Proposition 218. The Agency relies on Griffith II, asserting that the court applied the "concept of collective reasonableness with respect to rate allocations. . . ." Further, the case demonstrates, the Agency tells us, that its activities in "management . . . of the Basin's groundwater" justify basing its rates on total water demand, because all four retailers benefit from having the Agency's imported water available, even when they do not use it. Neither claim withstands analysis.

Griffith II involved a challenge under Proposition 218, so we pause to describe its relevant points. Proposition 218 contains various procedural (notice, hearing, and voting) requirements for the imposition by local governments of fees and charges "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Art. XIII D, § 2, subd. (e).) Fees or charges for water service (at issue in Griffith II) are exempt from voter approval (art. XIII D, § 6, subd. (c)), but substantive requirements apply. These include a proportionality requirement: that the amount of a fee or charge imposed on any parcel or person "shall not exceed the proportional cost of the service attributable to the parcel." (Id., subd. (b)(3).)

In Griffith II, the plaintiffs challenged charges imposed by the defendant water management agency on the extraction of groundwater (called a "groundwater augmentation charge"). The defendant agency had been created to deal with the issue of groundwater being extracted faster than it is replenished by natural forces, leading to saltwater intrusion into the groundwater basin. (Griffith II, supra, 220 Cal.App.4th at p. 590.) The defendant agency was specifically empowered to levy groundwater augmentation charges on the extraction of groundwater from all extraction facilities, "'for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within [the defendant's boundaries].''' (Id. at p. 591.) The defendant's strategy to do so had several facets, but its
purpose was to reduce the amount of water taken from the groundwater basin by supplying water to some coastal users, with the cost borne by all

Griffith II found the charge complied with the Proposition 218 requirement that the charge could not exceed the proportional costs of the service attributable to the parcel. (Griffith II, supra, 220 Cal.App.4th at pp. 600-601.) Proposition 218, the court concluded, did not require "a parcel-by-parcel proportionality analysis." (Griffith II, at p. 601.) The court found the defendant's "method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service," and Proposition 218 "does not require a more finely calibrated apportion." (Griffith II, at p. 601.) The augmentation charge "affects those on whom it is imposed by burdening them with an expense they will bear proportionately to the amount of groundwater they extract at a rate depending on which of three rate classes applies. It is imposed `across-the-board' on all water extractors. All persons extracting water—including any coastal users who choose to do so—will pay an augmentation charge per acre-foot extracted. All persons extracting water and paying the charge will benefit in the continued availability of usable groundwater." (Griffith II, at pp. 603-604.)

We see nothing in Griffith II that assists the Agency here. The Agency focuses on the fact that the defendant charged the plaintiff for groundwater extraction even though the plaintiff received no delivered water, as coastal landowners did. This claim, the court said, was based on the erroneous premise that the agency's only service was to deliver water to coastal landowners. The court pointed out that the defendant agency was created to manage the water resources for the common benefit of all water users, and the groundwater augmentation charge paid for the activities required to prepare and implement the groundwater management program. (Griffith II, supra, 220 Cal.App.4th at p. 600.) Further, the defendant agency "apportioned the augmentation charge among different categories of users (metered wells, unmetered wells, and wells within the delivered water zone)." (Id. at p. 601.) (The charges were highest for metered wells in the coastal zone, and there was also a per acre-foot charge for delivered water. (Id. at p. 593 & fn. 4.).)

We note further that in Griffith II, more than 1,900 parcel owners were subject to the groundwater augmentation charge, and they were placed in three different classes of water extractors and charged accordingly. (Griffith II, supra, 220 Cal.App.4th at pp. 593, 601.) Here, there are four water retailers receiving the Agency's wholesale water service, none of whom can reasonably be placed in a different class or category from the other three. In these circumstances, to say costs may be allocated to the four purveyors "collectively," based in significant part on groundwater not supplied by the Agency, because "they all benefit" from the availability of supplemental water supplies, would effectively remove the proportionality requirement from Proposition 26.
That we may not do. Proposition 26 requires by its terms an allocation method that bears a reasonable relationship to the payor's burdens on or benefits from the Agency's activity, which here consists of wholesale water service to be provided "directly to the payor." In the context of wholesale water rates to four water agencies, this necessarily requires evaluation on a "purveyor by purveyor" basis. (Cf. Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493, 1514 [186 Cal.Rptr.3d 362] (Capistrano) ["[w]hen read in context, Griffith II does not excuse water agencies from ascertaining the true costs of supplying water to various tiers of usage"; Griffith II's "comments on proportionality necessarily relate only to variations in property location"; "trying to apply [Griffith II] to the [Proposition 218 proportionality] issue[] is fatally flawed"]).

The Agency's claim that it is not charging the retailers for groundwater use, and its attempt to support basing its rates on total water demand by likening itself to the defendant agency in Griffith II, both fail as well. The first defies reason. Because the rates are based on total water demand, the more groundwater a retailer uses, the more it pays under the challenged rates. The use of groundwater demand in the rate structure necessarily means that, in effect, the Agency is charging for groundwater use.

The second assertion is equally mistaken. The differences between the Agency and the defendant in Griffith II are patent. In Griffith II, the defendant agency was created to manage all water resources, and specifically to deal with saltwater intrusion into the groundwater basin. The Agency here was not. It was created to acquire water and to "provide, sell, and deliver" it. It is authorized to develop and implement groundwater management plans only with the approval of the retail water purveyors (and other major groundwater extractors). In other words, while the Agency functions as the lead agency in developing and coordinating groundwater management plans, its only authority over groundwater, as the trial court found, is a shared responsibility to develop those plans. Further, in Griffith II, the defendant agency was specifically empowered to levy groundwater extraction charges for the purpose of purchasing supplemental water. The Agency here was not. As the trial court here aptly concluded, Griffith II "does not aid [the Agency] for the simple reason that [the Agency] has no comprehensive authority to manage the water resources of the local groundwater basin and levy charges related to groundwater."

Finally, the Agency insists that it "must be allowed to re-coup its cost of service," and that the practice of setting rates to recover fixed expenses, "irrespective of a customer's actual consumption," was approved in Paland v. Brooktrails Township Community Services Dist. Bd. of Directors (2009) 179 Cal.App.4th 1358 [102 Cal.Rptr.3d 270] (Paland). Paland has no application here.

Paland involved Proposition 218. As we have discussed, Proposition 218 governs (among other things) "property related fees and charges" on parcels of property. Among its prohibitions is any fee or charge for a service "unless that service is actually used by, or immediately available to, the owner of the property in question." (Art. XIII D, § 6, subd. (b)(4).) The court held that a minimum charge, imposed on parcels of property with connections to the district's utility systems, for the basic cost of providing water service, regardless of actual use, was "a charge for an immediately available property-related water or sewer service" within the meaning of Proposition 218, and not an assessment requiring voter approval. (Paland, supra, 179 Cal.App.4th at p. 1362; see id. at p. 1371 ["Common sense dictates that continuous maintenance and operation of the water and sewer systems is necessary to keep those systems immediately available to inactive connections like [the plaintiff's]."].)

We see no pertinent analogy between Paland and this case. This case does not involve a minimum charge imposed on all parcels of property (or a
Newhall does not contest the Agency's right to charge for its costs of standing ready to provide supplemental water, and to recoup all its fixed costs. The question is whether the Agency may recoup those costs using a cost allocation method founded on the demand for groundwater the Agency does not supply, and is not empowered to regulate without the consent of groundwater extractors. The answer under Proposition 26 is clear: it may not. Paland does not suggest otherwise.\[5]\n
**c. Other claims—conservation and "conjunctive use"**

The Agency attempts to justify the challenged rates by relying on the conservation mandate in the California Constitution, pointing out it has a constitutional obligation to encourage water conservation. (Art. X, § 2 [declaring the state's water resources must "be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or\[1449\] unreasonable method of use of water [must] be prevented"]) The challenged rates comply with this mandate, the Agency contends, because reducing total water consumption will result in lower charges, and the rates encourage "a coordinated use of groundwater and supplemental water" (conjunctive use). This argument, too, misses the mark.\[1449\]

Certainly the Agency may structure its rates to encourage conservation of the imported water it supplies. (Wat. Code, § 375, subd. (a) [public entities supplying water at wholesale or retail may "adopt and enforce a water conservation program to reduce the quantity of water used by [its customers] for the purpose of conserving the water supplies of the public entity"].) But the Agency has no authority to set rates to encourage conservation of groundwater it does not supply. Moreover, article X's conservation mandate cannot be read to eliminate Proposition 26's proportionality requirement. (See City of Palmdale v. Palmdale Water Dist. (2011) 198 Cal.App.4th 926, 936-937 [131 Cal.Rptr.3d 373] ["California Constitution, article X, section 2 is not at odds with article XIII D [Prop. 218] so long as, for example, conservation is attained in a manner that `shall not exceed the proportional cost of the service attributable to the parcel.'"]; see id. at p. 928 [district failed to prove its water rate structure complied with the proportionality requirement of Prop. 218]; see also Capistrano, supra, 235 Cal.App.4th at p. 1511, quoting City of Palmdale with approval.)

The Agency also insists that basing its rates only on the demand for the imported water it actually supplies—as has long been the case—would "discourage users from employing conjunctive use. . . ." The Agency does not explain how this is so, and we are constrained to note that, according to the Agency's own 2003 groundwater management plan, Newhall and the other retailers "have been practicing the conjunctive use of imported surface water and local groundwater" for many years. And, according to that plan, the Agency and retailers have "a historical and ongoing working relationship . . . to manage water supplies to effectively meet water demands within the available yields of imported surface water and local groundwater."

In connection, we assume, with its conjunctive use rationale, the Agency filed a request for judicial notice, along with its reply brief. It asked us to take notice of three documents and "the facts therein concerning imported water use and local groundwater production" by Newhall and the other water retailers. The documents are the 2014 and 2015 water quality reports for the Santa Clarita Valley, and a water supply utilization table from the 2014 Santa Clarita Valley water report published in June 2015. All of these, the Agency tells us, are records prepared by the Agency and the four retailers, after the

*1450* administrative record in this case was prepared. The documents "provide further support" as to the "cooperative efforts of the Agency and the Purveyors in satisfying long-term water supply needs," and "provide context and useful background to aid in the Court's understanding of this case." The Agency refers to these documents in its reply brief, pointing out that since 2011, Newhall has increased its imported water purchases because of the impact of the current
drought on certain of its wells, while retailer Valencia Water Company increased groundwater pumping and purchased less imported water in 2014. These cooperative efforts, the Agency says, "reflect the direct benefit to Newhall of having an imported water supply available to it, whether or not it maximizes use of imported water in a particular year."

(7) We deny the Agency's request for judicial notice. We see no reason to depart from the general rule that courts may not consider evidence not contained in the administrative record. (Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 564 [38 Cal.Rptr.2d 139, 888 P.2d 1268]; cf. id. at p. 578 [the exception to the rule in administrative proceedings, for evidence that could not have been produced at the hearing through the exercise of reasonable diligence, applies in "rare instances" where the evidence in question existed at the time of the decision, or in other "unusual circumstances"]). Denial is particularly appropriate where judicial notice has been requested in support of a reply brief to which the opposing party has no opportunity to respond, and where the material is, as the Agency admits, "further support" of evidence in the record, providing "context and useful background." These are not unusual circumstances.

Returning to the point, neither conservation mandates nor the Agency's desire to promote conjunctive use—an objective apparently shared by the retailers—permits the Agency to charge rates that do not comply with Proposition 26 requirements. Using demand for groundwater the agency does not supply to allocate its fixed costs may "satisf[y] the Agency's constitutional obligations . . . to encourage water conservation," but it does not satisfy Proposition 26, and it therefore cannot stand. (Cf. Capistrano, supra, 235 Cal.App.4th at pp. 1511, 1498 [conservation is to be attained in a manner not exceeding the proportional cost of service attributable to the parcel under Prop. 218; the agency failed to show its tiered rates complied with that requirement].)

d. Other Proposition 26 requirements

We have focused on the failure of the challenged rates to comply with the proportionality requirement of Proposition 26. But the rates do not withstand scrutiny for another reason as well. Proposition 26 exempts the Agency's charges from voter approval only if the charge is imposed "for a specific government service or product provided directly to the payor that is not provided to those not charged. . . ." (Art. XIII C, subd. (e)(2), italics added.) The only "specific government service or product" the Agency provides directly to the retailers, and not to others, is imported water. As the trial court found: the Agency provides directly to the retailers, and not to others, is imported water. As the trial court found: the Agency does not provide Newhall groundwater. It does not maintain or recharge aquifers. It does not help Newhall pump groundwater. Nor does it otherwise contribute directly to the natural recharge of the groundwater Newhall obtains from its wells.

(8) The groundwater management activities the Agency does provide—such as its leadership role in creating groundwater management plans and its perchlorate remediation efforts—are not specific services the Agency provides directly to the retailers, and not to other groundwater extractors in the Basin. On the contrary, groundwater management services redound to the benefit of all groundwater extractors in the Basin—not just the four retailers. Indeed, implementation of any groundwater management plan is "subject to the rights of property owners and with the approval of the retail water purveyors and other major extractors of over 100 acre-feet of water per year." (West's Ann. Wat. Code, supra, foll. § 103-15.2, subds. (c), p. 505, italics added.)

Certainly the Agency may recover through its water rates its entire cost of service—that is undisputed. The only question is whether those costs may be allocated, consistent with Proposition 26, based in substantial part on groundwater use. They may not, because the Agency's groundwater management activities plainly are not a service "that is not provided to those not charged. . . ." (Art. XIII C, § 1, subd. (e)(2).)
In light of our conclusion the challenged rates violate Proposition 26, we need not consider the Agency's contention that the rates comply with Government Code section 54999.7 and the common law. Nor need we consider the propriety of the remedy the trial court granted, as the Agency raises no claim of error on that point.

DISPOSITION

The judgment is affirmed. Plaintiff shall recover its costs on appeal.

Bigelow, P. J., and Flier, J., concurred.

[1] All further references to any "article" are to the California Constitution.

[2] Newhall has appropriative water rights that arise from California's first-in-time-first-in-right allocation of limited groundwater supplies. (See El Dorado Irrigation Dist. v. State Water Resources Control Bd. (2006) 142 Cal.App.4th 937, 961 [48 Cal.Rptr.3d 468] ["[T]he appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators."]);

City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, 1241 [99 Cal.Rptr.2d 294, 5 P.3d 853] ["As between appropriators, . . . the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any [citation]."])

[3] There was also a $20-per-acre-foot reserve charge to fund the Agency's operating reserves, but the Agency reports in its opening brief that it suspended implementation of that charge as of July 1, 2013, when reserve fund goals were met earlier than anticipated.

[4] The trial court also observed that, "[a]part from [the Agency's] lack of authority to supply or manage Basin groundwater, Newhall correctly notes that [the Agency] has presented no evidence of its costs in maintaining the Basin."

[5] The parties refer to other recent authorities to support their positions in this case. We may not rely on one of them, because the Supreme Court has granted a petition for review. (City of San Buenaventura v. United Water Conservation Dist. (2015) 235 Cal.App.4th 228 [185 Cal.Rptr.3d 207], review granted June 24, 2015, S226036.) The Agency cites the other case extensively in its reply brief, but we see nothing in that case to suggest that the challenged rates here comply with Proposition 26. (Great Oaks Water Co. v. Santa Clara Valley Water Dist. (2015) 242 Cal.App.4th 1187 [___ Cal.Rptr.3d ___] (Great Oaks.).)

The Agency's brief fails to describe the circumstances in Great Oaks. There, a water retailer challenged a groundwater extraction fee imposed by the defendant water district. Unlike this case, the defendant in Great Oaks was authorized by statute to impose such fees, and its major responsibilities included "preventing depletion of the aquifers from which [the water retailer] extracts the water it sells." (Great Oaks, supra, 242 Cal.App.4th at p. 1197.) The Court of Appeal, reversing a judgment for the plaintiff, held (among other things) that the fee was a property-related charge, and therefore subject to some of the constraints of Proposition 218, but was also a charge for water service, and thus exempt from the requirement of voter ratification. (Great Oaks, at p. 1197.) The trial court's ruling in Great Oaks did not address the plaintiff's contentions that the groundwater extraction charge violated three substantive limitations of Proposition 218, and the Court of Appeal ruled that one of those contentions (that the defendant charged more than was required to provide the property related service on which the charge was predicated) could be revisited on remand. The
others were not preserved in the plaintiff's presuit claim, so no monetary relief could be predicated on those theories. (*Great Oaks*, at pp. 1224, 1232-1234.)

The *Agency* cites *Great Oaks* repeatedly, principally for the statements that the "provision of alternative supplies of *water* serves the long-term interests of extractors by reducing demands on the groundwater basin and helping to prevent its depletion," and that it was not irrational for the defendant *water* district "to conclude that reduced demands on groundwater supplies benefit retailers by preserving the commodity on which their long-term viability, if not survival, may depend." (*Great Oaks, supra*, 242 Cal.App.4th at pp. 1248-1249.) These statements, with which we do not disagree, have no bearing on this case, and were made in connection with the court's holding that the trial court erred in finding the groundwater extraction charge violated the statute that created and empowered the defendant *water* district. (*Id.* at pp. 1252-1253.)

[6] The *Agency* also cites *Brydon v. East Bay Mun. Utility Dist.*, (1994) 24 Cal.App.4th 178 [29 Cal.Rptr.2d 128] for the principle that, in pursuing a constitutionally and statutorily mandated conservation program, "cost allocations . . . are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity." (*Id.* at p. 193.) But *Brydon* predated both Proposition 218 and Proposition 26. (See *Capistrano*, supra, 235 Cal.App.4th at pp. 1512-1513 [*Brydon "simply has no application to post-Proposition 218 cases"; "it seems safe to say that *Brydon* itself was part of the general case law which the enactors of Proposition 218 wanted replaced with stricter controls on local government discretion"].)

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**198 Cal.App.4th 926 (2011) 131 Cal.Rptr.3d 373**

**CITY OF PALMDALE, Plaintiff and Appellant,**

**v.**

**PALMDALE WATER DISTRICT et al., Defendants and Respondents.**

**No. B224869.**

**Court of Appeal of California, Second District, Division Seven.**

August 9, 2011.

*927* Wm. Matthew Ditzhazy, City Attorney; Richards, Watson & Gershon, Gregory M. Kunert, and Whitney G. McDonald, for Plaintiff and Appellant.

Lagerlof, Senecal, Gosney & Kruse, Timothy J. Gosney, James D. Ciampa, and Francis J. Santo, for Defendants and Respondents.

*928* Daniel S. Hentschke, for Association of California *Water* Agencies as Amicus Curiae on behalf of Defendant and Respondent Palmdale *Water* District.

**OPINION**

WOODS, J. —
INTRODUCTION

In this appeal, the City of Palmdale (City) asserts the trial court erred in finding the Palmdale Water District (PWD) had adopted a new water rate structure in conformity with the constitutional requirements of Proposition 218.

(1) After conducting an independent review of the record (Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448 [79 Cal.Rptr.3d 312, 187 P.3d 37]), we conclude PWD failed to satisfy its burden to establish that its new water rate structure complies with the mandates of Proposition 218 (as set forth in art. XIII D of the Cal. Const. (article XIII D)), including the proportionality requirement, which specifies that no fee or charge imposed upon any person or parcel as an incident of property ownership shall exceed the proportional cost of the service attributable to the parcel. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

As of 2008, PWD revenues had decreased by about $1.3 million ("primarily due to a decline in water sales"), while its expenses had increased by about $1.2 million in 2008 (and $2.4 million in 2007). PWD's general manager concluded a 15 percent rate increase was necessary to balance the budget.

At a cost of $136,000, PWD retained Raftelis Financial Consultants (RFC) to prepare a rate study and recommend a new rate structure. According to RFC's water rate study report, PWD serves a population of approximately 145,000 with about 26,000 service connections. PWD's water supply consists of 60 percent surface water (from Littlerock Reservoir and the State Water Project) and 40 percent from PWD's 25 area groundwater wells. Single-family residential (SFR) customers account for 72 percent of PWD's total water usage. Remaining water usage is as follows: commercial/industrial (10 percent), multifamily residential (MFR) (9 percent), irrigation (5 percent), and construction and other customers such as schools and municipalities (4 percent).

According to RFC's report, over the preceding five years, PWD had spent more than $56 million to upgrade its water treatment plant and depleted its reserves. PWD wanted to issue $38.25 million in debt by July 2009 for future capital projects and refinancing. RFC presented policy issues for the PWD board to decide, including water budget allocation defaults and methods for calculating desired fixed revenue from proposed new rates. RFC advised the board regarding two options for determining fixed revenues: a "Cost of Service" option and a "Percentage of fixed cost" option. Advantages of the Cost of Service option were noted as "Defensible — Prop 218" and "Consistent with industry standards" but one disadvantage was "Greater revenue fluctuation with varying demand." An advantage of the alternative option was "rate stability" while disadvantages included "Significant impact on small customers who conserve water" and "weaker signal for water conservation." RFC indicated fixed revenue should not exceed 30 percent of revenues.

RFC again met with PWD's board regarding the "need to adopt a water rate increase structure for a future bond issue ...." It was determined PWD's new rate structure would recover 75 percent of its costs from fixed fees and 25 percent from variable fees "based on the bond team's recommendation and conservation factors...." The proposed rate structure then included a fixed monthly service charge based on meter size and commodity charges based on a water budget allocation. Residential customers were provided indoor and outdoor allocations, commercial customers received a three-year average allocation and irrigation customers received only an outdoor allocation. Commodity rates were then imposed under a tiered structure, determining how much the customer went over (or stayed within) the allocated budget.
Again, RFC presented two options for determining the commodity rates and monthly service charge: the Cost of Service (COS) option and the "Fixed/Variable Cost Allocation" (FV). With the FV option, monthly fixed charges would represent 75 percent of total costs while the COS alternative would include only billing and customer service costs plus meter charges in the fixed monthly fees. RFC indicated this option offered "more revenue stability" but a "weaker conservation signal." The reverse was true for the COS option: "less revenue stability" but a "stronger conservation signal."

When RFC presented its final water rate study report to the PWD board in March 2009, the board approved the FV option but modified it such that 60 percent of fixed costs would be recovered from fixed monthly charges and 40 percent would be recovered from variable charges.

PWD prepared a "Notice of Public Hearing" pursuant to Proposition 218, and the City (and its redevelopment agency) sent letters to PWD protesting the rate increase. PWD held a public hearing in May 2009 at which City representatives spoke against the increase and members of the public appeared to object as well. At the same meeting, the board adopted a resolution approving its 2009 bonds to replenish its reserves. "The success of this bond issue is dependent on the adoption of the pending water rate increases."

As approved, the new rate structure now imposes a fixed monthly service charge based on the size of the customer's meter and a per unit commodity charge for the commodity charge of water used, with the amount depending upon the customer's adherence to the allocated water budget. The customer pays a higher commodity charge per unit of water above the budgeted allotment, but the incremental rate increase depends on the customer's class. More particularly, all customers pay tier 1 rates ($0.64/unit in 2009) at 0 to 100 percent of their water budget allocation. Thereafter, however, the increased rate depends on the customer category:

<table>
<thead>
<tr>
<th>SFR/MFR</th>
<th>Commercial</th>
<th>Irrigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 2  ($2.50/unit)</td>
<td>100-125%</td>
<td>100-130%</td>
</tr>
<tr>
<td>Tier 3  ($3.20/unit)</td>
<td>125-150%</td>
<td>130-160%</td>
</tr>
<tr>
<td>Tier 4  ($4.16/unit)</td>
<td>150-175%</td>
<td>160-190%</td>
</tr>
<tr>
<td>Tier 5  ($5.03/unit)</td>
<td>Above 175%</td>
<td>Above 190%</td>
</tr>
</tbody>
</table>

The following day, the City filed a complaint seeking to invalidate the water rate increase and the 2009 bonds. (The case was deemed related to another action filed by the City against PWD seeking injunctive and declaratory relief to stop imposition of the new rates. The cases were not consolidated.)

This action was tried in February 2010. The City sought to introduce evidence beyond the scope of the administrative record, after propounding discovery and serving Public Records Act requests for documents. The trial court granted the City's motion to amend its complaint but denied its motion to augment the record. The City filed an offer of proof identifying evidence it would have presented at trial had it been allowed to do so and requested a statement of decision. Initially, the trial court's tentative ruling was to invalidate the rate increase but after hearing oral argument and taking the matter under submission, the trial court issued its ruling validating PWD's rates and the 2009 bonds. At the court's request, both the City and PWD submitted proposed statements of decision (and the City also filed objections to PWD's statement). The court issued PWD's statement without changes. (The court mistakenly believed the City had not filed a proposed statement.)
but, when the error was brought to the court's attention, decided PWD's statement should stand.) Judgment was entered. The City appeals.

**DISCUSSION**

"In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act. In adopting this measure, the people found and declared "that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent."" (Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal.App.4th 637, 640 [119 Cal.Rptr.2d 91], fns. omitted.) "Proposition 218 added articles XIII C and XIII D to the California Constitution. Article XIII C concerns voter approval for local government general taxes and special taxes. Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges. We are concerned here with article XIII D, specifically certain provisions concerning fees and charges." (Ibid.)

The relevant article XIII D provisions on fees and charges are as follows:

"[Section] 1. Application of article. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority.... [¶] ... [¶]

"[Section] 2. Definitions. As used in this article: [¶] ... [¶]

"(e) `Fee' or `charge' means 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. [¶]... [¶]

"(g) `Property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

"(h) `Property-related service' means a public service having a direct relationship to property ownership. [¶] ... [¶]

"(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

"(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

"(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

"(3) Assessments as provided by this article.

"(4) Fees or charges for property related services as provided by this article."
"(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.\[21\] \[¶\] ... \[¶\]


"(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article [(these procedures include notice to property owners, and a public hearing for proposed new or increased fees)]: \[¶\] ... \[¶\]

"(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property-related service.

"(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

"(3) 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.

"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

"(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. \[¶\] Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

"(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing....

"(d) Beginning July 1, 1997, all fees or charges shall comply with this section." (Italics added.)

(2) As our Supreme Court emphasized in Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, supra, 44 Cal.4th 431, "We ""must enforce the provisions of our Constitution and "may not lightly disregard or blink at... a clear constitutional mandate."""" [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.]" (Id. at p. 448.) "Because Proposition 218's underlying purpose was to limit government's power to exact revenue and to curtail the deference that had been traditionally accorded legislative enactments on fees, assessments, and charges, a more rigorous standard of
Among other substantive challenges, the City argues PWD failed to demonstrate that its water rates are proportional to the cost of providing water service to each parcel as required under section 6, subdivision (b), paragraph 934.

*934 (3) of article XIII D: "The Proposition 218 Ballot Pamphlet makes clear that the voters intended that `No property owner's fee may be more than the cost to provide service to that property owner's land.'" Nevertheless, the City says, PWD's rates violate this proportionality requirement in a number of respects: (1) for no permissible purpose (according to the City), PWD admittedly targets irrigation users to pay dramatically higher and disproportionate water rates; (2) PWD's monthly service charge is arbitrary and not tied to the actual costs of providing identified services to each meter; (3) PWD's commodity charge tiers are not proportional to the costs of providing water service; and (4) PWD's water budget structure is not proportional to the costs of providing water service and fails to achieve its stated purpose. Moreover, the City urges, PWD failed to prove its revenues under the new rate structure will not exceed the costs of providing water service in contravention of article XIII D, section 6, subdivision (b), paragraph (1), and instead "all but assures that revenues PWD receives from customers in the higher tiers will be more than is required to cover PWD's costs of service." Further, the City says, PWD's new rates require irrigation users to pay for services they cannot receive in violation of section 6, subdivision (b), paragraph (4) of article XIII D.

According to the City, "PWD's scheme charges a few irrigation users a vastly disproportionate share of PWD's total costs. PWD makes no showing whatsoever that PWD's cost of delivering service to those irrigation users is proportionately higher than PWD's costs of delivering service to residential and commercial users. The record shows that PWD intentionally seeks to recoup most of its costs from a relatively few irrigation users (who happen to be institutions such as the City), so as to keep costs to the vast majority of PWD's customers proportionately low. This sort of price discrimination is not allowed under Proposition 218 ...."

In response, PWD asserts that the structuring of the various tiers does not even constitute a "fee or charge" for purposes of Proposition 218 but merely "defined percentages of a customer's water budget that define the breaking points for the applicable tiers," but this is inconsistent with the law as PWD uses these tiers to calculate its customers' water rates. "Because it is imposed for the property-related service of water delivery, [PWD's] water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D ...." (Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 217 [46 Cal.Rptr.3d 73, 138 P.3d 220].) "[A]ll charges for water delivery" incurred after a water connection is made "are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (Ibid.)

Next, PWD says it is entitled to promote conservation in such a manner pursuant to article X, section 2, of the California Constitution: "It is hereby

*935 declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.... This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."
In addition, PWD notes, consistent with this constitutional provision, the Legislature enacted Water Code section 372 (allocation-based conservation water pricing) which provides:

"(a) A public entity may employ allocation-based conservation water pricing that meets all of the following criteria:

"(1) Billing is based on metered water use.

"(2) A basic use allocation is established for each customer account that provides a reasonable amount of water for the customer's needs and property characteristics. Factors used to determine the basic use allocation may include, but are not limited to, the number of occupants, the type or classification of use, the size of lot or irrigated area, and the local climate data for the billing period. Nothing in this chapter prohibits a customer of the public entity from challenging whether the basic use allocation established for that customer's account is reasonable under the circumstances. Nothing in this chapter is intended to permit public entities to limit the use of property through the establishment of a basic use allocation.

"(3) A basic charge is imposed for all water used within the customer's basic use allocation, except that at the option of the public entity, a lower rate may be applied to any portion of the basic use allocation that the public entity has determined to represent superior or more than reasonable conservation efforts.

"(4) A conservation charge shall be imposed on all increments of water use in excess of the basic use allocation. The increments may be fixed or may be determined on a percentage or any other basis, without limitation on the number of increments, or any requirement that the increments or conservation charges be sized, or ascend uniformly, or in a specified relationship. The volumetric prices for the lowest through the highest priced increments shall be established in an ascending relationship that is economically structured to encourage conservation and reduce the inefficient use of water, consistent with Section 2 of Article X of the California Constitution.

(b)(1) Except as specified in subdivision (a), the design of an allocation-based conservation pricing rate structure shall be determined in the discretion of the public entity.

"(2) The public entity may impose meter charges or other fixed charges to recover fixed costs of water service in addition to the allocation-based conservation pricing rate structure.

"(c) A public entity may use one or more allocation-based conservation water pricing structures for any class of municipal or other service that the public entity provides." (Wat. Code, § 372.)

(3) While this statute contemplates allocation-based conservation pricing consistent with California Constitution, article X, section 2, PWD fails to explain why this provision cannot be harmonized with Proposition 218 and its mandate for proportionality. PWD fails to identify any support in the record for the inequality between tiers, depending on the category of user.

(4) In addition, PWD says, "the distinct tiers for irrigation users are [further] supported by Water Code section 106, which expressly recognizes that the use of water for domestic purposes is superior to that for irrigation usage." However, the precise language of section 106 is as follows: "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Wat. Code, § 106, italics added; and see Deetz v. Carter (1965) 232 Cal.App.2d 851, 854, 856 [43 Cal.Rptr. 321] [domestic use includes "consumption for the sustenance of human beings, for household conveniences, and for
the care of livestock," but not "commercial purposes"). Yet, under PWD's tier structure, commercial users are permitted to use amounts of **water** exceeding their budgeted allocation under tier 1 at a lower cost than irrigation only users — without any explanation for this disparity even attempted by PWD.

California Constitution, article X, section 2 is not at odds with article XIII D so long as, for example, conservation is attained in a manner that "shall not exceed the proportional cost of the service attributable to the parcel." (Art. XIII D, § 6, subd. (b), par. (3).) According to the record, the efficient use of **water** in keeping with the policy in favor of **water** conservation is already built into the customer's budgeted allocation (the tier 1 rate, which is equal for all users). Yet, a review of the tier structure alone establishes that irrigation customers such as the City are charged disproportionate rates reaching tier 5 ($5.03/unit) rates at 130 percent of their budgeted allocation as compared to other users who do not reach such high rates until they exceed 175 percent (SFR/MFR) or 190 percent (commercial) without any showing by PWD of a corresponding disparity in the cost of providing **water** to these customers at such levels. Notably, PWD's "IRR" category means customers designated as "irrigation only" users; PWD does not segregate the recognized outdoor and irrigation usage of its other customers such as residential or commercial users. As a result, a residential (single- or multifamily) or commercial user (constrained only by its historical three-year average usage) could waste or inefficiently use **water** by, for example, filling, emptying and refilling a swimming pool or excessively hosing off a worksite or parking lot without the same proportional cost because of the significant disparity in tiered rates for **water** use in excess of the customer's allotted **water** budget. According to the record, it is the irrigation-only user (perhaps, as the City urges, maintaining playing fields, playgrounds and parks for example) who is "potentially the most impacted," without a corresponding showing in the record that such impact is justified under California Constitution, article X, section 2, or permissible under article XIII D, section 6.

As stated in section 6, subdivision (b), paragraph (5) of article XIII D, "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." According to RFC, it was the cost of service (COS) option — the option PWD did not choose — that was "[d]efensible [under] Prop[osition] 218," and this option was also "[c]onsistent with industry standards," but it meant "[g]reater revenue fluctuation with varying demand." On the other hand, RFC advised PWD the "[p]ercentage of fixed cost" or FV option it ultimately chose would send a "weaker signal for **water** conservation" and would mean a "[s]ignificant impact on small customers who conserve **water**," but afforded "rate stability." (Italics added.) It follows that PWD has failed to carry its burden to demonstrate compliance with the requirements of article XIII D, and the judgment must be reversed.

**DISPOSITION**

The judgment is reversed. The City is entitled to its costs of appeal.

Perluss, P. J., and Zelon, J., concurred.

On August 25, 2011, the opinion was modified to read as printed above.

**[1]** These costs per unit are the tiered rates for 2009; the per unit cost increases each year thereafter while the tier percentages remain the same.
Article XIII D, section 4 sets forth procedures and requirements for assessments analogous to the procedures and requirements for fees and charges set forth in article XIII D, section 6, post. Article XIII D, section 5 specifies the effective date and exemptions from section 4.
[3] SFR/MFR Commercial Irrigation Tier 2 ($2.50/unit) 100-125% 100-130% 0-110% Tier 3 ($3.20/unit) 125-150% 130-160% 110-120% Tier 4 ($4.16/unit) 150-175% 160-190% 120-130% Tier 5 ($5.03/unit) Above 175% Above 190% Above 130%

[4] In addition to arguing PWD's rate structure violated the proportionality requirement of Proposition 218, the City says the trial court abused its discretion in denying its motion to augment (beyond the administrative record) and raises a number of additional substantive and procedural challenges, but we need not address these additional arguments in light of our disposition of the preceding issue.

In submitting this application for adjustment in solid waste assessment, I reiterate my objection to cutting my time in here in half under the guise of combining my two required and distinct appeals, and, further demand that any testimony and evidence presented attempting to refute my statements or the evidence presented herein be presented over the same required to be declared under the same penalty of perjury that the testimony and evidence presented is true and correct that is required of appellants as a matter of equal application of law and fair hearing.
APPEAL OF SOLID WASTE FEE ASSESSMENT
2017-2018

A separate appeal must be filed for each Parcel and/or unsecured property tax bill.

NAME: Wayne De Lisle PARCEL/ACCOUNT NUMBER: 006-130-025-0

hereby appeals the decision of the solid waste fee administrator denying my/our application for an adjustment to the solid waste fees that have been imposed for the 2017-2018 Fiscal Year. I/we further certify that I/we or the entity that I/we represent is/are the owner, or tenant or other party responsible for the waste disposal fee imposed on the above-identified property, pursuant to Section 8.05.010 of the Sierra County Code.

I/we further certify that the basis for the adjustment of solid waste fees is as follows: (Check all applicable boxes)

RESIDENTIAL FEE PROPERTIES:

[X] The property qualifies as a single-family residence.

(1.020) Section 8.05.010 of the Sierra County Code Solid waste system charges begins “A. Pursuant to the provisions of Section 6 of Article XIII D of the California Constitution, . . .” (1.030) Whether the referenced property qualifies as a single-family residence pursuant to Section 8.05.010 of the Sierra County Code is irrelevant to the amount of the exaction, as it is being applied to my parcels, and being appealed from and encroaches upon prohibitions constitutionally expressed and held as rights. (1.040) Section 8.05.010 of the Sierra County Code is

[ ] The property qualifies as a multi-family residential property and the maximum total number of units that are available for occupancy during the year has been miscalculated as ______ units, and the actual number of units that are or may at any time be located on the property during the year is ______.

[X] Solid Waste System is not immediately available for use by the subject property.

NON-RESIDENTIAL FEE PROPERTIES:

[X] The amount of refuse that has been generated from the property during the period set by ordinance (April 1, 2016 thru March 31, 2017) has been erroneously calculated as ______ cubic yard of waste and should be ______ cubic yards.

The basis for the above waste generation estimate is as follows: (Use separate page if necessary.)

Requiring appellant reliance upon unverifiable data derived from years prior to the subject appeal as set by County Ordinance violates due process and creates legal impossibilities for appellants. Furthermore, failure by FEE ADMINISTRATOR to “include a written statement of facts fully and fairly describing the basis for the” Appellant’s Applications For Adjustment to Solid Waste Fee Assessment 2017-2018 Fiscal Year appeal (demonstrating the misapplication of the solid waste fee to the property) together with copies of all relevant documents in support of the” Appellant’s Application For Adjustment to Solid Waste Fee Assessment 2017-2018 Fiscal Year De Lisle Sierra County APNs 006-130-024-006-130-025-0, which are constitutionally required, is an expressed prohibition on County from imposing these exactions in the first instance

The appeal must include a written statement of facts fully and fairly describing the basis for the appeal (demonstrating the misapplication of the solid waste fee to the property) together with copies of all relevant documents in support of the appeal.

FAILURE TO PROVIDE ALL INFORMATION REQUIRED BY THIS APPLICATION MAY RESULT IN THE DENIAL OF THE APPLICATION FOR ADJUSTMENT TO SOLID WASTE ASSESSMENT. APPEALS MUST BE FILED WITHIN 60 DAYS OF THE DATE OF THE SOLID WASTE FEE ADMINISTRATOR’S DENIAL OF THE APPLICATION FOR ADJUSTMENT.

In submitting this application for adjustment in solid waste assessment, I declare under penalty of perjury that the foregoing information is true and correct.

Executed on this 26 _____ day of July ___, 2018 ___________________

SIGNATURE
Wayne De Lisle

PRINT OR TYPE NAME

PRINT NAME OF PROPERTY OWNER IF DIFFERENT FROM APPLICANT

RETURN THIS FORM TO:
Sierra County Clerk - Recorder
P.O. Box D
Downieville, CA 95936
I XIII D, §6, (a, 1), states:

(1) 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 owners 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.

This section is applicable to any fee imposed on a parcel basis or for fees which provide a property related service and constitutional permission to impose an exaction under §6 authority is further restricted to compliance with §6, (b, 1-5), which states:

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

Note: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the "cost of service to either of my parcels", "service attributed to parcels other than to my parcels" or for "anything other than providing waste disposal service to one of my two parcels."

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

The stated purpose of these exactions from me are to provide my two parcels with solid waste disposal services. Revenues derived from exactions imposed on either of my parcels cannot exceed the cost of providing solid waste disposal services to my parcels.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
Revenues derived from exactions on my parcels for solid waste disposal services cannot be used for any other purpose other than providing solid waste disposal services to my parcels.

(3) 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.

Fees and charges imposed upon any parcel or person as an incident of property ownership cannot exceed the proportional cost of the actual use of the service by the parcel. Deficiencies in derived revenues on one parcel heavily using Agency’s waste disposal service are not allowed to be attributed to other parcel(s) that is/are not generating the volume of waste that would be commensurate (proportional to) with that exaction for that parcel. Therefore, averaging high use and low use to arrive at an admitted average use also brings in tow with it admission of violating requirements (1), (2), and (3) above by supplementing the exactions made on high use parcels with the a excess funds derive from low using parcels. Nevertheless, Agency Fee Administrator clearly demonstrates that under Agency’s fee scheme exactions imposed on low use parcels our use to supplement inadequate exactions from high use parcels. §6, (b, 1-3), prohibits Agency from imposing exactions on parcels that exceeds the proportional cost of providing the service to those parcels.

Neither the Board of Supervisors, Agency nor Fee Administrator advances no theory upon which exempts the Board of Supervisors, Agency nor Fee Administrator from the constitutional prohibition on using revenues derived from one parcel to supplement revenues inadequately derived from other parcels.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b)
"...As used herein "immediate availability" or "immediately available" shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner’s use. (Immediate availability such be interpreted consisted with the court ruling in Paland v. Brooktrails Township Community Services Dist. Bd. of Directors, 176 Cal.App. 4th 158.)"

Whereas, the Paland Court said the term "immediately available", as used within California Constitution Article XIIID, §6, means:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold added.)

PUBLIC ACCESS HOURS FOR SOLID WASTE DISPOSAL

County Solid Waste Transfer Stations, located in Alleghany Ramshorn, Sattley and Sierra City, shall be open to receive solid wastes eighteen (18) hours per week on Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M.

The Landfill Site, located on Garbage Pit Road, Loyalton, shall be open to receive solid wastes twenty-four (24) hours per week on Friday, Saturday, Sunday and Monday -10:00 A. M. to 4:00 P. M. (Bold mine.)

So, that makes the Landfill Site only "immediately available" to the public for a whopping twenty-four (24) hours per week on Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M., just 24 out of 168 hours a week, a niggardly 0.14285714285714% of the time, and, by no stretch of anyone's imagination "immediately available" in light of the Paland Court's conclusion on the meaning of "immediately available", save County Official's.

And, that makes the Alleghany Ramshorn, Sattley and Sierra City, County Solid Waste Transfer Stations only "immediately available" for eighteen (18) hours per week on Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M. 18 out of 168 hours, an even more niggardly 0.10714285714286% of the time, and, by no stretch of anyone's imagination "immediately available in light of the Paland Court's conclusion on the meaning of "immediately available", save County Official's.

All anyone need do is imagine what the Paland Court Decision would have been given their conclusions on the meaning of "immediately available" if the Brooktrails Township Community Services Dist. was only making water available to Paland's water meter a niggardly .10714285714286% of the time. Or, to bring it a wee bit closer to home, recon back to the time that the water
supply to the Downieville Court House went down and imagine if that were the case a whopping 99.89285714285714% of the time. The odds are 99.89285714285714% that Paland would have prevailed the first time around.

County, by positing the following text found in Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b) demonstrates their willful intent to mutate the express holding of the Paland Court to suit their own illicit purposes rather than comport their actions with Article XIII D, §6, (b), and the holding of the Paland Court:

...As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner’s use.”

Contrary to the Board of Supervisors’ misattributed “finding of facts” above, the Paland Court soundly held that their immediately available” holding solely applies to Agency’s conduct, not to parcel owners as frequently admitted by the Fee Administrator much to the chagrin of the Board of Supervisors. Here, the Board of Supervisors, ever so boldly yet illicitly, mutates their their spin on “immediate availability” or “immediately available” exemplarily distinguishing the Board of Supervisors’ version of “immediate availability” or “immediately available” from the Paland Court’s “immediately available” all the while commingling that with unfathomable mumbo-jumbo.

Moreover, “Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.” Exacting fees or charges based on potential or future use of a service without compliance with Section 4 is having or showing a stubborn and determined intention to do as one wants, regardless of the consequences or effects.

The “customary use” of my APN 006-130-025-0 parcel is not as a “residential”, the use is for storage and for my APN 006-130-024-0 parcel is a single resident residence, no family whatsoever being involved.

Were “...As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property...” actually a true fact in the real world, which it is not, then the insignificant act of changing the
classification of the structure on the parcel would not alter the volume of waste generated by that parcel one iota.

However, here in Sierra County, multiple structure parcel owners being assessed multiple exactions can eliminate the exaction on one of the structures simply by changing the structure’s classification, actual volume of waste generation never being considered, which, flies directly in the face of Solid Waste Resolution 2017-087 which, in pertinent part reads: “... the imposition of fees for the use and support of the County solid waste system in proportion to the waste generated by property owners. . .” Please peruse the foregoing quote extracted from Solid Waste Resolution 2017-087 again.) Is that an unintentional error regarded as revealing subconscious knowledge that only exactions pursuant to Article XIII D, §6, (b), and cannot, lawfully, be the superseded by the subterfuge found in:

...As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner’s use.”

The Sierra BOS is not, lawfully, at liberty to “negate” parcel owner’s “facts” that are not to the County’s advantage.

Here is what the Paland Court actually “conclude[d]”:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold added.)

1. Sadly, a super majority of the BOS constantly and errantly stick their heads deeply into the sand by willfully ignoring the following text found within the Paland Court’s conclusion above as though it does not exist, which, it most certainly does exist for all of those willing to see: “... a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied).” [Bold mine.]
1.1 Found among those “... other substantive requirements . . . “ is §6, (b,3), requiring that “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.” to which that same super majority of the BOS constantly and arrogantly thumb their noses at it. Because I do not produce the volume of waste for which I am charged by these
illicit exactions together with the Agency Fee Administrator’s 
remiss in her duty to address the issues herein raised, proffers no 
relevant evidence to the contrary and yet denies my requests for 
ajustment to exactions from me, the methods by which these exactions 
are applied to me for my two parcels are done in violation of 
Proposition 218 Article XIII D, §6, subdivision b.

2. The ". . . immediately available" requirement clearly is 
logically focused on the Agency's conduct, not the property owner's. 
. . ." has been mutated by the County from their enterprise Agency 
onto the property owner which is expressly prohibited.

3. County, by positing the following text found in Sierra County 
Code §8.05.010  Solid Waste System Charges in pertinent part of (b) 
demonstrates their willful intent to mutate the express holding of 
the Paland Court to suit their own illicit purposes rather than 
comport their actions with Article XIII D, §6, (b), and the holding 
of the Paland Court positing the following text:

“. . .the County solid waste system is available to the property 
owner for his or her use. The election of a property owner not to 
use his or her real property for any period of time does not negate 
the fact that the County solid waste system being available for the 
property owner's use.”

3.1 County Code limiting PUBLIC ACCESS HOURS FOR SOLID WASTE 
DISPOSAL, in Pike where the subject parcels are located, to a 
niggardly eighteen (18) hours per week, is neither an “unilateral 
act of the property owner” nor is the service “immediately 
available”, as required, to any property owner.

Additionally, exaction is a prepayment based on potential or future 
use of a service which are not permitted by 6, (b, 4).

No compelling evidence, not even a hint of a good faith attempt at 
proffering compelling evidence, nada, zilch, nothing.

Neither this BOS nor Its Agency has ever proffered an iota of 
compelling evidence relative to either BOS’ or its Agency’s full 
compliance with California Constitution Article XIII D, §6, (b), as 
required at §6, (b, 5) which reads, in pertinent part: “In any 
legal action contesting the validity of a fee or charge, the burden 
shall be on the agency to demonstrate compliance with this Article.”
In spite of the requirement at §6, (b, 5), County and its Agency advance an ultra vires ritual causing or intended to cause confusion or bewilderment over just how County gets away with feigning compliance with the Paland Court’s holding on the meaning of the term “immediately available” by illicitly mutating the Paland Court’s holding alleging that County’s brand of voodoo somehow validates County’s silly alternate conceptualization of reality, via vague implied association verses specific causation and correlation, e.g., a naked assertion, that the Paland Court allegedly found, that for County purposes, the term “immediately available” really means that County’s Waste Disposal System ‘only has to be “immediately available” for ‘eighteen hours a day’ when the Paland Court made no such holding.

The only supporting alleged evidence that available a niggardly ‘eighteen hours a day’ is the coequal with the Paland Court’s “immediately available” was advanced by Supervisor Adams, someone supposably unbiased but isn't, stating that the 18 hour Weekly restriction to availability was imposed equally on all parcel owners in Sierra County.

Well, here, imposing severely restricted availability equally on everyone while "immediately available" is the standard that must be met simply does not transform that which is substandard to that of meeting the standard set by the Paland Court.

Standby charges are usually nothing more than flat rate parcel taxes imposed on an on occupied residential parcel on the theory that residential solid waste disposal service may, at some point in the indefinite future should the residential parcel eventually be occupied, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent "special benefit" requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 4 or cease to be collected.

Residential exactions are allegedly "calculated" by surveying the waste production of the few parcels opting in for an additional fee driven home pick up Service roughly quantifying the volume of waste
picked up which is tabulated on route pick up tickets. Those route
pick up tickets are alleged by Agency to be summarized in the form
of an Excel spreadsheet. However, the figures therein cannot be
reconciled and appear to be manipulated sub rosa. Agency asserts
"privilege" to preclude parcel owners’ access to Agency alleged
underpinnings of alleged calculations.

Agency denies public Records act requests for access to
documentation alleged by Agency to support Agency calculations. When
I challenged Agency’s denial, Agency defended it's denial of my
request with an email represented to be the legal opinion of a
paralegal supposedly in the office of County Council.

On challenging that paralegal’s determination, an attorney from
County Council's office responded claiming an exemption from the
public records act for Sierra County solid waste disposal system
being a utility.

Upon my challenging that erroneous assertion with California
Government Code section 25832 clearly stating that services provided
pursuant to Government Code 25830 are specifically not a public
utility, and, to which neither Agency no County Council's office has
yet to respond. That failure to respond, in and of itself is a
violation of California's public records act response mandates.

This fallacious withholding of the evidence necessary to discredit
Agency’s errant modus operandi deprives this appellant of the
ability to demonstrate methodology deployed by Agency to distort the
various identified classifications/tiers/identified divers levels of
service provided to individual parcels involved in Agency’s Survey.

(5) No fee or charge may be imposed for general governmental
services including, but not limited to, police, fire, ambulance or
library services where the service is available to the public at
large in substantially the same manner as it is to property owners.

Comment: This provision prohibits the imposition of parcel "charges"
for general governmental services. The purpose of this provision is
to stop those levies, such as the County of Los Angeles' parcel
"charge" for library services irrespective of use of library
services.
Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.

And the Hoaxing continues: Another finding of fictitious facts

In pertinent part of Solid Waste Resolution 2017-087 which reads:

WHEREAS, this is a continuation of the 2016-2017 fiscal year fee, no new fees are to be assessed, Proposition 218 procedures are not necessary.

Which also flies directly in the face of §6, (b), which reads:

Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

Commercial fees are calculated on a her cubic yard of waste produced on a given parcel. Various supervisors have posited, on the records of these hearings and the records of the public hearings on imposing these fees, that this method is the maximum exaction allowed under article XIII D, section 6, while at the same time positing that article XIII D, section 6, (5, 3), does not apply to parcels County has classified residential parcels. Neither County nor agency can point to any language found within article XIII D, section 6, (5, 3), differentiating commercial parcels from residential parcels this is self-manufactured Fiction by county and imposed by a willing Agency to knowingly and willfully circumvent constitutional prohibitions on County and its agencies from exacting fees or charges that exceed the actual cost of providing service to any particular Parcel, including my two parcels, whether classified residential or commercial

XIII D, §6, (a, 1), states:

(1) 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 owners 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.

This section is applicable to any fee imposed on a parcel basis or for fees which provide a property related service and constitutional permission to impose an exaction under §6 authority is further restricted to compliance with §6, (b, 1-5), which states:

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:
Comment: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the "cost of service."

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

The stated purpose of these exactions from me are to provide my two parcels with solid waste disposal services. Revenues derived from exactions imposed on either of my parcels cannot exceed the cost of providing solid waste disposal services to my parcels.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

Revenues derived from exactions on my parcels for solid waste disposal services cannot be used for any other purpose other than providing solid waste disposal services to my parcels. Revenues derived from exactions on my parcels for solid waste disposal services to my parcels cannot be used for offsetting fees or charges for providing services to parcels other than my own parcels. Therefore, Agency is prohibited from both deriving excess revenues exacted from parcels lightly using Agency’s solid waste disposal services to supplement inadequate exactions from those parcels using Agency’s solid waste disposal services heavily as well as deriving revenues in access of the actual cost of providing the solid waste disposal Service to the light user in the first instant.

(3) 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.

Fees and charges imposed upon any parcel or person as an incident of property ownership cannot exceed the proportional cost of the actual use of the service by the parcel. Deficiencies in derived revenues on one parcel heavily using Agency’s waste disposal service are not allowed to be attributed to other parcel(s) that is/are not generating the volume of waste that would be commensurate (proportional to) with that exaction for that parcel. Therefore, averaging high use and low use to arrive at an admitted average use also brings in tow with it admission of violating requirements (1), (2), and (3) above by supplementing the exactions made on high use parcels with the excess funds derive from low using parcels. Nevertheless, Agency Fee Administrator clearly demonstrates that under Agency’s fee scheme exactions imposed on low use parcels our use to supplement inadequate exactions from high use parcels. §6, (b, 1-3), prohibits Agency from imposing exactions on parcels that exceeds the proportional cost of providing the service to those parcels.

Agency advances no theory upon which exempts Agency from the constitutional prohibition on using revenues derived from one parcel to supplement revenues derive from other parcels. Exam exam exams legs Stamps exam magazine exam stamps exam exam example exam eggs exam exempt exempt

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

10. Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b)

“...As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property
would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County
solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her
real property for any period of time does not negate the fact that the County solid waste system being available for the
property owner's use. (Immediate availability such be interpreted consisted with the court ruling in Paland v. Brooktrails
Township Community Services Dist. Bd. of Directors, 176 Cal.App.4th 158.)"

Whereas, the Paland Court said the term "immediately available", as used within California Constitution Article XIIIID, §6, means:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property
owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the
unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that
causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee
rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold added.)

PUBLIC ACCESS HOURS FOR SOLID WASTE DISPOSAL

County Solid Waste Transfer Stations, located in Alleghany Ramshorn, Sattley and Sierra City, shall be open to receive solid
wastes eighteen (18) hours per week on Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M.
The Landfill Site, located on Garbage Pit Road, Loyalton, shall be open to receive solid wastes twenty-four (24) hours per
week on Friday, Saturday, Sunday and Monday -10:00 A. M. to 4:00 P. M. (Bold mine.)

So, that makes the Landfill Site only "immediately available" to the public for a whopping twenty-four (24) hours per week on
Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M., just 24 out of 168 hours a week, a niggardly
0.14285714285714% of the time, and, by no stretch of anyone's imagination "immediately available" in light of the Paland Court’s conclusion on the meaning of "immediately available", save County Official's.

