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Court of Appeal, State of California

SECOND APPELLATE DISTRICT, DIVISION 5

GLENDALE COALITION FOR BETTER GOVERNMENT,
Plaintiff, Respondent and Cross-Appellant

vs.

CITY OF GLENDALE
Defendant, Appellant and Cross-Respondent

Appeal from the Superior Court of the State of California
County of Los Angeles, Case No. BS153253
Honorable James C. Chalfant, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT CITY OF GLENDALE

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

To Acting Presiding Justice Lamar Baker and the Honorable Associate Justices of Division 5 of the Second District Court of Appeal:

The Association of California Water Agencies ("ACWA"), the California Special Districts Association ("CSDA"), the California State Association of Counties ("CSAC"), and the League of California Cities ("League") (collectively, "Local Government Amici"), pursuant to subdivision (c) of Rule 8.200 of the Rules of Court, respectfully request permission to file the accompanying amicus curiae brief in support of the City of Glendale.

The brief is limited to the issue whether the cost of fire hydrants and water system capacity necessary to fight fires ("fire protection water service") may be included in water service fees subject to Proposition 218. Water special districts, such as those represented by ACWA and CSDA, have a particular interest in the outcome of this case. The trial court held that fire protection water service should be funded from general taxes, not water rates. But many special districts do not receive property taxes, and Proposition 218 prevents them from levying general taxes. They would be left without a source of revenue to fund fire

protection water service, which is a required part of providing a public water supply service. General purpose governments, including the cities and counties represented by the League and CSAC, have a similar interest. Although they do have the power to tax, the decision would eliminate an important source of income to cities or counties that have water utilities, eliminating the discretion they now have to determine the most appropriate method of funding essential public services. Local Government Amici urge the Court to avoid this result, which was not intended by the voters when they adopted Proposition 218, and hold that the revenue needed to pay fire protection water services may be collected from property-related fees for water service.

Local Government Amici represent cities, counties, and special districts throughout California. ACWA is a statewide coalition of 450 public water agencies. CSDA is a non-profit corporation with a membership of over 800 special districts. CSAC is a non-profit corporation composed of California's 58 counties. The League is an association of 474 California cities.

Each Local Government Amicus has a process to identify cases affecting its members that warrant its participation as amicus. ACWA has a Legal Affairs Committee, composed of attorneys from each of its regional divisions throughout the state. The Committee monitors litigation of significance to ACWA's members. CSDA has a Legal Advisory Working Group, comprised

of 22 special district attorneys from all regions of the state. The Working Group monitors litigation of concern to special districts, identifying cases of statewide or national significance. CSAC sponsors a Litigation Coordination Program administered by the California County Counsels' Association. CSAC's Litigation Committee monitors litigation of concern to California's counties. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, identifying cases of statewide or national significance. ACWA, CSDA, CSAC, and the League have determined this case to be of importance to their members.

The public agency members of Local Government Amici fund essential public services to millions of Californians through user and other fees subject to requirements established by Proposition 218. (Cal. Const., arts. XIII C & XIII D.) Many of them charge fees for ongoing supply of water that include a component to recover costs for fire protection water service. Indeed, many do not segregate fire protection costs from other water service costs. The trial court's ruling, if affirmed, would have a substantial adverse financial effect on these agencies.

Local Government Amici's perspective on this important matter will provide the Court a broader view of the role fire protection water service plays in water rates and the impact of

this case on public agency financing. Local Government Amici urge the Court to consider this context in reaching an appropriate decision in the case at bar. Local Government Amici's counsel are familiar with the issues involved. Additional briefing is useful on this matter and we therefore request this honorable Court grant leave to file the accompanying amicus curiae brief.

Respectfully submitted,

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INTRODUCTION

The City of Glendale, like many public water suppliers, considers water and facilities necessary to fight fires as an integral part of the City's water service. As is typical for public water suppliers throughout California, the cost of the system's fire suppression components are recovered from water service fees paid by all water users.

