C071906

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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CITIZENS FOR FAIR REU RATES, et al.
Plaintiffs and Appellants,
v.
CITY OF REDDING, et al.,
Defendants and Respondents.

_____

On Appeal from the Superior Court of the State of California,
County of Shasta
Case Nos. 171377 and 172960
Honorable William D. Gallagher

_____

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE AN *AMICUS* BRIEF IN SUPPORT OF THE RESPONDENT CITY OF REDDING; PROPOSED BRIEF OF *AMICUS CURIAE*

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TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD DISTRICT:

The League of California Cities ("the League") and the California State Association of Counties ("CSAC"), pursuant to Rule 8.200(c) of the California Rules of Court, request permission of the Presiding Justice to file the accompanying *amicus curiae* brief in support of the Defendant and Respondent City of Redding ("the City").

The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League, CSAC, and their member cities and counties have a substantial interest in the outcome of this case because it raises important questions regarding the application of Proposition 26. In particular, this case raises the question of whether a charge or fee that was valid before the

enactment of Proposition 26 can now be challenged as an unauthorized "tax" under Proposition 26, even if it has not been increased or extended; or whether a fee or charge that was valid before the passage of Proposition 26 is "grandfathered" and remains valid provided it is not increased or extended.

The League and CSAC believe that their perspective on these issues is important for the Court to consider and will assist the Court in deciding this matter. The undersigned counsel has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation. This *amicus* brief primarily addresses relevant arguments which were not presented in the parties' briefs. The League and CSAC thus hereby request leave to allow the filing of the accompanying *amicus curiae* brief.

In compliance with subdivision (c)(3) of Rule 8.200, the undersigned counsel represents that he authored this brief in its entirety on a pro bono basis, that his firm is paying for the entire cost of preparing and submitting this brief, and that no party to this action or any other person either authored this brief or made any monetary contribution to fund the preparation or submission of this brief.

Dated: May 23, 2013 JARVIS, FAY, DOPORTO & GIBSON, LLP

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AMICUS CURIAE BRIEF

I. INTRODUCTION

The Plaintiffs and Appellants bring a challenge under Proposition 26 to the rates charged by the City of Redding for electrical service. In particular, they challenge the "Payment in Lieu of Taxes," or "PILOT," which is a cost recovered through the City's electrical rates.

The PILOT is a transfer from the City's electric utility to its general fund, and it has been implemented by the City for 25 years, pursuant to a formula that has been unchanged since 2005. The Plaintiffs contend that the PILOT does not fit the definition of a permissible fee under Proposition 26 and therefore must be invalidated. In its response brief, the City has ably demonstrated why this challenge should be rejected on multiple grounds, including the merits. However, *amici* file this brief to stress why the Court should not even reach the merits of the Plaintiffs' challenge in the first place. A challenge may be asserted under Proposition 26 ***only*** to a charge that is "imposed, extended, or increased" ***after*** Proposition 26 was enacted. Because the PILOT is a preexisting charge that was valid before the enactment of Proposition 26, and because it has not been "increased" or "extended" since Proposition 26 was enacted, Proposition 26 does not apply to it.

Proposition 26, enacted in 2010, was an amendment to Proposition 218, and therefore it must be interpreted as part of Proposition 218. Proposition 218, enacted in 1996, added articles 13C and 13D to the California Constitution. These articles imposed restrictions on the levy of local taxes and property-related assessments and fees. Article 13C addresses taxes. It defines special and general taxes and provides that if a local government wants to "impose, extend, or increase" a tax, the tax must be approved by the voters. (Cal. Const. Art. 13C, § 2.) Article 13D addresses property-related fees and assessments. It provides that fee-payers

must be notified of a new or increased property-related fee and provides procedures for fee payers to object to, and sometimes to vote on, a new or increased fee. (Cal. Const. Art. 13D, § 6.) Article 13D also imposes substantive limits on property-related fees, requiring that they not exceed the cost to provide the service for which they are charged. Significantly, however, fees for electricity service were specifically exempted from Article 13D. (Cal. Const. Art. 13D, § 3.)

Proposition 26 amended Article 13C, the part of Proposition 218 related to taxes, but not Article 13D, the part of Proposition 218 related to property-related fees. This distinction is important because, while Proposition 218 made the requirements of Article 13D expressly applicable to existing fees, it did not make the requirements of Article 13C applicable to existing taxes, except for those enacted within a certain "window period" before the enactment of Proposition 218. Since Proposition 26 amended Article 13C, its requirements should likewise not apply to existing charges.