And, that makes the Alleghany Ramshorn, Sattley and Sierra City, County Solid Waste Transfer Stations only
"immediately available" for eighteen (18) hours per week on Saturday, Sunday and Monday - 10:00 A. M. to 4:00 P. M."18 out of
168 hours, an even more niggardly 0.10714285714286% of the time, and, by no stretch of anyone's imagination "immediately available" in light of the Paland Court’s conclusion on the meaning of "immediately available", save County Official's.

All anyone need do is imagine what the Paland Court Decision would have been given their conclusions on the meaning
of "immediately available" if the Brooktrails Township Community Services Dist. was only making water available to Paland’s
water meter a niggardly .10714285714286% of the time. Or, to bring it a wee bit closer to home, recon back to the time that the water
supply to the Downieville Court House went down and imagine if that were the case a whopping
99.89285714285714% of the time.
The odds are 99.89285714285714% that Paland would have prevailed the first time around.

County, by positing the following text found in Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b) demonstrates their willful intent to mutate the express holding of the Paland Court to suit their own illicit purposes rather than comport their actions with Article XIII D, §6, (b), and the holding of the Paland Court:
As used herein “immediate availability” or “immediately available” shall mean that the property is developed with a structure or otherwise used, the customary nature of which is that the use of the structure or the customary use of the property would normally generate solid waste or create a need to dispose of solid waste from the property and as to which, the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner's use.”

Here is what the Paland Court actually “conclude[d]”:

"We conclude the "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available" and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied)." (Bold added.)

1. The “... immediately available" requirement is logically focused on the agency's conduct, not the property owner's...” has been mutated by the County from their enterprise Agency onto the property owner which is expressly prohibited.

2. County, by positing the following text found in Sierra County Code §8.05.010 Solid Waste System Charges in pertinent part of (b) demonstrates their willful intent to mutate the express holding of the Paland Court to suit their own illicit purposes rather than comport their actions with Article XIII D, §6, (b), and the holding of the Paland Court positing the following text:

“...the County solid waste system is available to the property owner for his or her use. The election of a property owner not to use his or her real property for any period of time does not negate the fact that the County solid waste system being available for the property owner's use.”

2.1 County Code limiting PUBLIC ACCESS HOURS FOR SOLID WASTE DISPOSAL, in Pike where the subject parcels are located, to a niggardly eighteen (18) hours per week, is neither an “unilateral act of the property owner” nor is the service “immediately available”, as required, to any property owner.

Standby charges are usually nothing more than flat rate parcel taxes imposed on an on occupied residential parcel on the theory that residential solid waste disposal service may, at some point in the indefinite future should the residential parcel eventually be occupied, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent "special benefit" requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 4 or cease to be collected.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.
Comment: This provision prohibits the imposition of parcel "charges" for general governmental services. The purpose of this provision is to stop those levies, such as the County of Los Angeles' parcel "charge" for library services irrespective of use of library services.

**Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.**

County’s solid waste disposal Administrator has both historically and currently relies upon transfer site attendants to identify the point of origin, quantify the volume of waste to be transferred, collect gate-fees in addition to annual exactions for surcharge items which are not covered by this annual exaction, issue receipts for collected fees, transfer possession of receipts issued to administrator along with fees collected by attendant for deposit into County’s solid waste disposal Enterprise fund.

Furthermore, transfer site attendance are charged with both quantifying and rejecting disposal of solid waste generated by all parcels County has classified as residential sources that exceeding weekly disposal volume limits.

Residential exactions are allegedly "calculated" by surveying the waste production of the few parcels opting in for an additional fee driven home pick up Service roughly quantifying the volume of waste picked up which is tabulated on route pick up tickets. Those route pick up tickets are alleged by Agency to be summarized in the form of an Excel spreadsheet. However, the figures therein cannot be reconciled and appear to be manipulated sub rosa. Agency asserts "privilege" to preclude parcel owners’ access to Agency alleged underpinnings of alleged calculations.

Agency denies public Records at requests for access to documentation alleged by Agency to support Agency calculations. When I challenged Agency’s denial, Agency defended it's denial of my request with an email represented to be the legal opinion of a paralegal supposedly in the office of County Council.

On challenging that paralegal’s determination, an attorney from County Council's office responded claiming an exemption from the public records act for Sierra County solid waste disposal system being a utility.

Upon my challenging that erroneous assertion with California Government Code section 25832 clearly stating that services provided pursuant to Government Code 25830 are specifically not a public utility, and, to which neither Agency no County Council's office has yet to respond. That failure to respond, in and of itself is a violation of California's public records act response mandates.

Moreover, this fallacious withholding of the evidence necessary to discredit agency’s errant modus operandi deprives this appellant of the ability to demonstrate methodology deployed by Agency to distort the various identified classifications divers levels of service provided the if you parcels involved in agency’s Survey.

**Existing law**, Article XIII D, operative when the County takes action to impose an alleged assessment, fee or charge for alleged services alleged to be provided parcels within the County, sets strict restrictions upon imposition, namely §6(b). Those requirements are as follows:
(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

(Comment: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the “cost of service.”)

1. Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

2. Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(Comment: Requirements 1 & 2 will prohibit the current practice of siphoning off fee revenue to supplement a city’s general fund. This practice, sometimes known as charging an “in lieu franchise fee,” currently occurs both in Los Angeles and Sacramento, as well as in many other municipalities. However, “cost of service” may also include reasonable overhead expenses as well as other items on a service bill which are necessary to provide service to the particular service user. What is included in “cost of service” will have to be determined on a case by case basis.)

3. 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.

(Comment: As with assessments, fees and charges, must be no greater than the proportional cost of the actual use of the service provided to the parcel.)

4. No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(Comment: Standby charges are usually nothing more than flat rate parcel taxes imposed on the theory that water or sewer service may, at some point in the indefinite future, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent “special benefit” requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 4 or cease to be collected.)

5. No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

(Comment: This provision prohibits the imposition of parcel “charges” for general governmental services. The purpose of this provision is to stop those levies, such as the County of Los Angeles’ parcel “charge” for library services irrespective of use of library services.)

Reliance by an agency on any parcel map including, but not limited to, an assessor’s parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.
(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until such fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(Comment: This exemption for sewer, water and refuse collection is for voter approval only. Such fees must still meet all of the five substantive requirements of paragraph (b). The policy reason for this exemption is consistent with preventing end-runs around Proposition 13. Since water, sewer and refuse collection fees pre-date Proposition 13, they were exempted from voter approval.)

(d) Beginning July 1, 1997, all fees or charges shall comply with this Section.

SECTION 5. LIBERAL CONSTRUCTION. The provisions of this Act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

(Comment: The purpose of this section is to ensure that, in the event of any ambiguity, the rights of taxpayers will be the paramount consideration.)

SECTION 6. SEVERABILITY. If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

(Comment: This provision is a standard severability clause.)

Assuming, arguendo, that revenues derived from the fee or charge shall not exceed the funds required to provide the property related service, then the agency may be in compliance with §6, subdivision (b)(1). However, the following strongly indicates such is not the case:

Article XIII D, §6, subdivision (b)(2), requires that revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. This exaction is imposed on my parcels for the specific purpose of disposing of waste generated on my parcels for disposal by the county’s waste disposal enterprise.

The Solid Waste Fee Administrator has not, will not and cannot demonstrate any portion of these fees exacted from me for disposal of waste generated on either of my parcels is or has ever been used to offset the cost of disposing of waste generated on either of my parcels.

Therefore, funds derived from these exactions from me for my parcels must either be retained by the Agency/enterprise for potential or future use of this service in violation of this subdivision and §6, subdivision (b)(1) for exceeding the funds required to provide the property related service, and §6, subdivision (b)(3), or, these exactions must be based solely upon potential or future use of this service which are not permitted by §6, subdivision (b)(4).

The discretionary function of the Office of Solid Waste Fee Administrator in these proceedings, a function ascribed to the Office of Sierra County Tax Assessor, via Sierra County Code, being a legal action (a mandated administrative remedy) contesting the validity of a fee or charge (Article XIII D, §6(B)(5), the burden shall be on the agency to demonstrate compliance with this Article. This Office’s long practiced policy of avoiding addressing issues raised in these proceedings with the tacit consent of the Board of Supervisors, in spite of their directives to the contrary, is not
unique to me and my parcels. It dates back to the first imposition of solid waste disposal exaction impositions in Sierra County predating the passage of Proposition 218. In fact, both Sierra County and this Agency defiantly thumbed their noses at holding mandated protest hearing and votes for eight years (2004) after the effective date of Proposition 218, in blatant violation thereof.

§6, subdivision (b)(3), requires that 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. The ordinary meaning of the word "proportional" is "having a size, number, or amount that is directly related to or appropriate for something." (Merriam-Webster.com (2016) [as of 4/29/16]). The ordinary meaning of the phrase "attributable to" is "capable of being attributed or ascribed." (Oxford English Dict. Online (2016) [as of 4/29/16].) "Ascribe" means "to refer to a supposed cause, source, or author." (Merriam-Webster.com (2016) [as of 4/29/16].) In view of the foregoing, subdivision (b)(3) should be construed as requiring that a property-related charge not exceed an amount that is directly related to the cost of service caused by the individual parcel.

Solid Waste Fee Administrator’s own Waste Generation Studies/Surveys, arguendo, if taken at face value, which, are unreconcilable (The individual volumes do not tally with their represented grosses is acknowledged by the Solid Waste Fee Administrator by the statements found thereon: “Total does not include Extra Services”; and, “.”) classifies waste generation by those participating therein as producers of 1 can of waste per week, 2 cans of waste per week, 3 cans of waste per week, 4 cans of waste per week, 5 cans of waste per week, and 6 cans of waste per week. Nevertheless, each of those individually disparate levels of parcel usages within the Solid Waste Fee Administrator’s waste disposal enterprise reviewed by the Administrator are illogically conflated into a single-one-size-fits-all-flat-rate-exaction under the classification of ‘single-family-residence’, none of which pay an exaction proportional to the service provided to the parcel.

In testing the above construction of this exaction against those extrinsic aids that bear on the enactors' intent, in particular the ballot materials accompanying Proposition 218 that place the initiative in historical context. The Legislative Analyst's analysis of Proposition 218 informed voters that one of the measure's "proposed requirements for property-related fees" was that "[n]o property owner's fee may be more than the cost to provide service to that property owner's land." (Ballot Pamp. Gen. Elec. (1996) analysis of Prop. 218 by legislative analyst, p. 73.) Thus, the ballot materials confirm that subdivision (b)(3) requires a nexus between a property-related charge (the exaction) and the cost of service attributed to the individual parcel.

In view of the foregoing, Agency compliance with Proposition 218 plainly requires Agency to charge customers based on the cost of providing Agency service to their parcel. To comply with subdivision (b)(3), Agency also has to correlate its prices with the actual cost of providing Agency service at those tiered levels.

Given the $420.84 flat-rate-one-size-fits-all annual exaction on all parcels classified ‘single family residence’ and the per can rate of $3.34, the acknowledged weekly distribution of tiered solid waste generation exaction cost verses per parcel generation volumes looks like this (overcharges are red, undercharges are negative in blue):

<table>
<thead>
<tr>
<th>Parcel Generated</th>
<th>$ per can per week</th>
<th>1 Can</th>
<th>2 Cans</th>
<th>3 Cans</th>
<th>4 Cans</th>
<th>5 Cans</th>
<th>6 Cans</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Generated</td>
<td>$3.34</td>
<td>$6.68</td>
<td>$10.02</td>
<td>$13.36</td>
<td>$16.70</td>
<td>$20.04</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$4.7531</td>
<td>$1.4131</td>
<td>-$1.9269</td>
<td>-$5.2669</td>
<td>-$8.6069</td>
<td>-$11.9469</td>
<td></td>
</tr>
<tr>
<td>Proportionality</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

So, your own ‘source documentation’ demonstrates that the 1 can/week tier each pays for $247.16 to dispose of solid waste that they do not generate on their parcel under this exaction, and the 2 can/week tier pays $73.48. That renders Article XIII D, §6(b)(3), utter surplusage - Which, you swore an oath/affirmation to uphold.

Now, the courts have construed Article XIII D, §6(b)(3), not to prohibit exactions less than the actual cost of service to the parcel, but, only that the exaction cannot exceed the actual cost of providing the service to the parcel. That means you are permitted to undercharge to your hearts content, but, your are prohibited by 6(b)(1-3), from overcharging any parcel.

The record is devoid of any evidence that the Agency undertook to determine the proportional per-parcel cost of providing waste disposal service or how that cost varies by parcel usage of that service. Indeed, the Agency does not even mention the proportional per-parcel cost of service in justifying its rate. Accordingly, the Agency fails to carry its burden to show it is in compliance with subdivision (b)(3). Implementation of this exaction is predicated upon Agency compliance with subdivision (b)(3). The Agency has failed to demonstrate Agency compliance with subdivision (b)(3). Therefore, subdivision (b) prohibits Agency from imposing this exaction on those, like myself, producing much less than the volume of waste generation per-parcel that is represented by the amount of this illicit exaction.

Furthermore, this parcel owner, subject to this exaction, is prohibited from accessing, under authority of California’s Public Records Act requests, pickup run reports allegedly relied upon supporting the Solid Waste Fee Administrator’s Waste Generation Studies/Surveys. Thus preventing verification of any alleged ‘calculations’ proffered by the Solid Waste Fee Administrator.

Presumably, supplying excessive amounts of waste disposal service to some parcels increases the need for system maintenance and new waste disposal sources, thereby increasing the Agency's costs.

To the extent that certain consumers overutilize the resource, they contribute disproportionately to the necessity for conservation of landfill space, and the requirement that the Agency acquire new sources for the disposal of solid waste. That being the case, subdivision (b)(3) disallows the Agency from overcharging low-volume users to cover the excessive users’ higher costs. However, the Agency cannot simply assume the Agency’s rates bear the requisite relationship to its costs. Here, the Agency is improperly attempting to allocate the expenses for service not provided to users whose levels of waste generation are so low that they cannot be said to be responsible for the excess waste generation of others. This is further bolstered by statute law addressing operators of landfills such as Agency.

Sierra County's Solid Waste Enterprise is subject to Public Resources Code §§40051 -40052, 40057 and40196 which state:

ARTICLE 2. General Provisions [40050. - 40063.] (Article 2 added by Stats. 1989, Ch. 1095, Sec. 22. )
This division shall be known and may be cited as the California Integrated Waste Management Act of 1989.

(Added by Stats. 1989, Ch. 1095, Sec. 22.)

40051.
In implementing this division, the board and local agencies shall do both of the following:
(a) Promote the following waste management practices in order of priority:
   (1) Source reduction.
   (2) Recycling and composting.
   (3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.
(b) Maximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal. For wastes that cannot feasibly be reduced at their source, recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices.

Added by Stats. 1989, Ch. 1095, Sec. 22.)

Of particular note above is the part mandating source reduction.

Source, identified herein by APN, i.e., the ‘source’ of the solid waste generated by the parcel for disposal within Agency’s system of waste disposal.

40052.

The purpose of this division is to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs.

(Amended by Stats. 1993, Ch. 656, Sec. 1. Effective October 1, 1993.

The purpose of this division is to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible. . . and to specify the responsibilities of local governments to develop and implement integrated waste management programs.

40057.

Each county, city, district, or other local governmental agency which provides solid waste handling services shall provide for those services, including, but not limited to, source reduction, recycling, composting activities, and the collection, transfer, and disposal of solid waste within or without the territory subject to its solid waste handling jurisdiction.

(Amended by Stats. 1989, Ch. 1095, Sec. 22.)

Each county, city, district, or other local governmental agency which provides solid waste handling services shall provide for those services, including, but not limited to, source reduction, recycling, composting activities. . .

40196.

“Source reduction” means any action which causes a net reduction in the generation of solid waste. “Source reduction” includes, but is not limited to, reducing the use of nonrecyclable materials, replacing disposable materials and products with reusable materials and products, reducing packaging, reducing the amount of yard wastes generated, establishing garbage rate structures with incentives to reduce the amount of wastes that generators produce, and increasing the efficiency of the use of paper, cardboard, glass, metal, plastic, and other materials. “Source reduction” does not include steps taken after the material becomes solid waste or actions which would impact air or water resources in lieu of land, including, but not limited to, transformation.

(Amended by Stats. 1990, Ch. 145, Sec. 5. Effective June 19, 1990.)
Sierra County’s Agency operates a landfill. Thus Agency is mandated to promote source reduction, recycling and composting as Agency’s top priority. Our Legislature defines source reduction to mean any action, which causes a net reduction in the generation of solid waste. Solid waste is alleged by both County and Agency on parcels classified ‘single family residences’. “Source reduction” includes, but is not limited to, establishing garbage rate structures with incentives to reduce the amount of wastes that generators produce. Agency's disproportionate one-size-fits-all-fixed-flat-rate-fee provides no incentive whatsoever to parcel owners subject to this exaction to reduce the amount of wastes being generated on residential parcels. The only incentive Agency's disproportionate one-size-fits-all-fixed-flat-rate-fee provides is getting the most bang for the fixed amount of dollars exacted. Agency's disproportionate one-size-fits-all-fixed-flat-rate-fee flies directly in the face of mandated "source reduction" as well as Article XIII D, §6(b)(3)'s proportionality requirements.

The historic as well as the current schemes for establishing Agency’s exactions satisfies neither PRC §40051’s mandated incentives nor Article XIII D, §6(b)(3)’s proportionality mandate. Whereas, exactions comporting with Article XIII D, §6(b)(3)’s proportionality mandate satisfies both the PRC §40051’s mandated incentives and Article XIII D, §6(b)(3)’s proportionality mandate. Nevertheless, four of the five Sierra County Board of Supervisors continue to thumb their noses at both PRC §40051’s mandated incentives and Article XIII D, §6(b)(3)’s proportionality mandate.

Sierra County adopts the court's ruling in Paland v. Brooktrails Township Community Services Dist. Bd. of Directors, 176 Cal.App.4th 158, subsequent to rewriting that ruling to suit Sierra County whims.

§6, subdivision (b)(4), requires that no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

The records of your determinations and hearing held subsequent to determination are devoid of any evidence that the codified public access hours to our landfill and transfer sites comport with subdivision (b)(4)’s requirement that access must be “immediately available to, the owner of the property in question.”, Supervisor Lee Adam’s irrelevant machinations that I have the same access everyone else in the county has notwithstanding. The court in the Paland case, pursuant to Article XIII D, §6(b)(4) establishes that standard, not Supervisor Adams, not the Board of Supervisors. The fact that the County codified public access hours precluding owners’ access the vast majority of the time flies directly in the face of the court’s holding in Paland. That is at issue here, not Supervisor Adams’ or the Board of Supervisors’ irrelevant machinations.

§6, subdivision (b)(5), requires that no fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

The September 1997 issue of Debt Line reported on an Attorney General opinion which concluded that water service was not “property related” for purposes of Article XIID of the California Constitution (Proposition 218). Such an interpretation, if adopted by the courts, would permit local governments to impose water rates in a manner that deviates from the important “costs of service” requirements mandated by the new law, as well as depriving California taxpayers of significant procedural protections.
In light of the importance of this issue, the drafters and sponsors of Proposition 218 desire to set the record straight as to what they believe the proper (and only) interpretation of Proposition 218 is with respect to Proposition 218’s applicability to water rates.

The opinion of the Attorney General was in response to an inquiry from Senator Richard Rainey regarding “tiered” water rates. Such rates typically assess higher charges per unit of water as the level of consumption increases. Although tiered water rates conceivably could reflect the actual “cost of service” for water users, such a rate structure is usually imposed for the purpose of encouraging conservation, and thus deviates from “cost of service” requirements under Article XIII D.

The opinion contained little actual analysis of tiered rates and, what little analysis was presented, was flawed. For example, the opinion set forth a substantial discussion of various “rules of construction” applicable to the interpretation of initiatives. Yet, the opinion failed to mention or follow Proposition 218’s very specific liberal construction provision which constitutionally mandates that the provisions of the act “shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” (Section 5 of the Right to Vote on Taxes Act.)

Contrary to the opinion of the Attorney General, the express language of Proposition 218 subjects water rates to the procedural and substantive requirements of the new law. Under Article XIIID, the terms “fee” and “charge” are defined broadly as “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.” (Cal. Const., art. XIIID, sec. 2, subd. (e).)

A. Meaning of “Incident of Property Ownership”

Any fee or charge imposed by a local agency upon a person as an “incident of property ownership” is subject to Article XIIID unless expressly exempt therefrom under Proposition 218. The opinion of the Attorney General construes the phrase “incident of property ownership” as something that is dependent upon property ownership. However, this interpretation is inconsistent with the way the term “incident of property ownership” has been used and understood under California law.

For example, excise taxes are imposed on the exercise of one of the incidents of property ownership, such as the ability to transfer or devise property or the ability to use, store, or consume it. City of Oakland v. Digre (1988) 205 Cal.App.3d 99, 106.) An excise tax is a tax whose imposition is triggered not by ownership but instead by some particular use of the property or privilege associated with ownership. (Thomas v. City of East Palo Alto (1997) 53 Cal.App.4th 1084, 1089.) An excise tax generally is levied against an activity which can be foregone without loss of ownership. (Digre, supra, 205 Cal.App.3d at p. 109.) The target of an excise tax can always avoid taxation by not engaging in the privilege taxed. (Id.) An excise tax is imposed upon the person engaging in the privilege being tax, which can be the property’s occupant rather than the property owner. (Cf. City of Glendale v. Trondsen (1957) 48 Cal.2d 93.)

Corpus Juris Secundum notes the following concerning what constitutes an “incident of ownership” for purposes of property generally:

“Ownership of property comprises numerous different attributes. The chief incidents of the ownership of property are the right to its possession, the right to its use, and the right to its enjoyment, according to the owner’s taste and wishes, free from unreasonable interference, usually to the exclusion of others…In addition, an incident of ownership is the right to exercise dominion over property, to change or improve the property, or to sell or otherwise dispose of it according to the will of the owner, and without any diminution or control except only by the laws of the land.” (73 C.J.S., Property, Sec. 27, pp. 209-212.)
“Incidents of property ownership” include the sale, transfer, or rental of property, as well as the use of services. (Thomas, supra, 53 Cal.App.4th at p. 1088.) The development of property is also an “incident of property ownership” as an excise tax may be imposed on the privilege of developing property. (Centex Real Estate Corp. v. City of Vallejo (1993) 19 Cal.App.4th 1358, 1364.)

Consistent with the above analysis and Section 5 of Proposition 218 which constitutionally mandates that its provisions be liberally construed, a fee or charge imposed upon a person as an “incident of property ownership” is a fee or charge associated with the exercise of one or more of the incidents of property ownership including, but not limited to, the use of property, rental of property, or the use of services related to the property.

Property-related fees or charges under Article XIIID are not based merely on the ownership of property, as that would be an unduly restrictive interpretation inviting easy circumvention, as well as being inconsistent with the way the term “incident of property ownership” has been used and understood under California law.

B. “User Fee or Charge for a Property-Related Service”

The above discussion of the phrase “incident of property ownership” is only half the analysis. The conclusion that water rates are governed by Article XIIID is further supported by the inclusion of “a user fee or charge for a property related service” within the scope of the “fee” or “charge” definition under Section 2 of Article XIIID.

A usage fee is typically charged “only to those who use goods or services. The amount of the charge is related to the actual goods or services provided to the payer. The usage fee for an ongoing service would normally be a monthly charge rather than a one-time charge.” (San Marcos Water Dist. v. San Marcos Unified School Dist. (1986) 42 Cal.3d 154, 162.) Thus, a usage fee is triggered by the use of goods or services and not by the mere ownership of property. Such a fee is “voluntary” in the sense that it is the payer’s solicitation and utilization of a service which triggers the charge. (Id. at p. 161.) This clearly indicates that the scope of the “fee” or “charge” definition in Section 2(e) applies to levies beyond those based merely on the ownership of property. This situation is analogous to and consistent with an excise tax whose imposition is triggered not by ownership but instead by some particular “incident of property ownership” such as the use of services. (See Thomas, supra, 53 Cal.App.4th at p. 1089.)

Under Section 2(e), in order for a user fee or charge to be subject to Article XIIID, it must be for a “property related service.” In determining what constitutes a “property related service,” the focus is on the nature of the service being provided and whether that service is sufficiently related to property. The focus is not on the nature or characteristics of the fee or charge, as the “user fee or charge” component of the definition addresses that issue.

A “property related service” is defined as “a public service having a direct relationship to property ownership.” (Cal. Const., art. XIIID, sec. 2, subd. (h).) The definition specifically states that the public service for which the fee or charge is imposed must have a direct relationship to property ownership rather than being based on the mere ownership of property or imposed on a parcel basis.

Mindful of the constitutionally mandated Section 5 liberal interpretation provision which requires a liberal interpretation that effectuates the purposes of limiting local government revenue and enhancing taxpayer consent, a “property related service” must be broadly construed. The “ownership” of property is defined as the “right of one or more persons to possess and use it to the exclusion of others.” (Civ. Code, sec. 654.) It is a “collection of rights to use and enjoy property.” (Black’s Law Dict. (6th ed. 1990) p. 1106, col. 2.) As further evidence that “property ownership” under Proposition 218 is broad in its scope, the term includes “tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.” (Cal. Const., art. XIIID, sec. 2, subd. (g).)
Consistent with the Section 5 liberal interpretation provision and the foregoing definitions of “ownership,” a user fee or charge for a “property related service” is a fee or charge for a public service that has a direct relationship to the use, possession, or enjoyment of property. Under the foregoing, water service is the quintessential property related service. Virtually all water service has meaning only in the context of the use and enjoyment of property. The opinion of the Attorney General abjectly fails to provide any analysis supporting a contrary conclusion.

C. Purpose of Levy, Not Form, Controls Analysis

In contrast to the opinion of the Attorney General, it is unlikely that any court would construe the provisions of Proposition 218 in a manner so clearly contrary to its stated intent. Indeed, with respect to revenue issues in particular, courts have repeatedly rejected efforts to circumvent provisions of law by simply manipulating the form of the levy. An excellent example was encountered by the Supreme Court in the San Marcos case (San Marcos, supra, 42 Cal.3d 154).

At issue in San Marcos was whether a utility fee for capital improvements was a special assessment from which public entities are exempt, or a user fee which public entities must pay. In resolving the issue, the Supreme Court established a “purpose” test which looks to the purpose of the fee rather than how the form of the fee is varied, a matter which can be easily manipulated. The Supreme Court noted:

“By placing the emphasis on the purpose of the charge, the courts in those cases created a rule which conforms to the policy behind the implied exemption for public entities, and avoids easy manipulation…Under the rule we adopt, no matter how the form of the fee is varied (i.e., whether it is based on actual or anticipated use; whether a one-time fee or monthly fee; and whether charged to all property owners or only to users of the sewer system), the purpose of the fee will determine whether or not public entities are exempt from paying the fee.” (Id. at p. 164.)

The Attorney General has previously followed the San Marcos “purpose” rule, and in doing so noted that it was not significant what the fees were called, upon whom they were imposed, or the basis upon which they were assessed. It was the use of the revenues that was the controlling factor. If the fees were to help pay for ongoing services provided, they were user charges. (See 71 Ops.Cal.Atty.Gen. 163, 165 (1988).)

Applying the San Marcos “purpose” rule in the context of a “user fee or charge for a property related service,” which determines whether or not a levy is subject to Article XIIID, the purpose of the charge must be the controlling factor rather than the form of the charge, a factor which can be easily manipulated by local governments in an attempt to avoid the requirements of Article XIIID.

Thus, if the purpose of a fee or charge is to fund a service, then it should not matter how the form of that fee or charge is varied (e.g., whether it is based on actual or anticipated use; whether a one-time fee or monthly fee; whether it is based on a per parcel basis or some other basis; or whether charged to all property owners or only to users of the service). Consistent with the “purpose” rule articulated in the San Marcos case, if a fee or charge is for a property related service, then it is subject to the requirements of Article XIIID without regard to the form of the fee or charge, a matter which can be easily manipulated by local governments in an attempt to avoid the requirements of Proposition 218.

D. Utility Services are “Property Related Services”

Mindful of the constitutionally mandated Section 5 liberal interpretation provision which requires a liberal interpretation that effectuates the purposes of limiting local government revenue and enhancing taxpayer consent, utility services are “property related services” under Article XIIID.
Section 6(c) of Article XIIIID specifically exempts water, sewer, and refuse collection services only from the voter approval requirements of Article XIIIID, but not from the other requirements of Article XIIIID. (Cal. Const., art. XIIIID, sec. 6, subd. (c).) It has long been a rule of interpretation that “the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made.” (Brown v. State of Maryland (1827) 25 U.S. 419, 438.) This rule is applicable to the constitution as to other instruments. (Id.) Thus, water, sewer, refuse collection, and similar services are intended to be within the scope of Article XIIIID as “property related services.”

Proposition 218 also expressly exempts fees for the provision of electrical or gas service from not being deemed imposed as an incident of property ownership for purposes of Article XIIIID. (Cal. Const., art. XIIIID, sec. 3, subd. (b).) However, the scope of the exemption does not include other types of utility services such as water, drainage, sewer, or refuse collection. It is a settled rule of statutory construction that “where a statute provides a specific exemption to a general rule, other exceptions are necessarily excluded.” (Adams v. County of Sacramento (1991) 235 Cal.App.3d 872, 880.) Had the drafters intended to expand the exemptions to include fees for water service, they would have done so expressly.

Furthermore, it has been stated by our courts that “land to which utility service cannot be extended…cannot be developed.” (L & M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal.App.3d 1038, 1048.) At issue in the Ferreira case was the constitutionality of two statutes (Civ. Code, sec. 1001, Code Civ. Proc., sec. 1245.325) which provide private condemnation authority to a property owner to acquire an appurtenant easement to provide utility service to the owner’s property.

Section 1001 of the Civil Code specifically authorizes any owner of real property to “acquire by eminent domain an appurtenant easement to provide utility service to the owner’s property.” (Civ. Code, sec. 1001, subd. (b).) “Utility service” refers to “water, gas, electric, drainage, sewer, or telephone service.” (Civ. Code, sec. 1001, subd. (a).) Section 1001 is designed to serve “the function of opening what would otherwise be landlocked property to enable its most beneficial use.” (Ferreira, supra, 146 Cal.App.3d at p. 1048.) This clearly illustrates the “direct relationship” between utility service and property ownership (the use, possession, and enjoyment of property), thereby making utility service a “property related service” for purposes of Article XIIIID of the Constitution.

Conclusion

It is the drafters’ position, supported by the clear language of Proposition 218, the liberal construction provision, and the intent of the voters that fees and charges for water service are governed by Proposition 218. To the extent tiered water rates are imposed in a manner that deviates from “cost of service” requirements, those rates are in violation of Proposition 218. Local governments or special districts which do not abide by the requirements of the new constitutional language do so at the risk of litigation.

Here, as applied to my parcels, both County and Agency bifurcates the effect of Article XIII D, §6(b)(3), one fork applied to commercial parcels, the other is denied residential parcels, all the while having relied upon the very same source text, §6(b)(3). Nothing within §6(b) distinguishes or permits distinguishing commercial from residential parcels. Nevertheless, both County and Agency lamely assert that County’s ability to rely solely upon County’s ability to “classify” parcels overrides §6(b)(3)’s substantive limitation on exactions from residential parcels while maintaining full force and effect on commercial parcels. Neither this Agency nor County has ever carried their burden of proof under Article XIII D, §6(b)(5), to demonstrate compliance with §6(b)(3)’s substantive limitation on exactions from residential parcels, because they cannot — So, both just thumb their noses at it.
Article XIII D, § 6 (b) establishes five substantive limitations on fees subject to its provisions. They are:

1. Fee revenues cannot exceed the funds required to provide the service (cost of service limitation);

2. Fee revenues cannot be used for any purposes other than that for which the fee is imposed (use limitation);

3. The amount of the fee imposed on a parcel or person as an incident of property ownership cannot exceed the proportional cost of service attributable to the parcel (proportionality limitation);

4. Fees may be imposed only for service actually used by, or immediately available to, the owner of the property (service limitation);

5. Fees may not be imposed for general governmental services where the service is available to the public at large in substantially the same manner as it is to property owners (general purpose limitation).

In this case, the court found the transfer violated the cost of service and use limitations.

The court also held that the city had the burden of proof under Article XIII D, § 6 (b)(5), but had failed to show that any portion of the transferred funds related to the production or provision of water or water-related services. The court rejected the city’s argument that the fee was not property-related because some customers were not property owners or tenants. The court found that it must look to the “character of the primary revenue source: property owners and tenants,” not to a minuscule portion of LADWP’s water revenue. According to the court, if it looked to the exceptions rather than the rule, “a municipality could avoid the Constitutional transfer restrictions by selling a few bottles of water to merchants.” The court rejected the city’s argument that enforcement by lien is required for a fee to be subject to Proposition 218, relying on Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal. App. 4th 1364, 1393 (enforcement through a lien tends to support the determination that a fee is imposed as an incident of property ownership, but lack of that enforcement mechanism is not determinative). Finally, the court flatly rejected the city’s home rule argument citing Johnson v. Bradley (1992) 4 Cal. 4th 389, 403 (a charter city remains subject to the guarantees and requirements of the state and federal Constitutions).

The judgment against the city provides, “Thus, the City may not collect, either for retention or transfer, rates for water and water-related services that are designed to generate a surplus (i.e., ‘revenues [that] exceed the funds required to provide [water and water-related] service’ to its customers) after servicing all debts and paying all expenses related to the production and provision of water and water-related services for its customers and setting aside reasonable reserves (including reserves for water- and water service-related capital projects and contingencies) as outlined in Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal. App. 4th 637, Howard Jarvis Taxpayers Assn. v. City of Fresno (2005) 127 Cal. App. 4th 914, and Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal. 4th 209.”
This decision confirms that cost of service is the ceiling for property-related fees. Cost of service is also the floor for agencies that rely on fee revenue to support their operations. Interagency payments, such as charges for administrative overhead by cities and districts that provide multiple services, must be justified based on costs of service actually provided to the enterprise supported by the fee generating the revenue to make the payment, not on theories such as “in-lieu franchise fees” (rejected in Roseville) or “fees in-lieu of taxes” (rejected in Fresno). Further, although water to run the enterprise itself is a cost of service that may be passed on to customers, a city cannot expect to obtain free water for its general municipal services such as parks and libraries.


Base service fee for water provided through an existing connection is a property-related fee, not a standby charge (assessment). The cost of providing service includes capital as well as operating expenses.

Brooktrails Township CSD was established to provide water and sewer service to approximately 6,500 parcels of land near Willits. Slightly more than 1,500 of the parcels are connected to the water system, and a slightly less than that number connected to the sewer system. The district generates revenue through standby charges, pursuant to Government Code § 61124 and by reference the Uniform Standby Charge Procedures Act [Gov’t Code §§ 54984 et seq.], connection fees, and monthly rates. The monthly rates include a base rate and, for water service, an inclining usage-based rate. Rate revenue is used to pay a portion of the district’s capital, operation, and maintenance expenses. Paland fell behind on his monthly bills, resulting in the district shutting off service and locking his meter. The district refused to unlock the meter unless Paland paid all delinquent charges, but continued to assess the base rate for water and sewer services. After Paland brought his bill current, the district reinstated service. Thereafter the monthly bills showed no actual water use on the property, but the district continued to charge the base monthly rate for water and sewer. Paland sued the district for declaratory and injunctive relief alleging the base monthly rates for the periods when his water service was turned off were “standby charges” that had not been approved pursuant to Article XIII D, § 4 (procedural and substantive requirements for levy of special assessments).

Article XIII D, § 6 (b)(4) prohibits property-related fees for service “unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.” Proposition 218 does not define “standby charges.”

Keller v. Chowchilla Water Dist. (2000) 80 Cal. App. 4th 1006, 1011. Paland contended that service is not immediately available when the meter is locked in the closed position, even though it could be reopened at any time upon payment of delinquent bills. In Paland’s view, the district could charge him for water only if “he can ‘twist his tap and turn on water.’” The court rejected Paland’s narrow view, stating,

“We conclude the ‘immediately available’ requirement is logically focused on the agency’s conduct, not the property owner’s. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes services not to be actually used, the service is “immediately available” and a charge for the service is a fee rather than an assessment (assuming the other substantive requirements of a fee are satisfied).”
The court also rejected Paland’s arguments that operation and maintenance costs could be paid only by assessments, and that once he had paid his connection charge he was exempt from further charges for operation and maintenance unless he further burdens the system by actual use. Stating the obvious, the court said, “Common sense dictates that continuous maintenance and operation of the water and sewer systems is necessary to keep those systems immediately available to inactive connections like Paland’s.”

The case also contains brief discussion of the application of the 120 day limitations period of Government Code § 66022(a) to rate challenges. The trial court had dismissed a previous challenge based on this provision, and had limited the scope of the challenge in the amended complaint to the fees imposed by the resolution adopted within 120 days of the filing. Because of it ruling that the fee was valid, the court of appeal did not decide the procedural question.

This case confirms the practice of many agencies. Enterprise operations are frequently funded from a variety of revenue sources, including capacity charges, connection charges, standby charges, investment earnings, some tax revenues if the agency has preexisting tax authority, as well as rate revenue. The amount of

1 As the court in Keller observed, the term also does not appear to be defined in any of the various statutes authorizing imposition of standby charges (sometimes called availability charges). The standby charge evaluated in the Keller case was imposed on all property capable of receiving water from the District, thus even property owners who did not and had not used district water were required to pay for the cost of water purchases made by the district. Keller v. Chowchilla Water Dist., 80 Cal. App. 4th 1006, 1009. Government Code § 61124, which authorizes community services districts to levy standby charges for water, sewer, or water and sewer services, contains typical language authorizing the charges on parcels, “to which water or sewers are made available for any purpose of the district, whether the water or sewers are actually used or not.” (See also, Gov’t Code § 54984.2, similar language.) Water Code § 389 says that “water standby charge” and “water availability charge” have the same meaning. The court in Kennedy v. City of Ukiah (1977) 69 Cal. App. 3d 545, 553, used this definition, “Standby and availability charges are fees exacted for the benefit which accrues to property by virtue of having water available to it, even though the water might not actually be used at the present time.”

The revenue requirement that is satisfied by rates is determined by taking total costs of the enterprise operation (operating and maintenance expenses, debt service, pay- as-you-go capital, changes in reserves, etc.), deducting the revenue expected to be generated by other sources such as investment income, taxes, standby charges, and capacity charges, then spreading the rest of the revenue over the amount of service or volume of commodity expected to be sold for the relevant rate period. In order to ensure sufficient revenues and smooth rate ramps (either up or down), agencies rely on “fixed” revenues such as base charges to support core activities.

3. In Pajaro Valley Water Agency v. Amrhein (2007) 150 Cal. App. 4th 1364, groundwater pumping charges imposed on all pumpers within the district, including small domestic users, were found to be property-related fees subject to Article XIII D, not assessments on property or taxes, or regulatory fees exempt from Proposition 218 under Apartment Owners Assn. of Los Angeles County v. City of Los Angeles.

Great Oaks Water Co. v. Santa Clara Valley Water District involves a challenge to a groundwater extraction fee paid by a water utility for commercial extraction of water that is then resold to the utility’s water customers. One question presented is whether the extraction fee imposed on the commercial water utility is a property-related fee subject to the requirements of Article XIII D. Another question, if it is a property-related fee, is whether the fee is subject to the exemption from the election requirement of Article XIII D, § 6(c) as a fee for “sewer, water or refuse collection services”. North San Joaquin Water Conservation District v. Howard Jarvis Taxpayers Assoc. also involves the question whether a groundwater extraction fee is subject to the election requirement. Both cases also involve challenges
to the fees based on the proportionality limitation of Article XIII D, § 6(b)(3). The districts’ enabling acts requires that groundwater charges be established at different rates for agricultural water and non-agricultural water, without regard to any cost of service differences. [Water Code § 75594 (water conservation districts); Santa Clara Valley Water District Act § 26.9 (a)(3)(D); West’s Cal. Wat. Code Appendix § 60-26.9 (a)(3)(D).]

Article XIII D, § 6 (c) provides,

“Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted to and approved by a majority vote of property owners of the property subject to the fee or charge, or at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.”

In North San Joaquin, the trial court determined that services funded by the ground water pumping charge were within the scope of “water, sewer, or refuse collection services.” In Great Oaks Water Co. the trial court found they were not. ACWA has authorized participation in an amicus brief supporting the position that groundwater extraction fees are exempt from the election requirement.

The only prior appellate case construing the scope of section 6(b)(3) is Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal. App. 4th 1351. That case involved a storm water drainage fee imposed on owners and occupants of developed lots in the city to pay for the cost of the storm drain system. The court found that storm water management was not a “water, sewer, or refuse collection service.” Having concluded "that the storm drainage fee 'burden[s] landowners as landowners," the court of appeal in Salinas next concluded that no exemption from the voter approval requirement applied. The City had argued, and the trial court had found, that the storm drainage fee was for water and sewer services and, thus, was within the exemption of subdiv. (c) of Article XIID, § 6 for fees "for sewer, water and refuse collection services." "Sewer" is an undefined term in Article XIII D and is also not defined by the Proposition 218 Omnibus Implementation Act. [Gov't Code §§ 53750 et seq.] The City argued that the court should apply dictionary and other definitions of sewer that include both sanitary and storm water facilities within the term. The HJTA relied on the 1998 Attorney General's opinion that concluded that because flood control and drainage facilities were distinguished from sewer facilities in the Proposition 218 exemption provisions relating to assessments (Article XIII D, § 5, subdiv. (a)), that they should also be distinguished from sewer facilities for the purposes of the vote exemption for property related fees (Article XIII D, § 6, subdiv. (c)), even though the language of the exemptions is different. [81 Ops. Cal. Atty. Gen. 104 (1998).] The court rejected both arguments. Instead, it said, "The popular, nontechnical sense of sewer service, particularly when placed next to 'water' and 'refuse collection' services, suggests the service familiar to most households and businesses, the sanitary sewerage system." Concluding that use of the term "sewer" is ambiguous in Proposition 218 and relying on its previous determination that its provisions must be construed liberally to curb the rise of fees (citing the uncodified Section 5 of Proposition 218), the court resorted to the principle that exceptions to a general rule must be strictly construed and concluded that sewer services should have the "narrower, more common meaning applicable to sanitary sewerage.

Relying on the court’s discussion of water and sewer service in Salinas, HJTA and Great Oaks take the position that water service is narrowly limited to only those activities associated with delivery of water directly to consumers. Salinas stands for the proposition that storm water management and flood control are generally not provision of sewer or water service, it does not stand for the proposition that a fee imposed on the extraction of groundwater from a basin and used to purchase water and provide facilities necessary to refill the basin is not provision of water or water service. In its only discussion of water, the Salinas court wrote:

“For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." Government Code section 53750, enacted to explain some of the terms used in articles XIII C and XIII D, defines "[w]ater" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or
distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.” Id. at 1358.

Groundwater management generally involves all of the activities necessary to put water into groundwater basins where it is stored for later consumption. Although the extraction of the water may be done by others, without “water service” provided the groundwater replenishment and management activities funded by the groundwater extraction charge, there would be no water to extract and consume. Similarly, the Pajaro case held that the groundwater extraction charges at issue in that case were subject to Prop. 218 because the water provided to the wells of rural domestic users was not meaningfully different from the water provided via pipes to urban users and that both such services required compliance with the protest hearing procedures of Article XIII D, § 6(a). This reasoning suggests that efforts to supply water to wells by maintaining functioning groundwater basins ought to be a “water” service subject to the protest hearing requirement of § 6(a) and exempt from the election requirement of § 6(c).


This case involves a property-related storm drainage fee imposed to partially fund a flood protection plan. The flood protection plan and fee were developed after months of collaboration among local government agencies and community organizations, and the fee was approved by a majority of landowners though a mail-ballot “special election.” The special election was held pursuant to procedures adopted by the district’s board as authorized by Article XIII D, § 6(c), which authorizes an agency to “adopt procedures similar to those for increases in assessments in conduct of elections under this subdivision.” Because the district chose to submit the fee to approval by a majority of landowners, the procedures contained provisions for property and owner identification, as well as signatures, on the ballots. The trial court upheld the election, but the court of appeal reversed, setting aside the election results “because the voters’ names were printed on the ballots and ballots had to be signed, yet voters were provided no assurances that their votes would be kept secret.” The Supreme Court granted review.

The issues presented in the petition upon which review as granted are:

1. Does the voting secrecy requirement of California Constitution, article II, § 7 apply to property-owner “voting” on a property-related fee pursuant to article XIII D, § 9(c)?

2. Does the voting secrecy requirement of California Constitution, article II, § 7 apply to property-owner “ballots” on assessments subject to article XIII D, § 4 notwithstanding the contrary direction of subdivision (d) of that § 4 and of Government Code § 53753?

3. If voting secrecy applies in these contexts, must local governments affirmatively inform property owners ballot secrecy will be maintained?

4. May a court overturn property owners’ election to approve an assessment or property-related fee because a local government failed to inform property owners that ballot secrecy would be maintained or because a lapse in ballot secrecy occurred?”

The ACWA, CSAC, CSDA, and League of Cities have authorized a joint amicus brief on behalf of the district. If the requirement for secret ballots applies to property owner approval of fees and assessments, weighted or fractional voting becomes particularly problematic.

Automatic inflationary increases and pass-through of wholesale water charges.

6. This section specifically authorizes the agencies providing water, sewer, or refuse collection services to adopt automatic rate adjustments for inflation or to pass-through increases in wholesale water charges. The automatic increases are good for up to five years; compliance with Article XIII D, § 6 is required for future changes to the schedule. Notice of automatic increases must be given in 30 days in advance, and may be included in regular billing statements. Inflation adjustments may not result in a charge that exceeds the costs of service.


Allocation-based Conservation Water Pricing

This bill establishes an alternative method of establishing a conservation based price structure for water service. Under the bill, an “allocation-based conservation water pricing” structure is comprised of a “basic charge” and a “conservation charge.” The basic charge is a volumetric charge for the cost of water service, other than fixed costs recovered through the type of charge described in the Paland case, and other than the costs recovered by the conservation charge. The conservation charge is a volumetric charge to recover the “incremental costs” of service for use of water in excess of the basic use allocation and for other conservation or demand management programs. The statute requires establishment of a basic use allocation for each customer account based on consumer needs and property characteristics. The Irvine Ranch Water District and Santa Ana Watershed Project Authority were the co-sources of the bill. Many believed the bill was unnecessary because pre-existing law permitted agencies to develop pricing structures that deter waste and encourage efficiency. (E.g., Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal. App. 4th 1364, 1390.)

B. Assessments


This case involves an assessment district formed to provide enhanced security, streetscape maintenance (e.g., street sweeping, gutter cleaning, graffiti removal), and marketing, promotion, and special events for business improvement in a commercial area. These services are provided only to the properties within the district, and exceeded the services that would be otherwise be provided by the city. The engineer’s report concluded and the court found that these services “affect the assessed property in a way that is particular and distinct from [their] effect on other parcels and that real property in general and the public at large do not share.” The opinion was the result of reconsideration after remand in light of Silicon Valley Taxpayers Assn v. Santa Clara County Open Space Authority (2008) 44 Cal. 4th 431.

The engineer’s report based the amount of the assessment for each assessed property within the district on three factors: street frontage, building size, and lot size. Those factors account for 40 percent, 40 percent, and 20 percent, respectively, of the amount assessed for each property. The City determined the amount of the assessment by first identifying the special benefits as the enhanced services, separating the special benefits from general benefits, and identifying the estimated costs of the special benefits. The City then calculated the assessment for each assessed property as a portion of the total cost of the services by applying the three factors. The City heavily discounted the assessment for various nonprofit entities (“religious organizations, clubs, lodges and fraternal organizations”) within the boundaries of the district, and totally exempted from assessment properties zoned solely for residential use.

Dahms challenged the assessment arguing: (1) that the city council held the hearing on the proposed assessment too early, in violation of article XIII D, because the hearing took place on the 45th day after the City mailed notices of the
proposed assessment, (2) the discounts to certain properties violated the requirement that assessments be proportional
to special benefits, (3) the city failed to properly separate general from special benefit, and (4) that the special benefit
was not properly apportioned. After exercising its independent judgment as required by *Silicon Valley*, the Court of
Appeal upheld the assessment.

The court rejected the first argument applying the standard rule of CCP § 12 that “[t]he time in which any act provided
by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and
then it is also excluded.” It also concluded that nothing in article XIII D prohibits discounted assessments or required
that any discounts be uniformly granted across all parcels in an assessment district.

*The assessment on a particular parcel cannot exceed the reasonable cost of the proportional special benefit
carferred on that parcel, but if the assessments imposed on some parcels are discounted, article XIII D is not
violated so long as those discounts do not cause the assessments imposed on the remaining parcels to exceed the
reasonable cost of the proportional special benefit conferred on those parcels.* There was no showing that the
assessments on some parcels went up because of the discounts, and Dahms does not argue that they did.

Dahms argued that if the special benefits that are conferred also produce general benefits, then the value of those
general benefits must be deducted from the reasonable cost of providing the special benefits before the assessments are
calculated. The court rejected this theory concluding that once general and special benefits are separated, the entire cost
of the special benefit is subject to assessment. The court also rejected Dahms’ challenge to the front footage component
of the assessment spread formula. Dahms argued that total length of streets on all sides of a parcel should be used rather
than front footage. The court found that it made sense to use front footage only rather than total street length to
determine the proportional special benefit from the services provided because, for example, a clean and safe front
entrance to a commercial parcel is more likely to constitute a special benefit to that parcel than a clean and safe side or
rear, where there may or may not be any entrance at all. At the same time, the formula took into account building size
and lot size of each assessed parcel, which the engineer’s report and court found, when taken together, provided for an
assessment that did not exceed special benefit.


This case involved the interpretation of two internally inconsistent provisions of the Municipal Improvement
Act of 1913 relating to the filing of actions. The upshot of the case is that the Supreme Court reversed the Court of
Appeal and concluded that that under Sts. & Hwy. Code § 10601 validation actions involving such
assessments can be brought only by the legislative body that approved the assessment or the contractor that
would perform the work, while property owner actions to contest assessments are governed solely by Sts. & Hy.
Code, § 10400, and consequently are not subject to the general validation procedure, but must be filed within 30
days after the assessment is levied.

3. SB 321 (Benoit)

*Assessment majority protest ballots.*

This bill, sponsored by the Howard Jarvis Taxpayers Association, is intended to provide greater transparency to
the majority protest ballot process for special assessments. As presently drafted, the bill would amend
Government Code § 53753 as follows:

- Subdivision (b) is amended to add a requirement that the envelope containing the assessment ballot state
  on the outside “OFFICIAL
  BALLOT ENCLOSED” in no less than 16 point type. (The quoted language is in 16 point type, Times
  New Roman font.) The agency may additionally place the statement on the envelope in a language or
languages other than English.

- Subdivision (e)(1) is amended to provide that the impartial person designated by the agency to tabulate the assessment ballots may include the clerk of the agency. It is also amended to provide that ballots shall be unsealed and tabulated “in public view at the conclusion of the hearing so as to permit all interested persons to meaningfully monitor the accuracy of the tabulation process” if the tabulation is done by agency personnel or vendors that participated in research, design, engineering, public education, or promotion of the assessment.

- Subdivision (e)(2) is amended to provide that assessment ballots and information used to determine the weight of each ballot shall be treated as disclosable public records during and after tabulation, equally accessible to assessment proponents and opponents. The subdivision is also amended to require that the ballots be kept a minimum of two years.

"The right to notice and appeal (See: Sophia R. Meyer’s Dec 27, 2016, at 4:43 PM, response to my CPRA request #20 of you dated Dec 16, 2016, at 12:43 AM,, which was also CCed to you.) is conferred by statute (See: Dana Point Safe Harbor Collective v. Superior Court (2010) 51 Cal.4th 1, 5 . . . )."

The text of California Government Code §§25830-25831 follow:

25830. (a) On or before the first day of July of each calendar year, the board of supervisors of any county may, by resolution or ordinance, establish a schedule of fees to be imposed on land within the unincorporated area of the county and incorporated areas of the county where cities do not provide their own waste disposal sites, revenue from the fees to be used for the acquisition, operation, and maintenance of county waste disposal sites and for financing waste collection, processing, reclamation, and disposal services, where those services are provided. In establishing the schedule of fees, the board of supervisors shall classify the land based upon the various uses to which the land is put, the volume of waste occurring from the different land uses and any other factors that the board determines would reasonably relate the waste disposal fee to the land upon which it would be imposed. Fees imposed within the incorporated and unincorporated areas shall be uniform. Prior to imposing fees within an incorporated area, the board of supervisors shall obtain the consent of the legislative body of the city to impose the fees.

(b) The board shall set a reasonable fee for each category established and divide the land according to categories and ownership; provided, however, that the board shall establish categories of land for which:

(1) No services are provided and no fee required.

(2) Services are provided and no fee required.

(c) The board shall determine eligibility for inclusion in these categories, upon application, on a case-by-case basis. The board shall impose the appropriate fee upon each division of land and provide for the billing and collection of the fees. The fees may be established, billed, and collected on a monthly or yearly basis, and may be billed and collected by the county tax collector as part of the regular county tax billing system.
Any fees authorized pursuant to Section 25830, or pursuant to Section 40059 of the Public Resources Code, that remain unpaid for a period of 60 or more days after the date upon which they were billed may be collected thereafter by the county as provided in this section.

(a) At least once a year, the board of supervisors shall cause to be prepared a report of delinquent fees. The board shall fix a time, date, and place for hearing the report and any objections or protests to the report.

(b) The board shall cause notice of the hearing to be mailed to the landowners listed on the report not less than 10 days prior to the date of the hearing.

(c) At the hearing, the board shall hear any objections or protests of landowners liable to be assessed for delinquent fees. The board may make revisions or corrections to the report as it deems just, after which, by resolution, the report shall be confirmed.

(d) The delinquent fees set forth in the report as confirmed, or the list prepared pursuant to subdivision (e), shall constitute special assessments against the respective parcels of land and are a lien on the property for the amount of the delinquent fees. A certified copy of the confirmed report, or the list prepared pursuant to subdivision (e), shall be filed with the county auditor for the amounts of the respective assessments against the respective parcels of land as they appear on the current assessment roll. The lien created attaches upon recordation, in the office of the county recorder of the county in which the property is situated, of a certified copy of the resolution of confirmation or the list prepared pursuant to subdivision (e). The assessment may be collected at the same time and in the same manner as ordinary county ad valorem property taxes are collected and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for those taxes. All laws applicable to the levy, collection, and enforcement of county ad valorem property taxes shall be applicable to the assessment, except that if any real property to which the lien would attach has been transferred or conveyed to a bona fide purchaser for value, or if a lien of a bona fide encumbrancer for value has been created and attaches thereon, prior to the date on which the first installment of the taxes would become delinquent, then the lien that would otherwise be imposed by this section shall not attach to the real property and the delinquent fees, as confirmed, relating to the property shall be transferred to the unsecured roll for collection.