The California Constitution provides that a public agency may not impose property-related fees or charges for general governmental services, including fire service, available to the public at large in substantially the same manner as to property owners. (Cal. Const. art. XIII D, §6 subd. (b)(5).) This case presents the question of whether a public water supplier that provides a water system that includes fire hydrants and system capacity to provide water in the volumes and at the pressures necessary to extinguish fires ("fire protection water service") is providing a general governmental service and is consequently precluded from recovering those costs through water service fees? The trial court, without significant analysis, invalidated the City's inclusion of fire protection water service costs in its fees for water service, by confusing fire protection water service with general fire department services, and saying that these costs were for "quintessentially general government services that should be funded through voter-approved taxes, and not property

related fees." Local Government Amici, representing most of California's public water suppliers, believe the trial court analyzed and answered the question incorrectly.

In fact, fire protection water service is water service, not fire service, and is appropriately funded through fees for water service under Proposition 218, as it has been historically. The trial court's decision to the contrary is an upheaval of existing practice that was not intended by the voters. If affirmed by this Court, it will create a funding crisis for California's public water providers that the voters did not intend when they approved Proposition 218.

BACKGROUND

A. Proposition 218

Proposition 218 was an initiative constitutional amendment, passed by the voters in 1996. It was a follow-on to Proposition 13, which limited property taxes. According to the ballot argument for Proposition 218, its purpose was to plug a loophole in Proposition 13 created by politicians, which allowed them "to raise taxes without voter approval by calling taxes 'assessments' and 'fees.'" (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1196.)

Proposition 218 added Articles XIII C and XIII D to the Constitution. Article XIII D, section 6 deals with property-related fees and charges, which include fees for ongoing water service associated with ordinary ownership or use of property. (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217.) Subdivision (a) imposes procedural requirements, including notice to record owners, a public hearing, and an opportunity for majority protest. Subdivision (b) imposes substantive requirements that tie revenues to the cost of providing service and limit fees charged in connection with a parcel to the proportional cost of the services attributable to the parcel. (Cal. Const., art. XIII D, § 6, subds. (b)(1)–(b)(4).)

Subdivision (b)(5) contains an additional limitation. It provides: "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*." (Cal. Const., art. XIII D, § 6, subd. (b)(5) (hereinafter "Subdivision (b)(5)") (emphasis added).)

B. Water Service

Water service in California can be provided by cities, as here, or by public or private water suppliers. Besides cities, the other major category of public water suppliers is special districts.

Counties that provide water service typically do so through county service areas or other dependent special districts. There are numerous different kinds of water special districts. (Legislative Analyst's Office, Water Special Districts: A Look at Governance and Public Participation (2002) (Water Special Districts)).[1] Independent special districts—that is, those not controlled by a city or county—account for nearly 90 percent of total water activity revenues in California. (*Ibid.*)

Water service is considered an enterprise service, which means that it is funded primarily through charging a fee for the service. (Institute for Local Government, Understanding the Basics of Municipal Revenues in California: Cities, Counties and Special Districts (2016), at p. 6.)[2] In addition, some water special districts receive an allocation of property taxes to fund a portion of their activities. Because of state allocation formulas, those water special districts that received property taxes prior to the passage of Proposition 13 generally continue to receive property taxes today. Districts that did not receive property taxes prior to 1978 generally do not receive them today. (Water Special Districts, *supra*; see Rev. & Tax. Code §§ 96, 96.1.)

[1] http://www.lao.ca.gov/2002/water_districts/special_water_districts.html
[2] https://www.ca-ilg.org/sites/main/files/file-attachments/basics_of_municipal_revenue_2016.pdf

ARGUMENT

I. Fire Protection Water Service is Water Service, Not Fire Service.

If you ask voters where they get their fire service, they will likely say, "from the fire department." Or they might say, "from the city." But it is highly unlikely that they will say, "from the water department" or "from the water district." The voters recognize that they get fire service from firefighters and fire engines, and water service from reservoirs, pipes and plumbing.

