Case No. C081929

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PARADISE IRRIGATION DISTRICT, et al.,
Petitioners and Appellants,

v.

COMMISSION ON STATE MANDATES, *Respondent,*

DEPARTMENT OF WATER RESOURCES, et al.,
Real Parties in Interest and Respondents.

[PROPOSED] AMICUS BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONERS AND APPELLANTS PARADISE IRRIGATION DISTRICT, ET AL.

Sacramento County Superior Court
Case No. 34-2015-800002016
The Honorable Timothy M. Frawley

Jennifer B. Henning (SBN 193915)
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7535
jhenning@counties.org

Attorney for Amici Curiae California State Association of Counties and League of California Cities

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTRODUCTION 5

LEGAL ARGUMENT 7

I. A Ruling that Fee Authority Exists Where the Ultimate Decision on the Fee is Made by Voters is Inconsistent with the Gann Limit 7

A. The Gann Limit Places a Ceiling on Expenditures From Tax Revenues 8

B. If Fees Are Rejected by Majority Protest or in a Required Vote, The Revenue Available to Pay for the Mandated Programs is Subject to the Gann Limit 9

C. The Result of Respondents' Interpretation of the Authority to Levy Fees is a Gann Limit Violation 10

D. The Purpose of the Constitutional Subvention Requirement is to Avoid the Inevitable Result of the Trial Court's Ruling 13

II. The Trial Court's Ruling that an Agency Must "Try and Fail" is not Provided by Statute and Violates the Commission on State Mandate's Governing Regulations 14

CONCLUSION 16

CERTIFICATION OF COMPLIANCE 17

TABLE OF AUTHORITIES

CASES

Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205 10

County of Fresno v. State of California (1991) 53 Cal.3d 482 13

County of Los Angeles v. State of California (1987) 43 Cal.3d 46 13

County of Placer v. Corin (1980) 113 Cal.App.3d 443 ..... 8, 9

County of San Diego v. Com. on State Mandates (2016) 7 Cal.App.5th 12 13

County of San Diego v. State of California (1997) 15 Cal.4th 68 6

DeBartolo Corp. v. Florida Gulf Coast Trades Council (1988) 485 U.S. 568 7

Dept. of Finance v. Com. on State Mandates (2016) 1 Cal.5th 749 13

Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351 ..... 9, 11

People v. Garcia (2017) 2 Cal.5th 792 7

San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal.4th 571 8

S*anta Barbara County Taxpayers Ass'n v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940 8

STATUTES

Gov. Code, § 17556 ..... 5, 7, 12

Gov. Code, § 7901 9

REGULATIONS

Cal. Code Regs., tit. 2, § 1181.2 ..... 14, 15

Cal. Code Regs., tit. 2, § 1183.1 15

CONSTITUTIONAL PROVISIONS

Cal. Const., art. XIII B, § 1 8

Cal. Const., art. XIII B, § 6 ..... 5, 13, 14

Cal. Const., art. XIII B, § 8 ..... 8, 9

Cal. Const., art. XIII D 5

INTRODUCTION

Section 6 of article XIII B of the California Constitution requires the State to provide subventions to local agencies when the State mandates that a local agency perform a new program or higher level of service, with limited exceptions. Government Code section 17556, subdivision (d) provides that no subventions are required if the local agency "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Section 17556 was codified before the voters adopted article XIII D of the California Constitution (Proposition 218), which imposes vote requirements (sometimes by a 2/3 majority) and majority protest procedures for certain types of fees. This case poses the question of how to reconcile articles XIII B and XIII D. The specific issue facing this Court boils down to this: Does a local agency have "authority" to levy a fee for purposes of Section 17556(d) if such fee is subject to the restrictions of Proposition 218?

The answer to that question must clearly be no. The authority to levy a fee contemplated by Section 17556(d) cannot include fees that are subject to rejection or approval by voters because if the fee fails, local agencies can only provide the mandated services by using their tax revenue, potentially violating the appropriations limit found in article XIII B of the California Constitution (Gann Limit). If there are no fees to pay for the mandated services, and the State does not provide a subvention to the

agencies, the only other way to fund the service is from tax proceeds. Respondents fail to explain how this is to be accomplished without violating the Gann Limit.