Proposition 26 added subdivision (e) to section 1 of Article 13C, and provides a more detailed definition of what charges are taxes and what charges are not, and therefore what charges must be approved by the voters when they are imposed, extended, or increased. The proponents of Proposition 26 argued that it was necessary to close loopholes in Proposition 218. They felt there were charges that they considered to be taxes that were not being treated as taxes – that were being put into effect without being submitted to the voters. Proposition 26 therefore sought to expand the definition of "tax" to include charges that previously had not been treated as taxes and to make those charges subject to voter approval. Importantly, however, Proposition 26 did not change the basic rule of Article 13C: *a vote on a tax is necessary only when the tax is imposed, extended, or increased.* If a valid previously-imposed charge is already in effect and is continued without being increased or extended, then the voting

requirements of Article 13C are not triggered and a vote is not required. (By comparison, Article 13D did apply its requirements to existing property-related fees, but again, Article 13D expressly did not apply to fees for electrical services.)

As shown in the City's Opening Brief, and as recognized by the trial court in its decision, the City of Redding's PILOT program has existed for 25 years. Although it has been occasionally modified, it has remained in substantially the same form since 1988, and its formula has not been modified since 2005. This formula was in effect when Proposition 26 was adopted in 2010, and it has not been changed since.

Before Proposition 26, the electrical rates charged by the City, including the PILOT, were certainly valid, because the rates charged by a municipal electrical utility only had to be reasonable. The law did not limit the amount of such charges to the amount necessary to cover the cost of providing the electrical service, and the City has shown that its electricity rates are very reasonable, being among the lowest in the state.

The Plaintiffs claim that the PILOT is prohibited by Proposition 26, arguing that it is a charge for a government service that exceeds the cost to provide the service and that it is therefore a tax. In its brief, the City has shown that the PILOT is, in fact, a cost, and that therefore it is properly part of the charge for electricity services and is therefore a valid part of the cost of service under Proposition 26. However, even if this were not the case, because the PILOT is being imposed at the same rate and with the same unchanged formula, it has not been imposed, extended, or increased. Consequently, Article 13C's requirement that it be approved by the voters has not been triggered, and the City should be able to continue to implement the existing PILOT.

This issue as to the non-retroactivity of Proposition 26 is an important issue for all cities and public agencies in California that operate

electrical utilities, as there are many programs, such as programs to reduce greenhouse gasses and to increase the use of renewable energy sources, many of them mandated by the State, that are funded through existing electricity rates. While Proposition 26 may prevent the addition of new programs such as these, immediately invalidating the rate structures that support existing programs would be extremely disruptive, and, as the City showed in its brief, would run counter to the stated intent of the proponents of Proposition 26. The Court should therefore affirm the judgment of the trial court and hold that a cost that is recovered through a municipal electrical utility's rates that was valid before the adoption of Proposition 26, and which remains unchanged, can remain a valid cost that can be recovered by the rates.

II. ARGUMENT

A. The City should be able to continue to apply the PILOT because it has not been imposed, extended, or increased since the passage of Proposition 26.

The trial court found that the PILOT is a cost that has been recovered through the City's electrical rates since 1988, and it was certainly valid prior to the passage of Proposition 26. Because Article 13C of the California Constitution only requires a vote on a tax when it is imposed, extended, or increased, the City should be able to maintain the PILOT as a cost that can be recovered by its rates because it has not been imposed, extended, or increased since the passage of Proposition 26.

1. A charge that was valid before Proposition 26 may continue to be applied so long as it is not imposed, extended, or increased.

A charge that was valid before the passage of Proposition 26 should remain valid, provided it is not imposed, extended, or increased after the passage of Proposition 26.

Article 13C of the California Constitution, the part of Proposition 218 that applies to taxes, provides that "[n]o local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote" and "[n]o local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." (Cal. Const. Art. 13C, § 2, subds.(b) and (d).)