In interpreting Proposition 218, a court should determine and effectuate the intent of the voters who enacted it. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418.) To do so, it should give words in the text their ordinary meaning. (*Ibid.*; 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, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.").) This interpretation has been confirmed by the Legislature in the Omnibus Proposition 218 Implementation Act, which defines water as "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. (n) ; see also *Greene v Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal. 4th 277, 290-291 [applying the Omnibus Act to construe Proposition 218].) The Legislature's conclusion that providing fire protection water service is an integral part of a water utility's function is also evident in Water Code section 350's authorization for a public water supplier to declare water shortage emergencies "whenever it finds and determines that ordinary demands and requirements of water consumers cannot be satisfied without depleting the water supply of the distributor to the extent that there would be insufficient water for human consumption, sanitation, and fire protection."

The distinction between "supplying water for fire protection purposes" and "providing fire protection service" is recognized by statute. A public agency *providing water for fire protection purposes* may not levy or charge a tax or fee for fire protection water service on an entity *providing fire protection service*, except under a written contract. (Gov. Code § 53069.9, subd. (b)(1)). "Entity providing fire protection services" is defined to include a city, county, city and county, fire company, or fire protection district—not a water district. (*Id.* at subd. (c).)

In fact, most water special districts are not allowed to provide fire service. Special districts have only the powers conferred by statute. (*Turlock Irr. Dist. v. Hetrick* (1999) 71

Cal.App.4th 948, 952–953 (water district has no power to supply natural gas).) And irrigation districts, for example, are expressly authorized to deliver water for fire protection purposes (Wat. Code § 22077), but may not provide fire service (15 Ops.Cal.Atty.Gen 89 (1950)).

This distinction holds even if the infrastructure to provide the water is given the shorthand name of "fire flows" or "fire protection service." This Court should focus on the nature of the service, as understood by the voters, not the labels used internally by the City of Glendale.

Fire hydrants, and the pipes that serve them, are as much a part of a water system's necessary infrastructure as reservoirs, pump stations, and the pipes that serve houses. In fact, they are the same pipes. It is impractical to separate the facilities that provide water to extinguish fires from the rest of the water system. Furthermore, it is common knowledge that fire hydrants provide system access for other purposes, such as connection of temporary construction meters or to drain pipes in order to perform necessary maintenance. Building separate fire-only water systems would be a waste of public resources, especially since a water system provides a fire suppression function as an incident to the provision of water service generally.

Thus, fire protection water service (i.e. the cost of the fire suppression benefit that is provided by the water enterprise) is

simply part of the water service cost that may be recovered through fees for water service.

II. Fire Protection Water Service Is Not a General Governmental Service, Because It Provides a Benefit to Property Owners That Is Not Provided in the Same Manner As to the General Public.

The voters' intention to continue to allow fees for water service to recover costs of fire protection is further evidenced by the language of Subdivision (b)(5). That section does not broadly preclude all fees or charges for general governmental services. Rather, it precludes use of fees only "where the service is available to the public at large in substantially the same manner as it is to property owners." Fire protection provided as a function of water service is not provided to the public at large in substantially the same manner as property owners. While it goes without saying that the public at large benefits from all government services, the availability of fire protection water service primarily benefits the owners whose property is protected, whether it is by extinguishing a fire on their property or preventing the spread of fire by extinguishing a fire burning on a vacant lot next door.

As discussed earlier, ongoing water service provided through pipelines is a property-related service. In other words, it

benefits property owners as an incident of property ownership. (*Bighorn-Desert View Water Agency v. Verjil* , *supra,* 39 Cal.4th at 217.) Fire protection water service is provided in the same manner as other domestic water services and provides a benefit to property owners that is different in several ways from the "fire" benefit provided to the general public. First is location. Water systems are designed under the California Fire Code to provide sufficient flow to fight structure fires on particular property. (Cal. Code Regs., tit. 24, § 507.1.) Second, property owners cannot build on their property without adequate fire protection infrastructure being present. (*Ibid.*; Glendale Mun. Code §§16.12.020, 16.28.020.) Third, fire hydrants are used to protect property, specifically structures. (Fire chief memo, 6 AR 1317.)

The trial court found that the use of fire hydrants to suppress fires does not "solely" protect structures with water meters, but also benefits the general public. (4 JA 593-594.) The court stated, "I have no evidence, and I choose to disbelieve an implication that the fire department would deny a car, a vacant lot, citizens in a diner the protection of a hose from a fire hydrant if something was on fire." (R.T. 22.) But that is not the test. The test is whether the service provided to property owners is a general government service, provided in the same manner as to the general public. (Subdivision (b)(5).) Here, it is not. Not only

does the fire chief's memo establish that (6 AR 1317), but common sense does as well. Any benefit provided to the general public by fire protection service is incidental to its primary purpose of protecting property owners' property.