Presumably, this is why the Commission on State Mandates and the trial court both concluded that a local agency must at least first try to obtain the fee increase to fund the mandated service, but could later make a mandate claim if the voters rejected the fee under Proposition 218. But this novel "try and fail" theory is flawed because it has no basis in the constitution or the implementing statutes, and because it violates the Commission's own governing regulations.

There is no question that the fundamental purpose of the mandate subvention requirement in section 6 of article XIII B is to prevent "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.) Yet, Respondents' position would do just that. In any instance in which the fees to fund a state mandated program are rejected by voters – a circumstance that is far from hypothetical, particularly where higher vote thresholds are required – the local agency would be left to violate the Gann Limit to carry out the State mandated service. That is precisely the opposite of what is required by section 6 of article XIII B.

As such, this Court should interpret the "authority" to levy fees in Government Code section 17556(d) in a manner consistent with the California Constitution and hold that a local agency does not have such authority where the fee in question is subject to Proposition 218.

LEGAL ARGUMENT

I. A Ruling that Fee Authority Exists Where the Ultimate Decision on the Fee is Made by Voters is Inconsistent with the Gann Limit.

The question facing this Court is whether fee authority under Government Code section 17556(d) exists when the fee is subject to Proposition 218 requirements. When facing a statutory interpretation question, courts have an obligation to avoid constitutional problems if possible. (*People v. Garcia* (2017) 2 Cal.5th 792, 804 ["[A] statute should not be construed to violate the Constitution 'if any other possible construction remains available.'"]; *DeBartolo Corp. v. Florida Gulf Coast Trades Council* (1988) 485 U.S. 568, 575 ["[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."].) Because Respondents' interpretation of Section 17556(d) would raise serious constitutional questions, it must be rejected.

/ / /

/ / /

A. The Gann Limit Places a Ceiling on Expenditures From Tax Revenues.

In 1979, the voters adopted Proposition 4, which added article XIII B to the California Constitution. Proposition 4, among other things, establishes an appropriations limit each fiscal year for each entity of government, which cannot be exceeded (known as the "Gann Limit"). (Cal. Const., art. XIII B, § 1; S*anta Barbara County Taxpayers Ass'n v. Bd. of Supervisors* (1989) 209 Cal.App.3d 940, 944.) The measure was intended to be a "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.)

In general, a local appropriations limit is set based on the expenditures of the 1978-79 fiscal year, and is adjusted annually for changes in the cost of living and population. (Cal. Const., art. XIII B, §§ 1, 8, subd. (h).) "The measure sets out, for the purpose of calculating each governmental entity's spending limit, those categories of appropriations that are and are not subject to limitation." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574.) The Gann Limit "does not limit the ability to expend government funds collected from all sources. Rather, the appropriations limit is based on 'appropriations subject to limitation,' which consists primarily of the authorization to expend during a

fiscal year the 'proceeds of taxes.'" (*County of Placer, supra,* 133 Cal.App.3d at p. 447.)

Special assessments are not subject to the appropriation limit. (*County of Placer, supra,* 113 Cal.App. 3d at p. 447.) Further, proceeds from regulatory licenses, user charges, or user fees are not considered proceeds of taxes for purposes of the appropriations limit, unless the proceeds exceed the costs reasonably borne by the agency in providing the regulation, product, or service. (Gov. Code, § 7901, subd. (i)(1).) And, of significance to this litigation, subventions received by local agencies from the State to reimburse the costs of State mandates are not subject to the appropriations limit. (Cal. Const., art. XIII B, § 8, subd. (c).)

B. If Fees Are Rejected by Majority Protest or in a Required Vote, The Revenue Available to Pay for the Mandated Programs is Subject to the Gann Limit.

In answering the question posed by this case, the Court must consider the certain knowledge that fees proposed by a local agency are sometimes rejected by the public. In some cases, such as this case involving water fees, that may occur as the result of a successful majority protest. With regard to other types of fees, such as those related to stormwater, that may occur by a failure to obtain a 2/3 vote to approve the fee on a ballot. (*See Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351.) But for any fee that is subject to the restrictions of Proposition 218, what happens when the proposed fees are rejected by the voters?