(e) The requirements of subdivisions (a), (b), and (c) may be waived only if the county has adopted an alternative administrative procedure that allows property owners to appeal the solid waste fee and property owners are notified of their right to appeal. A list of delinquent fees shall be prepared showing the assessments of each respective parcel and shall be filed with the auditor.

California Government Code section 25830, authorizes imposition of ‘reasonable’ parcel exactions to support solid waste disposal. In 1996, We, The People, having had our fill with state, county, city and district’ officers’, officials’ and courts’ lame prestidigitation with our taxes, assessments, fees and charges, redefined the breadth of what ‘reasonable’
now consists of by passage of Proposition 218. Article XIII D, 6(b), now prohibits imposers of property related fees and charges from imposing exactions on property parcels that do not comport with §6(b)(1-5). To wit:

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) 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. (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

Reliance by an agency on any parcel map, including, but not limited to, an assessor’s parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

My fees have remained unpaid for a period of 60 or more days after the date upon which they were billed.

California Government Code section 25831, addresses collection of California Government Code section 25830 that remain unpaid for a period of 60 or more days after the date upon which they were billed. In doing so, our State Legislature, in California Government section 25831, (D), in pertinent part says that these fees:

“shall constitute special assessments against the respective parcels of land and are a lien on the property for the amount of the delinquent fees.” (Bold added.)

Article XIII D, §6(b)(4), in pertinent part says:

“assessments . . . shall not be imposed without compliance with Section 4.” (Bold added.)

Neither County nor this Agency has ever complied with Section 4 as required by Article XIII D.. Both County and this Agency defiantly thumb their noses at this prohibition.

California Government section 25831, subdivision (a) lists appealable judgments and orders. These include 'an order made after a judgment made appealable by paragraph (1).' (Code Civ. Proc., § 904.1, subd. (a)(2) (section 904.1(a)(2)).) Under section 904.1(a)(2), postjudgment orders granting or denying motions for attorney fees are deemed to be appealable. (Lakin v. Watkins Associated Industries (1993) 6 Cal.4th 644, 648 . . ; see Eisenberg et al., Cal. Practice
The notion that ‘I do what I’m told to do’ satisfies all Article XIII D, §4, or, §6(b) prohibitions is untenable. §6(b)(5) requires the exacting Agency to “ . . . demonstrate compliance with this article.” Silence on challenged elements of required compliance admits this Agency’s inability to ‘demonstrate compliance’ — Thus constitutionally prohibiting this Agency’s exactions for my parcels.

The following court cases support all of this appellant’s above assertions:

**TOWN OF TIBURON et al., Plaintiffs, Cross-Defendants, and Respondents,**

**v.**

**JIMMIE D. BONANDER et al., Defendants, Cross-Complainants, and Appellants.**

A119918.

_Court of Appeals of California, First District, Division Three_

Filed December 31, 2009

Frank Mulberg and Brett D. Mulberg for Defendants, Cross-Complainants, and Appellants.

McDonough Holland & Allen PC, Thomas R. Curry and Andrea S. Visveshwara; Ann R. Danforth, Town Attorney, for Plaintiffs, Cross-Defendants and Respondents.

McGUINESS, P.J.

The Town of Tiburon (the Town) formed a special assessment district for the purpose of placing overhead utility lines underground within the district. When original estimates of the project's cost proved to be too low, the Town sought to impose a supplemental assessment to cover the increased costs. After the Town filed an action to validate the supplemental assessment, a group of affected property owners (appellants) filed a cross-complaint challenging the supplemental assessment on a variety of grounds. On appeal from a judgment in favor of the Town, appellants argue the trial court erred in denying their petition for writ of mandate seeking to invalidate the supplemental assessment.

After conducting an independent review of the record, we conclude the supplemental assessment fails to satisfy the proportionality requirement imposed by article XIII D of the California Constitution (article XIII D), which mandates that no assessment shall exceed the reasonable cost of the proportional special benefit conferred on a parcel. (Art. XIII D, § 4, subd. (a).) Accordingly, we reverse the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

Appellants own real property located within the boundaries of the Del Mar Valley Utility Undergrounding Assessment District (Original District) and the Del Mar Valley Utility Undergrounding Supplemental Assessment District (Supplemental District). The Original District and the Supplemental District share the same boundaries and include the same parcels. Both districts employ the same approach for assigning special benefits and apportioning costs among the
parcels within the district. Thus, although this appeal concerns the Supplemental District, we consider the events giving rise to the Original District in order to give context to our consideration of the Supplemental District.

In May 2003, two property owners who live in a neighborhood of the Town commonly referred to as the Del Mar Valley area presented a petition of 116 homeowners to the Town to urge the creation of the Original District in order to finance the replacement of overhead utility wires with underground lines carrying electricity, telephone signals, and cable services. The property owners who signed the petition represented approximately 62 percent of the 187 homes in the proposed district. The petition satisfied the requirements of the Town's policy and procedures for the formation of utility undergrounding assessment districts in that it reflected the support of at least 60 percent of all the parcels in the proposed district. As indicated in the petition, it was understood that each owner would pay the assessment based upon "an equal payment," and it was estimated the project would cost $16,000 to $20,000 per parcel, exclusive of incidental costs, in addition to costs of $650 to $3,000 per parcel to cover the cost of undergrounding the lateral connection from the street to a residence.

After receiving the property owners' petition, the Town's council adopted a resolution of intention in June 2003 to form the Original District pursuant to the Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 et seq.). In July 2003, the Town approved expanding the Original District to include 18 parcels in a "special zone" referred to as the "West Hawthorne Drive Area." Although several properties in the West Hawthorne Drive Area border properties in the Original District as initially proposed, the administrative record reflects that the special zone receives its electrical utilities from a different grid than the rest of the Original District. The Town received petitions from 11 of the 18 parcel owners in the West Hawthorne Drive Area (or approximately 61 percent) favoring inclusion in the Original District.

The Original District is located on the Tiburon Peninsula, which extends into San Francisco Bay in Marin County. The boundaries of the district extend from Tiburon Boulevard, which runs along or near the bay, up to Hacienda Drive, which is roughly parallel to Tiburon Boulevard. Parcels within the district's boundaries near Tiburon Boulevard are generally smaller than parcels located closer to Hacienda Drive. A public school in the district occupies 10 parcels near Tiburon Boulevard. As reflected by comments in the public record, some of the parcels in the Original District are hillside properties with bay views, whereas some of the parcels, such as those closer to Tiburon Boulevard and the school, are generally situated at a lower elevation and lack bay views. Some properties in the Del Mar Valley have views toward Sausalito and the Golden Gate Bridge.

The Town engaged a civil engineer designated the "engineer of work" to prepare a report analyzing the proposed project. On March 10, 2005, the engineer of work submitted a preliminary engineer's report, which the Town's council approved on March 16, 2005. The report explained that the utilities to be placed underground provided direct service to the properties within the Original District. The report stated that the proposed underground utility facilities would confer a special benefit on the 221 parcels located in the proposed district as a result of aesthetic, service reliability, and safety benefits associated with the improvements. The engineer of work opined that the general benefits, if any, enjoyed by the surrounding community and the public in general as a result of the undergrounding of the local overhead utilities within the Original District were intangible and therefore not quantifiable. Therefore, the engineer of work concluded that 100 percent of the proposed improvements were of direct and special benefit to the properties located within the Original District.

In determining the special benefit conferred on each parcel within the Original District, the engineer of work assigned each parcel "benefit points" based on three categories: (1) aesthetic benefit from removal of unsightly poles and overhead wires, (2) improved safety because of the reduced risk of downed poles and wires, and (3) greater service reliability attributable to new wiring and equipment as well as the reduced risk of downed power lines. The engineer of work assigned benefit points according to the highest and best use of each property.[1] Thus, a vacant property would be treated as if it were developed to its highest potential and connected to the system.
The engineer of work assigned one benefit point for aesthetics to each parcel that is adjacent to existing overhead utility lines, irrespective of the particular view the property enjoys. Likewise, with respect to the safety benefit, each parcel adjacent to existing overhead utility lines received one benefit point. By contrast, the reliability benefit was dependent upon the nature of the property's use, with parcels containing a single family residence (designated "single family residential") assigned one benefit point for service reliability. Parcels other than those designated single family residential, such as parcels containing multiple dwellings and those on which the school is situated, were assigned benefit points for service reliability according to a formula contingent upon relative peak energy use. Therefore, a parcel containing a single family residence could receive a total of three benefit points—one for aesthetics, one for safety, and one for reliability.

Because almost all of the parcels within the Original District are considered single family residential, almost all of the parcels were assigned exactly three benefit points. Of the 221 parcels in the Original District, all but 23, or a total of 198, received three benefit points. Two parcels containing multiple dwelling units received 3.4 benefit points each, and the ten parcels on which the school is situated received a total of 17.3 benefit points.

The remaining 11 parcels are in areas that had previously placed their overhead utilities underground. These 11 parcels are located in two different areas, with seven of the parcels located on Noche Vista Lane, a private drive, and four of the parcels on Geldert Court, a cul-de-sac extending off of Geldert Lane. Nine of the 11 properties have no frontage along roadways with poles and overhead wires. These properties received no benefit points for aesthetics. However, with respect to two of the properties determined to have frontage along roadways with poles and overhead wires, the engineer of work assigned one-half of an aesthetic benefit point to each parcel, even though the parcels already received their utilities from an underground network. The report assigned one-half of a safety benefit point and one-half of a reliability benefit point to each of the 11 properties in the previously undergrounded areas. The engineer of work reasoned that "[t]hese properties are considered to receive half the benefit from service reliability, as their small systems are completely surrounded by and dependent on the larger overall system that is to be undergrounded, and half the benefit from improved safety, as ingress and egress from their property is directly affected by overhead lines and poles." Accordingly, of the 11 parcels in previously undergrounded areas, nine received one total benefit point each and two received 1.5 total benefit points each.

The Original District was split into three "zones of benefit" described as the Del Mar Valley Area, the West Hawthorne Drive Area, and the Hacienda Drive Area. The engineer of work calculated the construction costs separately for each of these zones. The West Hawthorne Drive Area consists of the 18 parcels that had petitioned to be included in the Original District but that receive their utilities from a separate system of overhead utility lines. The Del Mar Valley Area comprises the largest zone within the Original District, consisting of 164 parcels. The Hacienda Drive Area consists of 39 parcels on or near Hacienda Drive, on the northeastern border of the Original District. Although the engineer of work's report does not state why the Hacienda Drive Area was created as a separate zone for purposes of calculating construction costs, elsewhere in the administrative record it is explained that the area contains lower density development (i.e., larger parcels), thus making it more costly per parcel to place utilities underground.

Total costs for the assessment were estimated to be $4,720,000, of which $3,900,611 were construction costs. Construction costs in each of the three benefit zones were calculated separately and apportioned to properties within that zone in proportion to the number of benefit points assigned to each property. The remaining project costs, including incidental expenses and financial costs, were allocated to each zone in the same proportion as construction costs among the zones. As a consequence, a parcel in a zone with a higher construction cost per parcel would also have a correspondingly higher allocated cost for incidental expenses and financial costs.
Because the engineer of work determined construction costs separately for each of the three benefit zones, a parcel assigned three benefit points in one zone had a different proposed assessment than a parcel assigned the same number of benefit points in another zone. Thus, the proposed assessment for a single family residential parcel receiving three benefit points was $12,528.19 in the West Hawthorne Drive Area, $21,717.04 in the Del Mar Valley Area, and $31,146.62 in the Hacienda Drive Area. Proposed assessments for the 11 parcels in areas with utilities already placed underground ranged from $7,239.02 to $15,573.51.

Owners of parcels in the Original District voted in favor of the assessment. The vote was 71 percent in favor and 29 percent opposed, with individual parcel votes weighted according to each parcel's proposed assessment. On May 18, 2005, the Town's council voted unanimously to approve the engineer of work's final report, to order the improvements, to establish the Original District, and to confirm the proposed individual assessments. On May 27, 2005, assessment notices were sent to property owners within the Original District.

Two couples who had previously objected to inclusion of their parcels in the Original District filed suit in June 2005 against the Town and its council. (See Bonander v. Town of Tiburon (2009) 46 Cal.4th 646, 650.) That lawsuit, which remains pending, is not the subject of this appeal.[2]

In January 2006, while the legal challenge to the Original District was on appeal, property owners in the Original District received notice that projected construction costs were significantly higher than previously estimated. Construction costs had risen significantly since the summer of 2005, with the price of asphalt alone increasing 73 percent from July to October 2005. The engineer of work estimated that actual construction costs would exceed previous cost estimates by over $2 million.

At a meeting held on February 1, 2006, the Town's council considered a number of options in response to the increased cost estimates, including cancelling the project or pursuing the process for implementing a supplemental assessment to cover the increased costs. The Town's council chose to pursue the supplemental assessment process to allow affected property owners to determine for themselves whether to continue the project. Accordingly, the Town's council adopted a resolution of intention at the February 2006 meeting to form the Supplemental District pursuant to the Municipal Improvement Act of 1913.[3] The Town's resolution of intention indicated that the Supplemental District was to be established pursuant to section 10426 of the Streets and Highways Code.[4] The Town directed the engineer of work to prepare a supplemental engineer's report.

At a meeting held March 20, 2006, the Town's council considered a preliminary report for the Supplemental District prepared by the engineer of work. The engineer of work estimated that the net construction costs to be funded by the Supplemental District were $2,860,488, which represented the amount by which revised construction costs for the project exceeded construction funds available from the Original District assessment. Overall, taking into account incidental expenses and financing costs, there was a shortfall of $3,180,000 that would have to be covered by a supplemental assessment.

The engineer's report for the Supplemental District employed the same method of assessment as the Original District. The Supplemental District included the same 221 parcels as the Original District. The special benefit determinations and apportionment methodology were unchanged from the Original District. As with the Original District, it was determined that 100 percent of the proposed improvements specially benefited the properties within the Supplemental District. Benefit points were assigned for aesthetics, safety, and reliability. Each parcel in the Supplemental District received the same number of total benefit points as it had received in the Original District. The engineer of work again determined construction costs separately for the three zones of benefit—Del Mar Valley Area, West Hawthorne Drive Area, and Hacienda Drive Area. Thus, as reflected in the preliminary report for the Supplemental District, the
methodology for the Supplemental District assessment was identical to the methodology used for the Original District assessment.

At a March 2006 meeting, the Town's council considered whether to revise the proposed boundaries of the Supplemental District, and specifically considered whether to exclude the Hacienda Drive Area from the district. The engineer of work explained that the Town could modify the boundaries of the proposed Supplemental District. The construction costs attributable to any removed properties would be deleted from the total construction costs, but any incidental costs would generally be unaffected, causing the costs to be spread among fewer properties. Following the public comment period, the Town's council adopted a resolution approving the preliminary engineer's report and finalizing the external boundaries for the Supplemental District as proposed by the engineer of work. The Town's resolution set a public hearing for May 8, 2006, for the ultimate decision on whether to form the Supplemental District. The Town was directed to mail notices and ballots to affected property owners, along with envelopes for returning the ballots to the Town's clerk, not less than 45 days before the date of the public hearing.

The Town mailed notices, ballots, and return envelopes to property owners within the proposed Supplemental District on March 24, 2006. Property owners could return their ballots to the Town's clerk at any time before the close of the public hearing on May 8, 2006. The ballots were weighted according to each parcel's proposed assessment.

On the evening of May 8, 2006, the Town's council held a public hearing to hear and consider public testimony, tally the property owner votes, and, if the property owners voted in favor of the Supplemental District, to vote on whether to establish the district. The final engineer's report for the Supplemental District contained one change from the preliminary report. Specifically, the engineer of work had determined that a parcel located at 1 Tanfield Road, which is not within the Supplemental District, would receive a special benefit from the undergrounding project. Although the parcel takes its it utility service from Tanfield Road, a cul-de-sac off of Hacienda Drive that is not part of the undergrounding project, it was determined the property has a secondary utility access point on Hacienda Drive and also has some overhead wires crossing a corner of the property that would be removed. Thus, the engineer of work assigned the property half a benefit point for aesthetics and half a benefit point for safety. The property received a total of one special benefit point, which was equivalent to $6,778 in special benefits. Because the property was not included in the Supplemental District (or the Original District), this special benefit amount of $6,778 was deducted from the total amount to be assessed. Proposed assessment amounts in the Hacienda Drive Area were reduced accordingly.[5] The Town's council adopted a resolution approving the revised assessment amounts.

The votes were tallied at the close of the public hearing. Property owners voted in favor of forming the Supplemental District by a margin of 56 percent to 44 percent. Although the overall vote totals favored creation of the Supplemental District, the vote was not so favorable within the Hacienda Drive Area. Among property owners in the Hacienda Drive Area, 12 parcels voted for the Supplemental District while 23 parcels voted against its formation. The vote as weighted by assessment amounts in the Hacienda Drive Area was $246,332.16 for and $379,762.08 against, equating to roughly 61 percent opposition to formation of the Supplemental District. All of the property owners on Noche Vista Lane, which was in an area with its utilities already located underground, voted against the Supplemental District.

Following tabulation of the vote, the Town's council adopted a resolution to create the Supplemental District. The approved supplemental assessments for single family residential parcels receiving three benefit points were $7,740.00 in the West Hawthorne Drive Area, $14,812.21 in the Del Mar Valley Area, and $20,331.24 in the Hacienda Drive Area. [6] Supplemental assessments for the 11 parcels in areas with utilities already placed underground ranged from $4,937.41 to $10,165.79.

On May 18, 2006, the Town filed a complaint in the Marin County Superior Court seeking to validate the Supplemental District pursuant to section 860 et seq. of the Code of Civil Procedure. The Town sought a judgment declaring that it
had the authority to collect the assessments authorized by the resolution creating the Supplemental District and that it could use the assessments as security for the issuance of bonds. It further sought a judgment that the Supplemental District was formed in conformity with all applicable provisions of law, including the Municipal Improvement Act of 1913 and article XIII D.

Appellants are 21 individuals who own property within the Supplemental District.[7] Appellants answered the Town's complaint and filed a cross-complaint against the Town, the Town's council, Doe defendants, and "All Persons Interested in the Validity of the Del Mar Valley Utility Undergrounding Supplemental Assessment District." The cross-complaint contains seven causes of action. The first cause of action seeks to nullify the election approving the Supplemental District on the ground the Town violated property owner voting procedures. The second cause of action seeks to invalidate the resolution adopting the formation of the Supplemental District on the ground the district was not lawfully formed. The third cause of action seeks declaratory relief with respect to two distinct allegations—that the Town unfairly affected the vote by misleading property owners into believing the supplemental assessments would qualify as an income tax deduction, and that it was unfair for the Town to reach a settlement with the school district in which the Town agreed to pay for the school's proposed assessment in exchange for the school district abstaining from voting its 10 parcels against the Supplemental District. The fourth through sixth causes of action seek a writ of mandate directing the Town to set aside its resolution creating the Supplemental District. Among other things, appellants allege the Town violated article XIII D by creating an assessment district in which assessments on parcels exceed the reasonable cost of the proportional special benefit conferred on the parcel. The seventh cause of action seeks a declaration regarding the validity of the Supplemental District but contains no new factual allegations.

On September 12, 2006, appellants filed their opening brief in support of their petition for writ of mandate. On October 26, 2006, the Town moved for judgment on the pleadings on the ground that appellants had not raised any viable affirmative defenses in their answer. In an order dated January 3, 2007, the trial court denied appellants' petition for writ of mandate as well as the Town's motion for judgment on the pleadings. In denying the writ claims, the court determined that the Town did not abuse its discretion in determining benefits and proportional assessments for the Supplemental District. The court found there was nothing "'plainly arbitrary'" in the Town's determinations. The court also concluded that the Town was justified in relying upon the final engineer's report and that the method of assessment described in the report was sufficient to support the determination of benefits and proportional assessments.

The Town filed a motion for summary judgment and/or summary adjudication on January 5, 2007, in which it sought to dispose of the remaining three causes of action in the cross-complaint. In an order dated April 24, 2007, the trial court granted summary adjudication as to the first and second causes of action but denied summary adjudication as to the third cause of action, at least in part. The trial court determined that the third cause of action contained two separate and distinct claims. The court granted summary adjudication as to the issue of whether the Town had misrepresented the tax deductibility of assessments but denied summary adjudication as to the issue of the propriety of the Town's settlement agreement with the school district.

Appellants agreed to dismiss, with prejudice, the remaining claim in the cross-complaint's third cause of action in order to fully resolve the matter and allow the trial court to enter final judgment in the case. (See Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 399-403.) Accordingly, on October 4, 2007, the trial court entered an order of dismissal that was intended to fully resolve the action and act as a final judgment from which an appeal could be taken. This appeal followed.

DISCUSSION

Appellants contend the trial court erred in denying their petition for writ of mandate, asserting that the Supplemental District assessments violate the special benefit and proportionality requirements imposed by article XIII D. They also
claim the trial court erred in granting summary adjudication on claims that (1) the Town unlawfully formed the
Supplemental District, (2) the vote approving the Supplemental District is a nullity because the Town gave district
proponents improper access to ballot envelopes during the voting period, and (3) the Town misrepresented the income
tax deductibility of the assessments. Because the assessments violate the proportionality requirement of article XIII D,
we agree with appellants that they are entitled to a writ of mandate invalidating the assessments and vacating the
Town's resolution creating the Supplemental District.

I. Overview of Article XIII D and Law Governing Special Assessments

We begin with an overview of special assessments and Proposition 218, the 1996 initiative that added article XIII D to
the California Constitution. The Supreme Court explained the nature of a special assessment in
Knox v. City of Orland
(1992) 4 Cal.4th 132, a pre-Proposition 218 case. "[A] special assessment is `levied against real property particularly
and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.]" (Id. at p. 142.)
"[T]he essential feature of the special assessment is that the public improvement financed through it confers a special
benefit on the property assessed beyond that conferred generally. [Citations.]" (Southern Cal. Rapid Transit Dist. v.
Bolen
(1992) 1 Cal.4th 654, 661.) A tax is different from a special assessment. Unlike a special assessment, a tax may
be levied without regard to whether the property or person subject to the tax receives a particular benefit. (Knox v. City
of Orland, supra, 4 Cal.4th at p. 442.)

The voters approved Proposition 218, the Right to Vote on Taxes Act, in November 1996. (Apartment Assn. of Los
Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 835.) Proposition 218 can best be understood as the
progeny of Proposition 13, the landmark initiative measure adopted in 1978 with the purpose of cutting local property
provisions of Proposition 13 "limited ad valorem property taxes to 1 percent of a property's assessed valuation and
limited increases in the assessed valuation to 2 percent per year unless and until the property changed hands. [Citation.]"
[*] To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and
special districts from enacting any special tax without the two-thirds vote of the electorate. [Citations.]" (Howard Jarvis
Taxpayers Assn. v. City of Riverside, supra, 73 Cal.App.4th at pp. 681-682.)

Local governments found a way to get around Proposition 13's limitations, owing in part to a determination that a
"special assessment" was not a "special tax" within the meaning of Proposition 13. (See Knox v. City of Orland, supra,
4 Cal.4th at p. 141.) As a consequence, a special assessment could be imposed without the two-thirds vote required by
Proposition 13. (Howard Jarvis Taxpayers Assn. v. City of Riverside, supra, 73 Cal.App.4th at p. 682.) The ballot
arguments in favor of Proposition 218 declared that politicians had exploited this loophole by calling taxes
"assessments" and "fees" that could be enacted without the consent of the voters.[8] (Apartment Assn. of Los Angeles
County, Inc. v. City of Los Angeles, supra, 24 Cal.4th at p. 839.) Proponents of Proposition 218 claimed that ":[s]pecial
districts [had] increased assessments by over 2400% over 15 years" (ibid.), and they argued assessments were unfair,
with "[t]he poor pay[ing] the same assessments as the rich." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument in
favor of Prop. 218, p. 76.) The argument in favor of the initiative claimed that under then-existing law, "[a]n elderly
widow pays exactly the same on her modest house as a tycoon with a mansion." (Ibid.)

To address these concerns, the electorate approved Proposition 218, adding articles XIII C and XIII D to the California
Constitution. (Howard Jarvis Taxpayers Assn. v. City of Riverside, supra, 73 Cal.App.4th at p. 682.) "Proposition 218
allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and
(4) a fee or charge. [Citations.] It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes
by placing analogous restrictions on assessments, fees, and charges." (Ibid.)
Article XIII D imposes both procedural and substantive limitations on a public agency's ability to impose assessments. A public agency must comply with certain notice and hearing requirements before it may adopt a special assessment. (Art. XIII D, § 4, subds. (c), (d) & (e).) Also, an assessment may only be imposed if it is supported by an engineer's report and receives a vote of at least half of the owners of affected parcels, weighted "according to the proportional financial obligation of the affected property." (Art. XIII D, § 4, subds. (b) & (e).)

A valid assessment under Proposition 218 must also satisfy the substantive requirements of section 4, subdivision (a) of article XIII D. In particular, article XIII D "tightens the definition of the two key findings necessary to support an assessment: special benefit and proportionality." (Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 443 (Silicon Valley).) "An assessment can be imposed only for a 'special benefit' conferred on a particular property. (Art. XIII D, §§ 2, subd. (b), 4, subd. (a).) A special benefit is 'a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large.' (Art. XIII D, § 2, subd. (i).) . . . Further, an assessment on any given parcel must be in proportion to the special benefit conferred on that parcel: 'No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel.' (Art. XIII D, § 4, subd. (a))." (Silicon Valley, supra, 44 Cal.4th at p. 443.)

II. STANDARD AND SCOPE OF REVIEW

"Before Proposition 218 was passed, courts reviewed quasi-legislative acts of local governmental agencies, such as the formation of an assessment district, under a deferential abuse of discretion standard. [Citations.]" (Silicon Valley, supra, 44 Cal.4th at pp. 443-444.) "Courts presumed an assessment was valid, and a plaintiff challenging it had to show that the record before the legislative body 'clearly' did not support the underlying determinations of benefit and proportionality. [Citation.]" (Id. at p. 444.)

"The drafters of Proposition 218 specifically targeted this deferential standard of review for change. Article XIII D, section 4, subdivision (f), provides: 'In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.'" (Silicon Valley, supra, 44 Cal.4th at p. 444.)

In Silicon Valley, supra, 44 Cal.4th at p. 450, our Supreme Court held that "courts should exercise their independent judgment in reviewing whether assessments that local agencies impose violate article XIII D."[9] (Fn. omitted.) This standard of review applies because "after Proposition 218 passed, an assessment's validity, including the substantive requirements, is now a constitutional question." (Silicon Valley, at p. 448.) Thus, as a reviewing court we exercise de novo review of "local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Proposition 218. [Citations.]" (Ibid.)

The litigants dispute whether our independent review may extend beyond the administrative record of the Town's creation of the Supplemental District. Specifically, they disagree about whether we may consider matters contained in the administrative record associated with the Original District. The trial court limited its review to the administrative record associated with the Supplemental District. We took judicial notice of the Original District administrative record but deferred consideration of the relevance or materiality of that record.

Ordinarily, when we review the decision of a public agency under the substantial evidence standard, we confine our review to the administrative record of the agency's action. (See Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 573.) However, we are not so constrained when we exercise independent judgment in reviewing
the action of a public agency. As set forth in Code of Civil Procedure section 1094.5, subdivision (e), a court authorized
to exercise independent judgment may admit and consider extra-record evidence in administrative mandate proceedings
if the evidence was improperly excluded by the public agency or could not have been produced through the exercise of
reasonable diligence at the time of the hearing. Although the Town acknowledges this rule, it contends that appellants
have made no showing as to why the Original District administrative record was not presented to the Town's council or
was improperly excluded from consideration.

The more salient point, in our view, is that the Supplemental District concerns the same project as did the Original
District and employs the same special benefit formulas, boundaries, zones, and methodology. Evidence concerning
special benefit determinations and proportionality analyses in the Original District administrative record bears directly
upon the validity of the Supplemental District, which is merely an extension of the Original District. The administrative
record of the Original District cannot be characterized as evidence that was never proffered to or considered by the
Town's council, which approved the formation of the Original District less than a year before it initiated proceedings to
impose a supplemental assessment. Under the circumstances, we conclude it is proper to consider evidence in the
Original District administrative record to the extent it relates to special benefit and proportionality determinations relied
upon by the Town in creating the Supplemental District.[10]

III. SPECIAL BENEFITS

Appellants contend the Town failed to meet its burden under article XIII D, section 4, subdivision (f) to demonstrate
that the properties in question receive a special benefit over and above the benefits conferred on the public at large. We
are not persuaded.

Only special benefits are assessable under Proposition 218. (Art. XIII D, § 4, subd. (a).) "If a proposed project will
provide both general benefits to the community and special benefits to particular properties, the agency can impose an
assessment based only on the special benefits. It must separate the general benefits from the special benefits and must
secure other funding for the general benefits. [Citations.]" (Silicon Valley, supra, 44 Cal.4th at p. 450.)

The state Constitution defines the term "special benefit" as "a particular and distinct benefit over and above general
benefits conferred on real property located in the district or to the public at large." (Art. XIII D, § 2, subd. (i).) "General
enhancement of property value does not constitute 'special benefit.'" (Ibid.)

A project confers a special benefit when the affected property receives a "direct advantage" from the improvement
funded by the assessment. (Silicon Valley, supra, 44 Cal.4th at p. 452, fn. 8.) By contrast, general benefits are
"derivative and indirect." (Id. at p. 453.) The key is whether the asserted special benefits can be tied to particular
parcels based on proximity or other relevant factors that reflect a direct advantage enjoyed by the parcel.[11] (Id. at pp.
455-456.)

The Supreme Court applied these principles in the seminal case of Silicon Valley, supra, 44 Cal.4th 431. There, the
court considered whether an assessment district created by Santa Clara County for the purpose of acquiring and
preserving open space satisfied article XIII D. The assessment district covered a vast area, including "approximately
314,000 parcels and over 800 square miles containing over 1 million people." (Silicon Valley, supra, at p. 439.) The
engineer's report set the amount of the assessment at $20 for a single-family home and provided a formula for
estimating the proportionate special benefit that other properties would receive. (Ibid.) The engineer's report
enumerated seven special benefits the assessment would confer on all residents and property owners in the district,
including protection of views and enhanced recreational activities, among others. (Id. at p. 453.)
The Silicon Valley court concluded that properties in the open space assessment district received no particular and distinct benefits beyond those shared by the district's property in general or by the public at large. (Silicon Valley, supra, 44 Cal.4th at p. 456.) The assessment district demonstrated "no distinct benefits to particular properties above those which the general public using and enjoying open space receives." (Id. at p. 455.) Any special benefits that might have arisen would likely have resulted from "factors such as proximity, expanded or improved access to the open space, or views of the open space. [Citation.]" (Ibid.) However, because the open space assessment district had "not identified any specific open space acquisition or planned acquisition, it [could not] show any specific benefits to assessed parcels through their direct relationship to the 'locality of the improvement.'" (Id. at pp. 455-456.) No attempt was made to tie benefits to particular parcels. (Id. at p. 454.) As a consequence, the court concluded the assessment failed to satisfy the special benefit requirement of article XIII D. (Id. at p. 456.)

The Supplemental District bears little relation to the defective assessment district in Silicon Valley. The Town's engineer of work identified three special benefits—improved aesthetics, increased safety, and improved service reliability. Each of these benefits is tied to individual properties based on proximity to existing overhead utility lines. The benefits are neither indirect nor derivative but instead are direct and relate to specific properties.

Appellants contend the Town failed to demonstrate that the aesthetics special benefit applies to each property in the Supplemental District, arguing that the engineer's report makes no attempt to tie the aesthetic benefit point to specific properties. They also argue that special benefits for safety and reliability do not pass constitutional muster. In essence, they claim there is nothing to indicate that placing overhead utility lines underground would improve safety or service reliability, asserting there have been no extraordinary safety or service reliability issues in the neighborhood. Appellants' claims lack merit.

A property received an aesthetics benefit point only if it is adjacent to visible overhead utility lines. Those properties in the Supplemental District that are not adjacent to overhead utility lines received no benefit points for aesthetics. Appellants' primary complaint with regard to the aesthetics benefit appears to be that the engineer of work assigned an equivalent aesthetics benefit to all parcels adjacent to overhead utility lines regardless of the degree to which the view from a parcel will be improved. However, the mere fact a particular benefit is conferred equally on most or all properties in an assessment district does not compel the conclusion the benefit is not tied to particular properties. The engineer of work explained that the key aesthetics criterion was proximity to overhead utility lines, without regard to subjective assessments of relative improvements in views.

As for appellants' contentions regarding safety and service reliability benefits, they have offered no support for their contention that the neighborhood has been free of service reliability and safety issues. Further, it requires no independent research to support the self-evident conclusion that placing overhead utility wires underground will reduce the risk of weather-related power outages as well as the safety risk posed by downed utility poles and lines. These benefits are plainly tied to specific properties located adjacent to utility poles and lines.

Appellants further contend the Town improperly treats the general enhancement of property value as a special benefit. They cite the engineer of work's conclusion that the undergrounding project will confer specific benefits because the improvements will "specifically enhance the values of the properties within the [Supplemental] District." Appellants assert "[p]roperty value enhancement from undergrounding of overhead utility wires is not a permissible consideration in a special assessment under [article XIII D]."

General enhancement of property value is a general benefit and thus not assessable under article XIII D. (Silicon Valley, supra, 44 Cal.4th at p. 454.) In other words, the mere fact that a project or service has the effect of enhancing property values in a community does not necessarily mean those properties enjoy a special benefit. On the other hand, the prohibition against basing assessments on general property value enhancements does not mean any benefit that
enhances property values is a general benefit. Nearly every assessment that confers a particular and distinct advantage on a specific parcel will also enhance the overall value of that property in some respect. Such an effect does not transform a special benefit into a general benefit. An increase in property value attributable to a project that provides a direct advantage to a particular property—instead of an indirect or derivative benefit—is a specific rather than a general enhancement in property value. Here, any enhancement in property values arises from specific benefits conferred on parcels in the Supplemental District.

Appellants complain that the engineer's report is flawed because it determined that the undergrounding project would yield no quantifiable general benefits for the community at large or the parcels within the Supplemental District. When determining whether benefits are general or special, we must be mindful of the rationale for making the distinction. The purpose of limiting assessments to special benefits conferred on particular properties is to avoid having property owners in an assessment district pay for general benefits enjoyed by the public at large. Conversely, if a project confers particular and distinct benefits upon specific properties in an assessment district, it would be unfair to have taxpayers outside the assessment district pay for those benefits that specifically benefit only property owners within the district. In this case, there is little reason to believe the undergrounding project will confer derivative and indirect benefits upon property owners or others outside the Supplemental District.[13]

Furthermore, the mere fact that properties throughout the Supplemental District share the same special benefit does not render that benefit "general" and therefore an improper subject of an assessment. Section 2, subdivision (i) of article XIII D specifies that a special benefit is a "particular and distinct benefit over and above general benefits conferred on real property located in the district . . . ." As the court in Silicon Valley observed, in a properly drawn district—"limited to only parcels receiving special benefits from the improvement—every parcel within that district receives a shared special benefit." (Silicon Valley, supra, 44 Cal.4th at p. 452, fn. 8.) One might be tempted to characterize these shared special benefits as "general" because they are not "particular and distinct" or "over and above" the benefits conferred on other properties in the district. However, the Supreme Court stated it did not "believe that the voters intended to invalidate an assessment district that is narrowly drawn to include only properties directly benefitting from an improvement." (Ibid.) As the court explained: "[I]f an assessment district is narrowly drawn, the fact that a benefit is conferred throughout the district does not make it general rather than special. In that circumstance, the characterization of a benefit may depend on whether the parcel receives a direct advantage from the improvement (e.g., proximity to a park) or receives an indirect, derivative advantage resulting from the overall public benefits of the improvement (e.g., general enhancement of the district's property values)." (Ibid.)

We conclude the Town has met its burden to establish that properties in the Supplemental District receive a particular and distinct benefit not shared by the district in general or the public at large within the meaning of article XIII D.

IV. PROPORTIONALITY

Appellants assert that the Town failed to meet its burden under article XIII D, section 4, subdivision (f) to demonstrate that the amounts of the contested assessments are proportional to, and no greater than, the benefits conferred on the properties in question. We agree. As we explain, the assessment scheme suffers from two infirmities that result in assessments that are disproportionate to special benefits. First, the Town's apportionment method is largely based on cost considerations rather than proportional special benefits. Second, properties within the Supplemental District are required to pay for special benefits conferred upon parcels that were excluded from the Supplemental District.

A. Apportionment Based Upon Cost Rather than Benefit

Under article XIII D, "[f]or an assessment to be valid, the properties must be assessed in proportion to the special benefits received . . . ." (Silicon Valley, supra, 44 Cal.4th at p. 456.) The public agency bears the burden of
demonstrating that the amount of any contested assessment is proportional to the benefits conferred on the property. (Art. XIII D, § 4, subd. (f.))

For the sake of clarity, it must be emphasized that an assessment is not measured by the precise amount of special benefits enjoyed by the assessed property. (White v. County of San Diego (1980) 26 Cal.3d 897, 905.) Instead, an assessment reflects costs allocated according to relative benefit received. As a general matter, an assessment represents the entirety of the cost of the improvement or property-related service, less any amounts attributable to general benefits (which may not be assessed), allocated to individual properties in proportion to the relative special benefit conferred on the property. (Ibid.; Art. XIII D, § 4, subd. (a.)) Proportional special benefit is the "equitable, nondiscriminatory basis" upon which a project's assessable costs are spread among benefited properties. (White v. County of San Diego, supra, at p. 905.) Thus, the "reasonable cost of the proportional special benefit," which an assessment may not exceed, simply reflects an assessed property's proportionate share of total assessable costs as measured by relative special benefits. (See Art. XIII D, § 4, subd. (a.).)

Here, the primary determinant of the assessment amount is the relative cost of constructing the capital improvement, not the proportional special benefit conferred on a property. As a consequence of this cost-based apportionment scheme, properties that receive identical special benefits pay vastly different assessments. In the case of single family residential parcels that received a total of three benefit points for aesthetics, safety, and service reliability, the different assessments for the three "benefit zones" are as follows:

- West Hawthorne Drive Area: $7,740
- Del Mar Valley Area: $14,812.21
- Hacienda Drive Area: $20,331.24

As the numbers make clear, the assessment for a property in the Hacienda Drive Area is nearly three times the assessment for a property in the West Hawthorne Drive Area receiving the same proportional benefit. This result violates the proportionality requirement of article XIII D.

The disproportionate assessments result directly from the engineer of work's creation of three "benefit zones" for which construction costs were determined—and apportioned—separately. The benefit zones have nothing to do with differential benefits among the three zones but instead are better characterized as "cost zones," as counsel for the Town acknowledged at oral argument. In other words, the engineer did not justify the zones based upon any differential benefit enjoyed by parcels within the different zones. Instead, the only justification for the different zones appears to be variances in cost per parcel of placing overhead utilities underground in the various areas of the Supplemental District. It is purportedly more costly to place utilities underground in the Hacienda Drive Area, where lot sizes are generally larger.

As a result of the manner in which the Town has allocated costs and determined benefits, almost all of the differential in assessments is based on cost rather than benefit. All but 23 of the 221 parcels in the Supplemental District are assigned three benefit points under the engineer of work's analysis. Thus, but for cost differentials, 198 of the 221 parcels would have identical assessments, if total project costs were divided among all parcels in proportion to special benefits. There are three different assessment amounts among those 198 parcels only because the engineer of work chose to determine and allocate costs separately in each of the three zones of benefit.

The Town acknowledges that the engineer of work allocated the cost of undergrounding based on varying construction costs throughout the Supplemental District. It claims that if construction costs were not determined and allocated zone-by-zone, then smaller properties in more dense areas, such as the West Hawthorne Drive Area, would subsidize undergrounding in less dense areas with larger lot sizes, such as the Hacienda Drive Area. The Town asserts that this result is prohibited by article XIII D.
The Town's approach has a certain appeal. After all, an apportionment method that determines assessments based upon the actual cost of constructing the improvement on each property, or within a particular neighborhood, would appear to be equitable. However, there are a variety of problems with the Town's approach.

Among other things, the Town's apportionment method violates the express terms of article XIII D, which specifies that the "proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement . . . ." (Art. XIII D, § 4, subd. (a), italics added.) Thus, article XIII D expressly contemplates that proportionate special benefit is a function of the total cost of a project, not costs determined on a property-by-property or a neighborhood-by-neighborhood basis.[14] Further, subdivision (f) of section 4 of article XIII D states that it is the public agency's burden to demonstrate that the "amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question." (Italics added.) The critical inquiry, therefore, concerns the special benefits conferred on the property. Properties that receive the same proportionate special benefit pay the same assessment, without regard to variations in the cost of construction among the properties.

There may be cases in which the relative cost of an improvement is a reliable measure of relative benefit conferred. This relationship does not always hold true, however. For example, one could envision an undergrounding project in which all properties receive an identical benefit—e.g., all the benefited properties sit on level ground, are the same size, have exactly the same street frontage, and have essentially the same view of overhead utility lines that will be removed. Assume for purposes of this hypothetical that it is substantially more expensive to place utilities underground in front of a particular group of properties because of the condition of the ground on which the homes sit (e.g., they are situated on top of solid rock that makes it difficult to dig trenches). Under the Town's logic, those properties should be assessed more to avoid having neighboring properties subsidize the properties' greater costs, even though it is acknowledged the project confers the same proportionate special benefit on all properties.

The fallacy in this approach is that it assumes the costs associated with particular properties—or a particular neighborhood—can be considered in isolation. To the contrary, the costs of an improvement project must be considered as a whole. A public improvement such as a utility undergrounding project is either undertaken in an entire district or not at all. In the hypothetical involving certain properties with higher construction costs, the neighboring properties enjoy the benefits of the undergrounding project only because the project was pursued in the entire assessment district, which necessarily includes the properties with higher construction costs.[15] It is for this reason that the individual assessments for benefited properties must be apportioned in relation to the entirety of the project's assessable costs, as article XIII D requires. (Art. XIII D, § 4, subd. (a).) To reiterate, proportionate special benefit is the basis upon which a project's total assessable costs are apportioned among parcels within an assessment district. This method ensures that each property owner pays an equitable share of the overall assessable cost as measured by the relative special benefit conferred on the property.

We do not suggest the Town should have applied equal assessments to each of the properties in the Supplemental District. It may be that lot size, length of street frontage with overhead wires, and/or some combination of similar factors are proper considerations in determining each property's relative special benefit. For example, in Dahms v. Downtown Pomona Property & Business Improvement Dist. (2009) 174 Cal.App.4th 708, 720-721 (Dahms), the Court of Appeal determined that an assessment for a downtown business district was properly apportioned based on building size, street frontage, and lot size. The apportionment formula (40 percent front footage, 40 percent building size, and 20 percent lot size) reflected that larger businesses would receive proportionally greater benefits from the business district than would businesses in smaller buildings on smaller lots. (Id. at p. 721.) Here, the Town did not establish or even suggest that lot density was a proper determinant of proportional special benefit.
During oral argument in this matter, the Town's counsel suggested the recently decided case of *Dahms* supports the proposition that properties may be assessed in proportion to the cost of providing an improvement, as opposed to the special benefit conferred by the improvement. The case stands for no such principle. The court in *Dahms* stated that the formula for determining special benefit turned upon lot size and street frontage because some properties received "more special benefit than others." (*Dahms, supra, 174 Cal.App.4th at p. 720.*) Specifically rejecting an argument that the apportionment formula should have been based on the total length of streets bordering all sides of a business instead of the business's front street footage, the court explained that "[i]t makes sense to use front footage rather than total street length to determine the *proportional special benefit* that a parcel will derive from the services of the [business district] (e.g., increased security, litter removal, and graffiti removal). For example, a clean and safe front entrance to a commercial parcel is more likely to constitute a *special benefit* to that parcel than a clean and safe side or rear, where there may or may not be any entrance at all. At the same time, the City's formula also takes into account other measures (namely, building size and lot size) of each parcel's size and consequent *proportional special benefit*, and those other measures should compensate for any disproportionality that might have resulted from exclusive reliance on front footage." (*Id. at p. 721, italics added.*) The apportionment formula in *Dahms* turned on special benefits and not upon costs.

Even if it were proper to divide the Supplemental District into different zones based upon special benefits conferred on properties in each of the zones, the approach followed by the Town nevertheless lacks adequate support in the record. As the map of the Supplemental District reflects, lots in the West Hawthorne Area are smaller, as are lots in the lower portion of the Del Mar Valley Area. Lots in the Hacienda Drive Area are larger, but so too are lots in the upper areas of the Del Mar Valley Area. Thus, if lot density were a determinant of special benefit conferred on a parcel, the division of zones selected by the engineer of work is illogical. The upper parts of the Del Mar Valley Area should be treated no differently than the Hacienda Drive Area; the lot sizes appear to be no different. In fact, many of the lots in the upper Del Mar Valley Area appear to be larger than lots in the Hacienda Drive Area, so it would appear that, under the Town's logic, the Hacienda Drive Area is actually subsidizing the upper reaches of the Del Mar Valley Area. In short, the manner in which the engineer of work divided the Supplemental District into three zones of benefit appears to be arbitrary, even assuming lot density has some bearing on proportionate special benefit. The engineer provided an inadequate justification for the particular boundaries delineating the benefit zones.

**B. Specially Benefited Properties Excluded from the Supplemental District**

Section 4, subdivision (a) of article XIII D provides that an agency proposing to "levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed." As contemplated by this constitutional provision, the boundaries of an assessment district are dictated by a determination of which properties receive special benefits. If a property receiving a special benefit is excluded from the assessment district, then the assessments on properties included in the district will necessarily exceed the proportional special benefit conferred on those properties. In such a case, the properties in the assessment district effectively subsidize the special benefit enjoyed by properties outside the district that pay no assessment.

Here, the Town excluded certain properties from the Supplemental District even though they receive special benefits. Specifically, the engineer of work saw fit to exclude two streets from the Supplemental District—Tanfield Road and Acacia Court. These streets are cul-de-sacs that extend off of Hacienda Drive. Tanfield Road has overhead utility lines and is not part of the undergrounding project. Acacia Court already has its utility lines placed underground and is also not part of the project. Based on maps contained in the record on appeal, it appears that nine parcels are located on Tanfield Road, while seven parcels are located on Acacia Court. There appears to be no dispute that both Tanfield Road and Acacia Court receive their electrical, telephone, and cable utilities from Hacienda Drive.
Initially, the engineer of work assigned no benefit points to the Tanfield Road and Acacia Court properties. However, in the final engineer's report, the engineer of work identified a parcel at 1 Tanfield Road, located at the corner of Tanfield Road and Hacienda Drive, that receives a special benefit from the proposed undergrounding project. The engineer determined that the property has a "secondary access point" on Hacienda Drive and that overhead wires crossing a corner of the property are slated to be removed during the undergrounding project. The engineer's report assigned the property half the benefit for aesthetics and half the benefit for safety, resulting in one full benefit point. Because the property was not included in the Supplemental District, the assessment that would have otherwise been applied to the property was deducted and "not assessed to the rest of the properties in the [Supplemental] District." In other words, the engineer of work deducted the cost of the proportional special benefit conferred on 1 Tanfield Road in order to prevent the properties in the Supplemental District from subsidizing that property's special benefit and paying correspondingly higher assessments as a result.

Our independent review indicates that all of the properties on Tanfield Road and Acacia Court should have been assigned special benefits, if the engineer of work's methodology had been applied consistently. Those properties are situated no differently than the properties on Noche Vista Lane and Geldert Court which, as previously discussed, are in areas where the utilities have already been placed underground. In the case of Noche Vista Lane, a cul-de-sac off of Hacienda Drive, and Geldert Court, a cul-de-sac off of Geldert Lane, the engineer of work determined the properties in those areas received half the benefit from service reliability and half the benefit from improved safety. The engineer reasoned that "their small systems are completely surrounded by and dependent on the larger overall system that is to be undergrounded." As a result, the properties benefit from increased service reliability. With respect to the safety benefit, the engineer reasoned that "ingress and egress from their property is directly affected by overhead lines and poles."

This reasoning applies equally to the excluded Tanfield Road and Acacia Court properties. The properties on Acacia Court, in particular, share the same reliability and safety benefits as the properties on Noche Vista Lane and Geldert Court.[16] Although the utilities on Acacia Court are already placed underground, its system is completely dependent upon the larger system that is being undergrounded. Further, ingress and egress from the property is through Hacienda Drive and is therefore directly affected by overhead lines and poles. If the engineer of work's methodology had been consistently applied, the seven parcels on Acacia Court should have received one benefit point each, composed of one-half of the reliability benefit and one-half of the service benefit. The same reasoning should also apply to the nine or so parcels on Tanfield Road, even though they will not have their utilities placed underground. They will enjoy increased service reliability because their system is completely dependent upon the larger overall system that is being undergrounded. There is less chance that downed power lines in the Supplemental District will cause a service interruption in their neighborhood. Moreover, they enjoy a safety benefit because ingress and egress to their cul-de-sac is through areas where overhead utilities will be placed underground.

Property owners in the Supplemental District are effectively subsidizing special benefits received by properties on Tanfield Road and Acacia Court. The exclusion of those areas from the Supplemental District causes the assessments to exceed the proportionate special benefit conferred on each parcel. This outcome violates the proportionality requirement of article XIII D, section 4, subdivision (a).

At oral argument, counsel for the Town acknowledged there may be imperfections in the way the Supplemental District is drawn, such as the exclusion of Tanfield Road and Acacia Court. Counsel nonetheless urged that we uphold the validity of the Supplemental District in spite of its imperfections, reasoning in effect that no special assessment district could survive scrutiny if courts expected rigorous mathematical precision in the calculation and apportionment of assessments. We agree with the Town in principle. Any attempt to classify special benefits conferred on particular properties and to assign relative weights to those benefits will necessarily involve some degree of imprecision. For example, in this case the engineer assigned equal weight to the three special benefits—aesthetics, service reliability,
and safety. While this formula may be a legally justifiable approach to measuring and apportioning special benefits, it is not necessarily the only valid approach. Whichever approach is taken to measuring and apportioning special benefits, however, it must be both defensible and consistently applied.

Here, the analysis adopted by the engineer was applied inconsistently. The result is that parcels on Noche Vista Lane were assessed for the Supplemental District while parcels on Acacia Court—which should have been treated the same as those on Noche Vista Lane—were not assessed at all. This disparity is not the product of excusable imprecision but instead reflects an inconsistent approach to imposing assessments. Taken together with the fact that assessments amounts are based on relative cost instead of proportionate special benefit, the flaws in the Supplemental District are simply too great to disregard as mere "imperfections."

In summary, because differences in assessments are primarily driven by cost differentials, the assessments are disproportionate, with parcels receiving the same special benefits assigned substantially different assessment amounts. Additionally, because certain parcels that receive a special benefit were excluded from the Supplemental District, the assessments exceed the proportional special benefit conferred on each parcel in the Supplemental District. Accordingly, we conclude the Supplemental District violates the proportionality requirement of article XIII D. In light of this conclusion, we need not reach the other arguments appellants raise.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to enter a new judgment granting appellants' petition for writ of mandate. The trial court shall issue a writ vacating the Town of Tiburon's Resolution No. 24-2006 and invalidating the assessments imposed by the Del Mar Valley Utility Undergrounding Supplemental Assessment District. Appellants shall recover their costs on appeal.

We concur:

Siggins, J.

Jenkins, J.

[1] Certain parcels with no potential for development were considered exempt from the assessment, such as parcels too small to be developed or those designated as open space.

[2] The plaintiff property owners sought to invalidate the resolution establishing the Original District on a number of grounds, including that the assessment violated article XIII D. (Bonander v. Town of Tiburon, supra, 46 Cal.4th at p. 650.) The trial court dismissed the complaint on procedural grounds, concluding that the plaintiffs had failed to comply with requirements applicable to validation actions (Code Civ. Proc., § 860 et seq.). (Bonander v. Town of Tiburon, supra, at p. 652.) After this court affirmed the dismissal, the Supreme Court accepted review of the matter. (Ibid.) The Supreme Court ultimately held that a property owner who contests an individual assessment levied under the Municipal Improvement Act of 1913 is not required to comply with procedural requirements applicable to validation actions. (Bonander v. Town of Tiburon, supra, at p. 659.) Accordingly, the trial court's judgment of dismissal was reversed and the plaintiffs were allowed to proceed with their challenge to the Original District. The record before this court does not disclose whether the trial court in that action has ruled on the challenge to the Original District or, if so, how the court ruled.

[3] The Town adopted the resolution of intention without requiring petitions of support from at least 60 percent of the parcels in the proposed Supplemental District. The Town reasons that the 70 percent favorable vote on the Original
District obviated the need for a separate petition to demonstrate support among property owners for pursuing the project.

[4] Streets and Highways Code section 10426 provides: "The supplemental assessment shall be made and collected in the same manner, as nearly as may be, as the first assessment. [¶] Subsequent supplemental assessments may be made, if necessary, to pay for the improvement. At the hearing the legislative body may confirm, modify, or correct the supplemental assessment. The decision of the legislative body thereon is final."

[5] For a parcel designated single family residential in the Hacienda Drive Area that received three benefit points, the proposed total assessment for the Supplemental District declined from $20,527.68 to $20,331.24, or a reduction of $196.44. Because the engineer of work's assessment methodology considered each benefit zone separately for purposes of allocating costs and calculating special benefits, the proposed assessments in the Del Mar Valley Area and the West Hawthorne Drive area were unaffected.

[6] The combined assessment from the Original District and the Supplemental District for a single family residential parcel receiving three benefit points was $20,268.19 in the West Hawthorne Drive Area, $36,529.25 in the Del Mar Valley Area, and $51,477.86 in the Hacienda Drive Area.

[7] Two of the appellants, Jimmie D. Bonander and Frank Mulberg, are also parties to the lawsuit seeking to invalidate the Original District.

[8] On the court's own motion, we take judicial notice of the 1996 ballot pamphlet materials associated with Proposition 218, including the summary prepared by the Attorney General, the Legislative Analyst's analysis, and the ballot arguments for and against the initiative. (See PG&E Corp. v. Public Utilities Com. (2004) 118 Cal.App.4th 1174, 1204, fn. 25.)