Proposition 26 refined the definition of a tax under Article 13C by adding a new subdivision – subdivision (e) – to section 1 of Article 13C. This new subdivision provides additional focus to the definition of a tax and attempts to shift the burden of proof when a charge is challenged on the grounds that it is a tax. It provides that all levies, charges, or exactions are taxes, unless they fit into one of seven enumerated categories. (Cal. Const. Art. 13C, § 1, subd.(e)(2).)[1] However, Proposition 26 did not change the consequence of a charge being a tax, which requires it to be approved by the voters when imposed, increased, or extended. Therefore, if a preexisting charge that was previously valid is not increased or extended, it does not have to be submitted to a vote. It only has to be submitted to a vote if it is increased or extended, otherwise it is "grandfathered" and can remain in effect.

This conclusion is rooted in Article 13C and the case law interpreting it. Under Article 13C, taxes that were legally enacted without a vote of the electorate before Proposition 218 were "grandfathered" and remain legal and in effect and do not have to be submitted to a vote unless they are increased or extended. As the Second District explained in *AB*

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[1]In *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, the court found an implied eighth category of charge that is not a tax, and that is a charge that is not payable to, or for the benefit of, a local government. (*Id.* at pp. 1328-29.)

Cellular LA, LLC v. City of Los Angeles (2007) 150 Cal.App.4th 747, "a local taxing entity can enforce less of a local tax than is due under a voter-approved methodology, *or a grandfathered methodology*, and later enforce the full amount of the local tax due under that methodology without transgressing Proposition 218." (*Id*. at p. 763; emphasis added.)

It is also evident from the "window period" in Article 13C that preexisting taxes were grandfathered and do not have to be approved by the electorate to remain in effect. The "window period" is the specified period of time before the effective date of Proposition 218 that gave Article 13C limited retroactivity. A tax enacted during the window period had to comply with Article 13C, which meant being be submitted to a vote of the electorate. The window period started on January 1, 1995, and any tax that had been "imposed, extended, or increased" between January 1, 1995 and the enactment of Proposition 218 on November 5, 1996 had to be approved by the voters. (Cal. Const. Art. 13C, § 2(c).) Of course, the clear implication is that any tax enacted before the window period can continue to be applied without being submitted to a vote of the electorate.

As explained by the City in its brief, Proposition 26 has a similar window period for the part of Proposition 26 that applies to the State (Cal. Const. Art. 13A, § 3(c)), which shows that outside of the window period, Proposition 26 is not intended to be retroactive. (See Respondent's Brief, pp.15-16.) In particular, the continued application of a charge that was validly adopted before Proposition 26 can continue to be applied.

The intent of the electorate that Article 13C would not apply to existing taxes (except those enacted during the window period) is especially apparent if one compares its language to that in Article 13D. As noted earlier, while Article 13C applies to taxes, Article 13D applies to fees and assessments. And while Article 13C only applies when a local government acts to "impose, extend, or increase" a tax, Article 13D more broadly

includes existing property-related fees. (See Cal. Const. Art. 13D, § 6, subd. (d) [requiring that "Beginning July 1, 1997, all fees and charges shall comply with this section."]; see also, *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, 923-925 [interpreting this provision to mean that Article 13D applies to existing fees and charges].) Article 13C, unlike Article 13D, does not have any language extending its scope to existing taxes – its operative terms only apply when a local agency imposes, extends, or increases a tax. (And, of course, there can be no argument that Article 13D applies to the PILOT, since it expressly does not apply to "fees for the provision of electrical or gas service." (Cal. Const. Art. 13D, § 3, subd. (a)(4).))

2. Because the PILOT was a valid charge before the enactment of Proposition 26, and because it has not been increased or extended, it can continue to be applied.

The PILOT was a valid cost that was recovered by the City's electrical charges for more than 20 years before the passage of Proposition 26. Because it has not been increased, extended, or imposed since the passage of Proposition 26, it can continue to be recovered through these charges.

Certainly, there is no question that the PILOT was a valid charge before the passage of Proposition 26. As already mentioned, electricity rates were not subject to Proposition 218's restrictions in Article 13D to property-related fees, such as fees for water, sewer, or garbage service. (Cal. Const. Art. 13D, § 3, subd.(b).) Prior to Proposition 26, rates for electrical services only had to be reasonable and could, in fact, return a modest profit to the municipality that could be transferred to the general fund. (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1180-83 [municipal utility rates must be reasonable and can make a profit]; *American Microsystems, Inc. v. City of Santa Clara* (1982) 137 Cal.App.3d

1037, 1041-43 [applying "reasonable" standard to municipal electricity rates]. The City has shown that its electricity rates are very reasonable and are, in fact, some of the lowest in the state. (See Respondent's Brief, p. 6.)