Under such circumstances, there are obviously no "proceeds from regulatory licenses, user charges, or user fees" to pay for the State mandated services. Under the trial court's ruling, there would be no subventions received by local agencies from the State to cover the costs of the mandated services. The agency has no discretion to decide not to perform the mandated activity, because it is required by statute or regulation. Yet, the limited revenue that remains to pay for the costs of State-mandated services is tax proceeds subject to the Gann Limit. An interpretation of the Government Code that results in this unconstitutional problem must be rejected.

C. The Result of Respondents' Interpretation of the Authority to Levy Fees is a Gann Limit Violation.

Respondents argue that if a local agency has authority to bring a fee to the voters for approval (whether by majority protest or otherwise), the State has no obligation to provide a subvention to reimburse for the cost of the mandate. Respondents are not clear, however, on the fundamental problem created by their argument: How can local agencies comply with the Gann Limit if the fees proposed to pay for the State's mandated services are rejected by the voters?

Respondents Department of Finance and Department of Water Resources acknowledge that it is possible that the constituents may reject the proposed fees. Citing to *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, Respondents merely concede that if that should

occur, it reflects nothing more than the "power-sharing arrangement" between agencies and users of agency services. (DOF/DWR Respondent's Br., p. 26.) In a similar vein, Respondent Commission on State Mandates refers to Proposition 218 requirements as "political hurdles" that do not have constitutional significance related to the State's obligation to provide subventions for mandated activities. These arguments must be rejected.

First, *Bighorn-Desert View Water Agency* has no bearing on this case. It did not address in any way the obligation of the State to provide subventions to reimburse for State mandated programs, nor did it attempt to reconcile Proposition 218 requirements with article XIII B.

Further, water fees may be subject to a majority protest process, as discussed in *Bighorn-Desert*, but other types of fees, like stormwater fees, require an affirmative 2/3 vote to go into effect. (*See Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351.)[1] Thus, while the Supreme Court may have identified a "power-sharing

[1] It is important to recognize that the legal questions at issue in this case may be applicable beyond the context of fees that may or may not be imposed to fund the particular mandates imposed by the Water Conservation Act of 2009. Indeed, Respondent Department of Finance takes the position that no subvention is required even if a local agency's fee authority is subject to Proposition 218's 2/3 vote requirement. (*See* Dept. of Finance Supplemental Comments in Pending Stormwater Test Claims 15-TC-02, 10-TC-07, 09-TC-03, and 10-TC-11 ["Claimants have authority to impose property-related fees under their police power for alleged mandated permit activities whether or not it is politically feasible to impose such fees via voter approval as may be required by Proposition 218. Local governments can choose not to submit a fee to the voters and voters can indeed reject a proposed fee, but not with the effect of turning permit costs into state reimbursable mandates."].)

arrangement" between a water agency and its users as to the ability of users to act by initiative, that is not helpful in understanding the bigger issues before this Court concerning the Gann Limit and the obligations of the State to provide subventions for State-mandated programs.

More fundamentally, however, the suggestion that the limitations Proposition 218 imposes on local agencies to levy fees are nothing more than a reflection of power sharing or a political hurdle ignores the constitutional Gann Limit. Should an agency be unable to impose a fee due to Proposition 218 requirements, the mandate still must be performed. Yet the agency is constitutionally limited in the amount of tax proceeds it can expend in any given fiscal year. Respondents have provided this Court with no theory on which to adopt their interpretation of Government Code section 17556(d) that resolves this significant constitutional problem.

As noted above, this Court should interpret statutory provisions to avoid constitutional conflicts. Appellants' argument does just that. Applying Section 17556(d) only to those service charges, fees or assessments that a local agency has absolute authority to impose, rather than those in which authority has been vested in the voters, avoids Gann Limit violations and properly places the responsibility to fund the programs and services with the entity that imposes them. This Court should reject an interpretation of the statute that will certainly result in some jurisdictions violating the Gann Limit.

/ / /

D. The Purpose of the Constitutional Subvention Requirement is to Avoid the Inevitable Result of the Trial Court's Ruling.