[9] Because the trial court ruled on appellants' writ claims before the Supreme Court decided Silicon Valley, the lower court did not independently review whether the Supplemental District satisfies article XIII D. Instead, the trial court applied a deferential standard of review, relying on case law later expressly disapproved by the Supreme Court in Silicon Valley. (Silicon Valley, supra, 44 Cal.4th at p. 450, fn. 6.) Although the trial court applied what turned out to be an improper standard of review to appellants' writ claims, no purpose would be served by remanding the matter to the trial court for reconsideration under the appropriate standard because our review is de novo and affords no deference to the trial court's determinations in any event. (But see Barber v. Long Beach Civil Service Com. (1996) 45 Cal.App.4th 652, 659-660 [reversal required where trial court failed to exercise independent judgment and appellate review limited to whether substantial evidence supports trial court's conclusions].)

[10] We do not suggest that our consideration of the Original District administrative record permits us to entertain a challenge to the validity of the Original District in this appeal, which is limited to a consideration of whether the Supplemental District complies with article XIII D and other applicable law. The Original District administrative record is relevant only insofar as it supports or undermines a claim that the Supplemental District satisfies the substantive benefit and proportionality requirements of article XIII D. Nevertheless, we acknowledge that this appeal may have a bearing on the separate lawsuit challenging the Original District to the extent that litigation remains pending and raises the proportionality issue that is dispositive in this appeal.

[11] The analysis prepared by the Legislative Analyst for Proposition 218 included as examples of "[t]ypical assessments that provide general benefits" "fire, park, ambulance, and mosquito control assessments." (Ballot Pamp., Gen. Elec., supra, analysis of Prop. 218 by legislative analyst, p. 73.)
Appellants assert—without support—that some properties in the Supplemental District that are not adjacent to poles and overhead wires still received a benefit point for aesthetics. Because appellants have not pointed to any evidence in the record to support this assertion, we disregard it.

As explained below in section IV.B, we agree with appellants that some specially benefited parcels were not included in the Supplemental District. That problem—excluding specially benefited parcels from an assessment district—is distinct from the issue of distinguishing between general and special benefits.

We are aware that the ballot materials for Proposition 218 explained that one purpose of the measure was to ensure that "no property owner's assessment is greater than the cost to provide the improvement or service to the owner's property." (Ballot Pamp., Gen. Elec., supra, analysis of Prop. 218 by legislative analyst, p. 74.) We do not read this statement to suggest that individual assessments may be determined based on the actual construction cost associated with a particular property. Instead, the "cost to provide the improvement" to a particular property necessarily takes into account the project's costs as a whole, apportioned to that property in an equitable manner according to special benefit. This interpretation is consistent with the express terms of article XIII D as well as other statements in the ballot materials, where it was clarified that "[a]ssessments are limited to the special benefit conferred." (Ballot Pamp., Gen. Elec., supra, Attorney General's summary of Prop. 218, p. 72.)

The Town complains that aggregating costs for an entire improvement project causes low-cost areas to subsidize high-cost areas. This is not necessarily so. It may be that the proportional special benefit conferred on properties in the area with lower construction costs is less than that conferred on properties in the area with higher construction costs, resulting in proportionally larger assessments in the high-cost area. In any event, because the low-cost properties cannot enjoy the benefits of the improvement project without inclusion of the high-cost properties in the district, it is only fair that the entirety of the assessable construction cost is spread among all properties in proportion to special benefits.

Although the final engineer's report purports to justify the exclusion of Acacia Court from the Supplemental District on the ground its utility poles and lines have already been placed underground, the report contains no explanation as to why that street is treated differently from Noche Vista Lane or Geldert Court, which have also had utility lines and poles placed underground. One possible explanation for the differential treatment is that Noche Vista Lane is completely surrounded by the Supplemental District, whereas Tanfield Road and Acacia Court are not surrounded by the Supplemental District but instead are situated at its border. This explanation fails to justify the differential treatment, however, because the safety and service reliability benefits do not turn on whether a property is "surrounded" by other properties included in the district. Instead, the relevant criteria in assigning these benefits are (1) the source of the utilities supplying electrical, cable, and telephone services to the area, and (2) whether ingress and egress to the property is through areas that will have their utilities placed underground. For all practical purposes, Tanfield Road and Acacia Court are "surrounded" by the Supplemental District because they receive their utilities from the Supplemental District and ingress and egress is through the Supplemental District.

We deny as moot appellants' request for judicial notice of the legislative history of Government Code section 53753.

186 Cal.Rptr.3d 362

CAPISTRANO TAXPAYERS ASSOCIATION, INC., Plaintiff and Respondent,

v.
I. INTRODUCTION

Southern California is a "semi-desert with a desert heart." Visionary engineers and scientists have done a remarkable job of making our home habitable, and too many of us south of the Tehachapis never give a thought to its remarkable reclamation. In his brilliant — if opinionated — classic Cadillac Desert, the late Marc Reisner laments how little appreciation there is of "how difficult it will be just to hang on to the beachhead they have made.

In this case we deal with parties who have an acute appreciation of how tenuous the beachhead is, and how desperately we all must fight to protect it. But they disagree about what steps are allowable — or required — to accomplish that task. We are called upon to determine not what is the right — or even the more reasonable — approach to the beachhead's preservation, but what is the one chosen by the state's voters.

We hope there are future scientists, engineers, and legislators with the wisdom to envision and enact water plans to keep our beloved Cadillac Desert habitable. But that is not the court's mandate. Our job — and it is daunting enough — is solely to determine what water plans the voters and legislators of the past have put in place, and to determine whether the trial court's rulings complied with those plans.
We conclude the trial court erred in holding that Proposition 218 does not allow public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water — such as building a recycling plant. Its findings were that future water provided by the improvement is not immediately available to customers. (See Cal. Const., art. XIII D, § 6, subd. (b)(4) [no fees "may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question"].) But, as applied to water delivery, the phrase "a service" cannot be read to differentiate between recycled water and traditional, potable water. Water service is already "immediately available" to all customers, and continued water service is assured by such capital improvements as water recycling plants. That satisfies the constitutional and statutory requirements.

However, the trial court did not err in ruling that Proposition 218 requires public water agencies to calculate the actual costs of providing water at various levels of usage. Article XIII D, section 6, subdivision (b)(3) of the California Constitution, as interpreted by our Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 221 [46 Cal.Rptr.3d 73, 138 P.3d 220] (*Bighorn*) provides that water rates must reflect the "cost of the service attributable" to a given parcel. While tiered, or inclined rates that go up progressively in relation to usage are perfectly consonant with article XIII D, section 6, subdivision (b)(3) and *Bighorn*, the tiers must still correspond to the actual cost of providing service at a given level of usage. The water agency here did not try to calculate the cost of actually providing water at its various tier levels. It merely allocated all its costs among the price tier levels, based not on costs, but on pre-determined usage budgets. Accordingly, the trial court correctly determined the agency had failed to carry the burden imposed on it by another part of Proposition 218 (art. XIII D, § 6, subd. (b)(5)) of showing it had complied with the requirement water fees not exceed the cost of service attributable to a parcel. That part of the judgment must be affirmed.

II. FACTS

Sometimes cities are themselves customers of a water district, the best example in the case law being the City of Palmdale, which successfully invoked Proposition 218 to challenge the rates it was paying to a water district. (See *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926 [131 Cal.Rptr.3d 373] (*Palmdale*).) And sometimes cities are, as in the present case, their own water district. As amicus curiae Association of California Water Agencies (ACWA) points out, government water suppliers in California are a diverse lot that includes municipal water districts, irrigation districts, county water districts, and, in some cases, cities themselves. To focus on its specific role in this case as a municipal water supplier — as distinct from its role as the provider of municipal services which consume water such as parks, city landscaping or public golf courses — we will refer to appellant City of San Juan Capistrano as "City Water."

In February 2011, City Water adopted a new water rate structure recommended by a consulting firm. The way City Water calculated the new rate structure is well described in City Water's supplemental brief of November 25, 2014. City Water followed a pattern generally recommended by a manual used by public water agencies throughout the western United States known as the "M-1" manual. It first ascertained its total costs, including things like debt service on previous infrastructural improvements. It then

*1499 identified components of its costs, such as the cost of billing and the cost of water treatment. Next it identified classes of customers, differentiating, for example, between "regular lot" residential customers and "large lot" residential customers, and between construction customers and agricultural customers. Then, in regard to each class, City Water
calculated four possible budgets of water usage, based on historical data of usage patterns: low, reasonable, excessive and very excessive.

The four budgets were then used as the basis for four distinct "tiers" of pricing. For residential customers, tier 1, the low budget, was assumed to be exclusively indoor usage, based on World Health Organization guidelines concerning the "minimum quantity of water required for survival," with adjustments for things like "low-flush toilets and other high-efficiency appliances." Tier 2, the reasonable budget, included an outdoor allocation based on "typical landscapes," and assumed "use of native plants and drought-tolerant plants." The final two tiers were based on budgets of what City Water considers excessive usages of water or overuse volumes. Using these four budgets of consumption levels, City Water allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs, and thus the four-tier system would be, taken as a whole, revenue neutral, and City Water would not make a profit on its pricing structure. City Water did not try to calculate the incremental cost of providing water at the level of use represented by each tier, and in fact, at oral argument in this court, admitted it effectively used revenues from the top tiers to subsidize belowcost rates for the bottom tier.

Here is the rate structure adopted, as applied to residential customers:

<table>
<thead>
<tr>
<th>Tier</th>
<th>Usage</th>
<th>Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Up to 6 ccf[7]</td>
<td>$2.47 per ccf</td>
</tr>
<tr>
<td>2</td>
<td>7 to 17 ccf[8]</td>
<td>$3.29 per ccf</td>
</tr>
<tr>
<td>3</td>
<td>18 to 34 ccf[9]</td>
<td>$4.94 per ccf</td>
</tr>
<tr>
<td>4</td>
<td>Over 34 ccf[10]</td>
<td>$9.05 per ccf</td>
</tr>
</tbody>
</table>

City Water obtains water from five separate sources: a municipal groundwater recovery plant, the Metropolitan Water District, five local groundwater wells, recycled water wells, and the nearby Moulton Niguel Water District. With the exception of water obtained from the Metropolitan Water District, City Water admits in its briefing that the record does not contain any breakdown as to the relative cost of each source of supply.

The breakdown of cost from each of its various sources of water is, in percentage terms:

<table>
<thead>
<tr>
<th>Source</th>
<th>Percent of Supply</th>
<th>Cost to Supply</th>
</tr>
</thead>
<tbody>
<tr>
<td>Groundwater Recovery Plant</td>
<td>51.95%</td>
<td>Not ascertained</td>
</tr>
<tr>
<td>Metropolitan Water District</td>
<td>28.54%</td>
<td>$1,007 per-acre foot[11]</td>
</tr>
<tr>
<td>Local Wells</td>
<td>7.79%</td>
<td>Not ascertained</td>
</tr>
<tr>
<td>Recycled Wells</td>
<td>6.11%</td>
<td>Not ascertained</td>
</tr>
<tr>
<td>Moulton Niguel Water District</td>
<td>5.61%</td>
<td>Not ascertained</td>
</tr>
</tbody>
</table>
Various percentages of City Water's overhead — or fixed costs in the record — were allocated in percentages to some of the sources of water, so the price per tier reflected a percentage of fixed costs and costs of some sources.

This chart reflects those allocations:

<table>
<thead>
<tr>
<th>Tier</th>
<th>Price</th>
<th>Percentage Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$2.47</td>
<td>$1.78 to fixed costs, $0.62 to wells</td>
</tr>
<tr>
<td>2</td>
<td>$3.29</td>
<td>$1.78 to fixed, $1.46 to wells</td>
</tr>
<tr>
<td>3</td>
<td>$4.94</td>
<td>$1.53 to fixed, $0.69 to wells, $0.17 to the Metropolitan Water District, and $2.50 to the groundwater recovery plant</td>
</tr>
<tr>
<td>4</td>
<td>$9.05</td>
<td>0 to fixed, 0 to wells, $0.53 to groundwater recovery plant, $2.53 to recycled, $3.32 to the Metropolitan Water District, and $2.64 to penalty set aside</td>
</tr>
</tbody>
</table>

There is no issue in this case as to the process of the adoption of the new rates, such as whether they should have been voted on first under the article XIII C part of Proposition 218. For purposes of this appeal it is enough to say City Water adopted them.\[\text{[12]}\]

In August 2012, the Capistrano Taxpayers Association, Inc. (CTA), filed this action, challenging City Water's new rates as violative of Proposition 218, specifically article XIII D, section 6, subdivision (b)(3)'s limit on fees to the "cost of the service attributable to the parcel." After a review of the administrative record and hearing, the trial court found the rates were not compliant with article XIII D, noting it "could not find any specific financial cost data in the A/R to support the substantial rate increases" in the progressively more expensive tiers. In particular the trial judge found a lack of support for the inequality between the tiers.

The statement of decision also concluded that the imposition of charges for recycling within the rate structure violated the "immediately available" provision in article XIII D, section 6, subdivision (b)(4), because recycled water is not used by residential parcels. (City Water concedes that when the recycling plant comes on line, it will supply water to some, but not all, of its customers. Residences, for example, are not typically plumbed to receive non-potable recycled water.) City Water has timely appealed from the declaratory judgment, challenging both determinations.

III. DISCUSSION

A. Capital Costs and Proposition 218

We first review the constitutional text. Article XIII D, section 6, subdivision (b)(4) provides: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4."

The trial court ruled City Water had violated this provision by "charging certain ratepayers for recycled water that they do not actually use and that is
not immediately available to them." The trial judge specifically found, in his statement of decision, that "City [Water] imposed a fee on all ratepayers for recycled water services and delivery of recycled water services, despite the fact that not all ratepayers used recycled water or have it immediately available to them or would ever be able to use it."

(1) But the trial court assumed that providing recycled water is a fundamentally different kind of service from providing traditional potable water. We think not. When each kind of water is provided by a single local agency that provides water to different kinds of users, some of whom can make use of recycled water (for example, cities irrigating parkland) while others, such as private residences, can only make use of traditional potable water, providing each kind of water is providing the same service. Both are getting water that meets their needs. Non-potable water for some customers frees up potable water for others. And since water service is already immediately available to all customers of City Water, there is no contravention of subdivision (b)(4) in including charges to construct and provide recycled water to some customers.

On this point, Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586 [163 Cal.Rptr.3d 243] (Griffith) is instructive. Griffith involved an augmentation fee on parcels that had their own wells. An objection to the augmentation fee by the well owners was that the fee included a charge for delivered water, even though some of the properties were outside the area and not actually receiving delivered water. The Griffith court said that even if some parcel owners were not receiving delivered water, revenues from the augmentation fee still benefited those parcels, since they funded "activities required to prepare or implement the groundwater management program for the common benefit of all water users." (Id. at p. 602.) In Griffith the augmentation fee was thus intended to fund aggressive capital investments to increase the general supply of water, including some customers receiving delivered water when other customers did not. It was undeniable that by funding delivered water to some customers water was freed up for all customers. (See Griffith, supra, 220 Cal.App.4th at p. 602; accord, Paland v. Brooktrails Township Community Services Dist. Bd. of Directors (2009) 179 Cal.App.4th 1358 [102 Cal.Rptr.3d 270] [customer in rural area who periodically went inactive still had water immediately available to him].)

In the present case, there is a Government Code definition of water which shows water to be part of a holistic distribution system that does not distinguish between potable and non-potable water: "'Water' means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source." (Gov. Code, § 53750, subd. (m).)

A recycling plant, like other capital improvements to increase water supply, obviously entails a longer timeframe than a residential customer's normal one-month billing cycle. As shown in Morgan v. Imperial Irrigation Dist. (2014) 223 Cal.App.4th 892 [167 Cal.Rptr.3d 687], the timeframe for the calculation of the true cost of water can be, given capital improvements, quite long. (See id. at p. 900 [costs amortized over a six-year period].) And, as pointed out by amicus curiae Howard Jarvis Taxpayers Association, Government Code section 53756 contemplates timeframes for water rates that can be as much as five years. There is no need, then, to conclude that rates to pay for a recycling plant have to be figured on a month-to-month basis.

(2) The upshot is that within a five-year period, a water agency might develop a capital-intensive means of production of what is effectively new water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced. As amicus curiae Mesa Water District points out, Water Code section 31020 gives local water agencies the power to do acts to "furnish sufficient water in the district for any present or future beneficial use." (Wat. Code, § 31020, italics added.)
The trial court thus erred in concluding the inclusion of charges to fund a recycling operation was, by itself, a violation of subdivision (b)(4).

(3) However, the record is insufficient to allow us to determine at this level whether residential ratepayers who only use six ccf or less — what City Water considers the superconservers — are being required to pay for recycling facilities that would not be necessary but for above-average consumption. Proposition 218 protects lower-than-average users from having to pay rates that are above the cost of service for them because those rates include capital investments their levels of consumption do not make necessary. We note, in this regard, that in Palmdale, one of the reasons the court there found the tiered pricing structure to violate subdivision (b)(3) was the perverse effect of affirmatively penalizing conservation by some users. (See Palmdale, supra, 198 Cal.App.4th at pp. 937-938; accord, Brydon, supra, 24 Cal.App.4th at p. 202 ["To the extent that certain customers overutilize the resource, they contribute disproportionately to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water."].)

There is a case with an analogous lacuna, the Supreme Court case of California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421 [121 Cal.Rptr.3d 37, 247 P.3d 112] (Farm Bureau). In Farm Bureau, the record was also unclear as to the issue of apportionment between a regulatory activity's fees and its costs. (Id. at p. 428.) Accordingly, the high court directed the matter to be remanded to the trial court for such necessary findings.

That seems to us the appropriate way to complete the record in our case. Following the example of Farm Bureau, we remand the matter for further findings on whether charges to develop City Water's nascent recycling operation have been improperly allocated to users whose levels of consumption are so low that they cannot be said to be responsible for the need for that recycling.

B. Tiered Pricing and Cost of Service

1. Basic Analysis

We begin, as we did with the capital cost issue, with the text of the Constitution. In addition to subdivision (b)(3), the main provision at issue in this case, we also quote subdivision (b)(1), because it throws light on subdivision (b)(3). Subdivision (b) describes "Requirements for Existing, New or Increased Fees and Charges," and provides that, "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] (3) 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." (Italics added.)

In addition to these two substantive limits on fees, article XIII D, section 6, subdivision (b)(5) puts an important procedural limit on a court's analysis in regard to the burden of proof: "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." The trial court found City Water had failed to carry its burden of proof under subdivision (b)(5) of showing its 2010 tiered water fees were proportional to the cost of service attributable to each customer's parcel as required by subdivision (b)(3).

As respondent CTA quickly ascertained, the difference between tier 1 and tier 2 is a tidy 1/3 extra, the difference between tier 2 and 3 is a similarly exact 1/2 extra, and the difference between tier 3 and tier 4 is precisely 5/6ths extra. This fractional precision suggested to us that City Water did not
*1505 attempt to correlate its rates with cost of service. Such mathematical tidiness is rare in multidecimal point calculations. This conclusion was confirmed at oral argument in this court, when City Water acknowledged it had not tried to correlate the incremental cost of providing service at the various incremental tier levels to the prices of water at those levels.

In voluminous briefing by City Water and its amici curiae allies, two somewhat overlapping core thoughts emerge: First, they contend that when it comes to water, local agencies do not have to — or should not have to — calculate the cost of water service at various incremental levels of usage because the task is simply too complex and thus not required by our Constitution. The second core thought is that even if agencies are required to calculate the actual costs of water service at various tiered levels of usage, such a calculation is necessarily, as City Water's briefing contends, a legislative or quasilegislative, discretionary matter, largely insulated from judicial review. We cannot agree with either assertion.

(4) The appropriate way of examining the text of Proposition 218 has already been spelled out by the Supreme Court in Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448 [79 Cal.Rptr.3d 312, 187 P.3d 37] (Silicon Valley): "We `''must enforce the provisions of our Constitution and "may not lightly disregard or blink at ... a clear constitutional mandate.'''" [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.] [¶]

(5) Proposition 218 specifically states that `'[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.' (Ballot Pamp., [Gen. Elec. (Nov. 5, 1996)] text of Prop. 218, § 5, p. 109; see Historical Notes, [2A West's Ann. Const. (2008 supp.) foll. Cal. Const., art. XIII C.] at p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent." (Silicon Valley, supra, 44 Cal.4th at p. 448, italics added.)

(6) If the phrase "proportional cost of the service attributable to the parcel" (italics added) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really is an ascertainable cost of service that can be attributed to a specific — hence that little word "the" — parcel. Otherwise, the cost of the service language would be meaningless. Why use the phrase "cost of the service to the parcel" if a local agency does not actually have to ascertain a cost of service to that particular parcel?

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(7) The presence of subdivision (b)(1) of section 6, article XIII D, just a few lines above subdivision (b)(3), confirms our conclusion. Constitutional provisions, particularly when enacted in the same measure, should be construed together and read as a whole. (Bighorn, supra, 39 Cal.4th at p. 228.) The "proportional cost of the service" language from subdivision (b)(3) is part of a general subdivision (b), and there is an additional reference to costs in subdivision (b)(1). Subdivision (b)(1) provides that the total revenue from fees "shall not exceed the funds required to provide the property related service." (Italics added.)

(8) It seems to us that to comply with the Constitution, City Water had to do more than merely balance its total costs of service with its total revenues — that is already covered in subdivision (b)(1). To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since City Water did not try to calculate the actual costs of service for the various tiers, the trial court's ruling on tiered pricing must be upheld simply on the basis of the constitutional text.
We find precedent for our conclusion in the *Palmdale* case. There, a water district obtained its water from two basic sources: 60 percent from a reservoir and the state water project, and the 40 percent balance from the district's own area groundwater wells. Most (about 72 percent) of the water went to single-family residences, with irrigation users accounting for 5 percent of the distribution. (*Palmdale, supra, 198 Cal.App.4th at p. 928.*) For the previous five years, the district had spent considerable money to upgrade its water treatment plant ($56 million) but revenues suffered from a "decline in water sales," so its reserves were depleted. The district wanted to issue more debt for "future capital projects." (*Id. at pp. 928-929.*) Relying on consultants, the water district adopted a new, five-tiered rate structure, which progressively increased rates (for the top four tiers) for three basic categories of customers: residences, businesses, and irrigation projects. The tiered budgets for irrigation users were more stringent than for residential and commercial customers. (*Id. at p. 930.*) The way the tiers operated, all three classes of customers got a tier 1 budget, but irrigation customers had less leeway to increase usage without progressing to another tier. Thus, for example, the tier 2 rates for residential customers did not kick in until 125 percent of the budget, but tier 2 rates for irrigation customers kicked in at 110 percent of the budget. The tiered rate structure was itself based on a monthly allocated water budget. (*Ibid.*)

Two irrigation users — the *city* itself and its redevelopment agency — sought to invalidate the new rates. The trial court had the advantage of the newly decided Supreme Court opinion in *Silicon Valley*, which had clarified the standard of review for Proposition 218 cases. There, the high court made it clear that in Proposition 218 challenges to agency action, the agency had to bear the burden of proof of demonstrating compliance with Proposition 218, and both trial and reviewing courts are to apply an independent review standard, not the traditional, deferential standards usually applicable in challenges to governmental action. (*Silicon Valley, supra, 44 Cal.4th at p. 448.*) More directly, said *Silicon Valley*, it is not enough that the agency have substantial evidence to support its action. That substantial evidence must itself be able to withstand independent review. (See *id.* at pp. 441, 448-449 [explaining why substantial evidence to support the agency action standard was too deferential in light of Prop. 218's liberal construction in favor of taxpayer feature].)

With this in mind, the *Palmdale* court held the district had failed to carry its burden of showing compliance with Proposition 218. (*Palmdale, supra, 198 Cal.App.4th at pp. 937-938.*) The core of the *Palmdale* court's reasoning was twofold. First, there was discrimination against irrigation-only customers, giving an unfair price advantage to those customers in other classes who were inclined to inefficiently use — or, for that matter, waste — outdoor water. (The opinion noted the perfect exemplar of water waste: hosing off a parking lot.) Thus an irrigation user, such as a *city* providing playing fields, playgrounds and parks, was disproportionately impacted by the inequality in classes of users. (*Palmdale, supra, 198 Cal.App.4th at p. 937.*) Second, the discrimination was gratuitous. The district's own consultants had proposed a "cost of service" option that they considered Proposition 218 compliant, but the district did not choose it because it preferred a "fixed" option providing better "rate stability." (*Palmdale, supra, 198 Cal.App.4th at pp. 937, 929.*) In fact the choice had the perverse effect of entailing a "weaker signal for water conservation" for "small customers who conserve water." (*Id. at pp. 929, 937, some italics added.*)

We recognize that *Palmdale* was primarily focused on inequality between classes of users, as distinct from classes of water rate tiers. But, just as in *Palmdale* where the district never attempted to justify the inequality "in the cost of providing water" to its various classes of customers at each tiered level (*Palmdale, supra, 198 Cal.App.4th at p. 937*), so *City* Water has never attempted to justify its price points as based on costs of service for those tiers. Rather, *City* Water merely used what it thought was its legislative, discretionary power to attribute percentages of total costs to the various tiers. While an interesting conversation might be had about whether this was reasonable or wise, we can find no room for arguing its constitutionality. It does not comply with the mandate of the voters as we understand it.
2. City Water's Arguments

a. Article X, Section 2

In supplemental briefing prior to oral argument, this court pitched a batting practice fastball question to City Water, intended to give the agency its best chance of showing that the prices for its various usage tiers, particularly the higher tiers (e.g., $4.94 for all usage over 17 ccf to 34 ccf, and $9.05 for usage over 34 ccf) corresponded with its actual costs of delivering water in those increments. We were hoping that, maybe, we had missed something in the record that would demonstrate the actual cost of delivering water for usage over 34 ccf per month really is $9.05 per ccf, and City Water would hit our question into the upper deck.

What we got back was a rejection of the very idea behind the question. As would later be confirmed at oral argument, City Water's answer was that there does not have to be a correlation between tiered water prices and the cost of service. Its position is that the "cost-of-service principle of Proposition 218" must be "balance[d]" against "the conservation mandate of article X, section 2." In short, City Water justifies the lack of a correlation between the marginal amounts of water usage represented by its various tiers and the actual cost of supplying that water by saying the lack of correlation is excused by the subsidy for low usage represented by tier 1, on the theory that subsidized tier 1 rates are somehow required by article X, section 2. While we agree that low-cost water rates do not, in and of themselves, offend subdivision (b)(3) (see Morgan v. Imperial Irrigation Dist., supra, 223 Cal.App.4th at p. 899), we cannot adopt City Water's constitutional extrapolation of that point.

We quote the complete text of article X, section 2 in the footnote [15] Article X, section 2 was enacted in 1928 in reaction to a specific Supreme Court case

The voters overturned Herminghaus in the 1928 election by adopting article X, section 2, then denoted article XIV, section 3. (See Gin S. Chow v. City of Santa Barbara (1933) 217 Cal. 673, 699 [22 P.2d 5] (Gin Chow).) In the 1976 constitutional revision, old article XIV, section 3, was recodified verbatim as article X, section 2. (See Gray, "In Search of Bigfoot": The Common Law Origins of Article X, Section 2 of the California Constitution (1989) 17 Hastings Const. L.Q. 225 (hereinafter Origins of Article X, Section 2).)

The purpose of article X, section 2 was described in Gin Chow, the first case to reach the Supreme Court in the wake of the adoption of what is now
article X, section 2, in 1928. Justice Shenk, having been vindicated by the voters on the point of a perceived need to prevent the waste of water by letting it flow to the sea, summarized the new amendment in terms emphasizing beneficial use: "The purpose of the amendment was stated to be 'to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea', and is an effort 'on the part of the state, in the interest of the people of the state, to conserve our waters' without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners. That such purpose is reflected in the language of the amendment is beyond question. Its language is plain and unambiguous. In the main it is an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource, and thereby render available for beneficial use that portion of the waters of our rivers and streams which, under the old riparian doctrine, was of no substantial benefit to the riparian owner and the conservation of which will result in no material injury to his riparian right, and without which conservation such waters would be wasted and forever lost." (Gin Chow, supra, 217 Cal. at p. 700.)

The emphasis in the actual language of article X, section 2 is thus on a policy that favors the beneficial use of water as against the waste of water for nonbeneficial uses. That is what one would expect, consistent with both Justice Shenk's dissent in Herminghaus and his majority opinion in Gin Chow. (See Gray, supra, Origins of Article X, Section 2, 17 Hastings Const. L.Q. at p. 263 [noting emphasis in text on beneficial use].) The word "conservation" is used in the introductory sentence of the provision in the context of promoting beneficial uses: "the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." (Origins of Article X, Section 2, at p. 225, italics added.)

But nothing in article X, section 2, requires water rates to exceed the true cost of supplying that water, and in fact pricing water at its true cost is compatible with the article's theme of conservation with a view toward reasonable and beneficial use. (See Palmdale, supra, 198 Cal.App.4th at pp. 936-937 [reconciling art. X, § 2 with Prop. 218]; accord, Brydon, supra, 24 Cal.App.4th at p. 197 [noting that incremental rate structures create an incentive to reduce water use].) Thus it is hard for us to see how article X, section 2, can be read to trump subdivision (b)(3). We would note here that in times of drought — which looks increasingly like the foreseeable future — providing water can become very pricey indeed.[L8] And, we emphasize, there

*1511 is nothing at all in subdivision (b)(3) or elsewhere in Proposition 218 that prevents water agencies from passing on the incrementally higher costs of expensive water to incrementally higher users. That would seem like a good idea. But subdivision (b)(3) does require they figure out the true cost of water, not simply draw lines based on water budgets. Thus in Palmdale, the appellate court perceived no conflict between Proposition 218 and article X, section 2, so long as article X, section 2 is not read to allow water rates that exceed the cost of service. Said Palmdale: "California Constitution, article X, section 2 is not at odds with article XIII D so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel.' (Art. XIII D, § 6, subd. (b), par. (3))." (Palmdale, supra, 198 Cal.App.4th at pp. 936-937, italics added.) And as its history, and the demonstrated concern of the voters in 1928 demonstrates, article X, section 2 certainly does not require above-cost water rates.

In fact, if push came to shove and article X, section 2, really were in irreconcilable conflict with article XIII D, section 6, subdivision (b)(3), we might have to read article XIII D so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel.' (Art. XIII D, § 6, subd. (b), par. (3))." [L8] And, we emphasize, there

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Fortunately, that problem has not arisen. We perceive article X, section 2 and article XIIID, section 6, subdivision (b) (3) to work together to promote increased supplies of water — after all, the main reason article X, section 2 was enacted in the first place was to ensure the capture and beneficial use of water and prevent its wasteful draining into the ocean. As a pre-Proposition 218 case, *Brydon, supra*, 24 Cal.App.4th 178 observed, one of the benefits of tiered rates is that it is reasonable to assume people will not waste water as its price goes up. (See id. at p. 197 [noting that incremental rate structures create an incentive to reduce water use].) Our courts have made it clear they interpret the Constitution to allow tiered pricing; but the voters have made it clear they want it done in a particular way.

**b. Brydon and Griffith**

We believe the precedent most on point is *Palmdale*, and we read *Palmdale* to support the trial court's conclusion *City Water* did not comply

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*1512 with the subdivision (b)(3) requirement that rates be proportional to cost of service. The two cases *City Water* relies on primarily for its opposite conclusion, *Brydon* and *Griffith*, do not support a different result.

*Brydon* was a pre-Proposition 218 case upholding a tiered water rate structure as against challenges based on 1978's Proposition 13 rational basis and equal protection challenges. Similar to the case at hand, the water district promulgated an "inclining block rate structure." (*Brydon, supra*, 24 Cal.App.4th at p. 182; see p. 184 [details of four-tier structure].) Proposition 218 had not yet been enacted, so the opponents of the block rate structure did not have the "proportional cost of the service attributable to the parcel" language in subdivision (b)(3) to use to challenge the rate structure. They relied, rather, on the theory that Proposition 13 made the rate structure a "special tax," requiring a vote. (*Brydon*, at p. 182.) As a backup they made traditional rational basis and equal protection arguments. They claimed the rate structure was "arbitrary, capricious and not rationally related to any legitimate legislative or administrative objective" and, further, that the structure unreasonably discriminated against customers in the hotter areas of the district. (*Brydon, supra*, at p. 182.) The *Brydon* court rejected both the Proposition 13 and rational basis/equal protection arguments.

But *Brydon* — though it might still be read as evidence that tiered pricing not otherwise connected to cost of service would survive a rational basis or equal protection challenge — simply has no application to post-Proposition 218 cases. In fact, the construction of Proposition 13 applied by *Brydon* was based on cases Proposition 218 was designed to overturn. [19] The best example of such reliance was *Brydon's* declination to follow *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227 [211 Cal.Rptr. 567] (*Beaumont*) on the issue of the burden of proof. *Beaumont* had held it was the agency that had the burden of proof to show compliance with Proposition 13. *Brydon*, however, said the burden was on the taxpayers to show lack of compliance. In coming to its conclusion, *Brydon* invoked *Knox v. City of Orland* (1992) 4 Cal.4th 132 [14 Cal.Rptr.2d 159, 841 P.2d 144]. *Knox*, said *Brydon*, had "cast substantial doubt" on the "propriety of shifting the burden of proof to the agency." (*Brydon, supra*, 24 Cal.App.4th at

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*1513 p. 191.) But, more than a decade later, our Supreme Court in *Silicon Valley* recognized that *Knox* itself was one of the targets of Proposition 218. (See *Silicon Valley, supra*, 44 Cal.4th at p. 445.) [20] In the wake of *Knox's* fate (see in particular subd. (b)(5) [changing burden of proof]), it seems safe to say that *Brydon* itself was part of the general case law which the enactors of Proposition 218 wanted replaced with stricter controls on local government discretion.

As the *Silicon Valley* court observed, Proposition 218 effected a paradigm shift. Proposition 218 was passed by the voters in order to curtail discretionary models of local agency fee determination. (See *Silicon Valley, supra*, 44 Cal.4th at p. 446 ["As further evidence that the voters sought to curtail local agency discretion in raising funds ...."].) [21] Allocation of water rates might indeed have been a purely discretionary, legislative task when *Brydon* was decided, but not after passage of Proposition 218.
The other key case in which City Water's analysis of this point is Griffith. There, the fee itself varied according to the location of the property, e.g., whether the parcels with wells were coastal and metered, noncoastal and metered, or residential and nonmetered. Objectors to the fee asserted certain tiers in the fee, based on the geographic differences in the parcels covered by the fee, were not proportional to the cost they were paying. One objector in particular complained the fee was improperly established by working backwards from the overall amount of the project, subtracting other revenues, the balance being the augmentation charge, which was then apportioned among the users. (Griffith, supra, 220 Cal.App.4th at p. 600.) This objector argued that the proportional cost of service had to be calculated prior to setting the rate for the charge.

The court noted the M-1 industry manual recommends such a work-backwards-from-total-cost methodology in setting rates, and held that the objectors did not attempt to explain why such an approach "offends Proposition 218 proportionality." (Griffith, supra, 220 Cal.App.4th at p. 600.) The best the objectors could do was to point to what Silicon Valley had said about assessments, namely, agencies cannot start with "an amount taxpayers are likely to pay" and then determine their annual spending budget from that. (Ibid., quoting Silicon Valley, supra, 44 Cal.4th at p. 457.) The Griffith court distinguished the language from Silicon Valley, however, by saying the case before it did not entail any what-the-market-will-bear methodology. (Griffith, supra, 220 Cal.App.4th at p. 600.)

When read in context, Griffith does not excuse water agencies from ascertaining the true costs of supplying water to various tiers of usage. Its comments on proportionality necessarily relate only to variations in property location, such as what side of a water basin a parcel might fall into. That explains its citation to White, which itself was not only pre-Proposition 218, but pre-Proposition 13. Moreover, while the Griffith court may have noted that the M-1 manual generally recommends a work-backwards approach, we certainly do not read Griffith for the proposition that a mere manual used by utilities throughout the Western United States can trump the plain language of the California state Constitution. The M-1 manual might show working backwards is reasonable, but it cannot excuse utilities from ascertaining cost of service now that the voters and the Constitution have chosen cost of service.

To the extent Griffith does apply to this case, which is on the (b)(4) issue, we find it helpful and have followed it. But trying to apply it to the (b)(1) and (b)(3) issues is fatally flawed.

c. Penalty Rates

A final justification City Water gives for not tying tier prices to cost of service is to say it does not make any difference because the higher tiers can be justified as penalties not within the purview of Proposition 218 at all. (In the context of art. X, § 2, City Water euphemistically refers to its higher tiered rates as conservation rates as if such a designation would bring them within art. X, § 2 and exempt them from subd. (b)(3), but as we have explained, art. X, § 2, does not require what art. XIII D, § 6, subd. (b)(3) forbids) and designating something a "conservation rate" is no more determinative than calling it an "apple pie" or "motherhood" rate.

City Water's theory of penalty rates relies on the procedural first part of Proposition 218, specifically article XIII C, section 1, subdivision (e)(5). This part of Proposition 218 defines the word "tax" to exclude fines "imposed by" a local
government "as a result of a violation of law."[221] That is hardly a revelation, of course. We may take as a given that Proposition 218 was never meant to apply to parking tickets.

But City Water's penalty rate theory is inconsistent with the Constitution. It would open up a loophole in article XIII D, section 6, subdivision (b)(3) so large it would virtually repeal it. All an agency supplying any service would need to do to circumvent article XIII D, section 6, subdivision (b)(3), would be to establish a low legal base use for that service, pass an ordinance to the effect that any usage above the base amount is illegal, and then decree that the penalty for such illegal usage equals the incrementally increased rate for that service. Such a methodology could easily yield rates that have no relation at all to the actual cost of providing the service at the penalty levels. And it would make a mockery of the Constitution.

IV. CONCLUSION

All of which leads us to the conclusion City Water's pricing violates the constitutional requirement that fees "not exceed the proportional cost of the service attributable to the parcel." (Art. XIII D, § 6, subd. (b)(3).) This is not to say City Water must calculate a rate for 225 Elm Street and then calculate another for the house across the street at 226. Neither the voters nor the Constitution say anything we can find that would prohibit tiered pricing.

(10) But the tiers must be based on usage, not budgets. City Water's article X, section 2 position kept it from explaining to us why it cannot anchor rates to usage. Nothing in our record tells us why, for example, they could not figure out the costs of given usage levels that require City Water to tap more expensive supplies, and then bill users in those tiers accordingly. Such computations would seem to satisfy Proposition 218, and City Water has not shown in this record it would be impossible to comply with the constitutional mandate in this way or some other. As the court pointed out in Howard Jarvis Taxpayers Ass'n v. City of Fresno (2005) 127 Cal.App.4th 914, 923 [26 Cal.Rptr.3d 153], the calculations required by Proposition 218 may be "complex," but "such a process is now required by the California Constitution."

(11) Water rate fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII D, section 6, subdivision (b)(4). While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service — water service. And water service most assuredly is immediately available to City Water's customers now.

But, because the record is unclear whether low usage customers might be paying for a recycling operation made necessary only because of high usage customers, we must reverse the trial court's judgment that the rates here are necessarily inconsistent with subdivision (b)(4), and remand the matter for further proceedings with a view to ascertaining the portion of the cost of funding the recycling operation attributable to those customers whose additional, incremental usage requires its development.

(12) By the same token, we see nothing in article XIII D, section 6, subdivision (b)(3) that is incompatible with water agencies passing on the true, marginal cost of water to those consumers whose extra use of water forces water agencies to incur higher costs to supply that extra water. Precedent and common sense both support such an approach. However, we do hold that above-cost-of-service pricing for tiers of water service is not allowed by Proposition 218 and in this case, City Water did not carry its burden of proving its higher tiers reflected its costs of service. In fact it has practically admitted those tiers do not reflect cost of service, as shown by their tidy percentage increments and City Water's refusal to defend the calculations. And so, on the subdivision (b)(3) issue, we affirm the trial court's judgment.
Given the procedural posture the case now finds itself in, the issue of who is the prevailing party is premature. That question should be first dealt with by the trial court only after all proceedings as to City Water's rate structure are final. Accordingly, we do not make an appellate cost order now, but reserve that matter for future adjudication in the trial court. (See Neufeld v. Balboa Ins. Co. (2000) 84 Cal.App.4th 759, 766 [101 Cal.Rptr.2d 151] [deferring question of appellate costs in case being remanded until litigation was final].)

Moore, J., and Thompson, J., concurred.


[3] Until Bighorn, there was a question as to whether Proposition 218 applied at all to water rates. In 2000, the appellate court in Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 85 Cal.App.4th 79, 83 [101 Cal.Rptr.2d 905] (Jarvis v. Los Angeles), held that a city's water rates were not subject to Proposition 218, reasoning that water rates are mere commodity charges. Bighorn, however, formally disapproved Jarvis v. Los Angeles and held that water rates are subject to article XIII D of the California Constitution. (Bighorn, supra, 39 Cal.4th at p. 217, fn. 5.)

[4] For reader convenience, we will occasionally refer in this opinion in shorthand to "subdivision (b)(1)," "subdivision (b)(3)," "subdivision (b)(4)," and "subdivision (b)(5)," and sometimes even just to "(b)(1)" "(b)(3)," "(b)(4)" or "(b)(5)." Each time those references refer to article XIII D, section 6, subdivision (b) of the California Constitution. Also, all references to any "article" are to the California Constitution.

[5] We requested supplemental briefing prior to oral argument to clarify the nature of the issues and precisely what was in, and not in, the administrative record. We are indebted to able counsel on all sides for giving us their best efforts to answer our questions.

[6] Such rate structures are sometimes called "inclining" as in the pre-Proposition 218 case, Brydon v. East Bay Mun. Utility Dist. (1994) 24 Cal.App.4th 178, 184 [29 Cal.Rptr.2d 128] (Brydon). Amicus curiae ACWA estimates that over half its members now have some sort of tiered water rate system. As we will say numerous times in this opinion, tiered water rate structures and Proposition 218 are thoroughly compatible "so long as" — and that phrase is drawn directly from Palmdale — those rates reasonably reflect the cost of service attributable to each parcel. (Palmdale, supra, 198 Cal.App.4th at p. 936.)

[7] Ccf stands for one hundred cubic feet, which translates to 748 gallons. (See Brydon, supra, 24 Cal.App.4th at p. 184.)

[8] A precise figure for the usage is complicated by an attempt in the rate structure to distinguish indoor and outdoor use. Technically, tier 2 is tier 1 + 3 extra ccf's, plus an outdoor allocation that is supposed to average out to a total of 17 ccf's, i.e., 8 ccf's are allocated (on average) for outdoor use.

[9] Technically, tier 3 is defined as up to 200 percent of tiers 1 and 2, which, given City Water's projected 17 ccf average, works out to be 34 ccf.

[10] While the consultants distinguished between regular and large lot residential customers, the final structure made no distinction between the two.
In 2010, City Water was paying $719 per acre-foot for water from the Metropolitan Water District, and that cost was projected to increase incrementally each year until it reached $1,007 per acre-foot by 2014. One acre-foot equals 435.6 ccf.

With a minor qualification that, given our disposition, it need not be addressed in too much detail. A minor issue in the briefing is whether City Water should have made its consultants' report available for taxpayer scrutiny prior to the public hearing contemplated in article XIII D, section 6, subdivision (c). Since City Water is not able to show its price structure correlates with the actual cost of providing service at the various incremental levels even with the consultants' report, we need not get bogged down in this issue.

Government Code section 53756 provides in relevant part:

"An agency providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation, if it complies with all of the following:

"(a) It adopts the schedule of fees or charges for a property-related service for a period not to exceed five years pursuant to Section 53755." (Italics added.)

As described by the court, the fixed cost option was really a "fixed/variable" option, with fixed charges being 60 percent of total costs, the balance being variable. (Palmdale, supra, 198 Cal.App.4th at p. 929, capitalization omitted.)

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

"In order to have the beneficial use of less than one per cent of the maximum flow of the San Joaquin River on their riparian lands the plaintiffs are contending for the right to use the balance in such a way that, so far as they are concerned, over ninety-nine per cent of that flow is wasted. This is a highly unreasonable use or method of the use of water." (Herminghaus, supra, 200 Cal. at p. 123 (dis. opn. of Shenk, J.).)

Professor Gray's article is an exceptionally valuable source on the origins of article X, section 2.

It was recently noted that Santa Barbara is dusting off a desalinization plant built in the 1990's to provide additional water for the city in the current drought. (See Covarrubias, Santa Barbara Working to Reactivate Mothballed...
Two examples of early, post-Proposition 13 cases that took a strict constructionist view of the provision are *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 199 [182 Cal.Rptr. 324, 643 P.2d 941] (*Los Angeles County v. Richmond*) [strictly construing Prop. 13's voting requirements to avoid finding a transportation commission was a "special district"]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 [184 Cal.Rptr. 713, 648 P.2d 935] [strictly construing words "special tax"] used in § 4 of Prop. 13 as ambiguous to avoid finding municipal payroll and gross receipts tax was a "special tax"). *Brydon* expressly relied on *Los Angeles County v. Richmond*. (See *Brydon, supra*, 24 Cal.App.4th at p. 190.) Proposition 218 effectively reversed these cases with a liberal construction provision. (See *Silicon Valley, supra*, 44 Cal.4th at p. 445.)

Here is the relevant passage from *Silicon Valley*: "As the dissent below points out, a provision in Proposition 218 shifting the burden of demonstration was included in reaction to our opinion in *Knox*. The drafters of Proposition 218 were clearly aware of *Knox* and the deferential standard it applied based on *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676 [129 Cal.Rptr. 97, 547 P.2d 1377]." (*Silicon Valley, supra*, 44 Cal.4th at p. 445.)

Here and there in *City Water's* briefing there are references to a discretionary, legislative power in regard to local municipal water agencies conferred by article XI, section 9, which was a 1970 amendment to the Constitution, though one can trace it back to the Constitution of 1879. Basically, article XI, section 9, gives cities the right to go into the water supply business. We quote its text, unamended since 1970: "(a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent. [¶] (b) Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law."

Article XI, section 9 obviously does not require municipal corporations to establish fees in excess of their costs, so there is no incompatibility between it and the later enacted Proposition 218.

The relevant text from article XIII C, section 1, subdivision (e)(5) is: "(e) As used in this article, `tax' means any levy, charge, or exaction of any kind imposed by a local government, except the following: [¶] ... [¶] (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law."

MICHAEL E. BOYD, Plaintiff and Appellant,

v.

SOQUEL CREEK WATER DISTRICT, et al., Defendants and Respondents.

No. H041389.

Court of Appeals of California, Sixth District.

Filed April 29, 2016.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
I. FACTUAL AND PROCEDURAL BACKGROUND

A. Boyd

Boyd is a resident of Soquel, California. His wife, nonparty Pat Paramoure Boyd, has a water service account with the District.

B. The District's Search for an Alternative Water Supply

The District's aquifers are over-drafted. The District has investigated various potential alternative sources of water including a joint project with the City to build a desalination facility. In connection with that potential joint desalination project, the District and the City entered into a Memorandum of Agreement to Create a Joint Task Force to Pursue the Feasibility of Construction and Operation of a Seawater Desalination Facility (Joint Agreement) in September 2007.

In the Joint Agreement, the District and the City agreed to create a joint task force to investigate the construction of a seawater desalination facility. The Joint Agreement requires the District and the City to "contribute equal shares" toward the project. The District spent $4,248,216.27 on the desalination project between May 16, 2008 and December 7, 2012.

A draft Environmental Impact Report (EIR) was prepared for the proposed joint desalination facility. However, the Final EIR has not been certified, the proposed desalination project has not been approved, and no Notice of Determination under CEQA has been filed concerning the proposed project.

C. Santa Cruz Measure P

Boyd alleges that on November 6, 2012, voters in the City approved Measure P, a ballot measure requiring that City voters approve the plans for any desalination facility. Measure P allegedly provided that "no legislative action by the City that would authorize or permit the construction, operation, and/or acquisition of a desalination project, or that would incur any bonded or other indebtedness for that purpose, shall be valid or effective unless such action is
authorized by an affirmative vote of a majority of qualified electors in the City of Santa Cruz voting on the question at a statewide general, statewide primary, or regularly scheduled municipal election." Boyd further alleges that Measure P applies retroactively as of the date the measure qualified for placement on the ballot, July 2, 2012.

Boyd alleges that Measure P applies to and binds not only the City, but also the District "as an alleged agent of the City under the terms of [the Joint Agreement]" and as a "co-conspirator" with the City. No similar ballot measure regarding the District's funding of a desalination project has been placed on a ballot, let alone approved.

**D. The District's Rates and the 2013 Rate Increase**

The District has separate rates for single-family residential, multi-family residential, and commercial customers. The residential water quantity rates are tiered, meaning the price customers pay for water increases as they use more of the resource. Tiered rates are used to encourage customers to conserve water.

The District's Board of Directors stated its intent to adopt a resolution modifying water rates and service charges at regular meetings on December 11, 2012 and January 15, 2013. The District held a public hearing on the proposed rate increase on February 5, 2013. More than 45 days before that hearing, the District gave customers and property owners written notice of the proposed rate increase, the protest process, and the public hearing. At the hearing, the Board approved and adopted the rate increase.

The rate increase increased customers' bi-monthly service charge. With respect to water quantity rates, the rate increase altered both the tier structure and the rate charged for each tier. For example, prior to the rate increase, single-family residences were charged a rate of $3.51 for the first four units[2] of water used (Tier 1), a rate of $6.70 for units 5 to 15 of water used (Tier 2), and a rate of $11.61 for units 16 and above (Tier 3). Immediately following the rate increase, single-family residences were charged a rate of $3.60 for the first six units of water (Tier 1), $5.80 for units 7 to 14 (Tier 2), $8.50 for units 15 to 30 (Tier 3), and $13.00 for units 31 and above (Tier 4).

In support of its motion for summary judgment, the District submitted the declaration of its Finance Manager, Michelle Boisen. She declared that "[funds from the Rate Increase will be used for District operations including the evaluation of alternative water sources and environmental review of the proposed desalination plant. The Rate Increase does not include funds to construct the proposed desalination plant."

Boyd's wife, Paramoure Boyd, submitted a protest to the rate increase. Boyd attached a copy of that protest to the complaint. In it, Paramoure Boyd protested that the rate increase constituted a new tax, and thus required voter approval under Proposition 26. She reasoned that "[t]he true but hidden purpose of the increases [is] so as to predetermine the approval of ratepayer subsidized debt financing incurred for a pro-desal project campaign activity which has understated [(]miss-informed [sic] the public of[)] the fact that two thirds of the proposed three year water rate and the service charge increases are for the Board's pet project." In the protest letter Paramoure Boyd "designate[d]" Boyd "as [her] agent for service in these matters."

**E. Complaint and Proposed First Amended Complaint**

Boyd filed suit against the District and the City in March 2013. The complaint, much like Boyd's appellate briefs, is difficult to follow. We parse it as best we can.

Boyd's first cause of action, asserted against the District only, alleges that the 2013 rate increase violates Article XIII D, section 6, subdivision (b)(3) of the California Constitution (subdivision (b)(3)). Elsewhere in the complaint, in paragraphs not incorporated into the first cause of action, Boyd alleges that "[the District's] monthly service charge is
arbitrary and not tied to the actual costs of providing identified services to each meter; (2) [the District's] commodity charge tiers are not proportional to the costs of providing water service; and (3) [the District's] water budget structure is not proportional to the costs of providing water service and fails to achieve its stated purpose." In portions of the complaint not incorporated into the first cause of action, Boyd also alleges that the District's expenditure of $4,248,216 violated subdivision (b)(3).

The second cause of action, also asserted against the District, alleges that the District's unspecified "actions" violated Article XIII D, section 6, subdivision (b)(4) of the California Constitution (subdivision (b)(4)). In portions of the complaint not incorporated into the second cause of action, Boyd alleges (1) "[the District's] new rates require users to pay for services[,] desalination water supplies[,] they cannot receive in violation of section 6, subdivision (b), paragraph (4) of article XIII D" and (2) "the District[’s] expenditure of $4,248,216 was not within the definition of a water fee or charge and was already expended for the proposed desal project; therefore, this violated Art. XIII D, sect. 6(b) . . . (4)."

The third cause of action, asserted against only the District, alleges that "[t]he District's expenditure of $4,248,216 between May 16, 2008 to December 7, 2012 on the Desal project was not an exception within the definition of Article XIII C, section 1.; because these services `exceed the reasonable costs to the local government of conferring the benefit'; nor do the expenditures qualify as `assessments and property-related fees imposed in accordance with the provisions of Article XIII D'." (Italics in original.) Elsewhere in the complaint, in paragraphs not incorporated into the third cause of action, Boyd alleges that "[t]he District's expenditure of $4,248,216 . . . is a `tax' subject to the requirements of Art. XIII C, sect. 1. . . ."

The fourth and final cause of action is asserted against both the District and the City and is labeled "First Amendment, Due Process Violations, and 42 USC [§] 1983." In it Boyd alleges that, by virtue of Measure P, "any expenditure by the [District] and the City [on the desalination project after July 2, 2012] were [sic] in violation of Plaintiff's rights to free speech and procedural due process rights which Plaintiff alleges violated Plaintiff's federal civil rights under color of state law in violation of 42 [U.S.C. §] 1983." The fourth cause of action also contains the allegation that Boyd "was the victim of a civil conspiracy by Defendants to violate his civil rights." Boyd further alleges that "Defendants' alleged advocacy for sole sourcing new water supply for seawater desalination . . . has placed in jeopardy the health and welfare of unascertained customers whose water is contaminated by the toxic Chromium 6." The alleged connection between the proposed desalination project and Chromium 6 contamination is puzzling.

The complaint also contains other allegations, which are not clearly tethered to any of the causes of action. For example, Boyd complains that the District provided notice of the public hearing on the proposed rate increase during the Christmas holiday. Boyd also alleges that the defendants failed to identify a "potentially feasible alternative that might avoid a significant impact" and that the proposed desalination project "is not the least cost environmentally preferred option." Finally, Boyd alleges that the District was required to file an application for extraterritorial services to the Local Agency Formation Commission (LAFCO) before purchasing desalination water supplies from the City.

The complaint seeks, among other relief, an injunction preventing the District from implementing the rate increase unless and until it is approved by voters; an injunction preventing the District from making any further expenditure on the desalination project unless and until it is approved by voters; damages equal to his share of the $4,248,216 already expended on the desalination project; and equitable damages from both defendants.

Boyd filed a motion to amend and a proposed first amended complaint in July 2013. The trial court denied Boyd's motion to amend on the ground that his proposed amendments failed to state a cause of action.

F. Defendants' Successful Motions, Entry of Judgments, and Appeal
The District moved for summary judgment or, in the alterative, summary adjudication on February 14, 2014. The City moved for judgment on the pleadings on April 23, 2014.