Because the PILOT has not been increased, extended, or imposed since the passage of Proposition 26, it has not triggered the voting requirements of Article 13C and the City should continue to be able to apply it.

a. The PILOT has not been "increased" since the passage of Proposition 26.

The methodology used to calculate the PILOT has not been modified since 2005, and therefore as a matter of law it has not been increased since the passage of Proposition 26 in 2010. The Proposition 218 Omnibus Implementation Act provides that a tax is increased only when its rate is increased or when the methodology used to calculate the tax is revised and results in an increased charge:[2]

> "'Increased,' when applied to a tax, assessment, or property-related fee or charge, means a decision by an agency that does either of the following: (A) Increases any applicable rate used to calculate the tax, assessment, fee or charge. (B) Revises the methodology by which the tax, assessment, fee or charge is calculated, if that revision results in an increased amount being levied on any person or parcel." (Gov. Code § 53750, subd.(h)(1).)

The Proposition 218 Omnibus Implementation Act further provides that a tax is not increased if its methodology remains unchanged:

> "A tax, fee, or charge is not deemed to be 'increased' by an agency action that . . . [i]mplements or collects a previously

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[2]As the City explained in its brief, the Proposition 218 Omnibus Implementation Act is accorded great weight by the California Supreme Court when interpreting Proposition 218. (See Respondent's Brief, pp. 44-45, citing *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal. 277, 290-91.)

> approved tax, or fee or charge, so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel." (Gov. Code § 53750, subd.(h)(2).)

This means that "[a] taxing methodology must be frozen in time until the electorate approves higher taxes." (*AB Cellular LA, LLC, v. City of Los Angeles, supra*, 150 Cal.App.4th 747, 761-62.) And so long as a methodology is "frozen in time," the tax has not been increased and does not have to be submitted to the electorate. Since the methodology used to calculate the PILOT has not been changed since 2005 – has been "frozen in time" – it has not been increased.

b. The PILOT has not been "extended" since the passage of Proposition 26.

A tax, fee, or charge is "extended" when the tax, fee, or charge has a specific effective period and that period is affirmatively extended by the city, such as when a tax, fee, or charge has an expiration date or sunset clause and that date or clause is extended or removed. The Proposition 218 Omnibus Implementation Act provides:

> "'Extended,' when applied to an existing tax or fee or charge, means a decision by an agency to extend the stated effective period for the tax or fee or charge, including, but not limited to, amendment or removal of a sunset provision or expiration date." (Gov. Code § 53750, subd.(e).)

The PILOT has no expiration date or sunset clause and has been applied for 25 years. It therefore has not been "extended" by the City. (See *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission* ("*Citizens Association*") (2012) 209 Cal.App.4th 1182, 1195 ["extend" means in Article 13C a "chronological prolongation"].)

c. The PILOT has not been "imposed" since the passage of Proposition 26.

A tax is "imposed" under Article 13C when it is first enacted. (*Citizens Association, supra,* 209 Cal.App.4th 1182, 1194-95.) As explained above, taxes were "grandfathered" under Article 13C. (*AB Cellular LA, LLC v. City of Los Angeles, supra,* 150 Cal.App.4th 747, 763.) If they were enacted before the window period, they could continue to be applied, and provided they were not increased or extended, their continued collection would not trigger an election. Therefore, for the purposes of Article 13C, they are not "imposed" when they are collected.

In their Reply Brief, the Plaintiffs argue that under *Howard Jarvis Taxpayers Assoc. v. City of La Habra* ("*La Habra*") (2001) 25 Cal.4th 809, each time a city collects a tax, the tax is being "imposed" and the voting requirements of Proposition 218 apply. The Plaintiffs are mistaken. *La Habra* is distinguishable because the tax in that case had not been validly adopted in the first place, and therefore, the Court held, for the purpose of applying the statute of limitations (not for the purpose of determining whether the tax had been "imposed" under Article 13C), the tax was "imposed," and the statute began to run, each time the tax was collected.