A community's firefighters do far more than merely put out fires. While memories of 9/11 are perhaps the most vivid reminder of the rescue, medical, and other dedicated service our fire departments provide to the people, we see other examples almost daily. But this case is not about those services or how to pay for them. This case is about paying for water made available for fire protection and whether by the adoption of Proposition 218 the voters intended to require public water suppliers to exclude costs associated with providing fire protection water service from fees for water service.

Like ongoing water service generally, fire protection water service is a property-related service, because it is provided to property owners and to persons as an incident of property ownership. Any incidental benefit to the public generally is akin to other incidental benefits of water service to public health, community aesthetics, and human comfort. To characterize fire protection water service as other than water service would fundamentally alter the nature of water service as the voters understood it and the Legislature defined it. (Gov. Code §53750, subd. (n).) Amici respectfully contend that the trial court focused

its attention too broadly on the general benefit provided to people by firefighters, and ignored the particular benefit that fire protection water service provides directly to property owners.

III. Fees for Fire Protection Water Service Are Not a Disguised Tax.

The purpose of Subdivision (b)(5) was to prevent local government from getting around Proposition 13 by re-categorizing a tax as a fee for service. (See *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.*, *supra,*209 Cal.App.4th at 1196.) The trial court expressed the opinion that the City had done exactly that. (R.T. 24.) But fire protection water service was paid from fees for water service long before Proposition 13 was enacted in 1978. For example, a statute originally enacted in 1973 provides that any public agency providing fire protection water service may collect a charge to pay the costs of installing and maintaining fire hydrants "at the same time and in the same manner as other water rates or charges collected by the public agency." (Stats. 1973, ch. 149, § 1 (adding Gov. Code § 53069.9).) The Legislature found that the statute was declaratory of existing law. (*Id.* at § 2.)

Rather than plugging a loophole, the trial court's decision is an upheaval of existing practice that was not intended by the voters.

IV. The Trial Court's Ruling, If Allowed To Stand, Will Cause a Funding Crisis.

Interpreting Subdivision (b)(5) as requiring public water suppliers to carve out fire protection water service will have a substantial adverse financial effect on all public agencies, including the City, but particularly on special districts. Special districts providing fire protection water service must have a revenue source to pay for it. However, the trial court agreed with the Coalition's contention that fire flow charges should be paid from general tax revenue, not from water rates. (4 JA 593-594; RT 23.) The trial court did not consider that special districts generally do not receive any property tax revenues, unless they received them before the enactment of Proposition 13. (Water Special Districts, *supra*; see Rev. & Tax. Code §§ 96, 96.1.) And special districts have no power to levy general taxes. (Cal. Const., art. XIII C, § 2, subd. (a).)

The result is that special districts have no practical way to fund fire protection water service costs that they incur for the service they provide except through water rates, as they have historically done.

V. Conclusion

The trial court accepted the Coalition's argument that "fire service is the same as fire protection." (Respondent's Brief at 64.) While this argument is superficially appealing, the reality is different. Water suppliers, including cities and special districts, provide fire hydrants and system capacity for fire protection purposes as an integral part of operating a water utility. Fire protection water service is an aspect of the water service provided to property and persons as an incident of property ownership. It is not fire service. The principal benefit of fire protection water service is to property owners. The voters did not intend to deny public agencies the ability to include these essential costs in their water rates.

The trial court ruling, if affirmed on appeal, will create a funding crisis for an essential public service. The Court should reverse the judgment and provide declaratory relief to the City that its rates are lawful.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), the foregoing Brief of Amicus Curiae in Support of the City of Glendale contains 2,749 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File Amicus Brief, and this Certificate. This is fewer than the 14,000-word limit set by Rule 8.204(c). In preparing this certificate, I relied on the word count generated by Microsoft Word 2010.

Dated: July 9, 2018

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