The court held a hearing on both motions on May 20, 2014. After hearing argument, the court granted the District's motion for summary judgment and the City's motion for judgment on the pleadings and ordered that judgment be entered for defendants. The court did not address whether Boyd was entitled to leave to amend the complaint as to the City. Court entered judgment in favor of the City on June 2, 2014 and entered judgment in favor of the District on June 6, 2014. Also on June 6, 2014, the court filed a written order granting summary judgment to the District. Boyd timely appealed on July 7, 2014.

II. DISCUSSION

A. General Rules of Appellate Review

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. (Denham v. Superior Court (1970) 2 Cal.3d 557, 564.) "All intendment and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown." (Ibid.) Therefore, a party challenging a judgment or an appealable order "has the burden of showing reversible error by an adequate record." (Ballard v. Uribe (1986) 41 Cal.3d 564, 574.) "A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (Gee v. American Realty & Construction, Inc. (2002) 99 Cal.App.4th 1412, 1416.) Thus, where the appellant fails to provide an adequate record as to any issue the appellant has raised on appeal, the issue must be resolved against the appellant. (Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295.)

The appellant must also present argument supported by relevant legal authority as to each issue raised on appeal. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.'" (People v. Stanley (1995) 10 Cal. 4th 764, 793 (Stanley).)

Boyd is not exempt from compliance with these rules because he is representing himself. A party who chooses to act as his or her own attorney "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1247.)

B. Issues Raised on Appeal

The trial court granted both motions on numerous grounds. On appeal, however, Boyd raises only four issues. As an initial matter, he accuses the trial court judge of bias. With respect to his claim against the City, he argues the trial court erred in concluding he lacked standing. As to the District, he challenges the court's conclusions that the rate increase does not violate subdivisions (b)(3) and (b)(4) as alleged in counts 1 and 2.

C. Judicial Bias

Boyd contends the trial court exhibited bias during the hearing on defendants' motions. In support of that contention, Boyd—without citation to the record—identifies three comments the trial court made at the hearing. In the first comment, the court noted that he saw in the morning paper that "there's a meeting tonight" at the District. The court went on to explain that, because "[t]here's no environmental impact report to challenge," "the body that you should be
dealing with will be meeting at 7:00 o'clock tonight at the Soquel Creek Water District." In the second comment on which Boyd relies, the court stated: "[t]here's no application pending before LAFCO. LAFCO doesn't fit in here as well. And I sat on the LAFCO board many years ago. This doesn't fit within that." Third, the court advised Boyd of its tentative ruling to grant defendants' motions and told him, "This is your opportunity to argue against my tentative ruling."

Boyd's claim of judicial bias fails for numerous reasons. First, Boyd forfeited the point by failing to cite the part of the record where the trial court made the complained-of statements. (In re Marriage of Falcone & Fyke (2012) 203 Cal.App.4th 964, 978.) Second, the opening brief cites no legal authority to support Boyd's claim, such that we may consider it waived. (Stanley, supra, 10 Cal.4th at p. 793 ["[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration."].) Third, Boyd forfeited this claim of error by failing to raise it below. (See People v. Farley (2009) 46 Cal.4th 1053, 1110 [claim of judicial bias forfeited where not asserted below]; Moulton Niguel Water Dist. v. Colombo (2003) 111 Cal.App.4th 1210, 1218 ["owners did not preserve their claim of judicial bias for review because they did not object to the alleged improprieties and never asked the judge to correct remarks made or recuse himself"].) Finally, were we to reach the merits of Boyd's judicial bias claim, we would reject it. We do not believe "[a] person aware of the facts might reasonably entertain a doubt that the judge [was] able to be impartial." (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

D. Judgment on the Pleadings in Favor of the City

1. Standard of Review

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein." (Dunn v. County of Santa Barbara (2006) 135 Cal.App.4th 1281, 1298 (Dunn).) We will not, however, credit the allegations in the complaint where they are contradicted by facts that either are subject to judicial notice or are evident from exhibits attached to the pleading. (Hill v. Roll Internat. Corp. (2011) 195 Cal.App. 4th 1295, 1300 (Hill).) We review de novo whether a cause of action has been stated as a matter of law. (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125.) We do not review the validity of the trial court's reasoning, and therefore will affirm its ruling if it was correct on any theory. (Hill, supra, at p. 1300.)

"[I]t is an abuse of discretion to grant a motion for judgment on the pleadings without leave to amend "if there is any reasonable possibility that the plaintiff can state a good cause of action."" (Dudley v. Department of Transportation (2001) 90 Cal.App.4th 255, 260.) The appellant bears the burden of showing abuse of discretion and carries that burden by showing how the complaint can be amended to state a cause of action. (Ibid.)

2. Boyd Lacks Standing to Sue the City

As noted above, Boyd raises only one claim of error as to the court's order granting judgment on the pleadings to the City: he claims the trial court erroneously concluded that he lacks standing to sue the City. We perceive no error.

"'Standing' derives from the principle that '[e]very action must be prosecuted in the name of the real party in interest. . . .' (Code Civ. Proc, § 367.) A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action." (City of Santa Monica v. Stewart (2005) 126 Cal.App. 4th 43, 59 (Stewart).) "[A] person who invokes the judicial process lacks "standing" if he [or she] . . . does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of
sufficient magnitude reasonably to [en]sure that all of the relevant facts and issues will be adequately presented." (Id. at p. 60.)

The thrust of Boyd's claim against the City is that any expenditures on or advocacy of the desalination project after July 2, 2012 violated Measure P and his federal constitutional rights to free speech and due process. As we understand it, Boyd's theory is two-fold. First, he contends that by expending public funds to advocate for the desalination project, defendants compelled him to support that project in violation of his First Amendment right not to be compelled to speak. Second, he maintains the use of public funds to advocate for the desalination project is unconstitutional under Stanson v. Mott (1976) 17 Cal.3d 206.

Boyd lacks standing to assert his claim against the City because "[t]he complaint does not specify any actual or threatened action which would injure [Boyd] or violate [his] rights." (Stewart, supra, 126 Cal.App.4th at p. 60.) Indeed, the complaint does not allege any actual or threatened action by the City at all. It alleges only that "to the degree Defendants [sic] City of Santa Cruz . . . are [sic] involved in such advocacy[,] this also allegedly violates Plaintiffs First Amendment Rights also." But speculation that the City might be involved in advocacy of the desalination plant is not sufficient to allege actual or threatened action.

Even if Boyd had alleged that the City made expenditures on and advocated for the desalination project after July 2, 2012 (or has plans to do so), we would conclude he lacks standing because that conduct is not injurious to Boyd or his rights. Boyd does not allege that he resides in the City, pays City taxes, or is registered to vote in the City. To the contrary, his complaint and its exhibits show he is a resident of Soquel. Thus, any improper expenditure of City funds cannot possibly have harmed Boyd, a nontaxpayer. (See Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1086 [taxpayers have standing to sue to prevent the illegal expenditure of municipal funds under Code of Civil Procedure section 526a]; Reynolds v. City of Calistoga (2014) 223 Cal.App.4th 865, 873 [nontaxpayer lacked standing to challenge alleged misuse of City funds under Civ. Proc. Code § 526a].) To the extent that the City improperly expended funds on advocacy, Boyd has no constitutional claim based on that conduct because the City could not have used his funds. Finally, any violation of Measure P, which confers rights on City voters, could not have harmed Boyd, a nonresident, nonvoter.

Boyd contends he alleged standing in his proposed first amended complaint by alleging he pays the water bills issued by the District despite the fact that his wife is the customer of record. At best, that allegation indicates that the District expended funds it received from Boyd on the desalination project. But the fact remains that Boyd does not allege the City expended funds on the project, let alone any funds it received from him. Accordingly, we conclude the trial court correctly granted the City's motion on lack of standing grounds.

3. Boyd Fails to State a Claim Against the City

We affirm the judgment in favor of the City for the additional reason that the complaint does not state a claim against it. As discussed above, the complaint does not allege that the City engaged in any wrongful conduct. (Okun v. Superior Court (1981) 29 Cal.3d 442, 457 [cause of action failed to state a claim against any defendant where there was "no allegation of wrongful conduct by any of the defendant[s]"].) It merely suggests that the City might have engaged in wrongful conduct, which is insufficient.

The complaint contains the conclusory allegation that Boyd "was the victim of a civil conspiracy by Defendants to violate his civil rights, all actionable under 42 U.S.C. § 1983, to redress violations of federal laws committed by Defendants, i.e. to inter alia compel the enforcement of federal laws, for Plaintiff[s]' and the public's interests, and to secure remedial relief for Plaintiff for damages caused by those violations." The complaint does not allege facts regarding the formation and operation of the conspiracy, the wrongful act or acts done pursuant to it, or the damage
resulting from such acts. "Conspiracy is . . . a doctrine imposing liability for a tort upon those involved in its commission." (1-800 Contacts, Inc. v. Steinberg (2003) 107 Cal.App.4th 568, 590.) To the extent Boyd seeks to hold the City liable for the District's violations of his federal rights under a civil conspiracy theory (City of Monterey v. Del Monte Dunes at Monterey, Ltd. (1999) 526 U.S. 687, 709 ["claims brought pursuant to [42 U.S.C.] § 1983 sound in tort"]), that attempt fails given the lack of well-pleaded factual allegations and our obligation to disregard conclusions of law contained in a complaint. (Nicholson v. McClatchy Newspapers (1986) 177 Cal.App.3d 509, 521 ["bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient" to state a cause of action based upon a conspiracy theory].)

The complaint also alleges that "at all times herein mentioned, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment." The Supreme Court has described such allegations as "egregious examples of generic boilerplate." (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 134, fn. 12.) Where, as here, a complaint "does not allege [that] any conduct on [the defendant's] part caused any harm, loss or damage on the plaintiff[s] part," the addition of such boilerplate agency allegations "do not result in the complaint[s] stating a cause of action against" the defendant. (Falahati v. Kondo (2005) 127 Cal.App.4th 823, 829.)

In sum, the complaint fails to state a cause of action against the City.

4. Leave to Amend

Boyd's appellate briefs do not address whether the trial court abused its discretion by granting the City's motion without providing him leave to amend. Based on our review of the complaint, the proposed first amended complaint, and Boyd's appellate briefs, we find no reasonable probability that Boyd could amend his complaint to state a viable cause of action against the City. Therefore, we conclude the trial court did not abuse its discretion in not granting leave to amend.

E. Summary Judgment in Favor of the District

1. Standard of Review

In reviewing an order granting summary judgment, we review the entire record de novo in the light most favorable to the nonmoving party to determine whether the moving and opposing papers show a triable issue of material fact. (Addy v. Bliss & Glennon (1996) 44 Cal.App.4th 205, 214.) "A defendant moving for summary judgment has the burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action." (Jones v. Wachovia Bank (2014) 230 Cal.App.4th 935, 945 (Jones).) A defendant cannot "simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence," (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854, fn. omitted), but "must support[ ] the 'motion' with evidence." (Id. at p. 855.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (Ibid.) "If a defendant's moving papers make a prima facie showing that justifies a judgment in its favor, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact." (Jones, supra, at p. 945.)

2. Proposition 218
On appeal, Boyd challenges the trial court's conclusions that the District's rate increase does not violate subdivisions (b) (3) and (b)(4) of Article XIII D, section 6 of the California Constitution. Article XIII D was adopted in 1996 as part of Proposition 218. "Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. "The purpose of Proposition 13 was to cut local property taxes."

To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. Accordingly, a special assessment could be imposed without a two-thirds vote.” (Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 836-837.) The electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution, in part to address that loophole in Proposition 13. (Id. at p. 837.)

"Article XIII C imposes restrictions on general and special property taxes in addition to those imposed under article XIII A, and requires voter approval for any general or special tax imposed by a local governmental entity. . . . [A]rticle XIII D, is addressed to `Assessment and Property-Related Fee Reform,' and it `undertakes to constrain the imposition by local governments of "assessments, fees and charges."' (Paland v. Brooktrails Township Community Services Dist. Bd. of Directors (2009) 179 Cal.App.4th 1358, 1365.)

Subdivision (b) of section 6 of article XIII D imposes four limitations on fees and charges: "(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. [¶] (3) 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. [¶] (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. . . ." Boyd contends that the District's increased water rates violate two of the foregoing limitations.


3. Count 1: Article XIII D, Section 6, Subdivision (b)(3)

On appeal, Boyd argues that the District's rate increase violates subdivision (b)(3) because the new tiered water rates do not correspond to the actual cost of providing service at a given level of water usage. He contends that the trial court's decision to the contrary is inconsistent with the Fourth Appellate District's decision in Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493 (Capistrano). The District's position is that its rates satisfy the proportionality requirement set forth in subdivision (b)(3) because the rates (1) employ different user classifications (residential, multi-residential, and commercial); (2) are based on the amount of water used; and (3) encourage conservation as authorized under Water Code § 31035. The District submitted no evidence regarding the cost to it of providing water service or how it calculated the rates.

Subdivision (b)(3) provides: "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] . . . (3) 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." To
address Boyd's challenge, we must first determine the meaning of subdivision (b)(3). "The principles of constitutional interpretation are similar to those governing statutory construction. In interpreting a constitution's provision, our paramount task is to ascertain the intent of those who enacted it. [Citation.] To determine that intent, we 'look first to the language of the constitutional text, giving the words their ordinary meaning.' [Citation.] If the language is clear, there is no need for construction. [Citation.] If the language is ambiguous, however, we consider extrinsic evidence of the enacting body's intent. [Citations.]" (Thompson v. Department of Corrections (2001) 25 Cal.4th 117, 122.)

The ordinary meaning of the word "proportional" is "having a size, number, or amount that is directly related to or appropriate for something." (Merriam-Webster.com (2016) [as of 4/29/16].) The ordinary meaning of the phrase "attributable to" is "capable of being attributed or ascribed." (Oxford English Dict. Online (2016) [as of 4/29/16].) "Ascribe" means "to refer to a supposed cause, source, or author." (Merriam-Webster.com (2016) [as of 4/29/16].) In view of the foregoing, we construe subdivision (b)(3) as requiring that a property-related charge not exceed an amount that is directly related to the cost of service caused by the parcel.

"[W]e may test our construction against those extrinsic aids that bear on the enactors' intent [citation], in particular the ballot materials accompanying Proposition [218] that place the initiative in historical context." (Hi-Voltage Wire Works, Inc. v. City of San Jose (2000) 24 Cal.4th 537, 560.) The Legislative Analyst's analysis of Proposition 218 informed voters that one of the measure's "proposed requirements for property-related fees" was that "[n]o property owner's fee may be more than the cost to provide service to that property owner's land." (Ballot Pamp. Gen. Elec. (1996) analysis of Prop. 218 by legislative analyst, p. 73, available at.) Thus, the ballot materials confirm that subdivision (b)(3) requires a nexus between a property-related charge (here, the water rate) and the cost of service associated with a parcel.

In view of the foregoing, compliance with Proposition 218 plainly requires a water district to charge customers based on the cost of providing water service to their parcel.[6] (Accord Capistrano, supra, 235 Cal.App.4th at p. 1506 ["To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels"]) The record is devoid of any evidence that the District undertook to determine the cost of providing water service or how that cost varies by parcel or by water consumption. Indeed, the District does not even mention the cost of service in justifying its rate. Accordingly, we conclude the District failed to carry its burden to show it is entitled to judgment on Boyd's subdivision (b)(3)-based claim.

The District stresses the importance of tiered rates to promote water conservation. We note that nothing in Proposition 218 is obviously incompatible with the use of tiered rates. Presumably, supplying excessive amounts of water increases the need for system maintenance and new water sources, thereby increasing the District's costs. (Brydon v. East Bay Mun. Utility Dist. (1994) 24 Cal.App.4th 178, 202 ["To the extent that certain consumers overutilize the resource, they contribute disproportionately to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water"]). If that is the case, subdivision (b)(3) allows the District to charge more to excessive water users to cover those higher costs. However, we cannot simply assume the District's tiered rates bear the requisite relationship to its costs.

The District also contends that this court's decision in Griffith, supra, 220 Cal.App.4th 586 supports the trial court's conclusion that the District's rates comply with subdivision (b)(3). In our view, Griffith is distinguishable. There, a water management agency imposed a ground water augmentation charge on all customers to cover the costs of purchasing, capturing, storing, and distributing supplemental water to a subset of those customers. (Griffith, supra, 220 Cal.App.4th at p. 598.) The water management agency submitted evidence showing it calculated the ground water augmentation charge "based on a revenue-requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users." (Ibid. at p. 600.) In apportioning the revenue requirement, the water management agency
grouped similar users together and charged them according to usage, something this court deemed "a reasonable way to apportion the cost of service." (Id. at p. 601.)

*Griffith* is distinguishable because there, the water management agency submitted evidence showing how the augmentation charge was calculated. By contrast, here the District points us to no such record evidence. Therefore, it is impossible for us to conclude that the District's increased water rates bear the requisite relationship to its cost of providing water service.

"We affirm an order granting summary [judgment or] adjudication if it is legally correct on any ground raised in the trial court proceedings." (Kight v. CashCall, Inc. (2011) 200 Cal.App.4th 1377, 1387; accord Securitas Security Services USA, Inc. v. Superior Court (2011) 197 Cal.App.4th 115, 120.) Accordingly, before reversing the trial court's order as to count 1, we must consider the other grounds raised and addressed by the parties below. The District raised one other ground for summary judgment or adjudication of count 1—that Boyd is improperly engaging in the practice of law by representing his wife in this action. Section 6125 of the California Business & Professions Code provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar." Thus, "persons may represent their own interests in legal proceedings, but may not represent the interests of another unless they are active members of the State Bar." (Golba v. Dick's Sporting Goods, Inc. (2015) 238 Cal.App.4th 1251, 1261.)

For its contention that Boyd is acting as his wife's legal representative, the District relied on the following sentence in Boyd's complaint: "As stated in Plaintiff's Protest [Exhibit 1] dated January 30, 2013 as agent for the customer of record [my wife Pat [Paramoure] Boyd]; on the property's water account for 5439 Soquel Drive, Assessor's Parcel Number XXX-XXX-XX, SqWD Account#XXXXXXX-XXX, in Santa Cruz County California; states 'I am protesting the proposed water rate and the service charge increases, as violating the provisions of Proposition 26, also known as the 'Supermajority Vote to Pass New Taxes and Fees Act' (2010)." Exhibit 1 to the complaint is the protest Boyd's wife submitted to the District regarding the rate increase in which she designated Boyd "as my agent for service in these matters."

The sentence on which the District relies certainly implies that Boyd's wife is the plaintiff or that Boyd is acting as her agent. However, the complaint's caption identifies Boyd as the sole plaintiff; the complaint refers to e-mails sent by Boyd as being sent by "Plaintiff"; and the complaint complains of violations of plaintiff's rights, not his wife's rights. We believe the complaint is best construed as asserting Boyd's own interests, not those of his wife, such that there is no violation of the Business & Professions Code. We offer no opinion as to whether Boyd has standing to sue the District, an issue not raised below.

For the foregoing reasons, we conclude the trial court erred in granting summary judgment to the District on count 1.

4. **Count 2: Article XIII D, Section 6, Subdivision (b)(4)**

Subdivision (b)(4) provides: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4." The District submitted evidence that funds from the rate increase will be used to evaluate alternative water sources, including the proposed desalination project. On appeal, Boyd contends that the rate increase violates subdivision (b)(4) because it funds the proposed desalination plant, water from which is not immediately available to property owners.
For Boyd to prevail, we must conclude that the exploration of desalinated water as a potential future water source is a distinct "service" that is not "immediately available to" property owners. Neither case law nor statutory authority supports such a conclusion.

"The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines 'water' as 'any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.' (Gov. Code, § 53750, subd. (m))." (Griffith, supra, 220 Cal.App.4th at p. 595.) In Griffith, this court concluded, based in part on Government Code section 53750, subdivision (m), that "water service [includes] more than just supplying water." (Griffith, supra, at p. 595.) Rather, it includes the production, purchase, capture, storage, treatment, and distribution of water. (Ibid.) Given that water service includes water production, purchase, and capture, this court further concluded that "identifying and determining future supplemental water projects . . ." is part of water service. (Id. at p. 602.) Under Griffith's reasoning, the District's evaluation of the proposed desalination project as a future, supplemental source of water is part of its traditional water service. There is no dispute that the District's water service is immediately available. Accordingly, the rate increase does not violate subdivision (b)(4).

Boyd's reliance on Capistrano is misplaced. At issue in Capistrano was whether the City could pass along the cost of a new water recycling plant to customers. Like the proposed desalination facility at issue here, the recycling plant was not yet "on line." (Capistrano, supra, 235 Cal.App.4th at p. 1501.) The court held that subdivision (b)(4) "allow[s] public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water—such as building a recycling plant." (Capistrano, supra, at p. 1497.) The court reasoned that there was no subdivision (b)(4) violation because the provision of traditional potable water and the provision of nonpotable recycled water were both components of the City's existing water service, which was already immediately available to all customers. (Capistrano, supra, at p. 1502.) Thus, with respect to whether the exploration of desalinated water as a potential future water source is a distinct "service" that is not "immediately available to" property owners under subdivision (b)(4), Capistrano supports the District, not Boyd.

The Capistrano court went on to conclude that Government Code section 53756 restricts a water district's ability to pass on the capital costs of improvements like recycling and desalination facilities to customers. According to Capistrano, "[t]he upshot of Government Code section 53756 "is that within a five-year period, a water agency might develop a capital-intensive means of production of what is effectively new water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced." (Capistrano, supra, 235 Cal.App.4th at p. 1503.) The Capistrano court remanded the matter to the trial court to determine "whether charges to develop [the water district's] nascent recycling operation have been improperly allocated to users whose levels of consumption are so low that they cannot be said to be responsible for the need for that recycling." (Id. at p. 1504.)

On appeal, Boyd quotes (without citation) the Capistrano court's discussion of Government Code section 53756 and appears to assert that the District violated that provision by expending more than $4 million on the desalination project between "September 23, 2007 [and] December 7, 2012 . . . [, which is] a period longer than 5 years as specified by California Government Code § 53756." We decline to reverse the trial court's ruling that the District is entitled to judgment on count 2 on the basis of Government Code section 53756 for two reasons. First, the complaint makes no mention of Government Code section 53756. "[T]he pleadings set the boundaries of the issues to be resolved at summary judgment." (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648.) A "plaintiff cannot bring up new, unpleaded issues "in opposition to a motion for summary judgment or adjudication. (Ibid.) Because any claim that the District violated Government Code section 53756 was not alleged in the complaint, we decline to consider whether it creates a triable issue of material fact to defeat the District's summary judgment motion. Second, the allegations in the complaint do not support Boyd's new contention that the District's expenditures occurred over a period of more than five years. In his opening brief, Boyd contends that the District's desalination expenditures
began on September 23, 2007, which is the date on which the Mayor of Santa Cruz signed the Joint Agreement. But the complaint alleges that the District's $4 million in expenditures occurred between May 2008 and December 2012. A printout of the District's accounts payable, which is attached to the complaint as an exhibit, confirms that the expenditures at issue began on May 16, 2008.

In sum, the trial court did not err in concluding that the District's rate increase does not violate subdivision (b)(4).

III. DISPOSITION

The judgment in favor of the City is affirmed. The judgment in favor of the District is reversed and the matter is remanded to the trial court. On remand, the trial court is directed to vacate its order granting summary judgment to the District and to enter a new order denying the District summary adjudication on count 1 and granting the District summary adjudication on counts 2, 3, and 4.

The City shall recover its costs on appeal from Boyd. Boyd and the District shall bear their own costs on appeal.

BAMATTRE-MANOUKIAN, J. and MIHARA, J., concurs.


[2] One unit is equal to 748 gallons of water.

[3] Boyd alleges: "[B]ecause of the [District's] failure to carry out its duty to prevent the over drafting of the Aromas Red Sands Aquifer[, where water contaminated with Chromium 6 has been detected,] the [District's] alleged advocacy for desal coupled with their [sic] alleged failure to declare an emergency and a water hook-up moratorium on new connections; this allegedly exacerbated the chromium 6 problem . . . allegedly adding to the $4,248,216 for desal advocacy the amount of damages of at least $2.52 million' to the District's ratepayers that would have allegedly been avoided by Plaintiff and other like situated water ratepayers but for Defendant's alleged unlawful actions in unlawful alleged advocacy for their preferred water supply option, on matters that allegedly should be decided in an impartial unbiased manner based on the facts at hand by the voters." (Ellipsis in original.)

[4] We recognize that Boyd does not assert a claim pursuant to Code of Civil Procedure section 526a. Nevertheless, cases addressing taxpayer standing under Code of Civil Procedure section 526a are instructive. In that context, "courts have liberally construed the standing requirements for taxpayers." (Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1047.) However, even for purposes of a claim under Code of Civil Procedure section 526a, "a plaintiff must establish he or she is a taxpayer to invoke standing. . . ." (Torres, supra, at p. 1047.)

[5] The City raises this issue on appeal. Boyd responds that he "is alleging his equal protection and due process rights were violated by the City Defendants [sic] because even though Plaintiff paid the desalination facility tax in the City before and after the Proposition P election, he was disenfranchised from voting in the Proposition P election because he didn't reside in the City." Neither the complaint nor the opening brief refers to a "desalination facility tax" and the reply brief does not define that term. We find Boyd's response to be confusing and unpersuasive.

[6] This is not to say that Proposition 218 compels a parcel-by-parcel proportionality analysis, something this court rejected in Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586, 601 (Griffith). However, some nexus between costs and the charge is required.
Government Code section 53756 provides, in relevant part: "An agency providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation, if it complies with all of the following: [¶] (a) It adopts the schedule of fees or charges for a property-related service for a period not to exceed five years pursuant to Section 53755.”

163 Cal. Rptr. 3d 243

HAROLD GRIFFITH, Plaintiff and Appellant,

v.

PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.

JOSEPH P. PENDRY et al., Plaintiffs and Appellants,

v.

PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.


Court of Appeals of California, Sixth District.

October 15, 2013.

*589 Harold Griffith, in pro. per., for Plaintiff and Appellant Harold Griffith.

Johnson & James, and Robert K. Johnson, for Plaintiffs and Appellants Joseph P. Pendry, James Spain, Yuet-Ming Chu, William McGrath and Henry Schimpeler.


Aleshire & Wynder and Patricia J. Quilizapa for Association of California Water Agencies and California State Association of Counties as Amici Curiae on behalf of Defendant and Respondent.

OPINION

PREMO, J., —

After defendant Pajaro Valley Water Management Agency enacted ordinance No. 2010-02 that increased groundwater augmentation

*590 charges for the operation of wells within defendant's jurisdiction, plaintiff Harold Griffith challenged the ordinance on the grounds that the increase (1) was procedurally flawed because it was not approved in an election as
required by Proposition 218 (Cal. Const., art. XIII D, § 6), did not conform to certain substantive requirements of Proposition 218, and (3) was to be used for a purpose not authorized by the law under which defendant was formed. Thereafter, plaintiffs Joseph P. Pendry, James Spain, Yuet-Ming Chu, William J. McGrath, and Henry Schepeler (Pendry) challenged the ordinance on similar grounds and on the ground that it was void because one of the directors who voted for the ordinance had a disqualifying conflict of interest within the meaning of the Political Reform Act of 1974 (PRA) (Gov. Code, § 87100 et seq.). They also challenged an ordinance passed in 2002, which imposed an augmentation charge, and a 1993 management-fee ordinance. The trial court rendered judgments for defendant. Plaintiffs have appealed and reiterate their challenges. We are considering the two appeals together for purposes of briefing, oral argument, and disposition. After conducting an independent review of the record (Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448 [79 Cal.Rptr.3d 312, 187 P.3d 37]) (Silicon Valley), we affirm the judgments.

GENERAL BACKGROUND

We have previously detailed an historical background to this case in Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal.App.4th 1364, 1370-1375 [59 Cal.Rptr.3d 484] (Amrhein). We therefore decline to repeat it and will instead begin with the trial court's succinct summary.

"The Pajaro Valley Groundwater Basin supplies most of the water used in the Pajaro Valley. The water is being extracted faster than it is being replenished by natural forces, which leads to saltwater intrusion, especially near the coast. Once the water table drops below sea level, seawater seeps into the groundwater basin. [Defendant] was created [in 1984 by the Pajaro Valley Water Management Agency Act (Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Ann. Wat. — Uncod. Acts (2008) Act 760, p. 681)] to deal with this issue. At present, the strategy is to use recycled wastewater, supplemental wells, captured storm runoff, and a coastal distribution system. The purpose is to reduce the amount of water taken from the groundwater basin (for example, the amount taken from wells), by supplying water to some [coastal] users. The cost of this process is borne by all users, on the theory that even those taking water from [inland] wells benefit from the delivery of water to [coastal users], as that reduces the amount of groundwater those [coastal users] will extract [from their own wells], thereby keeping the water in [all] wells from becoming too salty."

Ordinance No. 2010-02 describes "three supplemental water projects that work together to provide supplemental water to reduce overdraft, retard seawater intrusion, and improve and protect the groundwater basin supply: (1) Watsonville Recycled Water Project, which provides tertiary treated recycled water for agricultural use and includes inland wells that are used to provide cleaner well water that is blended with the treated water in order to improve the water quality so that it may be used for agricultural purposes; (2) Harkins Slough Project, which diverts excess wet-weather flows from Harkins Slough to a basin that recharges the groundwater, which then is available to be extracted and delivered for agricultural use; and (3) Coastal Distribution System (`CDS'), which consists of pipelines that deliver the blended recycled water and Harkins Slough Project water for agricultural use along the coast."

"The Act specifically empowers [被告] to adopt ordinances levying `groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within [被告's boundaries].'" (Amrhein, supra, 150 Cal.App.4th at p. 1372; see Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Ann. Wat. — Uncod. Acts, supra, Act 760 (Act), § 1001.)

Ordinance No. 2010-02 states that the augmentation charge is necessary to cover the costs of "supplemental water service" described as follows: "(a) the purchase/acquisition, capture, storage and distribution of supplemental water
through the supplemental water projects [(Watsonville Recycled Water Project, Harkins Slough Project, and CDS)] and including the planning, design, financing, construction, operation, maintenance, repair, replacement and management of these project facilities, and (b) basin management monitoring and planning to manage the existing projects and to identify and determine future supplemental water projects that would further reduce groundwater overdraft and retard seawater intrusion. The cost of the service also includes ongoing debt payments related to the design and construction of the completed supplemental water projects."

**PROCEDURAL BACKGROUND**

In 2002, defendant approved ordinance No. 2002-02, which established an augmentation charge of $80 per acre-foot. Several citizens challenged the ordinance on the ground that the approval procedure did not comply with the notice, hearing, and voting requirements of Proposition 218. The trial court dismissed the case on the ground of a special statute of limitations, and the plaintiffs appealed to this court. We reversed the judgment after finding that part of the augmentation charge was not subject to the statute of limitations. (Scurich v. Pajaro Valley Water Management Agency (May 27, 2004, H025776) [nonpub. opn.] (Scurich); see Eiskamp v. Pajaro Valley Water Management Agency (2012) 203 Cal.App.4th 97, 100-101 [137 Cal.Rptr.3d 266] (Eiskamp).) We remanded the case for trial.

In 2003, defendant approved ordinance No. 2003-01, which increased the augmentation charge to $120 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. But it filed Amrhein as a validation proceeding seeking a declaration as to the validity of the ordinance. The trial court declared the ordinance valid, and citizens who had objected appealed to this court.

In 2004, defendant approved ordinance No. 2004-02, which increased the augmentation charge to $160 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. Griffith challenged the ordinance and a 1993 management-fee ordinance. San Andreas Mutual Water Company and others also challenged the ordinance. The two actions were consolidated with Scurich (Consolidated Lawsuits) and the Consolidated Lawsuits were stayed pending our decision in Amrhein.

In May 2007, we reversed the judgment in Amrhein after holding that "the augmentation fee is a fee or charge `imposed ... as an incident of property ownership' and thus subject to [the Proposition 218] preconditions for the imposition of such charges." (Amrhein, supra, 150 Cal.App.4th at p. 1370.)


"In January 2008, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants wanted to resolve all disputes in the Amrhein Lawsuit and the Consolidated Lawsuits. They and [defendant] then entered into a stipulated agreement for entry of judgment (stipulated agreement). The stipulated agreement provided: `all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation") as to [defendant's] actions shall be resolved by entry of judgment in the Pending Litigation'; [defendant] would pay $1.8 million to the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants for legal fees, costs, and expenses; and the augmentation charges collected pursuant to ordinances Nos. 2003-01 and 2004-02 would be refunded. It also stated that the `settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any
Augmentation Charge or Management Fee ordinances currently in effect....' The stipulated agreement did not provide for either the repeal of [ordinance No. 2002-02] or the refund of augmentation charges imposed under [that] Ordinance.

"In February 2008, judgment was entered pursuant to the terms of the stipulated agreement." (Eiskamp, supra, 203 Cal.App.4th at p. 102.)

In May 2010, defendant mailed notice of a public hearing on a proposed three-tier augmentation charge increase to all parcel owners. At the hearing, defendant tallied 291 written protests from 1,930 eligible parcel owners. Defendant then enacted ordinance No. 2010-02, which imposed the increased augmentation charges.

In June 2010, defendant began an all-mail election on the ordinance. It mailed ballots to all owners of land parcels served by wells who would be subject to the augmentation charge. Each ballot was accorded weighted votes proportional to the parcel's financial obligation as measured by average annual water use over the prior five years. And each ballot stated its number of votes. The weighted votes approved the ordinance 72 percent to 28 percent. But, if counted one vote per parcel, 324 votes were in favor of the ordinance and 608 votes were against the ordinance.

Plaintiffs then filed the instant actions to challenge ordinance No. 2010-02.

CHALLENGES TO ORDINANCE NO. 2010-02

"Proposition 218 was passed in 1996 by the electorate to plug certain perceived loopholes in Proposition 13. [Citations.] Specifically, by increasing assessments, fees, and charges, local governments tried to raise revenues without triggering the voter approval requirements in Proposition 13." (Silicon Valley Taxpayers' Assn. v. Garner (2013) 216 Cal.App.4th 402, 405-406 [156 Cal.Rptr.3d 703].)

Relevant here is the component of Proposition 218 that undertakes to constrain the imposition by local governments of "assessments, fees and charges." (§ 1.)

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*594 (1) Proposition 218 restricts "the power of public agencies to impose a `"[f]ee" or "charge," defined as 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.' [Citation.] The phrase `property-related service' is defined to mean `a public service having a direct relationship to property ownership.' [Citation.] `Property ownership' is defined to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.' [Citation.]

"Where a proposed fee or charge comes within this definition, [Proposition 218] requires the proposing agency to identify parcels upon which it will be imposed, and to conduct a public hearing. [Citation.] The hearing must be preceded by written notice to affected owners setting forth, among other things, a `calculat[ion] of `[t]he amount of the fee or charge proposed to be imposed upon each parcel....' [Citation.] If a majority of affected owners file written protests at the public hearing, `the agency shall not impose the fee or charge.' [Citation.] Moreover, unless the charge is for `sewer, water, [or] refuse collection services,' `no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.'" (Amrhein, supra, 150 Cal.App.4th at pp. 1384-1385.)

(2) As mentioned, we have determined that a groundwater augmentation charge such as the one imposed by ordinance No. 2010-02 "is indeed imposed as an incident of property ownership [and] that it is subject to the restrictions imposed on such charges by [Proposition 218]." (Amrhein, supra, 150 Cal.App.4th at p. 1393.) We cautioned in Amrhein, however, that "We should not be understood to imply that the charge is necessarily subject to all of the restrictions..."
imposed by [Proposition 218] on charges incidental to property ownership. [Amrhein] presents no occasion to determine whether this or a similar charge may fall within any of the express exemptions or partial exemptions set forth in that measure." (Ibid. & fn. 21.)

This case, however, presents such an occasion.

Boiled to its essence, plaintiffs' challenge to the election is that the weighted vote was improper. But the challenge necessarily fails if the augmentation charge falls within the express exemption set forth in Proposition 218 for sewer, water, and refuse collection services. (§ 6, subd. (c) [vote required to impose or increase property-related fee "[e]xcept for ... sewer, water, and refuse collection services."]).

Plaintiffs argue that defendant does not provide "water service" as that term is commonly understood. (See Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 Cal.App.4th 1351, 1358 [121 Cal.Rptr.2d 228] (Salinas) ["The average voter would envision `water service' as the supply of water for personal, household, and commercial use...."]). They urge that defendant provides "`groundwater management,'" which may be a service "but that service is not `water service.'" Plaintiffs, however, make a distinction without a difference.

(3) Domestic water delivery through a pipeline is a property-related water service within the meaning of Proposition 218. (Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 217 [46 Cal.Rptr.3d 73, 138 P.3d 220].) And we have held that, for purposes of Proposition 218, the augmentation charge at issue here does not differ materially "from a charge on delivered water." (Amrhein, supra, 150 Cal.App.4th at pp. 1388-1389.) If the charges for water delivery and water extraction are akin, then the services behind the charges are akin. Moreover, the Legislature has endorsed the view that water service means more than just supplying water. The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) Thus, the entity that produces, stores, supplies, treats, or distributes water necessarily provides water service. Defendant's statutory mandate to purchase, capture, store, and distribute supplemental water therefore describes water service.

Plaintiffs' reliance on Salinas is erroneous. In Salinas, the question was whether a storm drainage fee was exempt from the voter-approval requirement because it was a water or sewer service fee. Our point about the average voter envisioning water service as meaning the supplying of water was a preface to distinguishing water service from storm drainage rather than a definition of water service. The entire sentence reads "The average voter would envision `water service' as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away [from property], and discharges it into the nearby creeks, river, and ocean." (Salinas, supra, 98 Cal.App.4th at p. 1358.)

We therefore conclude that the augmentation charge at issue here is for water service within the meaning of Proposition 218. As such, it was expressly exempt from the fee/charge voting requirement.

In a second procedural attack, Pendry urges that defendant transgressed Proposition 218 by enacting ordinance No. 2010-02 without giving notice of the protest hearing to tenants and public utility customers who indirectly pay the augmentation charge. There is no merit to the claim.

"An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following: [¶] (1) 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." (§ 6, subd. (a)(1), italics added.)

(5) In short, Proposition 218 requires that notice of the protest hearing be sent to record owners, not tenants or customers. (See Gov. Code, § 53750, subd. (j) ["For purposes of ... Article XIII D of the California Constitution... [¶] ... [¶] (j) `Record owner' means the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency."].)

(6) It is true, as Pendry points out, that, in the definitions section of Proposition 218, the term "property ownership" is defined to include "tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (§ 2, subd. (g.) And it is true that "when a well [is] shown to be operated by a lessee or other occupant, that person could be billed...." (Amrhein, supra, 150 Cal.App.4th at p. 1383.) But the notice provision of section 6, subdivision (a), requires notice to record owners, not to those having property ownership. (Silicon Valley, supra, 44 Cal.4th at p. 444 ["The principles of constitutional interpretation are similar to those governing statutory construction.' [Citation.] If the language is clear and unambiguous, the plain meaning governs."].)

Proposition 218 also imposes substantive limitations, including restrictions on the use of revenues derived from such charges." (Amrhein, supra, 150 Cal.App.4th at p. 1385.)

"A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

"(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

"(3) 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.

"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4 [(procedures and requirements for proposed assessments)].

"(5) No fee or charge may be imposed for general governmental services... where the service is available to the public at large in substantially the same manner as it is to property owners, [¶] ... In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." (§ 6, subd. (b).)

Plaintiffs argue that the augmentation charge transgresses each of the section 6, subdivision (b), substantive limitations. 

Revenues shall not exceed the funds required to provide the property related service
According to Griffith, the revenues derived from the augmentation charge exceed the funds required to provide supplemental water service because some of the revenue is used to pay ongoing debt that was "incurred to build a now abandoned pipeline to bring water into the Valley." There is no merit to the point.

(7) As noted above, the Act allows defendant to levy groundwater augmentation charges for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water. Such costs necessarily include debt service incurred to construct facilities to capture, store, and distribute supplemental water.

**Revenues shall not be used for any purpose other than that for which the fee or charge was imposed**

According to plaintiffs, the revenues derived from the augmentation charge are used for a purpose other than that for which the charge was imposed because some of the revenue is used to pay debt service and defendant's general expenses. Again, the Act allows an augmentation charge to cover debt service. And similar reasoning supports that the costs of purchasing, capturing, storing, and distributing supplemental water necessarily include general expenses to administer the purchasing, capturing, storing, and distributing of supplemental water.

Pendry, however, expands on this theme in a separate, detailed argument to the effect that the augmentation charge is unauthorized by the Act. He contends that ordinance No. 2010-02 is invalid because it allows the augmentation charge to be used for "supplemental water service," a purpose not authorized by the Act. Without specifically referring to the Watsonville Recycled Water Project that blends treated recycled water with well water for agricultural use, he complains that defendant "is using the funds generated by the augmentation charge imposed by Ordinance 2010-02 to extract groundwater from within the watershed and deliver that water to the coast...."

Pendry relies on the Act, which authorizes defendant to levy augmentation charges to pay the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency. From there, Pendry notes that the Act states that "Supplemental water' means surface water or groundwater imported from outside the watershed or watersheds of the groundwater basin, flood waters that are conserved and saved within the watershed or watersheds which would otherwise have been lost or would not have reached the groundwater basin, and recycled water." (Act, § 316.) From this, Pendry concludes that the recycle/well blend is not supplemental water because the well portion of the blend is neither imported water, floodwater, nor recycled water. We disagree with Pendry's analysis.

Defendant's Rate Study (ante, fn. 8) explains that "The [Watsonville Recycled Water Facility] produces recycled water with salinity (Total Dissolved Solids or TDS concentration) between approximately 700 and 900 mg/L. The concentration of TDS varies seasonally as a result of the source water flowing into the Waste Water Treatment Plant. In order to reduce salinity and use the recycled water for irrigation purposes, the recycled water must be blended with higher quality (lower TDS) water. Therefore, the recycled water project includes the construction, operation, and maintenance of blend water from supplemental groundwater wells. The supplemental wells are described in the BMP [(Basin Management Plan)] as part of the recycled water project. The wells are a necessary component of the recycled water project, which reduces coastal pumping and thus increases the sustainable yield of the overall groundwater basin. These wells also off-set and reduce the adverse water quality wells located closer to the coast."
"Recycled water' means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource." (Wat. Code, § 13050, subd. (n).)

Given this definition, it is apparent that the Watsonville Recycled Water Facility does not produce recycled water because the water it produces is not suitable for the beneficial use of coastal agriculture. The water only becomes recycled water when blended with the well water. Thus, the recycle/well blend water delivered to the coast is supplemental water.

We are constrained to add that the Act unquestionably allows defendant to extract groundwater for the purpose of capturing recycled water. The Act generally provides that defendant "should, in an efficient and economically feasible manner, utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future needs of the basin." (Act, § 102, subd. (g).) It specifically provides that defendant, "in order to improve and protect the quality of water supplies may treat, inject, extract, or otherwise control water, including, but not limited to, control of extractions, and construction of wells and drainage facilities." (Id., § 711.) And it also provides that defendant "shall have the power to take all affirmative steps necessary to replenish and augment the water supply within its territory." (Id., § 714.)

The amount imposed as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel

According to Griffith, the amount imposed on his parcel was disproportionate because he uses no services. But this overlooks that "the management of the water resources ... for agricultural, municipal, industrial, and other beneficial uses is in the public interest ..." and defendant was created to manage the resources "for the common benefit of all water users." (Act, § 101.) It also overlooks that the augmentation charge pays for "the activities required to prepare or implement any groundwater management program." (Id., § 1002, subd. (a).)

Pendry similarly grounds his argument on the erroneous premise that "The only property owners receiving § 6(b) services from [defendant] are the coastal landowners receiving delivered water."

Pendry specifically complains that defendant "established the augmentation charge by calculating the amount needed for its project, and then subtracting its sources of revenue other than the augmentation charge, with the remainder being the amount of the augmentation charge." He urges that defendant improperly "worked backwards." According to Pendry, "the proportional cost of service must be calculated ... before setting the rate for the augmentation charge."

Defendant indeed established its augmentation charge based on a revenue requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users. The American Water Works Association Manual of Water Supply Practices: Principles of Water Rates, Fees, and Charges, in evidence below and relied on by defendant's ratemaking consultant, recommends this methodology ("The total annual cost of providing water service is the annual revenue requirements that apply to the particular utility.")). Pendry does not explain why this approach offends Proposition 218 proportionality. He cites Silicon Valley, supra, 44 Cal.4th at page 457 ("an assessment calculation that works backward by starting with an amount taxpayers are likely to pay, and then determines an annual spending budget based thereon, does not comply with the law governing assessments..."). Unlike Silicon Valley, however, this case neither involves an assessment nor a what-will-the-market-bear methodology. Pendry also cites Howard Jarvis Taxpayers Assn. v. City of Fresno (2005) 127 Cal.App.4th 914, 923 [26 Cal.Rptr.3d 153]. But that case says nothing
more than that costs should be determined and apportioned ("Together, subdivision (b)(1) and (3) of article XIII D, section 6, makes it necessary — if Fresno wishes to recover all of its utilites costs from user fees — that it reasonably determine [citation] the unbudgeted costs of utilities enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel."). (Ibid.)

Pendry acknowledges that defendant apportioned the augmentation charge among different categories of users (metered wells, unmetered wells, and wells within the delivered water zone). But he argues that *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926 [131 Cal.Rptr.3d 373] (*Palmdale*), holds that Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis. We disagree with Pendry.

In *Palmdale*, the court reversed a judgment that had upheld tiered categories of water rates. It held that the water district had failed to carry its burden to justify disparate treatment of the customer classes. The case did not hold that parcel-by-parcel analysis was required. It held that the water district charged categories disproportionately "without a corresponding showing in the record that such impact is justified under [Proposition 218]." (*Palmdale, supra,* 198 Cal.App.4th at p. 937.)

(8) Apportionment is not a determination that lends itself to precise calculation. (*White v. County of San Diego* (1980) 26 Cal.3d 897, 903 [163 Cal.Rptr. 640, 608 P.2d 728].) In the context of determining the validity of a fee imposed upon water appropriators by the State Water Resources Control Board, the Supreme Court has recently held that "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payers." (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438 [121 Cal.Rptr.3d 37, 247 P.3d 112].)

Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than that the amount shall not exceed the proportional cost of the service attributable to the parcel, defendant's method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render defendant's method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

*No fee or charge may be imposed unless it is immediately available and not for future services*

Plaintiffs argue that the augmentation charge will be used for future services because ordinance No. 2010-02 states that the charge will be used "to identify and determine future supplemental water projects ...." There is no merit to the point. *602* Defendant's water service consists of more than just delivering water. As mentioned, the Act authorizes defendant to levy groundwater augmentation charges to pay for purchasing, capturing, storing, and distributing supplemental water. Since one cannot rationally purchase supplemental water without identifying and determining one's needs, identifying and determining future supplemental water projects is part of defendant's present-day water service.

Pendry also complains that delivered water is one of the services and delivered water is not immediately available except to coastal properties within the delivered water zone. But, again, Pendry's complaint stems from his erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water and his failure to acknowledge that the augmentation charge pays for the activities required to prepare or implement the groundwater management program for the common benefit of all water users.
**Revenues may not be imposed for general governmental services where the service is available to the public at large in substantially the same manner as it is to property owners**

Plaintiffs reason that, since everyone is a water user, everyone benefits from the services charged to property owners via the augmentation charge. They conclude that the augmentation charge is imposed for general governmental services. We disagree with plaintiffs' analysis.

(9) The language of section 6, subdivision (b)(5), concerns the purpose of fees and charges. (Golden Hill Neighborhood Assn., Inc. v. City of San Diego (2011) 199 Cal.App.4th 416, 434, fn. 17 [130 Cal.Rptr.3d 865].) "The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service." (Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal.App.4th 637, 648 [119 Cal.Rptr.2d 91].) Defendant is not using money from the augmentation charge for "general governmental services." (§ 6, subd. (b)(5).) Rather, it is using the money to pay for the water service provided.

**CONFLICT OF INTEREST**

Pendry contends that defendant's board member Michael Dobler, who voted for ordinance No. 2010-02, had a disqualifying financial interest in the decision, and that his participation renders the ordinance void under the PRA. He points out that defendant's board of directors consists of seven members (Act, § 402) and ordinances must pass by "the affirmative vote of the majority of the members of the board" (id., § 410). He notes that the vote count to pass ordinance No. 2010-02 was four to one and, thus, insufficient

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*603* without Dobler's vote. He complains that Dobler has an interest in entities that farm in the delivered water zone. We disagree with Pendry's contention.

(10) The PRA was enacted by initiative in June 1974. It prohibits any public official from participating in a governmental decision in which he knows or has reason to know he has a financial interest. (Gov. Code, § 87100.) It allows a person to sue for injunctive relief and, "If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void." (Id., § 91003, subd. (b).) It also established the Fair Political Practices Commission (id., § 83100), which is authorized to adopt regulations to carry out the purposes and provisions of the PRA (Gov. Code, § 83112).

"A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official ...." (Gov. Code, § 87103.)

"The financial effect of a governmental decision on the official's economic interest is indistinguishable from the decision's effect on the public generally if ... [¶] ... [¶] (c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (Cal. Code Regs., tit. 2, § 18707.2, subd. (c) (regulation).)

Here, there is no serious question that (1) defendant is a water, irrigation, or similar district, and (2) the decision effected an adjustment to charges or rates.
Pendry disputes that the ordinance applies the charges proportionally and across the board to persons receiving services from defendant. He urges that the augmentation charge is imposed upon approximately 2,400 parcels located within defendant's boundaries, but only a handful of those properties receive the delivered water service (Dobler included) and can expect to benefit from the greater service, reliability, and improved water quality from the delivered water supply. This, however, is merely another variant of Pendry's erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water.

The augmentation charge affects those on whom it is imposed by burdening them with an expense they will bear proportionately to the amount of groundwater they extract at a rate depending on which of three rate classes applies. It is imposed "across-the-board" on all water extractors. All persons extracting water — including any coastal users who choose to do so — will pay an augmentation charge per acre-foot extracted. All persons extracting water and paying the charge will benefit in the continued availability of usable groundwater. That there is a separate charge for delivered water has no tendency to establish that the augmentation charge is applied to the interests of extractors in a manner that is anything other than proportional and across-the-board. It is plain that the ordinance satisfies the terms of regulation section 18707.2, subdivision (c), such that the "public generally" exception in the PRA applies to Dobler's vote. (See Amrhein, supra, 150 Cal.App.4th at pp. 1395-1396 (conc. opn. of Bamattre-Manoukian, J.).)

**ORDINANCE NO. 2002-02 AND 1993 MANAGEMENT FEE**

In *Eiskamp*, the plaintiff challenged ordinance No. 2002-02 on the ground that it was invalid because defendant did not comply "with the notice, hearing, and voting requirements of [Proposition 218]." (*Eiskamp, supra, 203 Cal.App.4th at p. 102.*) We concluded that the challenge was barred by the doctrine of res judicata because the 2008 stipulated judgment in the pending litigation resolved the issue against all persons. We specifically held that "Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was `binding and conclusive ... against [defendant] and against all other persons' (Code Civ. Proc., § 870, subd. (a)), including Eiskamp." (*Id.* at p. 106.) Since Pendry raises the same claim as the plaintiff in *Eiskamp*, his challenge is also barred.

Pendry disagrees. He asserts that *Eiskamp* was wrongly decided because "the in pro per plaintiff in *Eiskamp* did not properly present the correct facts or law to this Court." According to Pendry, the Consolidated Lawsuits were not in rem validation proceedings insofar as ordinance No. 2002-02 was concerned because, in *Scurich* (the case that challenged that ordinance via a reverse validation action), our reversal upheld the trial court's dismissal of the in rem validation cause of action and remanded for trial an in personam declaratory-relief cause of action. From this, Pendry reasons that ordinance No. 2002-02 was "not under attack" such that there was in rem jurisdiction in the Consolidated Lawsuits. Pendry concludes that the stipulated judgment only binds parties to the stipulated agreement and, since he was not a party, he is free to relitigate. Pendry's analysis is erroneous.

The settlement agreement served to resolve "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation")." (*Eiskamp, supra, 203 Cal.App.4th at p. 102,* italics added.) Specifically, the parties extinguished "any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect...." (*Ibid.,* italics added.)

In the pending litigation, the "judgment was entered pursuant to the terms of the stipulated agreement." (*Eiskamp, supra, 203 Cal.App.4th at p. 102.*) Since the Amrhein lawsuit was a validation proceeding and part of the pending
litigation, all persons are bound by the judgment. (Code Civ. Proc., § 870, subd. (a).) And since the judgment extinguished all claims that the parties, which includes all persons given that validation character of Amrhein, had made concerning any augmentation charge or management fee then in effect, Pendry cannot relitigate the claims here. Pendry concedes as much by recognizing that "the plaintiffs and defendants in Scurich and Amrhein [(all persons)] stipulated in private settlement discussions to accept money in exchange for foregoing their individual right to attack Ordinance 2002-02 in the future." That ordinance No. 2002-02 was not technically under attack at the time of the judgment does not detract from that the pending litigation was a validation proceeding that comprehensively extinguished all claims that had been made, or could have been made, about the validity of any augmentation charge or management fee then in effect. This necessarily includes claims against ordinance No. 2002-02 and the 1993 management fee.\footnote{13}

Pendry claims that applying res judicata against him transgresses due process. However, his argument is premised on the trial court's conclusion that res judicata applied because he was in privity with the parties in the pending litigation. Our conclusion is that res judicata applies because, by virtue of the validation character of the pending litigation, he was a party to the pending litigation.

**DISPOSITION**

The judgment in H038087 (Super. Ct. Santa Cruz County, No. CV168936-Griffith) is affirmed.

The judgment in H038264 (Super. Ct. Santa Cruz County, No. CV169080-Pendry) is affirmed.

Rushing, P. J., and Elia, J., concurred.

\footnote{1} Further unspecified section references are to California Constitution, article XIII D.

\footnote{2} Plaintiffs also asserted other grounds that they do not advance on appeal.

\footnote{3} In rem proceeding by public agency against all persons interested in validity of matter determined. (Code Civ. Proc., § 860 et seq.)

\footnote{4} Defendant proposed $195 per acre-foot for metered wells inside the coastal delivered water zone, $162 per acre-foot for metered wells outside the delivered water zone (primarily municipal, industrial, and agricultural users), and $156 per acre-foot for unmetered wells (primarily rural residential). It also proposed $306 per acre-foot for delivered water charges.