In the present case, the PILOT was certainly valid when it was first adopted, and it was certainly valid each time it was modified, including the most recent modification in 2005. In contrast, in *La Habra,* the city had enacted a tax without submitting it to the voters, as required by Proposition 62,[3] which had been passed by the voters six years previously. (*La Habra* at p. 813.) The city sought to avoid liability by claiming that the statute of

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[3]Proposition 62 was a statutory precursor to Proposition 218, which also required taxes to be approved by the voters, but did not apply to user fees and therefore has no application to the City of Redding's electrical rates. (See Gov. Code §§ 53722, 53723.)

limitations had expired because it began running when the tax was first enacted. (*Ibid.* at p. 812.) The Court disagreed, holding that if a tax is illegal in the first place, its continued collection gives rise to a new cause of action and a new limitations period each time it is collected. The Court was careful to limit its holding to this precise situation, explaining "we resolve only the statute of limitations issue upon which review was sought." (*Ibid.* at p. 825.) Importantly, unlike the court in *Citizens Association, supra*, the Court in *La Habra* did not consider the meaning of "impose" as used in Article 13C. As the court in *Citizens Association* held, under Article 13C, "impose" is "the first enactment of a tax." (*Citizens Association, supra*, 209 Cal.App. 1182, 1194.)

B. Even if the PILOT had been increased after the passage of Proposition 26, the remedy would be to reduce the PILOT back to its pre-Proposition 26 level, not to invalidate it.

When a tax under Proposition 218 is increased without a vote, the remedy is to return to the old, preexisting tax. For example, in *AB Cellular LA, LLC v. City of Los Angeles, supra*, 150 Cal.App.4th 747, the court found that a change in methodology was a tax increase that violated Proposition 218 because it had not been approved by the voters. The court declared that the increase violated Proposition 218, but it did not invalidate the underlying tax.[4] (*Id.* at pp. 753, 767-68.) Consequently, even if the Court decides that the PILOT was somehow improperly increased after the passage of Proposition 26, the City should be able to reinstate the preexisting PILOT in the form in which it existed before the passage of Proposition 26.

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[4]It is worth noting that the underlying tax had been enacted in 1993 before the passage of Proposition 218 (*AB Cellular LA, LLC v. City of Los Angeles, supra*, 150 Cal.App.4th 747, 752-53) and therefore had not been approved by the voters, but it had been "grandfathered."

C. The application of the Proposition 62 penalty provision is not properly before this court.

Lastly, the Plaintiffs urge the application of the penalty provision of Proposition 62 in section 53728 of the Government Code, which the Plaintiffs ludicrously call "a mild remedy at best." (Appellants' Opening Brief, p. 32.) But far from being mild, this remedy is draconian and could impose a double-loss on the City. The Proposition 62 penalty provision, if valid and if applicable, would reduce the City's property tax receipts on a dollar-for-dollar basis for each dollar it has collected of the allegedly improper PILOT. However, if the PILOT is found to be invalid, the electricity rate payers may also have claims for refunds. The City could therefore be faced with both a reduction to its property tax receipts as well as claims for refunds. Would the application of the remedy preclude refund claims? Who would receive the reduced property taxes? There are many uncertain issues with the application of this penalty, which has never been applied in any reported decision, although it has been on the books for over 25 years (which is likely due to the contradictions within it, and the uncertainty with how it would actually be put into effect).

However, the application of this remedy is not properly before this court. Because the trial court affirmed the City's application of the PILOT to its electricity rates, it did not rule on the application of the penalty, and therefore it is not part of this appeal. Only if the application of the PILOT is invalidated would the penalty become relevant, and then it should first be put before the trial court to decide whether to apply it and to address the problems with its application.

III. CONCLUSION

Proposition 26 has for the first time imposed restrictions on municipal electrical utility rates beyond the requirement that they must be reasonable. Applying these new restrictions to pre-existing charges would

cause significant hardship. However, Proposition 26, like the rest of Article 13C, should not be interpreted to be retroactive. A longstanding cost that has been recovered through a municipal electrical utility's rates, such as the City's PILOT, which was legally and consistently applied as part of electrical rates before the passage of Proposition 26, should remain a valid cost that can be recovered by the rates, provided it is not increased.

Dated: May 23, 2013 JARVIS, FAY, DOPORTO & GIBSON, LLP

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J:\Clients\140 [League of California Cities]\008 [Citizens v. Redding]\Pleading\Amicus Brief (with tables).wpd

WORD COUNT CERTIFICATION

I certify that this brief and accompanying application contains a total of 4008 words as indicated by the word count feature of the Word Perfect computer program used to prepare it.

Dated: May 23, 2013

/s/
Benjamin P. Fay