The subvention requirements in section 6 of article XIII B were put in place by the voters specifically to avoid what would occur if a fee proposed by a local agency to fund State-mandated programs is rejected by the voters. "The 'concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.'" (*Dept. of Finance v. Com. on State Mandates* (2016) 1 Cal.5th 749, 763, citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.) "Section 6 'was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.'" (*County of San Diego v. Com. on State Mandates* (2016) 7 Cal.App.5th 12, 19, citing *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.)

If the lower court ruling is upheld, notwithstanding the clear purpose of the constitutional subvention requirement, in any situation where a fee is rejected by voters, the fiscal responsibility for State-mandated programs would be shifted to local agencies. The fee authority language in Government Code section 17556, subdivision (d) must be interpreted to avoid such result.

II. The Trial Court's Ruling that an Agency Must "Try and Fail" is not Provided by Statute and Violates the Commission on State Mandate's Governing Regulations.

In an attempt to avoid both the Gann Limit violation issue and inconsistencies with the intent of section 6 of article XIII B, the trial court concluded that Proposition 218 does not present an actual hurdle to levying fees until a local agency proposes a fee and it is rejected by the voters. (Slip Op., p. 19.) In other words, there is no legal barrier to an agency's fee authority until the agency has tried and failed to impose the fee. (*Ibid.)* Respondent Commission on State Mandates continues to argue for application of the "try and fail" approach on appeal. (CSM Respondent's Br., p. 42.)

Amici agree with Respondents Department of Finance and Department of Water Resources on this point. (DOF/DWR Respondent's Br., pp. 27-28.) There is no basis in statute for the rule that a local agency may seek subventions after trying and failing to levy a fee.

In addition to the arguments made by DOF and DWR, such a rule is in conflict with the Commission's own governing regulations. For example, "test claims" are, by definition, limited to the "first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state pursuant to Government Code section 17521. . . ." (Cal. Code Regs., tit. 2, § 1181.2, subd. (s).) There is no mechanism for filing subsequent claims on the same statute.

Additionally, the regulations specify that the first test claim "filed by a similarly situated claimant is the test claim and no duplicate claims will be accepted by the Commission." (Cal. Code Regs., tit. 2, § 1183.1, subd. (b).) All other similarly situated agencies may only participate in the process through the submission of comments. (*Ibid.*) Joint test claims are permitted, but only under specified circumstances, which include that all claimants agree on the issues of the test claim. (Cal. Code Regs., tit. 2, § 1183.1, subd. (g).) The regulations also provide that the "test claim procedure functions similarly to a class action and has been established to expeditiously resolve disputes affecting multiple agencies." (Cal. Code Regs., tit. 2, § 1181.2, subd. (s).)

Requiring each agency to allege that it tried and failed to levy a fee before being eligible for subventions is completely inconsistent with the "class action" structure created by the Commission's regulations. The entire concept of the test claim process is that one test claim is used to determine whether a reimbursable mandate exists, and thereafter all agencies responsible for carrying out that mandate are eligible for reimbursement without the need to file individual test claims. The trial court's finding that each agency is required to file separate claims alleging facts specific to its attempt to levy a fee conflicts entirely with the Commission's governing regulations.

/ / /

/ / /

CONCLUSION

Government Code section 17556 provides that when a local agency has "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program of increased level of service," it is not entitled to subventions for those costs. Yet the voters were very clear in passing article XIII B: local governments are limited in what they can tax and spend, but are protected from being required to carry out State-mandated programs without additional revenue.

This Court is now tasked with deciding what "authority" means in the context of alleviating the State of its obligation to provide subventions. Amici urge this Court to interpret the statute in a manner that does not conflict with the California Constitution and that carries out the intent of the voters. This Court should hold that local agencies are entitled to subventions for reimbursable mandates if their authority to levy fees is subject to approval of the voters by majority protest or vote.

Dated: June 19, 2017

Respectfully submitted,

/s/

By _____
Jennifer B. Henning, SBN 193915

Attorney for Amici Curiae

California State Association of Counties
and League of California Cities

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 2,898 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of June, 2017 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING

Attorney for Amici Curiae

California State Association of Counties and League of California Cities