\footnote{5} The parties differ immaterially on the one-for-one vote count.

\footnote{6} According to defendant, the election was unnecessary but held nevertheless in an abundance of caution "because no case has explicitly reached the issue, and because of the near certainty of suit."

\footnote{7} Pendry does not challenge compliance with section 6, subdivision (b)(1).

\footnote{8} Defendant's Proposition 218 service charge report (Rate Study), in evidence below, explains that a previously recommended import pipeline was no longer feasible "[d]ue to changes in the availability of Central Valley Project water supplies."
"Agricultural uses shall have priority over other uses under this act within the constraints of state law." (Act, § 102, subd. (d).)

Pendry claims that the trial court did not find that the "public generally" exception applies in this case. It is true that the trial court's reasoning is ambiguous. The trial court's statement of decision finds against "a conflict of interest which could support the voiding of the subject Ordinance." The finding could be construed to mean that (1) Dobler had no disqualifying financial interest, (2) the "public generally" exception applied to Dobler's financial interest, or (3) Dobler's financial interest did not justify the discretionary remedy to void the ordinance. Pendry's point is of no moment. The parties argued the "public generally" exception to the trial court. The salient facts are undisputed. And Pendry urges us to review the PRA issue de novo because it involves statutory interpretation on undisputed facts.

The plaintiff in *Eiskamp* did not challenge the 1993 management-fee ordinance as does Pendry, but the management-fee ordinance stands on the same footing as the augmentation-charge ordinance since it was part of the stipulated judgment.

Plaintiff McGrath was a party to the stipulated agreement but he excepted himself from the causes of action herein that challenge ordinance No. 2002-02 and the management-fee ordinance.

Defendant's request to take judicial notice of three letters requesting depublication of *Eiskamp* and four letters supporting a petition for review of *Eiskamp* is denied.

59 Cal.Rptr.3d 484 (2007)
150 Cal.App.4th 1364

PAJARO VALLEY WATER MGMT. AGENCY, Plaintiff and Respondent,

v.

Ray AMRHEIN et al., Defendants and Appellants.

No. H027817.

Court of Appeal, Sixth District.

May 21, 2007.

Rehearing Denied June 14, 2007.


*485 Johnson & James, Robert K. Johnson, Aptos, for Defendants and Appellants Ray Amrhein et al.

Harold Griffith, Amicus Curiae for Appellants Ray Amrhein et al.

Maria Luisa Menchaca, Amicus Curiae for Appellants Fair Political Practices Commission.
We originally issued an opinion finding no error and affirming the judgment. We granted rehearing, however, to consider the effect of Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220 (Bighorn). In light of that decision we are now compelled to conclude that the augmentation fee is a fee or charge "imposed ... as an incident of property ownership" and thus subject to constitutional preconditions for the imposition of such charges. (Cal. Const., art. XIII D, § 2, subd. (e), added by initiative, Gen. Elec. (Nov. 5, 1996); see id., § 6.) Since the Agency made no attempt to comply with those conditions, we must reverse the judgment validating the charge.

BACKGROUND

The area subject to the Agency's jurisdiction is home to around 80,000 persons, about half of whom reside in Watsonville. This area lies atop the Pajaro Valley Groundwater Basin, which the trial court found to be "a single, interconnected basin of fresh groundwater to supply the whole region." Extraction of groundwater through wells supplies slightly over 95 percent of the water used in the basin. The remainder comes from a variety of surface sources including sloughs, rivers, creeks, and springs. About 86 percent of the water used within the basin goes to agriculture.

Since the 1950's the basin's groundwater supply has been subjected to chronic overuse, resulting in overdraft and seawater intrusion. Overdraft directly depletes supply by extracting more water than is replenished (recharged) by natural processes. Recent annual extractions from the basin total about 70,000 acre-feet, which reflects an overdraft of about 9,000 acre-feet. This in turn leads to seawater intrusion, which occurs when fresh groundwater is drawn below sea level, causing seawater to flow into the neighboring freshwater, rendering it too saline for use. Freshwater has been drawn to below sea level throughout much of the basin. An Agency witness testified that if seawater were allowed to intrude unimpeded into the areas of declining ground water elevation, "it would eventually fill that void with seawater. The entire basin would be impacted." As it is, seawater intrusion renders unusable 11,000 additional acre-feet of fresh groundwater every year.

Because of the depletion that has already occurred, seawater intrusion would not be halted merely by reducing extractions by the 9,000 acre-feet per year of overdraft, or even the 20,000 acre-feet of overdraft plus water lost to increased salinity. Rather, the Agency estimates that to achieve seawater exclusion by reduced extractions alone would require a reduction of about 44,000 acre-feet per year.
The Agency was created in 1984 through the Legislature's enactment, as an urgency measure, of the Pajaro Valley Water Management Agency Act. (Stats.1984, ch. 257, §§ 1 et seq., pp. 798 et seq., West's Ann. Wat.-Appen. (1995 ed.) ch. 124, §§ 124-1 et seq. (Act.)) It established an agency composed of a seven-member board of directors, each of whom must be a voter and resident of the basin. (Stats.1984, ch. 257, § 402, p. 805.) In creating the Agency, the Legislature found that "the management of the water resources within the Pajaro Valley Water Management Agency for agricultural, municipal, industrial, and other beneficial uses is in the public interest and that the creation of a water agency pursuant to this act is for the common benefit of all water users within the agency." (Stats.1984, ch. 257, § 101, p. 798.) It declared the Agency's purpose as "to efficiently and economically manage existing and supplemental water supplies in order to prevent further increase in, and to accomplish continuing reduction of, long-term overdraft and to provide and insure sufficient water supplies for present and anticipated needs within the boundaries of the agency." (Id., § 102, subd. (f), p. 799.) It decreed that the Agency "should, in an efficient and economically feasible manner, utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future needs of the basin." (Id., § 102, subd. (g), p. 799.) It directed that the

management of water resources under the Act be carried out in light of a number of objectives, including "the avoidance and eventual prevention of conditions of long-term overdraft, land subsidence, and water quality degradation" (id., § 102, subd. (a), p. 799), the establishment of "reliable, long-term supplies" rather than "long-term overdraft as a source of water supply" (id., § 102, subd. (b), p. 799), the reduction of long-term overdraft "realizing that an immediate reduction in long-term overdraft may cause severe economic loss and hardship" (id., § 102, subd. (c), p. 799), and the achievement of economic efficiency by "requir[ing] that water users pay their full proportionate share of the costs of developing and delivering water" (id., § 102, subd. (d), p. 799). The Legislature anticipated that "long-term overdraft problems may not be solved unless supplemental water supplies are provided." (Id., § 102, subd. (g), p. 799.) Accordingly it declared that the Agency could appropriately "acquire, buy, and transfer water and water rights in the furtherance of its purposes." (Id., § 102, subd. (e), p. 799.) It declared that "[a]gricultural uses shall have priority over other uses under this act within the constraints of state law." (Id., § 102, subd. (d), p. 799.)

The Act specifically empowers the Agency to adopt ordinances levying "groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency." (Stats. 1984, ch. 257, § 1001, p. 815.) It also authorizes the Agency to "regulate, limit, or suspend extractions from extraction facilities" (id., § 711, p. 811), and provides criteria for the allocation of rights to use available groundwater (id., § 712, pp. 809-810).

The Act also empowers the Agency to commence a "groundwater rights adjudication" (Stats.1984, ch. 257, § 1106, p. 817), which would effect "the determination of substantially all rights in the groundwater basin or the area subject to the adjudication" (id., § 310, p. 804). An economist testified about the effects on the local economy of a "worst case scenario" in which a groundwater rights adjudication would reduce groundwater extractions to 24,000 acre-feet per year, of which 12,000 would be allocated to residential use, leaving about 0.4 acre-feet per acre for farmers. He testified that this scenario would result in the loss of 9,000 jobs and an annual reduction in agricultural production of $360 million.[1]

In 2002, the Agency enacted, by unanimous vote, a Revised Basin Management Plan (BMP), which evaluated the problems of overdraft and seawater intrusion, examined a variety of potential solutions, identified a preferred solution, and recommended specific projects to implement it. The result was a plan whose primary components were (1) construction of a 23-mile
pipeline from San Benito County to the coast; (2) construction of a coastal distribution system for delivery of water to the area west of Highway 1 within the Basin; (3) procurement of water, or water rights, from owners in the Central Valley; (4) development of additional water supplies from local sources; and (5) eventual delivery of the resulting supplies to coastal farmers as well as some farmers along the pipeline route.

An Agency expert opined that the plan represents a reasonable engineering approach to achieving Agency goals, and is the most reasonable of many alternatives considered in terms of cost, environmental effects, and ability to meet those goals. The plan would bring in a total of about 18,500 acre-feet composed of 1,000 from Harkins Slough, 4,000 in recycled Watsonville water, and 13,400 in pipeline imports. The plan also sought to achieve savings of about 5,000 acre-feet through conservation. An Agency witness opined that these measures would solve the problems of overdraft and seawater intrusion, even though they fall well short of the amount by which extractions exceed the safe yield. He gave two reasons for this conclusion, the first of which seemed to be that by eliminating coastal extractions and replacing them with irrigation from outside sources, the plan would raise the groundwater level along the coast, which in turn would retard seawater intrusion. The second reason is unintelligible as stated in testimony, having been rendered so, we surmise, by mistranscription. In any event, the witness testified that if the projected solution "does not work," the plan will have put the infrastructure in place to "expand the existing system." Another expert witness testified that the application of 18,500 acre-feet at the coast would produce a hydraulic gradient equivalent, for purposes of excluding seawater, to reducing overall extraction by 45,000 acre-feet.

Funding for the project was expected to come from groundwater augmentation charges, such as that at issue here, along with (higher) charges on imported water, grants, and some public funds. More precisely, those portions not funded by grants or public funds would be financed by certificates of participation or selling bonds to be paid off from augmentation and delivery charges.

The Agency first collected a groundwater augmentation charge in 1994. The charge was increased from time to time by ordinance. At issue here is the Agency's Ordinance 2003-01, which increased the charge from $80 to $120 per acre-foot. An Agency witness testified that this was not sufficient to implement the BMP and that the charge would eventually rise to $158 per acre-foot. The water delivery charge would be $316 per acre-foot.

The augmentation charge is assessed against all extractors of groundwater. Although the evidence on this point is not entirely clear, there are apparently some 660 non-residential wells, most of them operated for farming purposes, and approximately 3,000 residential wells. Many large users have metered wells; in those cases the owner of the well is charged according to actual consumption. Few if any residential well users have meters; they are charged an "estimated use rate per dwelling" of 0.6 acre-feet per year, which is the estimated average rate of consumption. For unmetered agricultural use, the Agency estimates consumption based on a number of factors. For example, the Agency assumes that an apple orchard consumes one acre-foot per year per cultivated acre of land. The Agency can adjust estimated charges if a well owner shows that estimated consumption does not accurately reflect the amount extracted. While Agency witnesses knew of no cases where this had occurred with residential well users, it has occurred with other users billed on an estimated basis.

The Agency bills these charges to the owner, as identified in parcel records, of the land on which a well appears. Upon request, the Agency will bill a tenant, but it will send a duplicate bill to the owner, whom it considers ultimately responsible. The Agency has pursued collection proceedings against tenants and has entered into payment arrangements with tenants in arrears. The general manager testified that if a case arose in which a well were shown to belong to a person other than the landowner, the Agency would bill the well owner.
On July 1, 2003, the Agency brought this action for a declaration of the validity of the ordinance increasing the augmentation charge to $120 per acre-foot. Pursuant to Code of Civil Procedure section 860 et sequitur, the Agency named as defendants all persons interested in the validity of the ordinance. Objectors filed an answer generally denying the allegations of the complaint and asserting a number of grounds for invalidating the ordinance, including that (1) the charge constitutes "a property based tax or assessment" not enacted in compliance with governing law including Proposition 218; (2) the charge is invalid "inasmuch as certain members of the Board of Directors who voted on the Augmentation Charge Increase had a conflict of interest within the law, including but not limited to the provisions of Government Code section 87100, et seq."; and (3) the Agency is estopped to deny that the charge is an assessment on "rural domestic wells" in view of its own prior directive to the tax collectors of the affected counties to collect the charge as an assessment. A separate answer was filed by Pajaro Valley Citizens for Long Term Water Solution [sic], a nonprofit corporation, supporting the Agency's position.

After hearing testimony from witnesses for the Agency and Objectors, the trial court entered a judgment declaring the ordinance valid. Objectors moved to set aside the judgment on the ground that the court had allowed insufficient time for them to propose contents for, and object to, the requested statement of decision. The trial court granted that motion and filed a new judgment and statement of decision. Objectors filed this timely appeal.

I. Jurisdiction

Objectors assert that the trial court lacked jurisdiction "to decide the validity of the augmentation charge in a validation action." The argument apparently proceeds as follows: (1) a validation proceeding will only lie to determine the validity of official action where authorized "under any other law" (Code Civ. Proc., § 860); (2) the Agency predicated its complaint here on Government Code section 66022, which authorizes a validation proceeding "to ... review ... an ordinance ... modifying or amending an existing fee or service charge, adopted by a local agency"; (3) for purposes of this statute, "fee or service charge" means a capacity charge; (4) the augmentation charge at issue here is only partly a "capacity charge" subject to a validation proceeding under these provisions; and (5) the trial court therefore lacked jurisdiction to render a validation judgment with respect to those portions of the charge that are not a "capacity charge."

We fail to discern how this argument can affect the outcome of this appeal. Objectors raised the point below in a trial brief alluding to another lawsuit, which was then on appeal before this court, challenging an Agency augmentation charge by reverse validation action. The trial court there had dismissed the matter for failure to comply with the special limitations period applicable to such proceedings. (Code Civ. Proc., § 863.) After this matter was tried, but before judgment entered, a panel of this court rendered an unpublished decision in that case, holding that the augmentation fee was only partly a "capacity charge" and that insofar as it was not such a charge, the plaintiffs' objections were not subject to the special statute of limitations. (Scurich v. Pajaro Valley Water Management Agency (May 27, 2004, No. H025776), 2004 WL 1191948 [nonpub. opn.] (Scurich).)

Objectors cited that decision to the court below, arguing that it affected the outcome here in some way. However, they later entered into a stipulation declaring that "[i]nsofar as there is any portion of the augmentation charge ... that is not within the jurisdiction of this court for a validation action, the complaint may be deemed to have been amended to state a second cause of action among the defendants who have appeared, and the plaintiff, for declaratory relief as to the validity of Ordinance 2003-01. Nothing contained in this stipulation shall prevent the parties from raising any issue on appeal which was part of the proceedings in this case." The stipulation was executed by the Agency, Objectors, other appearing defendants, and the trial judge.
Despite this stipulation, Objectors persist in arguing that the trial court lacked jurisdiction to adjudicate the matter as a validation proceeding. The intended effect of this assertion is left to surmise. The point was offered below as a defense to the action, i.e., that the trial court lacked subject matter jurisdiction. As far as we can tell, no authority was ever provided for this proposition. In any event it would provide at most a partial defense, because Objectors do not appear to claim that the conditions for a validation proceeding are entirely lacking, only that part of the fee is not subject to adjudication in such a proceeding. The practical significance of this proposition, were we to accept it, is obscure at best. In the unpublished decision cited by Objectors, the question had the practical effect of resurrecting part of a lawsuit that the trial court had completely terminated. Here the error, if any, was the opposite — the court tried too much of the action as a validation proceeding, when only part of it was subject to such treatment. Since all parties before the court actively sought such an adjudication, this hypothetical error had no apparent effect on them. The record fails to establish, and Objectors make no attempt to demonstrate, that their argument entitles them to any particular relief.

This would follow even if Objectors had not stipulated away whatever objection they otherwise had. If a complaint contains allegations that would otherwise oust the trial court of jurisdiction, but the facts alleged would support a declaratory judgment, the complaint may be construed — even without a stipulation — to pray for such relief. (See Minor v. Municipal Court (1990) 219 Cal.App.3d 1541, 1547-1548, 268 Cal.Rptr. 919.) Here the Agency's right to seek declaratory relief is reinforced by Code of Civil Procedure section 869, which declares that an agency's entitlement to pursue a validation proceeding "shall not be construed to preclude the use by such public agency ... of mandamus or any other remedy to determine the validity of any thing or matter." Thus, assuming that some or all of the augmentation fee could not properly be adjudicated in a validation proceeding, the trial court's jurisdiction could, and as far as this record shows should, be saved by viewing the judgment as one in declaratory relief.

Under the circumstances here, the only apparent distinction between a validation judgment and a declaratory judgment is its effect on absent persons. A validation proceeding is in rem (Code Civ. Proa, § 860), and yields a judgment that is "forever binding and conclusive ... against the agency and against all other persons" (id., § 870, subd. (a)). A declaratory judgment, on the other hand, is in personam (Mills v. Mills (1956) 147 Cal. App.2d 107, 116, 305 P.2d 61), and generally has preclusive effect only on those who were joined or represented in the action (Campbell v. Scripps Bank (2000) 78 Cal. App.4th 1328, 1334, 93 Cal.Rptr.2d 635).[7] Thus if someone other than Objectors sought to relitigate some of the issues concerning the validity of the charge, it might be open to that person to contend that some aspects of the present judgment are not conclusive on the world but only on the parties appearing here. In no sense does it appear that the court lacked fundamental jurisdiction to adjudicate the issues before it or to issue a judgment binding on the parties now before us. This makes it unnecessary to consider the Agency's arguments that the reasoning in Scurich, supra, H025776, does not pertain here.[8]

II. Tax, Assessment, or Property-Related Charge[9]

A. Introduction

Objectors contend that the groundwater augmentation charge could not validly be imposed without complying with the provisions of Propositions 218 (Cal. Const., arts. XIII C & XIII D, § 3) and 62 (Gov. Code, §§ 53720-53730), under which it constituted a tax, property assessment, or charge incidental to property ownership. In our previous decision we concluded, on the basis of then-extant authority, that the charge did not fall within any of these descriptions. We have now concluded that while the charge is not a tax or assessment, it must be considered a property-related fee and, as such, is subject to the relevant provisions of Proposition 218.
As relevant here, Proposition 62 added provisions to the Government Code prohibiting any "local government or district" from imposing any "general tax" or "special tax" without voter approval. (Gov. Code, §§ 53722, 53723.) Article XIII C of the California Constitution (Art. 13C), which was enacted as part of Proposition 218, adopted by initiative in November 1996, similarly limits the power of local governments, which are broadly defined to include "any special district, or any other local or regional governmental entity" (Art. 13C, § 1, subd. (b)) to impose taxes, all of which are classified for purposes of the article as either general or special. (Art. 13C, § 2, subd. (a).) A general tax is "any tax imposed for general governmental purposes." (Art. 13C, § 1, subd. (a).) A special tax is "any tax imposed for specific purposes...." (Art. 13C, § 1, subd. (d).) No general tax may be imposed, increased, or extended without the approval of a majority of the voters. (Art. 13C, § 2, subd. (b).) "Special purpose districts [and] agencies" are altogether barred from imposing general taxes. (Art. 13C, § 2, subd. (a).) No special tax may be imposed without two-thirds voter approval. (Art. 13C, § 2, subd. (d).) Article 13C also attempts to guarantee to the electorate the power to reduce or "affect" local taxes, assessments, and charges by initiative. (Art. 13C, § 3.)

The second component of Proposition 218 is Article XIII D of the California Constitution (Art. 13D), which undertakes to constrain the imposition by local governments of "assessments, fees and charges." (Art. 13D, § 1.) An "[a]ssessment" is "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." (Art. 13D, § 2, subd. (b).) "Special benefit" means "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." (Art. 13D, § 2, subd. (i).) "Fee" and "charge" are defined interchangeably as "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." (Art. 13D, § 2, subd. (e).)

Article XIII D imposes procedural requirements on the levying of assessments, including a noticed public hearing and balloting of all affected landowners, who may veto the assessment by a majority negative vote, determined in proportion to the proposed assessment on each property. (Art. 13D, § 4, subds. (c)-(e).) A "[p]roperty [r]elated [f]ee[ ] [or] [c]harge[ ]" may only be imposed or increased after identification of affected parcels, notice to their owners, a public hearing an opportunity for protest, and with certain exceptions, approval by a majority of property owners or by two thirds of voters within the district. (Art. 13D, § 6.)

It is undisputed that the Agency did not comply with the procedures prescribed under Propositions 62 and 218 for general taxes, special taxes, assessments, or property-related charges. Therefore, if the groundwater augmentation charge falls within any of these categories, it must be invalidated.

B. Special Tax

There is no question that if the charge here is a "tax," it is a special tax. Objectors argue that it is precisely that. They cite Proposition 218's definition of a "special tax" as a "tax imposed for specific purposes...." (Art. 13C, § 1, subd. (d); Gov.Code, § 53721 [to same effect].) They thus focus on the benefit to be derived from the charge and its relationship to the manner in which the charge is distributed. In essence they contend that, with the exception of coastal farmers who will receive imported water, those paying the charge will receive no benefit beyond that enjoyed by the general public. In Objectors' view, this makes the charge a tax, not a fee. The Agency focuses on the relationship between the amount of the charge and the cost of the services it is earmarked to finance, contending that since the charge does not exceed the costs of groundwater remediation, it is not a tax.

We need not choose between these methodologies because they both beg the question whether the charge is a "tax" at all. It is evident on the face of Propositions 62 and 218 that not all charges are taxes. Proposition 218 classifies regulated public levies into four categories: general taxes, special taxes, assessments, and property-related charges.
Objectors' concern with the "special" or "general" nature of the benefit to be financed by the groundwater augmentation charge appears to have little bearing on whether the charge is a tax in the first instance.

Objectors cite several cases in connection with their contention that the charge here is a tax, but none supports the conclusion they seek. In *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1182, 132 Cal. Rptr.2d 1, the court considered a local ballot measure that sought to ratify a preexisting "utility user's tax" and to earmark its proceeds for police, fire, parks, recreation, or library services. There was no question about the charge's status as a "tax"; the only question was whether it was a "general tax," that could be imposed by a majority of the voters, or a "special tax," requiring a two-thirds vote. (See id. at pp. 1183-1184, 1186, 132 Cal.Rptr.2d 1.) In *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 232, 45 Cal.Rptr.2d 207, 902 P.2d 225, the court held, unremarkably, that a sales tax earmarked for transportation projects was a "special tax" subject to the two-thirds requirement. Indeed the point was scarcely contested; the only real issue was whether the taxing authority was a "district" for purposes of Government Code section 53722. (Santa Clara County Local Transportation Authority v. Guardino, supra, 11 Cal.4th at pp. 232-233, 45 Cal.Rptr.2d 207, 902 P.2d 225.) In *San Marcos Water Dist. v. San Marcos Unified School District* (1986) 42 Cal.3d 154, 158, 165, 168, 228 Cal.Rptr. 47, 720 P.2d 935, the court held that a one-time "sewer capacity fee" was a "special assessment" for purposes of a rule exempting publicly entities from paying such assessments, rather than a "user fee" which such an entity could be required to pay. In *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 597, 77 Cal.Rptr.2d 752, the court held that a "utility lien" imposed by a city to aid in collecting unpaid utility charges was not a special tax, special assessment, regulatory fee, or development fee, but "[a]t most ... a user fee...."

*494 The only factually similar case appears to be *Orange County Water District v. Farnsworth* (1956) 138 Cal.App.2d 518, 522, 292 P.2d 927, which considered the validity of a "replenishment assessment" charged by a water district to purchase water "for the purpose of replenishing the underground water supplies of said district...." According to Objectors, "Farnsworth held that 'the charge in question is in the nature of an excise tax levied upon the activity of producing ground water by pumping operations.'" This critically misquotes the court, which in fact said that the charge was "more in the nature of an excise tax" than it was an ad valorem property tax or a special assessment. (Id. at p. 530, 292 P.2d 927.) The court went on to note the sui generis quality of the charge and to declare that this alone could not render it unconstitutional: "As was said in *County of Ventura v. Southern Cal. Edison Co.* [(1948)] 85 Cal.App.2d 529, 193 P.2d 512 ..., `A holding that legislation is constitutionally invalid ... cannot be founded upon a mere difficulty of categorization, but rather must be based upon a clear, substantial, and irreconcilable conflict with the fundamental law.'" (Ibid.) The court's allusion to an excise tax is understandable given the state of the law at that time; according to our electronic research, no published California decision prior to the issuance of that opinion had ever used the phrase "user fee." In the wake of Proposition 13 and its progeny, a veritable riot of new jurisprudence has developed around these issues. The court's describing the fee there as "more in the nature of an excise tax" hardly compels adoption of Objectors' position here. (*Orange County Water District v. Farnsworth, supra,* 138 Cal.App.2d at p. 530, 292 P.2d 927.)

Under modern law, the central distinction between a tax and a fee appears to be that a tax is "imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.]" (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350; *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 700, 37 Cal. Rptr.3d 149, 158, 124 P.3d 719, 727.) The augmentation charge here exposes the falseness of this supposed dichotomy. While it is intended to finance improvements, and thus to raise "revenue," it is also charged in return for the benefit of ongoing groundwater extraction and the service of securing the water supply for everyone in the basin.[11] Indeed, if not for the prohibitive cost of metering smaller wells, which necessitates charging those extractors on the basis of estimated usage, the fee might well be justified on regulatory grounds, as bringing the actual cost of groundwater nearer its true replacement cost and thus subjecting it to the regulation of the marketplace. This rationale might still be readily invoked with respect to metered extractions and
perhaps those estimated based upon particular facts such as the nature of crops grown. In any event we are far from persuaded that the charge can be characterized as a "tax."

C. Special Assessment

Objectors contend that if the groundwater augmentation charge is not a tax it is a "special assessment." But Proposition 218 defines an "assessment" as a

*495 "levy or charge upon real property ...." (Art. 13D, § 2, subd. (b).) This reflects the central characteristic of a "special assessment" as a charge on land. Thus in Trumbo v. Crestline-Lake Arrowhead Water Agency (1967) 250 Cal.App.2d 320, 58 Cal.Rptr. 538, a "standby water charge" assessed by a water agency against certain properties whether or not water was used constituted not a tax but a "special assessment to be levied upon land according to the availability of water." (Id. at p. 322, 58 Cal.Rptr. 538.)

The augmentation charge is not a charge "upon real property," but one upon an activity — the extraction of groundwater. It is imposed under the authority of article 10, section 1001 of the Act, which provides that the Agency "may, by ordinance, levy groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency." (Stats.1984, ch. 257, § 1001, p. 815, italics added.) This stands in contrast to the authority granted the Agency to "fix charges upon land within the agency for the purpose of paying the costs of initiating, carrying on, and completing any of the powers, projects, and purposes for which the agency is organized." (Stats.1984, ch. 257, § 902, p. 814.) The latter provision arguably contemplates an "assessment" as defined in Article 13D, section 2, subdivision (b). The former does not; rather it contemplates a charge for an activity, to wit, the extraction of groundwater. (Stats.1984, ch. 257, § 1001, p. 815.) In adopting the ordinance here at issue, the Agency was manifestly acting under this statute and not under the statute authorizing charges on land.

The nature of an assessment as a charge on land is commonly reflected in its being secured by a lien on the charged property. (See Gov.Code, § 53931 ["All special assessments in which the amount thereof is apportioned among the several parcels of land assessed shall constitute a lien in said respective amounts upon the several parcels assessed...."]; Gov.Code, § 54718, subd. (a) [stating circumstances under which benefit assessment will not give rise to lien, but will be "transferred to the unsecured roll"]; Civ.Code, § 2911 [duration of liens, including those "to secure the payment of a public improvement assessment"].) In contrast to these provisions and to enforcement mechanisms for other charges, as discussed more fully in the following section, the augmentation charge is not secured by real property. As discussed more fully below, the charge differs from many other levies in that no mechanism exists for reducing delinquent payments to a lien short of filing suit, obtaining a judgment, and executing the judgment on real property belonging to the debtor — a remedy available to any creditor. (See Stats.1984, ch. 257, § 1004, p. 816; Wat.Code, §§ 75630 et seq.; Pajaro Valley Groundwater Agency Ordinance No. 2003-01, § 6.03.)

Objectors contend that whatever its intentions, the Agency in fact assessed the augmentation charge on real property because (1) it identified the presumptive owners and operators of wells by consulting parcel tax records to determine who owned the land on which wells were situated; and (2) in at least some cases the Agency billed these owners through county taxing authorities, who included augmentation charges with their property tax mailings. Neither of these facts establishes that the charge was assessed on real property.

The Agency's manager testified in essence that tax rolls were a convenient and reliable means of identifying the person responsible for extraction on the assumption
that this was likely to be the owner of the land on which extraction was occurring. The fact that property owners are presumed to be the operators and beneficiaries of wells situated on their premises does not convert a charge based on conduct into one assessed against land. The situation may be analogized to one in which an automobile is operated in a manner constituting a toll violation under Vehicle Code sections 40250 et sequitur. In general, the vehicle's owner is jointly liable with its operator unless he can show that the vehicle was used without his consent. (Veh.Code, § 40250, subd. (b).) This does not convert the resulting fine into a vehicle registration fee. It remains a charge based upon conduct. It is assessed against the person most likely to be responsible for and to have control over the conduct, on the supposition that if he is not primarily responsible, he can obtain recompense from those who are. (See Veh. Code, § 40250, subd. (b) ["Any person who pays any toll evasion penalty, civil judgment, costs, or administrative fees pursuant to this article shall have the right to recover the same from the driver, rentee, or lessee"].) Here Agency witnesses testified that when a well was shown to be operated by a lessee or other occupant, that person could be billed; the Agency had even entered into payment arrangements with lessees in lieu of collection proceedings. We have never heard of a county tax collector who was willing to look to anyone other than the record owner for payment of property taxes or assessments. The Agency's willingness to do so here lends strong support to its contention that the augmentation charge is in fact and in law an activities-related charge and not a property assessment.

Nor does the former inclusion of augmentation charges with tax bills lead to a different conclusion. The Agency's manager testified that prior to 2003, some or all extractors had been billed for augmentation charges along with their property taxes. In 2003, however, the Agency adopted two ordinances "rescinding" this practice after receiving a letter from the office of the Santa Cruz County Counsel expressing the view that "it was inappropriate to be using the tax rolls for the collection of the augmentation charge." The practice would apparently continue only with respect to the Agency's property management fee, which is not at issue here, and which the manager acknowledged to be "a property related fee" intended to fund administrative expenses.

Objectors also argue that the charge must be a property assessment because it is a "capacity charge." As noted in part I, ante, Objectors argue in a different context that the charge is only partly a "capacity charge." Here they seem to imply that it is entirely a capacity charge, which
We conclude that the augmentation charge was not a property assessment.

D. Charge Incidental to Property Ownership

The most difficult of the issues raised by Objectors is whether the augmentation charge falls within the provisions of Proposition 218 restricting the power of public agencies to impose a "[f]ee or `charge,"
" defined as 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." (Art. 13D, § 2, subd. (e); italics added.) The phrase "[p]roperty-related service" is defined to mean "a public service having a direct relationship to property ownership." (Art. 13D, § 2, subd. (h).) "Property ownership" is defined to "include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (Art. 13D, § 2, subd. (g).)

Where a proposed fee or charge comes within this definition, Article 13D requires the proposing agency to identify parcels upon which it will be imposed, and to conduct a public hearing. (Art. 13D, § 6, subd. (a)(1).) The hearing must be preceded by written notice to affected owners setting forth, among other things, a "calculat[ion]" of "[t]he amount of the fee or charge proposed to be imposed upon each parcel...." (Ibid.) If a majority of affected owners file written protests at the public hearing, "the agency shall not impose the fee or charge." (Art. 13D, § 6, subd. (a)(2).) Moreover, unless the charge is for "sewer, water, [or] refuse collection services," "no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Art. 13D, § 6, subd. (e).) Proposition 218 also imposes substantive limitations, including restrictions on the use of revenues derived from such charges. (Art. 13D, § 6, subd. (b).)

Objectors contend that the groundwater augmentation fee is subject to these requirements and that, because the Agency did not comply with them, it is invalid. In our original decision, we concluded that the charge is not "imposed ... as an incident of property ownership" (Art. 13D, § 2, subd. (e)) because it is imposed not on property owners as such, or even well owners as such, but on persons extracting groundwater from the basin. We acknowledged that the Agency considers the landowner ultimately responsible, but noted that the charge had sometimes been billed to, and collected from, tenants. Relying primarily upon Richmond, supra, 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, and Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 102 Cal.Rptr.2d 719, 14 P.3d 930 (Apartment Association), we reasoned that the charge was not incidental to property ownership because (1) it was incurred only through voluntary action, i.e., the pumping of groundwater, and could be mitigated or avoided altogether by refraining from that activity; (2) it would never be possible for the Agency to comply with Article 13D's requirement that it calculate in advance the amount to be charged on a given well; and (3) the charge burdens those on whom it is imposed not as landowners but as water extractors.[12]

We have been compelled to reexamine this rationale, and ultimately to abandon it, in light of Bighorn, supra, 39 Cal. 4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220. At issue there was the validity of a proposed initiative reducing certain charges by a water agency. In the portion of the opinion relevant here, the question was whether the charges constituted
"fee[s] or charge[s]" subject to the power guaranteed to voters by Article 13C, section 3, to "reduc[e] or repeal[ "], by initiative, "any local tax, assessment, fee or charge." The court did not attempt to determine the precise outlines of the class of fees and charges covered by Article 13C, because it reasoned that (1) any fee or charge falling within Article 13D necessarily came within Article 13C as well; (2) the charges at issue all fell within Article 13D; (3) the charges therefore fell within Article 13C and were subject to the initiative power.[13] (Bighorn, supra, 39 Cal.4th at pp. 215-216, 46 Cal. Rptr.3d 73, 138 P.3d 220.)

The point critical to our inquiry is the second one, i.e., that the charges came within Article 13D. The court cited Richmond for the proposition that "a public water agency's charges for ongoing water delivery ... are fees and charges within the meaning of article XIII D." (Bighorn, supra, 39 Cal.4th at p. 216, 46 Cal.Rptr.3d 499, 138 P.3d 220, citing Richmond, supra, 32 Cal.4th at pp. 426-427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court quoted at length a passage in Richmond where it explained its "agree[ment]" with the challengers that "supplying water is a 'property-related service' within the meaning of article XIII D's definition of a fee or charge...." (Richmond, supra, 32 Cal.4th at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518; see Bighorn, supra, 39 Cal.4th at pp. 214-215, 46 Cal.Rptr.3d 73, 138 P.3d 220.) The quoted passage opens with the Legislative Analyst's explicitly tentative opinion, as stated in the ballot pamphlet containing Proposition 218, that "[f]ees for water, sewer, and refuse collection service probably meet the measure's definition of a property-related fee." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73; Richmond, supra, at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court attributed this opinion to the Legislative Analyst's "apparent[ ] conclu[sion]" that "water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges (see Gov.Code, §§ 61621, 61621.3)." (Richmond, supra, 32 Cal.4th at pp. 426-427, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

The Richmond court found support for this imputed conclusion in "several provisions" of Article 13D, of which it cited two: (1) the declaration that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership" (Art. 13D, § 3, subd. (b)); and (2) the exemption of "fees or charges for sewer, water, and refuse collection services" from the voter approval requirements otherwise imposed by Article 13D on covered fees and charges (Art. 13D, § 6, subd. (c)). Accordingly, the court "agree[d]," some "water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D." (Richmond, supra, 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) However, the court acknowledged, a fee will fall within the provisions of that measure "if, but only if, it is imposed `upon a person as an incident of property ownership.'" (Ibid., quoting Art. 13D, § 2, subd. (e).) The court then issued the pronouncement of greatest relevance here: "A fee for ongoing water service through an existing connection is imposed `as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed `as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection." (Richmond, supra, 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court reiterated that Proposition 218 should not be read to absolutely prohibit new connection fees, an effect it would have if agencies were compelled to comply with its requirement that they identify and give notice to those on whom the fee is to be imposed. (Richmond, supra, 32 Cal.4th at pp. 427-428, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

In our original opinion we reasoned that in holding ongoing service fees to be within the purview of Article 13D, the Richmond court must have been speaking of flat fees, as opposed to those based on the amount of water (or similar commodity) consumed. Otherwise, it seemed to us, its rationale for holding the connection fee outside of Article 13D would apply with equal force to ongoing service fees. Where a fee is predicated on consumption it may be impossible
Moreover, it quite probably will be impossible to predict the quantity to be consumed, and thus to forecast the precise "amount of the fee or charge proposed to be imposed," as is required by Article 13D, section 6, subdivision (1). Further, a consumption-based fee would be incurred only through the occupant's "voluntary decision" to consume water delivered by the provider. The occupant has at least the theoretical alternative of securing water elsewhere, or not using it at all. We therefore applied Richmond's analysis of the connection fee to the Agency's consumption-based groundwater augmentation charge, concluding that the latter, like the former, falls outside Article 13D.

In Bighorn, supra, 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220, the court flatly rejected the view that consumption-based delivery fees are beyond the reach of Article 13D. What had begun in Richmond as a tentative surmise attributed to the Legislative Analyst now ripened into a broad categorical rule: "As we explained in Richmond, supra, 32 Cal.4th 409[, 9 Cal.Rptr.3d 121, 83 P.3d 518] ..., domestic water delivery through a pipeline is a property-related service within the meaning of this definition. (Id. at pp. 426-427[, 9 Cal.Rptr.3d 121, 83 P.3d 518] ...) Accordingly, once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. Consumption-based water delivery charges also fall within the definition of user fees, which are `amounts charged to a person using a service where the amount of the charge is generally related to the value of the services provided.' (Utility Audit Co., Inc. v. City of Los Angeles (2003) 112 Cal.App.4th 950, 957[, 5 Cal.Rptr.3d 520]....) Because it is imposed for the property-related service of water delivery, the Agency's water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D...." (Id. at p. 217, 46 Cal.Rptr.3d 73, 138 P.3d 220, fn. omitted.)

It would appear that the only question left for us by Bighorn is whether the charge on groundwater extraction at issue here differs materially, for purposes of Article 13D's restrictions on fees and charges, from a charge on delivered water. We have failed to identify any distinction sufficient to justify a different result, and the Agency points us to none. The Agency contends that the charge is not a "service fee," but that proposition seems beside the point if the charge is imposed as an incident of property ownership. The Agency's only argument on this point appears to be that the charge resembles those upheld by the Supreme Court in a still earlier decision, Apartment Association, supra, 24 Cal.4th 830, 102 Cal. Rptr.2d 719, 14 P.3d 930. In that case the court held that an "inspection fee" charged to residential landlords was not subject to the provisions of Article 13D. That measure, wrote Justice Mosk, "only restricts fees imposed directly on property owners in their capacity as such," whereas the fee there was imposed not because "a person owns property," but "because the property is being rented." (Apartment Association, supra, 24 Cal.4th at p. 838, 102 Cal. Rptr.2d 719, 14 P.3d 930.) He noted that the fee "ceases along with the business operation, whether or not ownership remains in the same hands." (Ibid.) He reasoned that the fee was "imposed on landlords not in their capacity as landowners, but in their capacity as business owners." (Id. at p. 840, 102 Cal.Rptr.2d 719, 14 P.3d 930.) Comparing the fee to one charged for a business license, Justice Mosk wrote that "[i]t is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business." (Ibid.) Proposition 218, he continued, governs "taxes, assessments, fees, and charges ... when they burden landowners as landowners. The ordinance ... imposes a fee on its subjects by virtue of their ownership of a business — i.e., because they are landowners. What plaintiffs ask us to do is to alter the foregoing language — changing `as an incident of property ownership' to `on an incident of property ownership.' But to do so would be to ignore its plain meaning — namely, that it applies only to exactions levied solely by virtue of property ownership." (Id. at p. 842, 102 Cal. Rptr.2d 719, 14 P.3d 930, fn. omitted.)

As we noted in our prior opinion, the Supreme Court cited Apartment Association with apparent approval in Richmond, supra, 32 Cal.4th at pages 414-415, 9 Cal. Rptr.3d 121, 83 P.3d 518. In Bighorn, however, it did not mention the case at all, even though it seems highly relevant to the question whether monthly delivery charges, and especially
consumption-based charges, fall within Article 13D. This omission raises questions about the reach, if not the vitality, of Apartment Association. The juxtaposition of that decision with Bighorn suggests the possibility that a fee falls outside Article 13D to the extent it is charged for consumption of a public service for purposes or in quantities exceeding what is required for basic (i.e., residential) use of the property. In Richmond and Bighorn the court was clearly concerned only with charges for water for "domestic" use. (See Bighorn, supra, 39 Cal.4th at p. 217, 46 Cal.Rptr.3d 73, 138 P.3d 220, italics added ["As we explained in Richmond, ..., domestic water delivery through a pipeline is a property-related service within the meaning of this definition"]). This leaves open the possibility that delivery of water for irrigation or other nonresidential purposes is not a property-based service, and that charges for it are not incidental to the ownership of property.\footnote{A finding that such a fee is not imposed as an incident of property ownership might be further supported by a clearly established regulatory purpose, e.g., to internalize the costs of the burdened activity or to conserve a supplied resource by structuring the fee in a manner intended to deter waste and encourage efficiency.}

We need not decide the soundness of these theories in the wake of Bighorn, because they cannot sustain the charge before us in any event. The charge is assessed on all persons extracting water, a large majority of whom are using it for residential or domestic purposes. Therefore even if a charge on nonresidential uses would fall outside the rationale of Bighorn, the present charge does not. Further, even if a predominantly regulatory purpose would save the charge, it is difficult to see how it might do so here, where the majority of users are charged on the basis not of actual but of estimated or presumptive use. Thus, while the augmentation charge may have some tendency to inhibit consumption and provide an incentive for efficient use by metered users, it can have little if any effect on the residential users who make up the majority of persons paying it. Nor is there any attempt to graduate the charge to further discourage the most intensive uses and encourage conversion to less intensive ones.\footnote{Similarly, assuming Apartment Association's capacity-based analysis retains vitality, we fail to see how it can validate the augmentation charge here. The charge is imposed not only on persons using water in a business capacity but also on those using water for purely domestic purposes. The extension of the charge to domestic wells cannot be attributed to unavoidable regulatory overbreadth. The Agency appears to have a good idea of who is extracting water for residential purposes and who is extracting it for irrigation purposes. Under Bighorn, a homeowner or tenant who uses extracted water for bathing, drinking, and other domestic purposes cannot be compared to a businessman who, as described in Apartment Association, elects to go into the residential landlord business.

In our previous opinion we adopted the view that one who incurred the charge did so not in the capacity of landowner, but in that of water user. We do not believe this view can be reconciled with Bighorn where the court held water delivery fees to be imposed as an incident of property ownership, whether or not based on usage, even though it might have been argued under Apartment Association that affected persons incurred delivery charges not as owners but as voluntary consumers of water.\footnote{Moreover the charge here is not actually predicated upon the use of water but on its extraction, an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water. The precise nature of a property owner's interest in underlying groundwater, and whether it constitutes a kind of real property ownership, is an esoteric and nuanced subject. (See Wat.Code, § 102 ["All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law"]; cf. State v. Superior Court of Riverside County (2000) 78 Cal.App.4th 1019, 1030, 93 Cal.Rptr.2d 276 (Riverside), fn. omitted ["the State's power under the Water Code is the power to control and regulate use; such a power is distinct from the concept of `ownership' as used in the Civil Code and in common usage"]; Joslin v. Marin Municipal Water Dist. (1967) 67 Cal.2d 132, 149, 60 Cal.Rptr. 377, 429 P.2d 889}.
[claim by purported riparian owners to unreasonable use of creek waters "does not constitute a compensable property right" when interfered with by appropriative user]; see generally Rossman & Steel, Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights (1982) 33 Hastings L.J. 903.) There appears to be no doubt, however, that an overlying owner possesses "special rights" to the reasonable use of groundwater under his land. (City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224,1237, fn. 7, 99 Cal.Rptr.2d 294, 5 P.3d 853.) These rights are said to be "based on the ownership of the land and ... appurtenant thereto." (California Water Service Co. v. Edward Sidebotham & Son, Inc. (1964) 224 Cal.App.2d 715, 725, 37 Cal. Rptr. 1, fn. omitted; see Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal.App.3d 992, 1001-1002, 122 Cal.Rptr. 918.) Thus, even if an overlying landowner does not strictly "own" the water under his land, his extraction of that water (or its extraction by his tenant) represents an exercise of rights derived from this ownership of land. In that respect a charge imposed on that activity is at least as closely connected to the ownership of property as is a charge on delivered water.

As against these factors tending to show that the charge is incidental to property ownership as that concept is elaborated in Bighorn and Richmond, only one feature cited by the Supreme Court appears to be lacking. In both of those cases the court alluded to the fact that the agencies there could, "by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges (see Gov.Code, §§ 61621, 61621.3)...." (Richmond, supra, 32 Cal.4th at pp. 426-427, 9 Cal. Rptr.3d 121, 83 P.3d 518; Bighorn, supra, 39 Cal.4th at p. 214, 46 Cal.Rptr.3d 73, 138 P.3d 220.) (Italics added.) The cited provisions of the Government Code, which have since been repealed and reenacted elsewhere, authorize community service districts to adopt various collection mechanisms, including the recording of a certificate of arrearage, which automatically constitutes a lien. (See Gov.Code, §§ 61115, subd. (c).) Such a mechanism supports the conclusion that the charge is conceived as one directly on the real estate thus encumbered. However, the Agency is not a community services district, and thus is not authorized by these statutes to employ such a mechanism. Nor do we find any authorization elsewhere for the Agency to unilaterally impose a lien based on an unpaid groundwater augmentation charge. The Act authorizes the Agency to collect interest on a delinquent charge and to "exercise any of the provisions of Article 5 (commencing with Section 75630) of Chapter 3 of Part 9 of Division 21 of the Water Code for the purpose of collecting delinquent groundwater charges." (Stats. 1984, ch. 257, § 1004, p. 816.) The cited provisions authorize the Agency to obtain, from a court, an injunction against operation of the offending "water-producing facility" (Wat.Code, § 75631; see id., § 75630 [temporary restraining order]) and to bring a civil suit for delinquent charges, interest, and penalties (Wat.Code, § 75633). They do not grant the Agency a lien, or the power to impose a lien. The Agency is thus relegated to the remedies available to any other creditor. These may of course include reducing the debt to judgment and then obtaining a lien on the property as an aid in execution of the judgment. But this no more makes the charge incidental to property ownership than is a credit card debt.

While the automatic or summary creation of a lien for unpaid charges would tend to support a determination that a charge is imposed as an incident of property ownership, the failure to provide such a mechanism does not appear determinative here. In every other respect the charge appears as closely related to property ownership as the charges at issue in Bighorn. Indeed, in at least one respect — the nature of the right burdened by the charge — it appears more closely related. Given the Bighorn decision, and its reading of the Richmond decision, we see no basis to conclude that the charge here should be viewed any differently from the charges held to be incidental to property ownership there. We thus conclude that the groundwater augmentation charge is indeed imposed as an incident of property ownership, that it is subject to the restrictions imposed on such charges by Article 13D, and that since the Agency did not conform to those restrictions the ordinance under review must be declared invalid.

*505 DISPOSITION
The judgment is reversed.

PREMO, J., concurs.

BAMATTRE-MANOUKIAN, J., Concurring.

In 2003, the Pajaro Valley Water Management Agency (the Agency) passed an ordinance increasing a groundwater augmentation fee for all groundwater extractions within its boundaries. In this action by the Agency under Code of Civil Procedure section 860 to validate the ordinance, the trial court heard testimony and issued a comprehensive statement of decision setting forth its findings of fact and conclusions of law regarding the three issues argued below and raised again here on appeal: 1) whether jurisdiction was proper under Code of Civil Procedure section 860; 2) whether two members of the Agency's Board of Directors had disqualifying conflicts of interest; and 3) whether the augmentation charge was invalid for failure to comply with provisions of articles XIII C and XIII D of the California Constitution. The trial court decided all three issues in favor of the Agency and judgment was entered validating the ordinance.

I concur in the result the majority reaches, to reverse the judgment on the ground that the augmentation charge is subject to the provisions of article XIII D of the Constitution. I write separately for three reasons: First, I wish to emphasize the standards that guide and govern our review and that are the "threshold issue" in every appeal. (Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal.App.3d 605, 611, 236 Cal.Rptr. 605.) Second, I would address appellants' second argument — that the ordinance at issue was void due to disqualifying conflicts of interest of two members of the Agency's Board — before reaching the constitutional issues. And last, as I wrote previously in my original concurrence in this case, I believe the question whether the augmentation charge at issue here was a fee imposed "as an incident of property ownership," within the meaning of the California Constitution, is a close and important issue. (Cal. Const., art. XIII D, § 2, subd. (e).) Our Supreme Court in Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220 (Bighorn) has now provided further guidance in this area of the law, thus clarifying the views it expressed in Richmond v. Shasta Community Services Dist. (2004) 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518 (Richmond). These two cases support the conclusion reached here, that the augmentation charge is a fee imposed "as an incident of property ownership," within the meaning of article XIII D of the Constitution.

As to the jurisdictional issue, the trial court made specific findings based on the evidence and supporting its conclusion that the augmentation charge was a capacity charge within the scope of Government Code section 66013, which made it a proper subject of a validation procedure under Code of Civil Procedure section 860. We defer to the trial court's findings resolving factual issues if supported by substantial evidence. (Winograd v. American Broadcasting Co. (1998) 68 Cal.App.4th 624, 632, 80 Cal.Rptr.2d 378.) In addition, as the majority notes, the parties stipulated in the trial court that if any portion of the augmentation charge was found not to be

506 within the jurisdiction of the court under Code of Civil Procedure section 860, the complaint would be deemed to be amended to include a declaratory relief cause of action, so that all issues relating to the augmentation charge could be addressed and preserved for appeal. I believe this record demonstrates that jurisdiction was proper.

Appellants next assert that a conflict of interest on the part of two of the Agency's board members disqualified them, rendering the ordinance null and void. Here again, the trial court made factual findings, based on the evidence at the hearing, and applied the relevant law, namely the Political Reform Act (Gov.Code, § 87100, et seq.) and the pertinent regulations (Cal. Code Regs., tit. 2, § 18700, et seq.). The trial court concluded that there was no disqualifying conflict of interest because the effect of the ordinance in question on the two directors was not distinguishable from its effect on
the "public generally," as that exception is defined in the Government Code and the corresponding regulations. (See Gov.Code, § 87103, Cal.Code Regs., tit. 2, § 18707.2.) I believe this presents mixed questions of fact and law for our review. (Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 800, 35 Cal.Rptr.2d 418, 883 P.2d 960.) Where the trial court has made factual determinations, such as those underlying the questions whether the financial burden and beneficial effect of the increased augmentation charge were "proportional," I believe we defer to those findings if they are supported by substantial evidence. To the extent that the court interpreted and applied the relevant statutes and regulations to the facts as found, or to those that were uncontroverted, we conduct independent review, as appellants contend. (See Finnegan v. Schrader (2001) 91 Cal.App.4th 572, 579, 110 Cal. Rptr.2d 552.)

Applying these rules, I would agree in general with the conclusions of the trial court: that the Agency is a "water, irrigation, or similar district" (Cal.Code Regs., tit. 2, § 18707.2, subd. (c)); that the evidence supported a finding that the augmentation charge is "applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent" of the affected property owners (Cal. Code Regs., tit. 2, § 18707.2, subd. (c)); that the evidence supported a finding that the "public generally" exceptions in the Political Reform Act and the regulations applied (Gov.Code, § 87103; Cal. Code Regs., tit. 2, § 18707.2, subsd. (a) & (c)); and that the evidence supported a finding that agriculture is a "predominant industry" throughout the Agency's district (Cal.Code Regs., tit. 2, § 18707.7, subd. (b)). Further, I would reject appellants' contentions that the regulations are in conflict with the statutory provisions in the Political Reform Act and that there was a common law conflict of interest. Therefore, based on the trial court's statement of decision, the record, and legal authority, and applying the relevant standards of review, I would find that the two directors did not have a disqualifying conflict of interest.

As to the constitutional issues, appellants contend that the question whether the augmentation charge complied with constitutional requirements is a question of law for this court to decide after independently reviewing the facts. I agree that as, a general rule, we conduct de novo review when we are asked to interpret constitutional provisions and their application to a particular ordinance. (Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866, 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350; Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 102 Cal.Rptr.2d 719, 14 P.3d 930.) In the case before us, however, the trial court made findings based upon the evidence. To the extent that these are findings of fact, I believe we defer to the trial court's findings resolving disputed factual issues if they are supported by substantial evidence in the record. The application of the law to the undisputed facts, or to the facts as found, is then de novo.

As the majority points out, the key constitutional issue in this case is whether the augmentation charge complied with constitutional requirements is a question of law for this court to decide after independently reviewing the facts. I agree that as a general rule, we conduct de novo review when we are asked to interpret constitutional provisions and their application to a particular ordinance. (Id. at p. 420, 9 Cal.Rptr.3d 121, 83 P.3d 518.) It was therefore not a special assessment, which is a levy "upon real property." (Cal. Const., art. XIII D, § 2, subd. (b).) The court distinguished this from a fee or charge, which could be imposed either on the property itself or upon the owner "as an incident of real estate ownership." (Id. § 2, subd. (h).)

In Richmond, supra, 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, the Supreme Court held that a capacity charge imposed as a condition of a new water hookup was not a charge "on real property as such," but was a charge against the individual for hooking up to water service. (Id. at p. 420, 9 Cal.Rptr.3d 121, 83 P.3d 518.) It was therefore not a special assessment, which is a levy "upon real property." (Cal. Const., art. XIII D, § 2, subd. (b).) The court distinguished this from a fee or charge, which could be imposed either on the property itself or upon the owner "as an incident of property ownership." (Richmond, supra, 32 Cal.4th at p. 420, fn. 2, 9 Cal.Rptr.3d 121, 83 P.3d 518.) The court also addressed a fire suppression charge, which it found was not a fee imposed "as an incident of property ownership" because it was "not imposed simply by virtue of property ownership, but instead it is imposed as an incident of the voluntary act of the property owner in applying for a service connection." (Id. at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.)
The court explained that if the same fee were imposed as part of ongoing water service, it would be "an incident of property ownership" because it would require "nothing other than normal ownership and use of property." (Id. at p. 427, 9 Cal. Rptr.3d 121, 83 P.3d 518.) The court relied in part on the Legislative Analyst's conclusion, in the ballot materials for Proposition 218, that water service "is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property." (Ibid.)

Recently in Bighorn, supra, 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220, the high court reaffirmed its reasoning in Richmond, finding that the water service charge at issue in Bighorn was a fee or charge within the meaning of article XIII D, and thus article XIII C, of the Constitution. Further, the court rejected an argument based on the distinction made in Richmond, namely that charges that are "consumption based" do not come within the definition in article XIII D, because such charges involve a voluntary decision on the part of the water customer as to how much water to use. (Bighorn, supra, 39 Cal.4th at p. 216, 46 Cal.Rptr.3d 73, 138 P.3d 220.) The court clarified that "once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (Id. at p. 217, 46 Cal.Rptr.3d 73, 138 P.3d 220.)

Bighorn thus addressed a concern I had previously expressed in a separate concurring opinion in this case. It appeared from the record here that the vast majority of property owners in the Pajaro Valley obtained their water from wells, and that alternative sources were not practically feasible. In these circumstances, I was concerned whether the continued use of this water should be characterized as part of the "normal ownership and use of property" (Richmond, supra, 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518) rather than as a "voluntary act of the property owner." (Id. at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.) Bighorn has resolved this issue. Under the authority of Richmond and Bighorn, and mindful of our role as an intermediate appellate court (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937), I conclude that the augmentation charge imposed by the ordinance here, even though it is a "consumption based" charge imposed per acre-foot for groundwater extractions within the Agency's boundaries, is a fee or charge imposed "as an incident of property ownership," within the meaning of article XIII D of the California, Constitution. The augmentation charge is thus subject to the restrictions and requirements of article XIII D, which concededly were not followed by the Agency. I would therefore reverse the judgment.

This characterization was disputed by an expert testifying for objectors, but the trial court's resolution of that conflict in favor of the Agency is not cogently challenged on appeal.

We will use the term "basin" to describe the area subject to the Agency's jurisdiction although the groundwater basin as geologically defined is only imperfectly contiguous with that area.

According to the Basin Management Plan, strawberries and raspberries require 2.8 and 3.7 acre-feet per acre of applied water, respectively, while deciduous crops — apparently meaning orchard crops other than citrus — require 0.7 acre-feet per year. In 1997, about 8,700 acres were devoted to strawberries and vine crops, while deciduous crops took up about 3,900 acres. Another 14,000 acres bore vegetable row crops while assorted other agricultural uses took up about 8,000 acres. The BMP did not set out the water demands for each of these other uses but noted a general trend toward more water-intensive crops and a corresponding movement away from the less water-intensive deciduous crops. These figures, coupled with the cited testimony, however, appear to support a finding that even deciduous crops could not be reliably sustained under the "worst case scenario" described in the testimony.

These sources would include recycled wastewater from Watsonville and water from the Harkins Slough project, already in place. The Agency would also establish supplemental wells to help maintain water deliveries in drier years. In addition it would seek to promote conservation.
The plan apparently contemplates at least three phases. Phase One was mainly the Harkins Slough project, with additional minor elements including the acquisition of an assignment of water rights at Mercy Springs, which would supply 25 to 30 percent of the anticipated water imports. The current phase is Phase Two, consisting largely of the coastal distribution system, Watsonville wastewater recycling facilities, and acquisition of additional water rights. Phase Three apparently consists of an "inland distribution system," providing water to inland farms at greater distances from the pipeline. As presently designed, however, the plan will supply imported water to inland farmers only when supply exceeds the coastal demand. However, depending on the Agency's success in arranging secure water supplies, there could be many years when this condition was present.

According to the transcript, the witness said, "The second thing that occurs in that respect is that the groundwater table declined and the cost is reduced and, therefore, water is not flowing as well through the coast so, therefore, more water is available." It is doubtful that the witness used the word "declined," highly unlikely that he said "cost is reduced," and all but certain that he did not utter the string of words here rendered. The transcript contains numerous other probable mistranscriptions, e.g., the probable phrase "lease of a parcel upon which the facility is located" appears as the nonsensical "lease of a partial fund which the facilities located...." Such transcription errors, which are by no means unique to this case, support an argument for entitling litigants to electronically record court proceedings on which their rights depend.

That is to say, other parties are not bound by the preclusive doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion). The precedential effect of an appellate decision on the same issues presents a separate question.

It also makes it unnecessary to consider whether the parties' mutual citation and discussion of *Scurich* violated former rule 977 of the California Rules of Court. (See now, Cal. Rules of Court, rule 8.1115.)

In our previous decision we necessarily considered, and rejected, Objectors' contention that the decision to increase the extraction charge was invalid because two directors acted under a disabling conflict of interest. The Fair Political Practices Commission has filed an eleventh-hour brief objecting rather obliquely to a portion of our analysis on that issue. Because we now find it unnecessary to reach the issue at all, we have excised the entire discussion.

This use of the term "special purpose district" illustrates the questionable draftsmanship that pervades the measure, for while it contains a definition for "special district" (Art. 13C, § 1, subd. (c)), it does not define the phrase "special purpose district."

Although the Agency does not appear to argue the point, it might be suggested that the augmentation charge operates in part to secure the "privilege" of avoiding more draconian measures, such as dramatic adjudicated reductions in permitted extractions. The Legislature has granted the Agency broad powers to restrict or suspend extractions if that becomes necessary to carry out its functions. (See 1984 Stats., ch. 257, §§ 712-714, pp. 811-812.)

We also placed considerable reliance on *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 83, 101 Cal.Rptr.2d 905 (*HJTA v. Los Angeles*), which rejected a contention that water rates "based primarily on the amount consumed" were subject to Proposition 218. The Supreme Court disapproved that decision in *Bighorn* insofar as it is inconsistent with the court's conclusion that "all charges for water delivery" incurred after a water connection is made are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. (*Bighorn, supra*, 39 Cal.4th at p. 217, fn. 5, 46 Cal.Rptr.3d 73, 138 P.3d 220, and accompanying text.)
The court nonetheless held the initiative invalid because it attempted to impose certain voter approval requirements on future rate increases that the court held beyond the proper scope of a local initiative. (Bighorn, supra, 39 Cal.4th at pp. 221-222, 46 Cal.Rptr.3d 73, 138 P.3d 220.)

Elsewhere in the opinion the court itself implicitly acknowledged the voluntary nature of water consumption when it pointed out that not all new service connections will necessarily be associated with new development, because "a property owner may request a new service connection without proposing any new development, such as when the owner of a previously developed residential parcel decides to use the District's water instead of water from an existing well on the property." (Richmond, supra, 32 Cal.4th at pp. 424-425, 9 Cal.Rptr.3d 121, 83 P.3d 518; italics added.) Of course, any occupant in a position to make such a choice is at least theoretically in a position to stop using the District's water and return to the existing well. Such an occupant is certainly acting "voluntarily" when he elects to use delivered water.

We assumed that the drafters of Article 13D used the term "amount," in deliberate contradistinction to "rate," to mean the actual sum to be charged to the owner of a given property. Unlike a rate, a consumption-driven charge cannot be determined until the amount consumed is known, i.e., after the fact. The holding in Bighorn appears incompatible with this view, compelling the conclusion that the notice requirements of Article 13D are satisfied if the agency apprises the owner of the proposed rate to be charged. Otherwise, the court's distinction between connection fees and ongoing service charges appears difficult, if not impossible, to defend.

Objectors have not suggested that a charge on water imported for irrigation or other non-domestic purposes would fall within Proposition 218.

Indeed, the Agency all but concedes that the charge is not truly "regulatory," ultimately sidestepping the point by attacking the straw-man premise that the fee is only brought within Article 13D by its consumption-based nature. We agree that a given fee does not become incidental to property ownership merely because it is based on consumption. No one has suggested that it does. The court in Bighorn held only that if a fee is otherwise incidental to ownership, its assessment based on consumption does not ipso facto take it outside of Article 13D.

We continue to believe that the distinction is far from frivolous. A charge may be imposed on a person because he owns land, or it may be imposed because he engages in certain activity on his land. A charge of the former type is manifestly imposed as an incident of property ownership. A charge of the latter may not be. This appears to be the distinction Justice Mosk sought to articulate for the court in Apartment Association. We doubt that it is satisfactorily captured by a distinction between business and domestic uses or purposes. For example, a water conservation agency might assess a charge on the filling of swimming pools both to defray the cost of the water so used and to inhibit what it might view as a wasteful use. Such a use might be characterized as "domestic," but it is far from self-evident that a charge on it would be incidental to the ownership of property, or to the provision of a property-related service.

A "community services district" is one created to provide any of a number of specified services. (See Gov.Code, § 61100.) The enumerated purposes include "[s]upply[ing] water for any beneficial uses, in the same manner as a municipal water district...." (Gov. Code, § 61100, subd. (a).) They do not include groundwater management. (Gov.Code, § 61100.) Moreover, the formation of such a district originates with a petition by voters (Gov.Code, § 61011) or a "resolution of application" by a local legislative body or special district (Gov.Code, § 61013). The Agency was created by act of the California Legislature.

Curiously, the Legislature has created an automatic lien for unpaid "groundwater extraction charge[s]" imposed by other, seemingly similar agencies, and has also authorized those agencies to collect such charges on the property tax rolls. (See Sierra Valley and Long Valley Groundwater Basins Act (Stats. 1983, ch. 1109, § 808, p. 4195, 72B West's

[21] We should not be understood to imply that the charge is necessarily subject to all of the restrictions imposed by Article 13D on charges incidental to property ownership. This case presents no occasion to determine whether this or a similar charge may fall within any of the express exemptions or partial exemptions set forth in that measure. (See, e.g., Art. 13D, § 6, subd. (c) ["Except for... sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area"]).

137 Cal.Rptr.3d 266

JOHN G. EISKAMP, Plaintiff and Appellant,

v.

PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.

No. H036624.

Court of Appeals of California, Sixth District.


*99 John G. Eiskamp, in pro. per., for Plaintiff and Appellant.
Richards, Watson & Gershon, James L. Markman and Ginetta L. Giovinco for Defendant and Respondent.

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*100 OPINION

MIHARA, Acting P. J. —

After respondent Pajaro Valley Water Management Agency (Agency) enacted three ordinances (ords. Nos. 2002-02, 2003-01, 2004-02) that increased groundwater augmentation charges for the operators of wells in the Agency's
jurisdiction, several lawsuits challenging the constitutionality of the ordinances were filed. In 2008, these lawsuits were resolved by a stipulated agreement for entry of judgment. In 2010, appellant John G. Eiskamp filed a complaint against the Agency seeking a declaration that ordinance No. 2002-02 (Ordinance) was invalid, a refund of augmentation charges, and an order directing the Agency to cease collection of the augmentation charges. The trial court sustained the Agency's demurrer to the complaint without leave to amend and entered judgment in favor of the Agency. We hold that the doctrine of res judicata bars relitigation of the causes of action in Eiskamp's complaint and affirm the judgment.

I. Factual and Procedural Background

On May 31, 2002, the Agency's board of directors (Board of Directors) approved the Ordinance, which established an augmentation charge of $80 per acre-foot for the extraction of groundwater from facilities within the Agency's boundaries. The Board of Directors did not comply with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution. Eiskamp is presently a member of the Board of Directors, and was a member when the Ordinance was approved.

In October 2002, several citizens filed a reverse validation action (Scurich Lawsuit) in which they challenged the validity of the Ordinance. After the Agency's motion to dismiss was granted, the Scurich plaintiffs appealed.

In May 2003, the Board of Directors approved ordinance No. 2003-01, which increased the augmentation charge to $120 per acre-foot. The Board of Directors did not comply with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution.

In July 2003, the Agency filed an action entitled Pajaro Valley Water Management Agency v. All Persons Interested in the Matter of the Validity of Pajaro Valley Water Management Ordinance 2003-01 (Amrhein Lawsuit). (Italics added.) In February 2004, the Amrhein Lawsuit came on for trial.

In May 2004, this court held in an unpublished decision "that the augmentation fee was only partly a `capacity charge' and that insofar as it was not such a charge, the plaintiffs' objections were not subject to the special statute of limitations." (Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal.App.4th 1364, 1376 [59 Cal.Rptr.3d 484] (Amrhein)). Thus, this court reversed the judgment to allow the plaintiffs to challenge that portion of the augmentation charges that were not used to fund capital facilities construction. The Scurich Lawsuit was then stayed pending the outcome of the Amrhein Lawsuit.

In August 2004, the trial court entered judgment in the Amrhein Lawsuit in favor of the Agency. Shortly thereafter, the Amrhein defendants filed an appeal in this court.

In November 2004, the Board of Directors adopted ordinance No. 2004-02, which increased the augmentation charge to $160 per acre-foot. The Board of Directors did not comply with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution.

The Griffith and San Andreas Lawsuits were consolidated with the Scurich Lawsuit under case No. 144843 (Consolidated Lawsuits).

In July 2006, this court affirmed the judgment in the Amrhein Lawsuit. After the Amrhein defendants filed a petition for rehearing, this court granted the petition to consider the effect of *Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205 [46 Cal.Rptr.3d 73, 138 P.3d 220]*. In May 2007, this court reversed the judgment, finding that "the augmentation fee is a fee or charge `imposed ... as an incident of property ownership' and thus subject to constitutional preconditions for the imposition of such charges ... (Cal. Const., art. XIII D, § 2, subd. (e), added by initiative, Gen. Elec. (Nov. 5, 1996) ...)," and that the Agency had failed to comply with these preconditions. (*Amrhein, supra, 150 Cal.App.4th at p. 1370*, citation omitted.)

*102 In October 2007, the Board of Directors repealed ordinances Nos. 2003-01 and 2004-02.

In January 2008, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants wanted to resolve all disputes in the Amrhein Lawsuit and the Consolidated Lawsuits. They and the Agency then entered into a stipulated agreement for entry of judgment (stipulated agreement). The stipulated agreement provided: "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the `Pending Litigation') as to the Agency's actions shall be resolved by entry of judgment in the Pending Litigation"; the Agency would pay $1.8 million to the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants for legal fees, costs, and expenses; and the augmentation charges collected pursuant to ordinances Nos. 2003-01 and 2004-02 would be refunded. It also stated that the "settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect ...." The stipulated agreement did not provide for either the repeal of the Ordinance or the refund of augmentation charges imposed under the Ordinance.

In February 2008, judgment was entered pursuant to the terms of the stipulated agreement.

In August 2010, Eiskamp filed a complaint against the Agency for declaratory relief and a petition for writ of mandate. The complaint alleged that Eiskamp was a member of the public and the owner of three parcels of real property within the Agency's jurisdiction. The complaint further alleged that the Board of Directors established the augmentation charge of $80 per acre-foot without complying with the notice, hearing, and voting requirements of article XIII D, section 6 of the California Constitution, thus rendering the Ordinance void. In May 2009, Eiskamp paid $9,024.39 and $5,516.96 that had been levied pursuant to the Ordinance in connection with two parcels of his real property. He then submitted written claims to the Agency for refunds of these amounts. These claims were deemed denied. In July 2010, the Agency sent bills to Eiskamp for augmentation charges for three parcels of his real property. The complaint sought refund of the amounts that Eiskamp had paid and an order directing the Agency to cease collecting the augmentation charges under the Ordinance.

The Agency filed a demurrer to the complaint and a request for judicial notice in support of the demurrer. Following a hearing, the trial court

*103 sustained the demurrer without leave to amend. Judgment was then entered in favor of the Agency, and Eiskamp filed a timely appeal.

II. Discussion
In reviewing an order sustaining a demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]" (McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) We may also consider matters that have been judicially noticed. [Citations.]" (Committee for Green Foothills v. Santa Clara County Bd. of Supervisors (2010) 48 Cal.4th 32, 42 [105 Cal.Rptr.3d 181, 224 P.3d 920].) "Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.]") (Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406].)

The Agency contends that the trial court properly sustained the demurrer on the ground that Eiskamp lacked standing to maintain an action for a writ of mandate. Relying on Carsten v. Psychology Examining Com. (1980) 27 Cal.3d 793 [166 Cal.Rptr. 844, 614 P.2d 276] (Carsten) and Braude v. City of Los Angeles (1990) 226 Cal.App.3d 83 [276 Cal.Rptr. 256] (Braude), the Agency asserts that Eiskamp forfeited his right as a citizen-taxpayer to maintain the present action because he is as a member of the Board of Directors.

(1) In Carsten, the appellant was a member of the psychology examining committee of the Board of Medical Quality Assurance (board). (Carsten, supra, 27 Cal.3d at p. 795.) She filed a petition for writ of mandate in which she sought to challenge the legality of the board's action in adopting a new method for testing license applicants. (Ibid.) Carsten recognized that under Code of Civil Procedure section 1086, "[t]he requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. [Citations.] As Professor Davis states the rule: 'One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable.' (Davis, 3 Administrative Law Treatise (1958) p. 291.)" (Carsten, at pp. 796-797.) Carsten concluded that since the appellant was "neither seeking a psychology license, nor in danger of losing any license she possess[ed] under the rule adopted by the board, she [was] not a beneficially interested person within the meaning of the statute." (Id. at p. 797.)

(2) Carsten also acknowledged that taxpayers have standing to challenge a governmental agency's expenditure of public funds, but concluded that the appellant lacked standing under this theory. (Carsten, supra, 27 Cal.3d at p. 798.) Carsten observed that since the appellant did not have a beneficial interest in the litigation, the court would be providing an advisory opinion. (Ibid.)

(3) The court further pointed out that when a party sues a governmental agency for which she is a board member, she is "both plaintiff and defendant in the same litigation." (Ibid.) Carsten then focused on the "policy issues which militate against permitting disgruntled governmental agency members to seek extraordinary writs from the courts. Unquestionably the ready availability of court litigation will be disruptive to the administrative process and antithetical to its underlying purpose of providing expeditious disposition of problems in a specialized field without recourse to the judiciary. Board members will be compelled to testify against each other, to attack members with conflicting views and justify their own positions taken in administrative hearings, and to reveal internal discussions and deliberations." (Ibid. at p. 799.) Thus, Carsten held that "a board member is not a citizen-taxpayer for the purpose of having standing to sue the very board on which she sits." (Id. at p. 801.)

In Braude, the appellant was a member of the respondent city council, a taxpayer, and a commuter on the respondent's freeways. (Braude, supra, 226 Cal.App.3d at p. 86.) The appellant brought a petition for writ of mandate to order the respondent to set aside an ordinance approving a project to build two office buildings. (Ibid.) He argued that he was a beneficially interested person for purposes of standing because he would be detrimentally affected in his daily commute
by increased traffic on the Harbor Freeway as a result of the project. (Id. at p. 88.) Braude rejected this argument, noting that the appellant shared "his beneficial interest with hundreds of thousands of people who use the Harbor Freeway everyday ... [and] several more hundreds of thousands of people [who] use this route on an occasional basis," and thus he did "not have a beneficial interest over and above the public at large." (Id. at pp. 88-89.) Relying on Carsten, supra, 27 Cal.3d 793, Braude also held that the appellant, as a member of the respondent's city council, had forfeited his right to bring an action as a citizen-taxpayer. (Braude, at p. 91.)

Here, unlike the appellants in Carsten and Braude, Eiskamp has a "direct and substantial" beneficial interest to be protected. (Save the Plastic Bag Coalition v. City of Manhattan Beach (2011) 52 Cal.4th 155, 166 [127 105 Cal.Rptr.3d 710, 254 P.3d 1005].) He is the owner of three parcels of real property within the Agency's jurisdiction, and the Agency has imposed augmentation charges in connection with each of these parcels. Thus, though Eiskamp is a member of the Board of Directors, he has standing to pursue the present writ of mandate.

The Agency contends, however, that the present action is barred by the doctrine of res judicata. We agree.

(4) "'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 896 [123 Cal.Rptr.2d 432, 51 P.3d 297].)

(5) In considering this issue, we note that "'[a] validation action implements important policy considerations. 'A central theme in the validating procedures is speedy determination of the validity of the public agency's action.' [Citation.] 'The text of section 870 and cases which have interpreted the validation statutes have placed great importance on the need for a single dispositive final judgment.' [Citation.]" (Friedland v. City of Long Beach (1998) 62 Cal.App.4th 835, 842 [73 Cal.Rptr.2d 427].)

(6) A validation proceeding is "in the nature of a proceeding in rem." (Code Civ. Proc., § 860.) Thus, "'[t]he judgment in a proceeding brought under the general validation procedure is 'binding and conclusive ... against the agency and against all other persons ....' (Code Civ. Proc., § 870, subd. (a), italics added.) Because the proceeding is in the nature of an action against the entire world, '[j]urisdiction of all interested parties may be had by [newspaper] publication of summons ...' and such other notice as the court may order. (Id., § 861.) More importantly, the general validation procedure is broad enough to include actions to invalidate public agency matters (sometimes called reverse validation actions). Code of Civil Procedure section 863 permits 'any interested person [to] bring an action ... to determine the validity of [the] matter' (italics added), and the phrase 'any interested person' might of course include a party contesting the matter in question." (Bonander v. Town of Tiburon (2009) 46 Cal.4th 646, 656 [94 Cal.Rptr.3d 403, 208 P.3d 146].)

(7) Here, the Scurich plaintiffs filed a reverse validation action in 2002 in which they challenged the validity of the Ordinance. This court "validat[ed] the $80 Augmentation Charge ... to the extent that the charge [was] used to fund capital facilities construction," but held that the statute of limitations did not bar the Scurich plaintiffs from challenging the Ordinance to the extent that the charges were used for other expenditures. Eiskamp is now seeking to challenge all of the augmentation charges imposed under the Ordinance. We will assume that Eiskamp could amend the complaint to challenge only that portion of the augmentation charges that were used for other expenditures, thereby avoiding the statute of limitations. If no other litigation involving the augmentation charges imposed by the Agency had occurred, res judicata would not apply and the amended complaint would state facts sufficient to constitute a cause of action.
However, in 2003, the Agency filed a validation proceeding (the Amrhein Lawsuit) to determine whether ordinance No. 2003-01 was valid. The Scurich Lawsuit was then stayed pending the outcome of the Amrhein Lawsuit. After the judgment in the Amrhein Lawsuit was reversed on the ground that the Agency failed to comply with constitutional requirements, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, the Amrhein defendants, and the Agency entered into a stipulated agreement that provided that "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the 'Pending Litigation')" would be resolved by entry of judgment. The stipulated agreement also stated that "this settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect...." The stipulated agreement did not require either the repeal of the Ordinance or the refund of augmentation charges imposed under the Ordinance. Thus, the stipulated agreement resolved the issue that Eiskamp now raises, that is, the validity of the augmentation charges imposed under the Ordinance, in favor of the Agency. Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was "binding and conclusive ... against the agency and against all other persons" (Code Civ. Proc., § 870, subd. (a)), including Eiskamp. Accordingly, Eiskamp is barred from relitigating the same issues that were resolved in the pending litigation.

In sum, the trial court properly sustained the demurrer to the complaint and entered judgment in favor of the Agency.

III. Disposition

The judgment is affirmed.


A petition for a rehearing was denied February 2, 2012, and appellant's petition for review by the Supreme Court was denied May 9, 2012, S200039.

[1] The plaintiffs in this lawsuit were James P. Scurich, John E. Eiskamp (appellant's son), Vincent J. Gizdich III, Dick Peixoto, and William J. McGrath.


[3] Eiskamp does not contend that the Agency failed to comply with the notification requirements for a validation proceeding (Code Civ. Proc., § 861).

[4] Eiskamp cites several federal cases on res judicata, collateral estoppel, privity, and stare decisis for the proposition that he is entitled to challenge the Agency's collection of the augmentation charges that were held invalid in Amrhein, supra, 150 Cal.App.4th 1364. However, his contentions rely on the premise that the judgment in the pending litigation did not apply to him.

[*] Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[†] Judge of the Santa Clara Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
After defendant Pajaro Valley Water Management Agency enacted ordinance No. 2010-02 that increased groundwater augmentation charges for the operation of wells within defendant's jurisdiction, plaintiff Harold Griffith challenged the ordinance on the grounds that the increase (1) was procedurally flawed because it was not approved in an election required by Proposition 218 (Cal. Const., art. XIII D, § 6),[1] (2) did not conform to certain substantive requirements of Proposition 218, and (3) was to be used for a purpose not authorized by the law under which defendant was formed. Thereafter, plaintiffs Joseph Pendry, James Spain, Yuet-Ming Chu, William J. McGrath, and Henry Schimpeler (Pendry) challenged the ordinance on similar grounds and on the ground that it was void because one of the directors who voted for the ordinance had a disqualifying conflict of interest within the meaning of the Political Reform Act (PRA) (Gov. Code, § 87100 et seq.).[2] They also challenged an ordinance passed in 2002, which imposed an augmentation charge, and a 1993 management-fee ordinance. The trial court rendered judgments for defendant. Plaintiffs have appealed and reiterate their challenges. We are considering the two appeals together for purposes of briefing, oral argument, and disposition. After conducting an independent review of the record (Silicon Valley
We have previously detailed an historical background to this case in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1370-1375 (*Amrhein*). We therefore decline to repeat it and will instead begin with the trial court's succinct summary.

"The Pajaro Valley Groundwater Basin supplies most of the water used in the Pajaro Valley. The water is being extracted faster than it is being replenished by natural forces, which leads to saltwater intrusion, especially near the coast. Once the water table drops below sea level, seawater seeps into the groundwater basin. [Defendant] was created [in 1984 by the Pajaro Valley Water Management Agency Act (Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Wat.—Uncod. Acts (2008) Act 760, p. 681 (Act))] to deal with this issue. At present, the strategy is to use recycled wastewater, supplemental wells, captured storm runoff, and a coastal distribution system. The purpose is to reduce the amount of water taken from the groundwater basin (for example, the amount taken from wells), by supplying water to some [coastal] users. The cost of this process is borne by all users, on the theory that even those taking water from [inland] wells benefit from the delivery of water to [coastal users], as that reduces the amount of groundwater those [coastal users] will extract [from their own wells], thereby keeping the water in [all] wells from becoming too salty."

Ordinance No. 2010-02 describes "three supplemental water projects that work together to provide supplemental water to reduce overdraft, retard seawater intrusion, and improve and protect the groundwater basin supply: (1) Watsonville Recycled Water Project, which provides tertiary treated recycled water for agricultural use and includes inland wells that are used to provide cleaner well water that is blended with the treated water in order to improve the water quality so that it may be used for agricultural purposes; (2) Harkins Slough Project, which diverts excess wet-weather flows from Harkins Slough to a basin that recharges the groundwater, which then is available to be extracted and delivered for agricultural use; and (3) Coastal Distribution System (‘CDS’), which consists of pipelines that deliver the blended recycled water and Harkins Slough Project water for agricultural use along the coast."

"The Act specifically empowers [defendant] to adopt ordinances levying `groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within [defendant's] boundaries.'" (*Amrhein, supra, 150 Cal.App.4th at p. 1372; see Act, § 1001.)

Ordinance No. 2010-02 describes that the augmentation charge is necessary to cover the costs of "supplemental water service" described as follows: "(a) the purchase/acquisition, capture, storage and distribution of supplemental water through the supplemental water projects [Watsonville Recycled Water Project; Harkins Slough Project; CDS] and including the planning, design, financing, construction, operation, maintenance, repair, replacement and management of these project facilities, and (b) basin management monitoring and planning to manage the existing projects and to identify and determine future water projects that would further reduce groundwater overdraft and retard seawater intrusion. The cost of the service also includes ongoing debt payments related to the design and construction of the completed supplemental water projects."

**PROCEDURAL BACKGROUND**

In 2002, defendant approved ordinance No. 2002-02, which established an augmentation charge of $80 per acre-foot. Several citizens challenged the ordinance on the ground that the approval procedure did not comply with the notice,
hearing, and voting requirements of Proposition 218. The trial court dismissed the case on the ground of a special statute of limitations, and the plaintiffs appealed to this court. We reversed the judgment after finding that part of the augmentation charge was not subject to the statute of limitations. (Scurich v. Pajaro Valley Water Management Agency (May 27, 2004, H025776) [nonpub. opn.] (Scurich); see Eiskamp v. Pajaro Valley Water Management Agency (2012) 203 Cal.App.4th 97, 100-101 (Eiskamp).) We remanded the case for trial.

In 2003, defendant approved ordinance No. 2003-01, which increased the augmentation charge to $120 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. But it filed Amrhein as a validation proceeding seeking a declaration as to the validity of the ordinance. The trial court declared the ordinance valid, and citizens who had objected appealed to this court.

In 2004, defendant approved ordinance No. 2004-02, which increased the augmentation charge to $160 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. Griffith challenged the ordinance and a 1993 management-fee ordinance. San Andreas Mutual Water Company and others also challenged the ordinance. The two actions were consolidated with Scurich (Consolidated Lawsuits) and the Consolidated Lawsuits were stayed pending our decision in Amrhein.

In 2007, we reversed the judgment in Amrhein after holding that "the augmentation fee is a fee or charge `imposed . . . as an incident of property ownership' and thus subject to [the Proposition 218] preconditions for the imposition of such charges." (Amrhein, supra, 150 Cal.App.4th at p. 1370.)


"In January 2008, the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants wanted to resolve all disputes in the Amrhein Lawsuit and the Consolidated Lawsuits. They and [defendant] then entered into a stipulated agreement for entry of judgment (stipulated agreement). The stipulated agreement provided: `all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation") as to [defendant's] actions shall be resolved by entry of judgment in the Pending Litigation'; [defendant] would pay $1.8 million to the Scurich plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants for legal fees, costs, and expenses; and the augmentation charges collected pursuant to ordinance Nos. 2003-01 and 2004-02 would be refunded. It also stated that the `settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect. . .' The stipulated agreement did not provide for either the repeal of [ordinance No. 2002-02] or the refund of augmentation charges imposed under [that] Ordinance.

"In February 2008, judgment was entered pursuant to the terms of the stipulated agreement." (Eiskamp, supra, 203 Cal.App.4th at p. 102.)

In May 2010, defendant mailed notice of a public hearing on a proposed three-tier augmentation charge increase to all parcel owners. At the hearing, defendant tallied 291 written protests from 1,930 eligible parcel owners. Defendant then enacted ordinance No. 2010-02, which imposed the increased augmentation charges.

In June 2010, defendant began an all-mail election on the ordinance. It mailed ballots to all owners of land parcels served by a well who would be subject to the augmentation charge. Each ballot was accorded weighted votes proportional to the parcel's financial obligation as measured by average annual water use over the prior five years. And each ballot stated its number of votes. The weighted votes approved the ordinance 72 percent to 28 percent. But, if
counted one vote per parcel, 324 votes were in favor of the ordinance and 608 votes were against the ordinance. Plaintiffs then filed the instant actions to challenge ordinance No. 2010-02.

CHALLENGES TO ORDINANCE NO. 2010-02

"Proposition 218 was passed in 1996 by the electorate to plug certain perceived loopholes in Proposition 13. [Citations.] Specifically, by increasing assessments, fees, and charges, local governments tried to raise revenues without triggering the voter approval requirements in Proposition 13." (Silicon Valley Taxpayers' Assn. v. Garner (2013) 216 Cal.App.4th 402, 405-406.)

Relevant here is the component of Proposition 218 that undertakes to constrain the imposition by local governments of "assessments, fees and charges." (§ 1.)

Proposition 218 restricts "the power of public agencies to impose a "[f]ee" or "charge," defined as 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.' [Citation.] The phrase 'property-related service' is defined to mean 'a public service having a direct relationship to property ownership.' [Citation.] 'Property ownership' is defined to 'include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.' [Citation.]

"Where a proposed fee or charge comes within this definition, [Proposition 218] requires the proposing agency to identify parcels upon which it will be imposed, and to conduct a public hearing. [Citation.] The hearing must be preceded by written notice to affected owners setting forth, among other things, a 'calculation' of '[t]he amount of the fee or charge proposed to be imposed upon each parcel. . . . ' [Citation.] If a majority of affected owners file written protests at the public hearing, 'the agency shall not impose the fee or charge.' [Citation.] Moreover, unless the charge is for 'sewer, water, [or] refuse collection services,' 'no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.'" (Amrhein, supra, 150 Cal.App.4th at pp. 1384-1385.)

As mentioned, we have determined that a groundwater augmentation charge such as the one imposed by ordinance No. 2010-02 "is indeed imposed as an incident of property ownership [and] that it is subject to the restrictions imposed on such charges by [Proposition 218]." (Amrhein, supra, 150 Cal.App.4th at p. 1393.) We cautioned in Amrhein, however, that "We should not be understood to imply that the charge is necessarily subject to all of the restrictions imposed by [Proposition 218] on charges incidental to property ownership. [Amrhein] presents no occasion to determine whether this or a similar charge may fall within any of the express exemptions or partial exemptions set forth in that measure." (Ibid. & fn. 21.)

This case, however, presents such an occasion.

Boiled to its essence, plaintiffs' challenge to the election is that the weighted vote was improper. But the challenge necessarily fails if the augmentation charge falls within the express exemption set forth in Proposition 218 for sewer, water, and refuse collection services. (§ 6, subd. (c) [vote required to impose or increase property-related fee "Except for . . . sewer, water, and refuse collection services."].)

Plaintiffs argue that defendant does not provide "water service" as that term is commonly understood. (See Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 Cal.App.4th 1351, 1358 ["The average voter would envision 'water service' as the supply of water for personal, household, and commercial use. . . ."] (Salinas.) They urge that defendant
provides "groundwater management," which may be a service "but that service is not 'water service.'" Plaintiffs, however, make a distinction without a difference.

Domestic water delivery through a pipeline is a property-related water service within the meaning of Proposition 218. (Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 217.) And we have held that, for purposes of Proposition 218, the augmentation charge at issue here does not differ materially "from a charge on delivered water." (Amrhein, supra, 150 Cal.App.4th at pp. 1388-1389.) If the charges for water delivery and water extraction are akin, then the services behind the charges are akin. Moreover, the Legislature has endorsed the view that water service means more than just supplying water. The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) Thus, the entity who produces, stores, supplies, treats, or distributes water necessarily provides water service. Defendant's statutory mandate to purchase, capture, store, and distribute supplemental water therefore describes water service.

Plaintiffs' reliance on Salinas is erroneous. In Salinas, the question was whether a storm drainage fee was exempt from the voter-approval requirement because it was a water or sewer service fee. Our point about the average voter envisioning water service as meaning the supplying of water was a preface to distinguishing water service from storm drainage rather than a definition of water service. The entire sentence reads "The average voter would envision 'water service' as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away [from property], and discharges it into the nearby creeks, river and ocean." (Salinas, supra, 98 Cal.App.4th at p. 1358.)

We therefore conclude that the augmentation charge at issue here is for water service within the meaning of Proposition 218. As such, it was expressly exempt from the fee/charge voting requirement.

In a second procedural attack, Pendry urges that defendant transgressed Proposition 218 by enacting ordinance No. 2010-02 without giving notice of the protest hearing to tenants and public utility customers who indirectly pay the augmentation charge. There is no merit to the claim.

"An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following: [¶] (1) 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 proposed fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge." (§ 6, subd. (a)(1), italics added.)

In short, Proposition 218 requires that notice of the protest hearing be sent to record owners, not tenants or customers. (See Gov. Code, § 53750, subd. (j) ["For purposes of . . . Article XIII D of the California Constitution . . . [¶] . . . [¶] (j) 'Record owner' means the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency."]).

It is true, as Pendry points out, that, in the definitions section of Proposition 218, the term "property ownership" is defined to include "tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (§ 2, subd. (g).) And it is true that "when a well [is] shown to be operated by a lessee or other occupant, that person could be billed." (Amrhein, supra, 150 Cal.App.4th at p. 1383.) But the notice provision of section 6,
subdivision (a), requires notice to record owners, not to those having property ownership. *Silicon Valley, supra, 44 Cal.4th at p. 444* ["'The principles of constitutional interpretation are similar to those governing statutory construction.' [Citation.] If the language is clear and unambiguous, the plain meaning governs."]

"Proposition 218 also imposes substantive limitations, including restrictions on the use of revenues derived from such charges." *Amrhein, supra, 150 Cal.App.4th at p. 1385.*

"A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

"(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

"(3) 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.

"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4 [procedures and requirements for proposed assessments].

"(5) No fee or charge may be imposed for general governmental services . . . where the service is available to the public at large in substantially the same manner as it is to property owners. . . . In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." (§ 6, subd. (b.).)

Plaintiffs argue that the augmentation charge transgresses each of the section 6, subdivision (b), substantive limitations.

**Revenues shall not exceed the funds required to provide the property related service**

According to *Griffith*, the revenues derived from the augmentation charge exceed the funds required to provide supplemental water service because some of the revenue is used to pay ongoing debt that was "incurred to build a now abandoned pipeline to bring water into the Valley." There is no merit to the point.

As noted above, the Act allows defendant to levy groundwater augmentation charges for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water. Such costs necessarily include debt service incurred to construct facilities to capture, store, and distribute supplemental water.

**Revenues shall not be used for any purpose other than that for which the fee or charge was imposed**

According to plaintiffs, the revenues derived from the augmentation charge are used for a purpose other than that for which the charge was imposed because some of the revenue is used to pay debt service and defendant's general expenses. Again, the Act allows an augmentation charge to cover debt service. And similar reasoning supports that the costs of purchasing, capturing, storing, and distributing supplemental water necessarily include general expenses to administer the purchasing, capturing, storing, and distributing of supplemental water.
Pendry, however, expands on this theme in a separate, detailed argument to the effect that the augmentation charge is unauthorized by the Act. He contends that ordinance No. 2010-02 is invalid because it allows the augmentation charge to be used for "supplemental water service," a purpose not authorized by the Act. Without specifically referring to the Watsonville Recycled Water Project that blends treated recycled water with well water for agricultural use, he complains that defendant "is using the funds generated by the augmentation charge imposed by Ordinance 2010-02 to extract groundwater from within the watershed and deliver that water to the coast. . . ."

Pendry relies on the Act, which authorizes defendant to levy augmentation charges to pay the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency. From there, Pendry notes that the Act states that "'Supplemental water' means surface water or groundwater imported from outside the watershed or watersheds of the groundwater basin, flood waters that are conserved and saved within the watershed or watersheds which would otherwise have been lost or would not have reached the groundwater basin, and recycled water." (Act, § 316.) From this, Pendry concludes that the recycle/well blend is not supplemental water because the well portion of the blend is neither imported water, flood water, nor recycled water. We disagree with Pendry's analysis.

Defendant's Rate Study (ante, fn. 8) explains that "The [Watsonville Recycled Water Facility] produces recycled water with salinity (Total Dissolved Solids or TDS concentration) between approximately 700 and 900 mg/L. The concentration of TDS varies seasonally as a result of the source water flowing into the Waste Water Treatment Plant. In order to reduce salinity and use the recycled water for irrigation purposes, the recycled water must be blended with higher quality (lower TDS) water. Therefore, the recycled water project includes the construction, operation, and maintenance of blend water from supplemental groundwater wells. The supplemental wells are described in the BMP [Basin Management Plan] as part of the recycled water project. The wells are a necessary component of the recycled water project, which reduces coastal pumping and thus increases the sustainable yield of the overall groundwater basin. These wells also off-set and reduce the adverse water quality wells located closer to the coast."

"'Recycled water' means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource." (Wat. Code, § 13050, subd. (n).)

Given this definition, it is apparent that the Watsonville Recycled Water Facility does not produce recycled water because the water it produces is not suitable for the beneficial use of coastal agriculture. The water only becomes recycled water when blended with the well water. Thus, the recycle/well blend water delivered to the coast is supplemental water.

We are constrained to add that the Act unquestionably allows defendant to extract groundwater for the purpose of capturing recycled water. The Act generally provides that defendant "should, in an efficient and economically feasible manner, utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future needs of the basin." (Act, § 102, subd. (g).) It specifically provides that defendant, "in order to improve and protect the quality of water supplies may treat, inject, extract, or otherwise control water, including, but not limited to, control of extractions, and construction of wells and drainage facilities." (Id. § 711.) And it also provides that defendant "shall have the power to take all affirmative steps necessary to replenish and augment the water supply within its territory." (Id. § 714.)

The amount imposed as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
According to Griffith, the amount imposed on his parcel was disproportionate because he uses no services. But this overlooks that "the management of the water resources ... for agricultural, municipal, industrial, and other beneficial uses is in the public interest" and defendant was created to manage the resources "for the common benefit of all water users." (Act, § 101.) It also overlooks that the augmentation charge pays for "the activities required to prepare or implement any groundwater management program." (Id. § 1002, subd. (a).)

Pendry similarly grounds his argument on the erroneous premise that "The only property owners receiving § 6(b) services from [defendant] are the coastal landowners receiving delivered water."

Pendry specifically complains that defendant "established the augmentation charge by calculating the amount needed for its project, and then subtracting its sources of revenue other than the augmentation charge, with the remainder being the amount of the augmentation charge." He urges that defendant improperly "worked backwards." According to Pendry, "the proportional cost of service must be calculated ... before setting the rate for the augmentation charge."

Defendant indeed established its augmentation charge based on a revenue-requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users. The American Water Works Association Manual of Water Supply Practices, in evidence below and relied on by defendant's rate-making consultant, recommends this methodology ("The total annual cost of providing water service is the annual revenue requirements that apply to the particular utility"). Pendry does not explain why this approach offends Proposition 218 proportionality. He cites Silicon Valley, supra, 44 Cal.4th at page 457 ("an assessment calculation that works backward by starting with an amount taxpayers are likely to pay, and then determines an annual spending budget based thereon, does not comply with the law governing assessments."). Unlike Silicon Valley, however, this case neither involves an assessment nor a what-will-the-market-bear methodology. Pendry also cites Howard Jarvis Taxpayers Assn. v. City of Fresno (2005) 127 Cal.App.4th 914, 923. But that case says nothing more than that costs should be determined and apportioned ("Together, subdivision (b)(1) and (3) of article XIII D, section 6, makes it necessary—if Fresno wishes to recover all of its utilities costs from user fees—that it reasonably determine [citation] the unbudgeted costs of utilities enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel."). (Ibid.)

Pendry acknowledges that defendant apportioned the augmentation charge among different categories of users (metered wells, unmetered wells, wells within the delivered water zone). But he argues that City of Palmdale v. Palmdale Water Dist. (2011) 198 Cal.App.4th 926 (Palmdale), holds that Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis. We disagree with Pendry.

In Palmdale, the court reversed a judgment that had upheld tiered categories of water rates. It held that the water district had failed to carry its burden to justify disparate treatment of the customer classes. The case did not hold that parcel-by-parcel analysis was required. It held that the water district charged categories disproportionately "without a corresponding showing in the record that such impact is justified under [Proposition 218]." (Palmdale, supra, 198 Cal.App.4th at p. 937.)

Apportionment is not a determination that lends itself to precise calculation. (White v. County of San Diego (1980) 26 Cal.3d 897, 903.) In the context of determining the validity of a fee imposed upon water appropriators by the State Water Resources Control Board, the Supreme Court has recently held that "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payers." (California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421, 438.)

Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than the amount shall not exceed the proportional cost of the service attributable to the parcel, defendant's method of grouping similar users
together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render defendant's method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

**No fee or charge may be imposed unless it is immediately available and not for future services**

Plaintiffs argue that the augmentation charge will be used for future services because ordinance No. 2010-02 states that the charge will be used "to identify and determine future supplemental water projects. . . ." There is no merit to the point.

Defendant's water service consists of more than just delivering water. As mentioned, the Act authorizes defendant to levy groundwater augmentation charges to pay for purchasing, capturing, storing, and distributing supplemental water. Since one cannot rationally purchase supplemental water without identifying and determining one's needs, identifying and determining future supplemental water projects is part of defendant's present-day water service.

Pendry also complains that delivered water is one of the services and delivered water is not immediately available except to coastal properties within the delivered water zone. But, again, Pendry's complaint stems from his erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water and his failure to acknowledge that the augmentation charge pays for the activities required to prepare or implement the groundwater management program for the common benefit of all water users.

**Revenues may not be imposed for general governmental services where the service is available to the public at large in substantially the same manner as it is to property owners**

Plaintiffs reason that, since everyone is a water user, everyone benefits from the services charged to property owners via the augmentation charge. They conclude that the augmentation charge is imposed for general governmental services. We disagree with plaintiffs' analysis.

The language of article XIII D, section 6, subdivision (b)(5), concerns the purpose of fees and charges. (Golden Hill Neighborhood Assn., Inc. v. City of San Diego (2011) 199 Cal.App.4th 416, 434, fn. 17) "The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service." (Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal.App.4th 637, 648.) Defendant is not using money from the augmentation charge for "general governmental service." (§ 6, subd. (b)(5).) Rather, it is using the money to pay for the water service provided.

**CONFLICT OF INTEREST**

Pendry contends that defendant's board member, Michael Dobler, who voted for ordinance No. 2010-02, had a disqualifying financial interest in the decision, and that his participation renders the ordinance void under the PRA. He points out that defendant's board of directors consists of seven members (Act, § 402) and ordinances must pass by "the affirmative vote of the majority of the members of the board" (id. § 410). He notes that the vote count to pass ordinance No. 2010-02 was 4 to 1 and, thus, insufficient without Dobler's vote. He complains that Dobler has an interest in entities that farm in the delivered water zone. We disagree with Pendry's contention.

The PRA was enacted by initiative in June 1974. It prohibits any public official from participating in a governmental decision in which he knows or has reason to know he has a financial interest. (Gov. Code, § 87100.) It allows a person to sue for injunctive relief and, "If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void." (Id. § 91003,
subd. (b). It also establishes the Fair Political Practices Commission (id. § 83100), which is authorized to adopt regulations to carry out the purposes and provisions of the PRA (id. § 83112).

"A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official. . . ." (Gov. Code, § 87103.)

"The financial effect of a governmental decision on the official's economic interest is indistinguishable from the decision's effect on the public generally if . . .: [¶] . . . [¶] (c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (Cal. Code Regs., tit. 2, § 18707.2, subd. (c) (regulation).)

Here, there is no serious question that (1) defendant is a water, irrigation, or similar district, and (2) the decision effected an adjustment to charges or rates.

Pendry disputes that the ordinance applies the charges proportionally and across the board to persons receiving services from defendant. He urges that the augmentation charge is imposed upon approximately 2400 parcels located within defendant's boundaries but only a handful of those properties receive the delivered water service (Dobler included) and can expect to benefit from the greater service, reliability, improved water quality from the delivered water supply. This, however, is merely another variant of Pendry's erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water.

The augmentation charge affects those on whom it is imposed by burdening them with an expense they will bear proportionately to the amount of groundwater they extract at a rate depending on which of three rate classes applies. It is imposed "across-the-board" on all water extractors. All persons extracting water—including any coastal users who choose to do so—will pay an augmentation charge per acre-foot extracted. All persons extracting water and paying the charge will benefit in the continued availability of usable groundwater. That there is a separate charge for delivered water has no tendency to establish that the augmentation charge is applied to the interests of extractors in a manner that is anything other than proportional and across-the-board. It is plain that the ordinance satisfies the terms of regulation section 18707.2, subdivision (c), such that the "public generally" exception in the PRA applies to Dobler's vote. (See Amrhein, supra, 150 Cal.App.4th at pp. 1395-1396 (conc. opn. of Bamattre-Manoukian, J.).)

ORDINANCE NO. 2002-02 AND 1993 MANAGEMENT FEE

In Eiskamp, the plaintiff challenged ordinance No. 2002-02 on the ground that it was invalid because defendant did not comply "with the notice, hearing, and voting requirements of [Proposition 218]." (Eiskamp, supra, 203 Cal.App.4th at p. 102.) We concluded that the challenge was barred by the doctrine of res judicata because the 2008 stipulated judgment in the Pending Litigation resolved the issue against all persons. We specifically held that "Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was `binding and conclusive . . . against [defendant] and against all other persons' (Code Civ. Proc., § 870, subd. (a)), including Eiskamp." (Id. at p. 106.) Since Pendry raises the same claim as the plaintiff in Eiskamp, his challenge is also barred.

Pendry disagrees. He asserts that Eiskamp was wrongly decided because "the in pro per plaintiff in Eiskamp did not properly present the correct facts or law to this Court." According to Pendry, the Consolidated Lawsuits were not in rem validation proceedings insofar as ordinance No. 2002-02 was concerned because, in Scurich (the case that challenged that ordinance via a reverse validation action), our reversal upheld the trial court's dismissal of the in rem validation
cause of action and remanded for trial an in personam declaratory-relief cause of action. From this, Pendry reasons that ordinance No. 2002-02 was "not under attack" such that there was in rem jurisdiction in the Consolidated Lawsuits. Pendry concludes that the stipulated judgment only binds parties to the stipulated agreement and, since he was not a party, he is free to relitigate. Pendry's analysis is erroneous.

The settlement agreement served to resolve "all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation")." (Eiskamp, supra, 203 Cal.App.4th at p. 102, italics added.) Specifically, the parties extinguished "any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect. . . ." (Ibid., italics added.)

In the Pending Litigation, the "judgment was entered pursuant to the terms of the stipulated agreement." (Eiskamp, supra, 203 Cal.App.4th at p. 102.) Since the Amrhein Lawsuit was a validation proceeding and part of the Pending Litigation, all persons are bound by the judgment. (Code Civ. Proc., § 870, subd. (a).) And since the judgment extinguished all claims that the parties, which includes all persons given that validation character of Amrhein, had made concerning any augmentation charge or management fee then in effect, Pendry cannot relitigate the claims here. Pendry concedes as much by recognizing that "the plaintiffs and defendants in Scurich and Amrhein [all persons] stipulated in private settlement discussions to accept money in exchange for foregoing their individual right to attack Ordinance 2002-02 in the future." That ordinance No. 2002-02 was not technically under attack at the time of the judgment does not detract from that the Pending Litigation was a validation proceeding that comprehensively extinguished all claims that had been made, or could have been made about the validity of any augmentation charge or management fee then in effect. This necessarily includes claims against ordinance No. 2002-02 and the 1993 Management Fee.

Pendry claims that applying res judicata against him transgresses due process. However, his argument is premised on the trial court's conclusion that res judicata applied because he was in privity with the parties in the Pending Litigation. Our conclusion is that res judicata applies because, by virtue of the validation character of the Pending Litigation, he was a party to the Pending Litigation.

**DISPOSITION**

The judgment in H038087 (Santa Cruz County Superior Court case No. CV168936-Griffith) is affirmed.

The judgment in H038264 (Santa Cruz County Superior Court case No. CV169080-Pendry) is affirmed.

Rushing, P.J. and Elia, J., concurs.

[1] Further unspecified section references are to the California Constitution, article XIII D.

[2] Plaintiffs also asserted other grounds that they do not advance on appeal.

[3] In rem proceeding by public agency against all persons interested in validity of matter determined. (Code Civ. Proc., § 860 et seq.)

[4] Defendant proposed $195 per acre-foot for metered wells inside the coastal delivered-water zone, $162 per acre-foot for metered wells outside the delivered-water zone (primarily municipal, industrial, and agricultural users), and $156 per acre-foot for unmetered wells (primarily rural residential). It also proposed $306 per acre-foot for delivered water charges.
The parties differ immaterially on the one-for-one vote count.

According to defendant, the election was unnecessary but held nevertheless in an abundance of caution "because no case has explicitly reached the issue, and because of the near certainty of suit."

Pendry does not challenge compliance with section 6, subdivision (b)(1).

Defendant's Proposition 218 Service Charge Report (Rate Study), in evidence below, explains that a previously recommended import pipeline was no longer feasible "due to changes in the availability of Central Valley Project water supplies."

"Agricultural uses shall have priority over other uses under this act within the constraints of state law." (Act, § 102, subd. (d).)

Pendry claims that the trial court did not find that the "public generally" exception applies in this case. It is true that the trial court's reasoning is ambiguous. The trial court's statement of decision finds against "a conflict of interest which could support the voiding of the subject Ordinance." The finding could be construed to mean that (1) Dobler had no disqualifying financial interest, (2) the "public generally" exception applied to Dobler's financial interest, or (3) Dobler's financial interest did not justify the discretionary remedy to void the ordinance. Pendry's point is of no moment. The parties argued the "public generally" exception to the trial court. The salient facts are undisputed. And Pendry urges us to review the PRA issue de novo because it involves statutory interpretation on undisputed facts.

The plaintiff in *Eiskamp* did not challenge the 1993 management-fee ordinance as does Pendry, but the management-fee ordinance stands on the same footing as the augmentation-charge ordinance since it was part of the stipulated judgment.

Plaintiff McGrath was a party to the stipulated agreement but he excepted himself from the causes of action herein that challenge ordinance No. 2002-02 and the management fee ordinance.

Defendant's request to take judicial notice of three letters requesting depublication of *Eiskamp* and four letters supporting a petition for review of *Eiskamp* is denied.

243 Cal.App.4th 1430 (2016)
197 Cal. Rptr. 3d 429

NEWHALL COUNTY WATER DISTRICT, Plaintiff and Respondent,

v.

CASTAIC LAKE WATER AGENCY et al., Defendants and Appellants.

No. B257964.

Court of Appeals of California, Second District, Division Eight.

January 19, 2016.
Plaintiff Newhall County Water District (Newhall), a retail water purveyor, challenged a wholesale water rate increase adopted in February 2013 by the board of directors of defendant Castaic Lake Water Agency (the Agency), a government entity responsible for providing imported water to the four retail water purveyors in the Santa Clarita Valley. The trial court found the Agency's rates violated article XIII C of the California Constitution (Proposition 26). Proposition 26 defines any local government levy, charge or exaction as a tax requiring voter approval, unless (as relevant here) it is imposed "for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., art. XIII C, § 1, subd. (e)(2).)

The challenged rates did not comply with this exception, the trial court concluded, because the Agency based its wholesale rate for imported water in substantial part on Newhall's use of groundwater, which was not supplied by the Agency. Consequently, the wholesale water cost allocated to Newhall did not, as required, "bear a fair or reasonable relationship to [Newhall's] burdens on, or benefits received from, the [Agency's] activity." (Art. XIII C, § 1, subd. (e), final par.)

We affirm the trial court's judgment.

FACTS

We base our recitation of the facts in substantial part on the trial court's lucid descriptions of the background facts and circumstances giving rise to this litigation.

1. The Parties

The Agency is a special district and public agency of the state established in 1962 as a wholesale water agency to provide imported water to the water purveyors in the Santa Clarita Valley. It is authorized to acquire water and water rights, and to provide, sell and deliver that water "at wholesale only" for municipal, industrial, domestic and other purposes. (72A West's Ann. Wat. Code—Appen. (1999 ed.) foll. § 103-15, p. 500.) The Agency supplies imported water, purchased primarily from the State Water Project, to four retail water purveyors, including Newhall.

Newhall is also a special district and public agency of the state. Newhall has served its customers for over 60 years, providing treated potable water to communities near Santa Clarita, primarily to single-family residences. Newhall owns and operates distribution and transmission mains, reservoirs, booster pump stations, and 11 active groundwater wells.
Two of the other three retail water purveyors are owned or controlled by the Agency: Santa Clarita Water Division (owned and operated by the Agency) and Valencia Water Company (an investor-owned water utility controlled by the Agency since Dec. 21, 2012). Through these two retailers, the Agency supplies about 83 percent of the water demand in the Santa Clarita Valley. The Agency's stated vision is to manage all water sales in the Santa Clarita Valley, both wholesale and retail.

The fourth retailer is Los Angeles County Waterworks District No. 36 (District 36), also a special district and public agency, operated by the county Department of Public Works. It is the smallest retailer, accounting for less than 2 percent of the total water demand.

2. Water Sources

The four retailers obtain the water they supply to consumers from two primary sources, local groundwater and the Agency's imported water.

The only groundwater source is the Santa Clara River Valley Groundwater Basin, East Subbasin (the Basin). The Basin is comprised of two aquifer systems, the Alluvium and the Saugus Formation. This groundwater supply alone cannot sustain the collective demand of the four retailers. (The Basin's operational yield is estimated at 37,500 to 55,000 acre-feet per year (AFY) in normal years, while total demand was projected at 72,343 AFY for 2015, and 121,877 AFY in 2050.)

The Basin, so far as the record shows, is in good operating condition, with no long-term adverse effects from groundwater pumping. Such adverse effects (known as overdraft) could occur if the amount of water extracted from an aquifer were to exceed the amount of water that recharges the aquifer over an extended period. The retailers have identified cooperative measures to be taken, if needed, to ensure sustained use of the aquifer. These include the continued "conjunctive use" of imported supplemental water and local groundwater supplies, to maximize water supply from the two sources. Diversity of supply is considered a key element of reliable water service during dry years as well as normal and wet years.

In 1997, four wells in the Saugus Formation were found to be contaminated with perchlorate, and in 2002 and 2005, perchlorate was detected in two wells in the Alluvium. All the wells were owned by the retailers, one of them by Newhall. During this period, Newhall and the two largest retailers (now owned or controlled by the Agency) increased their purchases of imported water significantly.

3. Use of Imported Water

Until 1987, Newhall served its customers relying only on its groundwater rights.[2] Since 1987, it has supplemented its groundwater supplies with imported water from the Agency.

The amount of imported water Newhall purchases fluctuates from year to year. In the years before 1998, Newhall's water purchases from the Agency averaged 11 percent of its water demand. During the period of perchlorate contamination (1998 to 2009), its imported water purchases increased to an average of 52 percent of its total demand. Since then, Newhall's use of imported water dropped to 23 percent, and as of 2012, Newhall received about 25 percent of its total water supply from the Agency. The overall average since it began to purchase imported water in 1987, Newhall tells us, is 30 percent.
The other retailers, by contrast, rely more heavily on the Agency's imported water. Agency-owned Santa Clarita Water Division is required by statute to meet at least half of its water demand using imported water. (See 72A West's Ann. Wat. Code-Appen. (2012 supp.) foll. § 103-15.1, subd. (d), p. 9 (West's Ann. Wat. Code).) Agency-controlled Valencia Water Company also meets almost half its demand with imported water.

4. The Agency's Related Powers and Duties

As noted above, the Agency's primary source of imported water is the State Water Project. The Agency purchases that water under a contract with the Department of Water Resources. The Agency also acquires water under an acquisition agreement with the Buena Vista Water Storage District and the Rosedale-Rio Bravo Water Storage District, and other water sources include recycled water and water stored through groundwater banking agreements. Among the Agency's powers are the power to "store and recover water from groundwater basins" (West's Ann. Wat. Code, supra, foll. § 103-15.2, subd. (b), p. 505), and "[t]o restrict the use of agency water during any emergency caused by drought, or other threatened or existing water shortage, and to prohibit the wastage of agency water" (West's Ann. Wat. Code, supra, foll. § 103-15, subd. (k), p. 502).

In addition, and as pertinent here, the Agency may "[d]evelop groundwater management plans within the agency which may include, without limitation, conservation, overdraft protection plans, and groundwater extraction charge plans. . . ." (West's Ann. Wat. Code, supra, foll. § 103-15.2, subd. (c), p. 505.) The Agency has the power to implement such plans "subject to the rights of property owners and with the approval of the retail water purveyors and other major extractors of over 100 acre-feet of water per year." (Ibid.)

In 2001, the Legislature required the Agency to begin preparation of a groundwater management plan, and provided for the formation of an advisory council consisting of representatives from the retail water purveyors and other major extractors. (West's Ann. Wat. Code, supra, foll. § 103-15.1, subd. (e)(1) & (2)(A), p. 9.) The Legislature required the Agency to "regularly consult with the council regarding all aspects of the proposed groundwater management plan." (Id., subd. (e)(2)(A).)

Under this legislative authority, the Agency spearheaded preparation of the 2003 Groundwater Management Plan for the Basin, and more recently the

*1437 2010 Santa Clarita Valley urban water management plan. These plans were approved by the retailers, including Newhall.

The 2003 Groundwater Management Plan states the overall management objectives for the Basin as (1) development of an integrated surface water, groundwater, and recycled water supply to meet existing and projected demands for municipal, agricultural and other water uses; (2) assessment of groundwater basin conditions "to determine a range of operational yield values that will make use of local groundwater conjunctively with [State Water Project] and recycled water to avoid groundwater overdraft"; (3) preservation of groundwater quality; and (4) preservation of interrelated surface water resources. The 2010 Santa Clarita Valley urban water management plan, as the trial court described it, is "an area-wide management planning tool that promotes active management of urban water demands and efficient water usage by looking to long-range planning to ensure adequate water supplies to serve existing customers and future demands. . . ."

5. The Agency's Wholesale Water Rates

The board of directors of the Agency fixes its water rates, "so far as practicable, [to] result in revenues that will pay the operating expenses of the agency, . . . provide for the payment of the cost of water received by the agency under the
State Water Plan, provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of that bonded debt . . . " (West's Ann. Wat. Code, supra, foll. § 103-24, subd. (a), p. 509.) The Agency's operating costs include costs for management, administration, engineering, maintenance, water quality compliance, water resources, water treatment operations, storage and recovery programs, and studies.

Before the rate changes at issue here, the Agency had a "100 percent variable" rate structure. That means it charged on a per acre-foot basis for the imported water sold, known as a "volumetric" rate. Thus, as of January 1, 2012, retailers were charged $487 per acre-foot of imported water, plus a $20-per-acre-foot charge for reserve funding.

Because of fluctuations in the demand for imported water (such as during the perchlorate contamination period), the Agency's volumetric rates result in fluctuating, unstable revenues. The Agency engaged consultants to perform a comprehensive wholesale water rate study, and provide recommendations on rate structure options. The objective was a rate structure that would provide revenue sufficiency and stability to the Agency, provide cost equity and certainty to the retailers, and enhance conjunctive use of the sources of water supply and encourage conservation. As the Agency's consultants put it, "[t]wo of the primary objectives of cost of service water rates are to ensure the utility has sufficient revenue to cover the costs of operating and maintaining the utility in a manner that will ensure long term sustainability and to ensure that costs are recovered from customers in a way that reflects the demands they place on the system."

The general idea was a rate structure with both volumetric and fixed components. Wholesale rate structures that include both a fixed charge component (usually calculated to recover all or a portion of the agency's fixed costs of operating, maintaining and delivering water) and a volumetric component (generally calculated based on the cost of purchased water, and sometimes including some of the fixed costs) are common in the industry.

6. The Challenged Rates

The Agency's consultants presented several rate structure options. In the end, the option the Agency chose (the challenged rates) consisted of two components. The first component is a fixed charge based on each retailer's three-year rolling average of total water demand (that is, its demand for the Agency's imported water and for groundwater not supplied by the Agency). This fixed charge is calculated by "divid[ing] the Agency's total fixed revenue for the applicable fiscal year . . . by the previous three-year average of total water demand of the applicable Retail Purveyor to arrive at a unit cost per acre foot." The Agency would recover 80 percent of its costs through the fixed component of the challenged rates. The second component of the Agency's rate is a variable charge, based on a per acre-foot charge for imported water. The rationale for recovering the Agency's fixed costs in proportion to the retailers' total water demand, rather than their demand for imported water, is this (as described in the consultants' study): "This rate structure meets the Agency's objective of promoting resource optimization, conjunctive use, and water conservation. Since the fixed cost is allocated on the basis of each retail purveyor's total demand, if a retail purveyor conserves water, then its fixed charge will be reduced. Additionally, allocating the fixed costs based on total water demand recognizes that imported water is an important standby supply that is available to all retail purveyors, and is also a necessary supply to meet future water demand in the region, and that there is a direct nexus between groundwater availability and imported water use—i.e., it allocates the costs in a manner that bears a fair and reasonable relationship to the retail purveyors' water use."
*1439 burdens on and benefits from the Agency's activities in ensuring that there is sufficient water to meet the demands of all of the retail purveyors and that the supply sources are responsibly managed for the benefits of all of the retail purveyors."

The rationale continues: "Moreover, the Agency has taken a leadership role in maintaining the health of the local groundwater basin by diversifying the Santa Clarita Valley's water supply portfolio, as demonstrated in the 2003 Groundwater Management Plan and in resolving perchlorate contamination of the Saugus Formation aquifer. Thus, since all retail purveyors benefit from imported water and the Agency's activities, they should pay for the reasonable fixed costs of the system in proportion to the demand (i.e. burdens) they put on the total water supply regardless of how they utilize individual sources of supply."

The Agency's rate study showed that, during the first year of the challenged rates (starting July 1, 2013), Newhall would experience a 67 percent increase in Agency charges, while Agency controlled retailers Valencia Water Company and Santa Clarita Water Division would see reductions of 1.9 percent and 10 percent, respectively. District 36 would have a 0.8 percent increase. The rate study also indicated that, by 2050, the impact of the challenged rates on Newhall was expected to be less than under the then-current rate structure, while Valencia Water Company was expected to pay more.

Newhall opposed the challenged rates during the ratemaking process. Its consultant concluded the proposed structure was not consistent with industry standards; would provide a nonproportional, cross-subsidization of other retailers; and did not fairly or reasonably reflect the Agency's costs to serve Newhall. Newhall contended the rates violated the California Constitution and other California law. It proposed a rate structure that would base the Agency's fixed charge calculation on the annual demand for imported water placed on the Agency by each of its four customers, using a three-year rolling average of past water deliveries to each retailer.

In February 2013, the Agency's board of directors adopted the challenged rates, effective July 1, 2013.

7. This Litigation

Newhall sought a writ of mandate directing the Agency to rescind the rates, to refund payments made under protest, to refrain from charging Newhall for its imported water service "with respect to the volume of groundwater Newhall uses or other services [the Agency] does not provide Newhall," and *1440 to adopt a new, lawful rate structure. Newhall contended the rates were not proportionate to Newhall's benefits from, and burdens on, the Agency's service, and were therefore invalid under Proposition 26, Proposition 13, Government Code section 54999.7, and the common law of utility ratemaking.

The trial court granted Newhall's petition, finding the rates violated Proposition 26. The court concluded the Agency had no authority to impose rates based on the use of groundwater that the Agency does not provide, and that conversely, Newhall's use of its groundwater rights does not burden the Agency's system for delivery of imported water. Thus the rates bore no reasonable relationship to Newhall's burden on, or benefit received from, the Agency's service. The trial court also found the rates violated Government Code section 54999.7 (providing that a fee for public utility service "shall not exceed the reasonable cost of providing the public utility service" (Gov. Code, § 54999.7, subd. (a))), and violated common law requiring utility charges to be fair, reasonable and proportionate to benefits received by ratepayers. The court ordered the Agency to revert to the rates previously in effect until the adoption of new lawful rates, and ordered it to refund to Newhall the difference between the monies paid under the challenged rates and the monies that would have been paid under the previous rates.
Judgment was entered on July 28, 2014, and the Agency filed a timely notice of appeal.

DISCUSSION

The controlling issue in this case is whether the challenged rates are a tax or a fee under Proposition 26.

1. The Standard of Review

We review de novo the question whether the challenged rates comply with constitutional requirements. Griffith v. City of Santa Cruz (2012) 207 Cal.App.4th 982, 989-990 [143 Cal.Rptr.3d 895] (Griffith I). We review the trial court's resolution of factual conflicts for substantial evidence. Morgan v. Imperial Irrigation Dist. (2014) 223 Cal.App.4th 892, 916 [167 Cal.Rptr.3d 687].

2. The Governing Principles

(1) All taxes imposed by any local government are subject to voter approval. (Art. XIII C, § 2.) Proposition 26, adopted in 2010, expanded the definition of a tax. A "tax" now includes "any levy, charge, or exaction of any kind imposed by a local government," with seven exceptions. (Art. XIII C, § 1, subd. (e).) This case concerns one of those seven exceptions.

(2) Under Proposition 26, the challenged rates are not a tax, and are not subject to voter approval, if they are "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Art. XIII C, § 1, subd. (e)(2).) The Agency "bears the burden of proving by a preponderance of the evidence" that its charge "is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Id., subd. (e), final par.)

3. This Case

It is undisputed that the Agency's challenged rates are designed "to recover all of its fixed costs via a fixed charge," and not to generate surplus revenue. Indeed, Newhall recognizes the Agency's right to impose a fixed water-rate component to recover its fixed costs. The dispute here is whether the fixed rate component may be based in significant part on the purchaser's use of a product—groundwater—not provided by the Agency.

(3) We conclude the Agency cannot, consistent with Proposition 26, base its wholesale water rates on the retailers' use of groundwater, because the Agency does not supply groundwater. Indeed, the Agency does not even have the statutory authority to regulate groundwater, without the consent of the retailers (and other major groundwater extractors). As a consequence, basing its water rates on groundwater it does not provide violates Proposition 26 on two fronts.

First, the rates violate Proposition 26 because the method of allocation does not "bear a fair or reasonable relationship to the payor's burdens on, or benefits received from," the Agency's activity. (Art. XIII C, § 1, subd. (e), final par.) (We will refer to this as the reasonable cost allocation or proportionality requirement.)

Second, to the extent the Agency relies on its groundwater management activities to justify including groundwater use in its rate structure, the benefit to the retailers from those activities is at best indirect. Groundwater management activities are not a "service . . . provided directly to the payor that is not provided to those not charged" (art. XIII C, § 1,
subd. (e)(2)), but rather activities that benefit the Basin as a whole, including other major groundwater extractors that are not charged for those services.

For both these reasons, the challenged rates cannot survive scrutiny under Proposition 26. The Agency resists this straightforward conclusion, proffering two principal arguments, melded together. The first is that the proportionality requirement is measured "collectively," not by the burdens on or benefits received by the individual purveyor. The second is that the "government service or product" the Agency provides to the four water retailers consists not just of providing wholesale water, but also of "managing the Basin water supply," including "management . . . of the Basin's groundwater." These responsibilities, the Agency argues, make it reasonable to set rates for its wholesale water service by "taking into account the entire Valley water supply portfolio and collective purveyor-benefits of promoting conjunctive use, not just the actual amount of Agency imported water purchased by each Purveyor. . . ."

Neither claim has merit, and the authorities the Agency cites do not support its contentions.

a. Griffin I and the proportionality requirement

It seems plain to us, as it did to the trial court, that the demand for a product the Agency does not supply—groundwater—cannot form the basis for a reasonable cost allocation method: one that is constitutionally required to be proportional to the benefits the rate payor receives from (or the burden it places on) the Agency's activity. The Agency's contention that it may include the demand for groundwater in its rate structure because the proportionality requirement is measured "collectively," not by the burdens on or benefits to the individual retail purveyor, is not supported by any pertinent authority.

In contending otherwise, the Agency relies on, but misunderstands, Griffin I and other cases stating that proportionality "'is not measured on an individual basis,' but rather "'collectively, considering all rate payors,'" and "'need not be finely calibrated to the precise benefit each individual fee payor might derive.'" (Griffin I, supra, 207 Cal.App.4th at p. 997, quoting California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421, 438 [121 Cal.Rptr.3d 37, 247 P.3d 112] [discussing regulatory fees under the Wat. Code and Prop. 13].) As discussed post, these cases do not apply here, for one or more reasons. Griffin I involves a different exemption from Proposition 26, and other cases involve Proposition 218, which predated Proposition 26 and has no direct application here. In addition to these distinctions—which do make a difference—the cases involved large numbers of payors, who could rationally be (and were) placed in different usage categories, justifying different fees for different classes of payors.

In Griffin I, the defendant city imposed an annual inspection fee for all residential rental properties in the city. The court rejected a claim that the inspection fee was a tax requiring voter approval under Proposition 26. (Griffin I, supra, 207 Cal.App.4th at p. 987.) Griffin I involves another of the seven exemptions in Proposition 26, the exemption for regulatory fees—charges imposed for the regulatory costs of issuing licenses, performing inspections, and the like. (Art. XIII C, § 1, subd. (e)(3) [expressly excepting, from the "tax" definition, a "charge imposed for the reasonable regulatory costs to a local government for . . . performing . . . inspections").)

The inspection fees in Griffin I met all the requirements of Proposition 26. The city's evidence showed the fees did not exceed the approximate cost of the inspections. (Griffin I, supra, 207 Cal.App.4th at p. 997.) And the proportionality requirement of Proposition 26 was also met: "The fee schedule itself show[ed] the basis for the apportionment," setting an annual registration fee plus a $20 per unit fee, with lower fees for "'self-certifications' that cost the city less to administer, and greater amounts charged when reinspections were required. (Griffin I, at p. 997.) The court concluded:
"Considered collectively, the fees are reasonably related to the payors' burden upon the inspection program. The largest fees are imposed upon those whose properties require the most work." (Ibid., italics added.)

Griffith I did, as the Agency tells us, state that "'[t]he question of proportionality is not measured on an individual basis'" but rather "'collectively, considering all rate payors.'" (Griffith I, supra, 207 Cal.App.4th at p. 997.) But, as mentioned, Griffith I was considering a regulatory fee, not, as here, a charge imposed on four ratepayers for a "specific government service or product." As Griffith I explained, "'[t]he scope of a regulatory fee is somewhat flexible'" and "'must be related to the overall cost of the governmental regulation,'" but "'need not be finely calibrated to the precise benefit each individual fee payor might derive.'" (Ibid.) That, of course, makes perfect sense in the context of a regulatory fee applicable to numerous payors; indeed, it would be impossible to assess such fees based on the individual payor's precise burden on the regulatory program. But the inspection fees were allocated by categories of payor, and were based on the burden on the inspection program, with higher fees where more city work was required.

(4) Here, there are four payors, with no need to group them in classes to allocate costs. The Griffith I concept of measuring proportionality "collectively" simply does not apply. Where charges for a government service or product are to be allocated among only four payors, the only rational method of evaluating their burdens on, or benefits received from, the governmental activity, is individually, payor by payor. And that is particularly appropriate considering the nature of the Proposition 26 exemption in question: charges for a product or service that is (and is required to be) provided "directly to the payor." Under these circumstances, allocation of costs "collectively," when the product is provided directly to each of the four payors, cannot be, and is not, a "fair or reasonable" allocation method. (Art. XIII C, § 1, subd. (e), final par.)

b. Griffith II—the proportionality requirement and related claims

In Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586 [163 Cal.Rptr.3d 243] (Griffith II), the court concluded, among other things, that a groundwater augmentation charge complied with the proportionality requirement of Proposition 218. The Agency relies on Griffith II, asserting that the court applied the "concept of collective reasonableness with respect to rate allocations. . . ." Further, the case demonstrates, the Agency tells us, that its activities in "management . . . of the Basin's groundwater" justify basing its rates on total water demand, because all four retailers benefit from having the Agency's imported water available, even when they do not use it. Neither claim withstands analysis.

Griffith II involved a challenge under Proposition 218, so we pause to describe its relevant points. Proposition 218 contains various procedural (notice, hearing, and voting) requirements for the imposition by local governments of fees and charges "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Art. XIII D, § 2, subd. (e).) Fees or charges for water service (at issue in Griffith II) are exempt from voter approval (art. XIII D, § 6, subd. (c)), but substantive requirements apply. These include a proportionality requirement: that the amount of a fee or charge imposed on any parcel or person "shall not exceed the proportional cost of the service attributable to the parcel." (Id., subd. (b).)

In Griffith II, the plaintiffs challenged charges imposed by the defendant water management agency on the extraction of groundwater (called a "groundwater augmentation charge"). The defendant agency had been created to deal with the issue of groundwater being extracted faster than it is replenished by natural forces, leading to saltwater intrusion into the groundwater basin. (Griffith II, supra, 220 Cal.App.4th at p. 590.) The defendant agency was specifically empowered to levy groundwater augmentation charges on the extraction of groundwater from all extraction facilities, "'for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within [the defendant's boundaries].'" (Id. at p. 591.) The defendant's strategy to do so had several facets, but its
purpose was to reduce the amount of water taken from the groundwater basin by supplying water to some coastal users, with the cost borne by all

users, "on the theory that even those taking water from [inland] wells benefit from the delivery of water to [coastal users], as that reduces the amount of groundwater those [coastal users] will extract [from their own wells], thereby keeping the water in [all] wells from becoming too salty." (Id. at pp. 590-591.)

Griffith II found the charge complied with the Proposition 218 requirement that the charge could not exceed the proportional costs of the service attributable to the parcel. (Griffith II, supra, 220 Cal.App.4th at pp. 600-601.) Proposition 218, the court concluded, did not require "a parcel-by-parcel proportionality analysis." (Griffith II, at p. 601.) The court found the defendant's "method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service," and Proposition 218 "does not require a more finely calibrated apportion." (Griffith II, at p. 601.) The augmentation charge "affects those on whom it is imposed by burdening them with an expense they will bear proportionately to the amount of groundwater they extract at a rate depending on which of three rate classes applies. It is imposed `across-the-board' on all water extractors. All persons extracting water—including any coastal users who choose to do so—will pay an augmentation charge per acre-foot extracted. All persons extracting water and paying the charge will benefit in the continued availability of usable groundwater." (Griffith II, at pp. 603-604.)

The court rejected the plaintiffs' claim the charge for groundwater extraction on their parcels was disproportionate because they did not use the agency's services—that is, they did not receive delivered water, as coastal landowners did. This claim, the court said, was based on the erroneous premise that the agency's only service was to deliver water to coastal landowners. The court pointed out that the defendant agency was created to manage the water resources for the common benefit of all water users, and the groundwater augmentation charge paid for the activities required to prepare and implement the groundwater management program. (Griffith II, supra, 220 Cal.App.4th at p. 600.) Further, the defendant agency "apportioned the augmentation charge among different categories of users (metered wells, unmetered wells, and wells within the delivered water zone)." (Id. at p. 601.) (The charges were highest for metered wells in the coastal zone, and there was also a per acre-foot charge for delivered water. (Id. at p. 593 & fn. 4.).)

We see nothing in Griffith II that assists the Agency here. The Agency focuses on the fact that the defendant charged the plaintiff for groundwater extraction even though the plaintiff received no delivered water, and on the court's statement that the defendant was created to manage water resources

for the common benefit of all water users. (Griffith II, supra, 220 Cal.App.4th at p. 600.) From this the Agency leaps to the erroneous conclusion that the rates here satisfy the proportionality requirement simply because all four retailers "benefit from having the Agency's supplemental water supplies available," even when they do not use them. This is a false analogy. In Griffith II, the defendant charged all groundwater extractors proportionately for extracting water (and had the power to do so), and charged for delivered water as well. Griffith II does not support the imposition of charges based on a product the Agency does not supply.

We note further that in Griffith II, more than 1,900 parcel owners were subject to the groundwater augmentation charge, and they were placed in three different classes of water extractors and charged accordingly. (Griffith II, supra, 220 Cal.App.4th at pp. 593, 601.) Here, there are four water retailers receiving the Agency's wholesale water service, none of whom can reasonably be placed in a different class or category from the other three. In these circumstances, to say costs may be allocated to the four purveyors "collectively," based in significant part on groundwater not supplied by the Agency, because "they all benefit" from the availability of supplemental water supplies, would effectively remove the proportionality requirement from Proposition 26.
That we may not do. Proposition 26 requires by its terms an allocation method that bears a reasonable relationship to the payor's burdens on or benefits from the **Agency's** activity, which here consists of wholesale water service to be provided "directly to the payor." In the context of wholesale water rates to four water agencies, this necessarily requires evaluation on a "purveyor by purveyor" basis. (Cf. Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493, 1514 [186 Cal.Rptr.3d 362] (Capistrano) ["[w]hen read in context, Griffith [II] does not excuse water agencies from ascertaining the true costs of supplying water to various tiers of usage"; Griffith II's "comments on proportionality necessarily relate only to variations in property location"; "trying to apply [Griffith II] to the [Proposition 218 proportionality] issue[] is fatally flawed").)

The **Agency's** claim that it is not charging the retailers for groundwater use, and its attempt to support basing its rates on total water demand by likening itself to the defendant **agency** in **Griffith II**, both fail as well. The first defies reason. Because the rates are based on total water demand, the more groundwater a retailer uses, the more it pays under the challenged rates. The use of groundwater demand in the rate structure necessarily means that, in effect, the **Agency** is charging for groundwater use.

The second assertion is equally mistaken. The differences between the **Agency** and the defendant in **Griffith II** are patent. In **Griffith II**, the defendant **agency** was created to manage all water resources, and specifically to deal with saltwater intrusion into the groundwater basin. The **Agency** here was not. It was created to acquire water and to "provide, sell, and deliver" it. It is authorized to develop and implement groundwater management plans only with the approval of the retail water purveyors (and other major groundwater extractors). In other words, while the **Agency** functions as the lead **agency** in developing and coordinating groundwater management plans, its only authority over groundwater, as the trial court found, is a shared responsibility to develop those plans. Further, in **Griffith II**, the defendant **agency** was specifically empowered to levy groundwater extraction charges for the purpose of purchasing supplemental water. The **Agency** here was not. As the trial court here aptly concluded, **Griffith II** "does not aid [the **Agency**] for the simple reason that [the **Agency**] has no comprehensive authority to manage the water resources of the local groundwater basin and levy charges related to groundwater."[4]

Finally, the **Agency** insists that it "must be allowed to re-coup its cost of service," and that the practice of setting rates to recover fixed expenses, "irrespective of a customer's actual consumption," was approved in **Paland v. Brooktrails Township Community Services Dist. Bd. of Directors** (2009) 179 Cal.App.4th 1358 [102 Cal.Rptr.3d 270] (Paland). **Paland** has no application here.

**Paland** involved Proposition 218. As we have discussed, Proposition 218 governs (among other things) "property related fees and charges" on parcels of property. Among its prohibitions is any fee or charge for a service "unless that service is actually used by, or immediately available to, the owner of the property in question." (Art. XIII D, § 6, subd. (b)(4).) The court held that a minimum charge, imposed on parcels of property with connections to the district's utility systems, for the basic cost of providing water service, regardless of actual use, was "a charge for an immediately available property-related water or sewer service" within the meaning of Proposition 218, and not an assessment requiring voter approval. (**Paland, supra**, 179 Cal.App.4th at p. 1362; see id. at p. 1371 ["Common sense dictates that continuous maintenance and operation of the water and sewer systems is necessary to keep those systems immediately available to inactive connections like [the plaintiff's]."]).

We see no pertinent analogy between **Paland** and this case. This case does not involve a minimum charge imposed on all parcels of property (or a
minimum charge for standing ready to supply imported water. Newhall does not contest the Agency's right to charge for its costs of standing ready to provide supplemental water, and to recoup all its fixed costs. The question is whether the Agency may recoup those costs using a cost allocation method founded on the demand for groundwater the Agency does not supply, and is not empowered to regulate without the consent of groundwater extractors. The answer under Proposition 26 is clear: it may not. Paland does not suggest otherwise.[5]

c. Other claims—conservation and "conjunctive use"

The Agency attempts to justify the challenged rates by relying on the conservation mandate in the California Constitution, pointing out it has a constitutional obligation to encourage water conservation. (Art. X, § 2 [declaring the state's water resources must "be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or un reasonable method of use of water [must] be prevented"]). The challenged rates comply with this mandate, the Agency contends, because reducing total water consumption will result in lower charges, and the rates encourage "a coordinated use of groundwater and supplemental water" (conjunctive use). This argument, too, misses the mark.

(6) Certainly the Agency may structure its rates to encourage conservation of the imported water it supplies. (Wat. Code, § 375, subd. (a) [public entities supplying water at wholesale or retail may "adopt and enforce a water conservation program to reduce the quantity of water used by [its customers] for the purpose of conserving the water supplies of the public entity"]). But the Agency has no authority to set rates to encourage conservation of groundwater it does not supply. Moreover, article X's conservation mandate cannot be read to eliminate Proposition 26's proportionality requirement. (See City of Palmdale v. Palmdale Water Dist. (2011) 198 Cal.App.4th 926, 936-937 [131 Cal.Rptr.3d 373] ["California Constitution, article X, section 2 is not at odds with article XIII D [Prop. 218] so long as, for example, conservation is attained in a manner that `shall not exceed the proportional cost of the service attributable to the parcel."]; see id. at p. 928 [district failed to prove its water rate structure complied with the proportionality requirement of Prop. 218]; see also Capistrano, supra, 235 Cal.App.4th at p. 1511, quoting City of Palmdale with approval.)

The Agency also insists that basing its rates only on the demand for the imported water it actually supplies—as has long been the case—would "discourage users from employing conjunctive use. . . ." The Agency does not explain how this is so, and we are constrained to note that, according to the Agency's own 2003 groundwater management plan, Newhall and the other retailers "have been practicing the conjunctive use of imported surface water and local groundwater" for many years. And, according to that plan, the Agency and retailers have "a historical and ongoing working relationship . . . to manage water supplies to effectively meet water demands within the available yields of imported surface water and local groundwater."

In connection, we assume, with its conjunctive use rationale, the Agency filed a request for judicial notice, along with its reply brief. It asked us to take notice of three documents and "the facts therein concerning imported water use and local groundwater production" by Newhall and the other water retailers. The documents are the 2014 and 2015 water quality reports for the Santa Clarita Valley, and a water supply utilization table from the 2014 Santa Clarita Valley water report published in June 2015. All of these, the Agency tells us, are records prepared by the Agency and the four retailers, after the

administrative record in this case was prepared. The documents "provide further support" as to the "cooperative efforts of the Agency and the Purveyors in satisfying long-term water supply needs," and "provide context and useful background to aid in the Court's understanding of this case." The Agency refers to these documents in its reply brief, pointing out that since 2011, Newhall has increased its imported water purchases because of the impact of the current
drought on certain of its wells, while retailer Valencia Water Company increased groundwater pumping and purchased less imported water in 2014. These cooperative efforts, the Agency says, "reflect the direct benefit to Newhall of having an imported water supply available to it, whether or not it maximizes use of imported water in a particular year."

(7) We deny the Agency's request for judicial notice. We see no reason to depart from the general rule that courts may not consider evidence not contained in the administrative record. (Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 564 [38 Cal.Rptr.2d 139, 888 P.2d 1268]; cf. id. at p. 578 [the exception to the rule in administrative proceedings, for evidence that could not have been produced at the hearing through the exercise of reasonable diligence, applies in "rare instances" where the evidence in question existed at the time of the decision, or in other "unusual circumstances"]). Denial is particularly appropriate where judicial notice has been requested in support of a reply brief to which the opposing party has no opportunity to respond, and where the material is, as the Agency admits, "further support" of evidence in the record, providing "context and useful background." These are not unusual circumstances.

Returning to the point, neither conservation mandates nor the Agency's desire to promote conjunctive use—an objective apparently shared by the retailers—permits the Agency to charge rates that do not comply with Proposition 26 requirements. Using demand for groundwater the Agency does not supply to allocate its fixed costs may "satisf[y] the Agency's constitutional obligations . . . to encourage water conservation," but it does not satisfy Proposition 26, and it therefore cannot stand. (Cf. Capistrano, supra, 235 Cal.App.4th at pp. 1511, 1498 [conservation is to be attained in a manner not exceeding the proportional cost of service attributable to the parcel under Prop. 218; the agency failed to show its tiered rates complied with that requirement].)

d. Other Proposition 26 requirements

We have focused on the failure of the challenged rates to comply with the proportionality requirement of Proposition 26. But the rates do not withstand scrutiny for another reason as well. Proposition 26 exempts the Agency's charges from voter approval only if the charge is imposed "for a specific government service or product provided directly to the payor that is not provided to those not charged. . ." (Art. XIII C, subd. (e)(2), italics added.) The only "specific government service or product" the Agency provides directly to the retailers, and not to others, is imported water. As the trial court found: the Agency "does not provide Newhall groundwater. It does not maintain or recharge aquifers. It does not help Newhall pump groundwater. Nor does it otherwise contribute directly to the natural recharge of the groundwater Newhall obtains from its wells."

(8) The groundwater management activities the Agency does provide—such as its leadership role in creating groundwater management plans and its perchlorate remediation efforts—are not specific services the Agency provides directly to the retailers, and not to other groundwater extractors in the Basin. On the contrary, groundwater management services redound to the benefit of all groundwater extractors in the Basin—not just the four retailers. Indeed, implementation of any groundwater management plan is "subject to the rights of property owners and with the approval of the retail water purveyors and other major extractors of over 100 acre-feet of water per year." (West's Ann. Wat. Code, supra, foll. § 103-15.2, subds. (c), p. 505, italics added.)

Certainly the Agency may recover through its water rates its entire cost of service—that is undisputed. The only question is whether those costs may be allocated, consistent with Proposition 26, based in substantial part on groundwater use. They may not, because the Agency's groundwater management activities plainly are not a service "that is not provided to those not charged." (Art. XIII C, § 1, subd. (e)(2).)
In light of our conclusion the challenged rates violate Proposition 26, we need not consider the Agency's contention that the rates comply with Government Code section 54999.7 and the common law. Nor need we consider the propriety of the remedy the trial court granted, as the Agency raises no claim of error on that point.

DISPOSITION

The judgment is affirmed. Plaintiff shall recover its costs on appeal.

Bigelow, P. J., and Flier, J., concurred.

[1] All further references to any "article" are to the California Constitution.

[2] Newhall has appropriative water rights that arise from California's first-in-time-first-in-right allocation of limited groundwater supplies. (See El Dorado Irrigation Dist. v. State Water Resources Control Bd. (2006) 142 Cal.App.4th 937, 961 [48 Cal.Rptr.3d 468] ["[T]he appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators."]; City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, 1241 [99 Cal.Rptr.2d 294, 5 P.3d 853] ["As between appropriators, . . . the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any [citation]."].)

[3] There was also a $20-per-acre-foot reserve charge to fund the Agency's operating reserves, but the Agency reports in its opening brief that it suspended implementation of that charge as of July 1, 2013, when reserve fund goals were met earlier than anticipated.

[4] The trial court also observed that, "[a]part from [the Agency's] lack of authority to supply or manage Basin groundwater, Newhall correctly notes that [the Agency] has presented no evidence of its costs in maintaining the Basin."

[5] The parties refer to other recent authorities to support their positions in this case. We may not rely on one of them, because the Supreme Court has granted a petition for review. (City of San Buenaventura v. United Water Conservation Dist. (2015) 235 Cal.App.4th 228 [185 Cal.Rptr.3d 207]; review granted June 24, 2015, S226036.) The Agency cites the other case extensively in its reply brief, but we see nothing in that case to suggest that the challenged rates here comply with Proposition 26. (Great Oaks Water Co. v. Santa Clara Valley Water Dist. (2015) 242 Cal.App.4th 1187 [___ Cal.Rptr.3d ___] (Great Oaks).)

The Agency's brief fails to describe the circumstances in Great Oaks. There, a water retailer challenged a groundwater extraction fee imposed by the defendant water district. Unlike this case, the defendant in Great Oaks was authorized by statute to impose such fees, and its major responsibilities included "preventing depletion of the aquifers from which [the water retailer] extracts the water it sells." (Great Oaks, supra, 242 Cal.App.4th at p. 1197.) The Court of Appeal, reversing a judgment for the plaintiff, held (among other things) that the fee was a property-related charge, and therefore subject to some of the constraints of Proposition 218, but was also a charge for water service, and thus exempt from the requirement of voter ratification. (Great Oaks, at p. 1197.) The trial court's ruling in Great Oaks did not address the plaintiff's contentions that the groundwater extraction charge violated three substantive limitations of Proposition 218, and the Court of Appeal ruled that one of those contentions (that the defendant charged more than was required to provide the property related service on which the charge was predicated) could be revisited on remand. The
others were not preserved in the plaintiff's presuit claim, so no monetary relief could be predicated on those theories. ([Great Oaks, at pp. 1224, 1232-1234.]

The Agency cites [Great Oaks] repeatedly, principally for the statements that the "provision of alternative supplies of water" serves the long-term interests of extractors by reducing demands on the groundwater basin and helping to prevent its depletion," and that it was not irrational for the defendant water district "to conclude that reduced demands on groundwater supplies benefit retailers by preserving the commodity on which their long-term viability, if not survival, may depend." ([Great Oaks, supra, 242 Cal.App.4th at pp. 1248-1249.]) These statements, with which we do not disagree, have no bearing on this case, and were made in connection with the court's holding that the trial court erred in finding the groundwater extraction charge violated the statute that created and empowered the defendant water district. (Id. at pp. 1252-1253.)

[6] The Agency also cites [Brydon v. East Bay Mun. Utility Dist. (1994) 24 Cal.App.4th 178 [29 Cal.Rptr.2d 128] for the principle that, in pursuing a constitutionally and statutorily mandated conservation program, "cost allocations . . . are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity." (Id. at p. 193.) But Brydon predated both Proposition 218 and Proposition 26. (See Capistrano, supra, 235 Cal.App.4th at pp. 1512-1513 [Brydon "simply has no application to post-Proposition 218 cases"; "it seems safe to say that Brydon itself was part of the general case law which the enactors of Proposition 218 wanted replaced with stricter controls on local government discretion"].)

198 Cal.App.4th 926 (2011)
131 Cal.Rptr.3d 373

CITY OF PALMDALE, Plaintiff and Appellant,

v.

PALMDALE WATER DISTRICT et al., Defendants and Respondents.

No. B224869.

Court of Appeal of California, Second District, Division Seven.

August 9, 2011.

*927 Wm. Matthew Ditzhazy, City Attorney; Richards, Watson & Gershon, Gregory M. Kunert, and Whitney G. McDonald, for Plaintiff and Appellant.

Lagerlof, Senecal, Gosney & Kruse, Timothy J. Gosney, James D. Ciampa, and Francis J. Santo, for Defendants and Respondents.

*928 Daniel S. Hentschke, for Association of California Water Agencies as Amicus Curiae on behalf of Defendant and Respondent Palmdale Water District.

OPINION

WOODS, J. —
INTRODUCTION

In this appeal, the City of Palmdale (City) asserts the trial court erred in finding the Palmdale Water District (PWD) had adopted a new water rate structure in conformity with the constitutional requirements of Proposition 218.

(1) After conducting an independent review of the record (Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448 [79 Cal.Rptr.3d 312, 187 P.3d 37]), we conclude PWD failed to satisfy its burden to establish that its new water rate structure complies with the mandates of Proposition 218 (as set forth in art. XIII D of the Cal. Const. (article XIII D)), including the proportionality requirement, which specifies that no fee or charge imposed upon any person or parcel as an incident of property ownership shall exceed the proportional cost of the service attributable to the parcel. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

As of 2008, PWD revenues had decreased by about $1.3 million ("primarily due to a decline in water sales"), while its expenses had increased by about $1.2 million in 2008 (and $2.4 million in 2007). PWD's general manager concluded a 15 percent rate increase was necessary to balance the budget.

At a cost of $136,000, PWD retained Raftels Financial Consultants (RFC) to prepare a rate study and recommend a new rate structure. According to RFC's water rate study report, PWD serves a population of approximately 145,000 with about 26,000 service connections. PWD's water supply consists of 60 percent surface water (from Littlerock Reservoir and the State Water Project) and 40 percent from PWD's 25 area groundwater wells. Single-family residential (SFR) customers account for 72 percent of PWD's total water usage. Remaining water usage is as follows: commercial/industrial (10 percent), multifamily residential (MFR) (9 percent), irrigation (5 percent), and construction and other customers such as schools and municipalities (4 percent).

According to RFC's report, over the preceding five years, PWD had spent more than $56 million to upgrade its water treatment plant and depleted its reserves. PWD wanted to issue $38.25 million in debt by July 2009 for future capital projects and refinancing. RFC presented policy issues for the PWD board to decide, including water budget allocation defaults and methods for calculating desired fixed revenue from proposed new rates. RFC advised the board regarding two options for determining fixed revenues: a "Cost of Service" option and a "Percentage of fixed cost" option. Advantages of the Cost of Service option were noted as "Defensible — Prop 218" and "Consistent with industry standards" but one disadvantage was "Greater revenue fluctuation with varying demand." An advantage of the alternative option was "rate stability" while disadvantages included "Significant impact on small customers who conserve water" and "weaker signal for water conservation." RFC indicated fixed revenue should not exceed 30 percent of revenues.

RFC again met with PWD's board regarding the "need to adopt a water rate increase structure for a future bond issue ...." It was determined PWD's new rate structure would recover 75 percent of its costs from fixed fees and 25 percent from variable fees "based on the bond team's recommendation and conservation factors....." The proposed rate structure then included a fixed monthly service charge based on meter size and commodity charges based on a water budget allocation. Residential customers were provided indoor and outdoor allocations, commercial customers received a three-year average allocation and irrigation customers received only an outdoor allocation. Commodity rates were then imposed under a tiered structure, determining how much the customer went over (or stayed within) the allocated budget.
Again, RFC presented two options for determining the commodity rates and monthly service charge: the Cost of Service (COS) option and the "Fixed/Variable Cost Allocation" (FV). With the FV option, monthly fixed charges would represent 75 percent of total costs while the COS alternative would include only billing and customer service costs plus meter charges in the fixed monthly fees. RFC indicated this option offered "more revenue stability" but a "weaker conservation signal." The reverse was true for the COS option: "less revenue stability" but a "stronger conservation signal."

When RFC presented its final water rate study report to the PWD board in March 2009, the board approved the FV option but modified it such that 60 percent of fixed costs would be recovered from fixed monthly charges and 40 percent would be recovered from variable charges.

PWD prepared a "Notice of Public Hearing" pursuant to Proposition 218, and the City (and its redevelopment agency) sent letters to PWD protesting the rate increase. PWD held a public hearing in May 2009 at which City representatives spoke against the increase and members of the public appeared to object as well. At the same meeting, the board adopted a resolution approving its 2009 bonds to replenish its reserves. "The success of this bond issue is dependent on the adoption of the pending water rate increases."

As approved, the new rate structure now imposes a fixed monthly service charge based on the size of the customer's meter and a per unit commodity charge for the commodity charge of water used, with the amount depending upon the customer's adherence to the allocated water budget. The customer pays a higher commodity charge per unit of water above the budgeted allotment, but the incremental rate increase depends on the customer's class. More particularly, all customers pay tier 1 rates ($0.64/unit in 2009) at 0 to 100 percent of their water budget allocation. Thereafter, however, the increased rate depends on the customer category:

<table>
<thead>
<tr>
<th>SFR/MFR</th>
<th>Commercial</th>
<th>Irrigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 2  ($2.50/unit)</td>
<td>100-125%</td>
<td>100-130%</td>
</tr>
<tr>
<td>Tier 3  ($3.20/unit)</td>
<td>125-150%</td>
<td>130-160%</td>
</tr>
<tr>
<td>Tier 4  ($4.16/unit)</td>
<td>150-175%</td>
<td>160-190%</td>
</tr>
<tr>
<td>Tier 5  ($5.03/unit)</td>
<td>Above 175%</td>
<td>Above 190%</td>
</tr>
</tbody>
</table>

The following day, the City filed a complaint seeking to invalidate the water rate increase and the 2009 bonds. (The case was deemed related to another action filed by the City against PWD seeking injunctive and declaratory relief to stop imposition of the new rates. The cases were not consolidated.)

This action was tried in February 2010. The City sought to introduce evidence beyond the scope of the administrative record, after propounding discovery and serving Public Records Act requests for documents. The trial court granted the City's motion to amend its complaint but denied its motion to augment the record. The City filed an offer of proof identifying evidence it would have presented at trial had it been allowed to do so and requested a statement of decision. Initially, the trial court's tentative ruling was to invalidate the rate increase but after hearing oral argument and taking the matter under submission, the trial court issued its ruling validating PWD's rates and the 2009 bonds. At the court's request, both the City and PWD submitted proposed statements of decision (and the City also filed objections to PWD's statement). The court issued PWD's statement without changes. (The court mistakenly believed the City had not filed a proposed statement.
but, when the error was brought to the court's attention, decided PWD's statement should stand.) Judgment was entered. The City appeals.

DISCUSSION

"In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act. In adopting this measure, the people found and declared ""that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent."" (Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal.App.4th 637, 640 [119 Cal.Rptr.2d 91], fns. omitted.) Proposition 218 added articles XIII C and XIII D to the California Constitution. Article XIII C concerns voter approval for local government general taxes and special taxes. Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges. We are concerned here with article XIII D, specifically certain provisions concerning fees and charges." (Ibid.)

The relevant article XIII D provisions on fees and charges are as follows:

"[Section] 1. Application of article. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority....

"[Section] 2. Definitions. As used in this article:

"(e) `Fee' or `charge' means 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.

"(g) `Property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

"(h) `Property-related service' means a public service having a direct relationship to property ownership.

"[Section] 3. Limitation of property taxes, assessments, fees and charges[.]

"(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

"(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

"(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

"(3) Assessments as provided by this article.

"(4) Fees or charges for property related services as provided by this article.
"(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.[22]" [¶] ... [¶]


"(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article [(these procedures include notice to property owners, and a public hearing for proposed new or increased fees)]: [¶] ... [¶]

"(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property-related service.

"(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

"(3) 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.

"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

"(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. [¶] Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

"(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing....

"(d) Beginning July 1, 1997, all fees or charges shall comply with this section." (Italics added.)

(2) As our Supreme Court emphasized in Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, supra, 44 Cal.4th 431, "We "'"must enforce the provisions of our Constitution and "may not lightly disregard or blink at... a clear constitutional mandate."'" [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.]" (Id. at p. 448.) "Because Proposition 218's underlying purpose was to limit government's power to exact revenue and to curtail the deference that had been traditionally accorded legislative enactments on fees, assessments, and charges, a more rigorous standard of
Among other substantive challenges, the City argues PWD failed to demonstrate that its water rates are proportional to the cost of providing water service to each parcel as required under section 6, subdivision (b), paragraph (3) of article XIII D: "The Proposition 218 Ballot Pamphlet makes clear that the voters intended that `No property owner's fee may be more than the cost to provide service to that property owner's land.'" Nevertheless, the City says, PWD's rates violate this proportionality requirement in a number of respects: (1) for no permissible purpose (according to the City), PWD admittedly targets irrigation users to pay dramatically higher and disproportionate water rates; (2) PWD's monthly service charge is arbitrary and not tied to the actual costs of providing identified services to each meter; (3) PWD's commodity charge tiers are not proportional to the costs of providing water service; and (4) PWD's water budget structure is not proportional to the costs of providing water service and fails to achieve its stated purpose. Moreover, the City urges, PWD failed to prove its revenues under the new rate structure will not exceed the costs of providing water service in contravention of article XIII D, section 6, subdivision (b), paragraph (1), and instead "all but assures that revenues PWD receives from customers in the higher tiers will be more than is required to cover PWD's costs of service." Further, the City says, PWD's new rates require irrigation users to pay for services they cannot receive in violation of section 6, subdivision (b), paragraph (4) of article XIII D.

According to the City, "PWD's scheme charges a few irrigation users a vastly disproportionate share of PWD's total costs. PWD makes no showing whatsoever that PWD's cost of delivering service to those irrigation users is proportionately higher than PWD's costs of delivering service to residential and commercial users. The record shows that PWD intentionally seeks to recoup most of its costs from a relatively few irrigation users (who happen to be institutions such as the City), so as to keep costs to the vast majority of PWD's customers proportionately low. This sort of price discrimination is not allowed under Proposition 218 ...."

In response, PWD asserts that the structuring of the various tiers does not even constitute a "fee or charge" for purposes of Proposition 218 but merely "defined percentages of a customer's water budget that define the breaking points for the applicable tiers," but this is inconsistent with the law as PWD uses these tiers to calculate its customers' water rates. "Because it is imposed for the property-related service of water delivery, [PWD's] water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D ...." (Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205, 217 [46 Cal.Rptr.3d 73, 138 P.3d 220].) "[A]ll charges for water delivery" incurred after a water connection is made "are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (Ibid.)

Next, PWD says it is entitled to promote conservation in such a manner pursuant to article X, section 2, of the California Constitution: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.... This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."
In addition, PWD notes, consistent with this constitutional provision, the Legislature enacted Water Code section 372 (allocation-based conservation water pricing) which provides:

"(a) A public entity may employ allocation-based conservation water pricing that meets all of the following criteria:

"(1) Billing is based on metered water use.

"(2) A basic use allocation is established for each customer account that provides a reasonable amount of water for the customer's needs and property characteristics. Factors used to determine the basic use allocation may include, but are not limited to, the number of occupants, the type or classification of use, the size of lot or irrigated area, and the local climate data for the billing period. Nothing in this chapter prohibits a customer of the public entity from challenging whether the basic use allocation established for that customer's account is reasonable under the circumstances. Nothing in this chapter is intended to permit public entities to limit the use of property through the establishment of a basic use allocation.

"(3) A basic charge is imposed for all water used within the customer's basic use allocation, except that at the option of the public entity, a lower rate may be applied to any portion of the basic use allocation that the public entity has determined to represent superior or more than reasonable conservation efforts.

"(4) A conservation charge shall be imposed on all increments of water use in excess of the basic use allocation. The increments may be fixed or may be determined on a percentage or any other basis, without limitation on the number of increments, or any requirement that the increments or conservation charges be sized, or ascend uniformly, or in a specified relationship. The volumetric prices for the lowest through the highest priced increments shall be established in an ascending relationship that is economically structured to encourage conservation and reduce the inefficient use of water, consistent with Section 2 of Article X of the California Constitution.

"(b)(1) Except as specified in subdivision (a), the design of an allocation-based conservation pricing rate structure shall be determined in the discretion of the public entity.

"(2) The public entity may impose meter charges or other fixed charges to recover fixed costs of water service in addition to the allocation-based conservation pricing rate structure.

"(c) A public entity may use one or more allocation-based conservation water pricing structures for any class of municipal or other service that the public entity provides." (Wat. Code, § 372.)

(3) While this statute contemplates allocation-based conservation pricing consistent with California Constitution, article X, section 2, PWD fails to explain why this provision cannot be harmonized with Proposition 218 and its mandate for proportionality. PWD fails to identify any support in the record for the inequality between tiers, depending on the category of user.

(4) In addition, PWD says, "the distinct tiers for irrigation users are [further] supported by Water Code section 106, which expressly recognizes that the use of water for domestic purposes is superior to that for irrigation usage." However, the precise language of section 106 is as follows: "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Wat. Code, § 106, italics added; and see Deetz v. Carter (1965) 232 Cal.App.2d 851, 854, 856 [43 Cal.Rptr. 321] [domestic use includes "consumption for the sustenance of human beings, for household conveniences, and for
the care of livestock," but not "commercial purposes].) Yet, under PWD's tier structure, commercial users are permitted to use amounts of water exceeding their budgeted allocation under tier 1 at a lower cost than irrigation only users — without any explanation for this disparity even attempted by PWD.

California Constitution, article X, section 2 is not at odds with article XIII D so long as, for example, conservation is attained in a manner that "shall not exceed the proportional cost of the service attributable to the parcel." (Art. XIII D, § 6, subd. (b), par. (3).)

According to the record, the efficient use of water in keeping with the policy in favor of water conservation is already built into the customer's budgeted allocation (the tier 1 rate, which is equal for all users). Yet, a review of the tier structure alone establishes that irrigation customers such as the City are charged disproportionate rates reaching tier 5 ($5.03/unit) rates at 130 percent of their budgeted allocation as compared to other users who do not reach such high rates until they exceed 175 percent (SFR/MFR) or 190 percent (commercial) without any showing by PWD of a corresponding disparity in the cost of providing water to these customers at such levels.[3]

Notably, PWD's "IRR" category means customers designated as "irrigation only" users; PWD does not segregate the recognized outdoor and irrigation usage of its other customers such as residential or commercial users. As a result, a residential (single- or multifamily) or commercial user (constrained only by its historical three-year average usage) could waste or inefficiently use water by, for example, filling, emptying and refilling a swimming pool or excessively hosing off a worksite or parking lot without the same proportional cost because of the significant disparity in tiered rates for water use in excess of the customer's allotted water budget. According to the record, it is the irrigation-only user (perhaps, as the City urges, maintaining playing fields, playgrounds and parks for example) who is "potentially the most impacted," without a corresponding showing in the record that such impact is justified under California Constitution, article X, section 2, or permissible under article XIII D, section 6.

As stated in section 6, subdivision (b), paragraph (5) of article XIII D, "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." According to RFC, it was the cost of service (COS) option — the option PWD did not choose — that was "[d]efensible [under] Prop[osition] 218," and this option was also "[c]onsistent with industry standards," but it meant "[g]reater revenue fluctuation with varying demand." On the other hand, RFC advised PWD the "[p]ercentage of fixed cost" or FV option it ultimately chose would send a "weaker signal for water conservation" and would mean a "[s]ignificant impact on small customers who conserve water," but afforded "rate stability." (Italics added.) It follows that PWD has failed to carry its burden to demonstrate compliance with the requirements of article XIII D, and the judgment must be reversed.[4]

**DISPOSITION**

The judgment is reversed. The City is entitled to its costs of appeal.

Perluss, P. J., and Zelon, J., concurred.

On August 25, 2011, the opinion was modified to read as printed above.

[1] These costs per unit are the tiered rates for 2009; the per unit cost increases each year thereafter while the tier percentages remain the same.
Article XIII D, section 4 sets forth procedures and requirements for assessments analogous to the procedures and requirements for fees and charges set forth in article XIII D, section 6, post. Article XIII D, section 5 specifies the effective date and exemptions from section 4.
In addition to arguing PWD's rate structure violated the proportionality requirement of Proposition 218, the City says the trial court abused its discretion in denying its motion to augment (beyond the administrative record) and raises a number of additional substantive and procedural challenges, but we need not address these additional arguments in light of our disposition of the preceding issue.

In submitting this application for adjustment in solid waste assessment, I reiterate my objection to cutting my time in here in half under the guise of combining my two required and distinct appeals, and, further demand that any testimony and evidence presented attempting to refute my statements or the evidence presented herein be presented over the same required to be declared under the same penalty of perjury that the testimony and evidence presented is true and correct that is required of appellants as a matter of equal application of law and fair hearing.