BONIFACIO BONNY GARCIA (SBN 100761)
CHAKA C. OKADIGBO (SBN 224547)
GARCIA, HERNANDEZ, SAWHNEY & BERMUDEZ, LLP
801 N. Brand Blvd., Suite 620
Glendale, California 91203
Tel (213) 347-0210; Fax (213) 347-0216

Attorneys for Respondent, City of Delano

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

DELANO GUARDIANS COMMITTEE, an corporated association,

Petitioner,

vs.

CITY OF DELANO, *et al.*,

Respondents

Case No: S-1500-CV 280116, SPC

CITY OF DELANO'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF MANDATE

Petition Filed: August 23, 2013

Trial Date: February 2, 2015
Time: 9:00 a.m.
Judge: Honorable Sidney P. Chapin
Dept.: 4

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I. INTRODUCTION

In July 2013, Respondent City of Delano ("City") increased its rates for water, sewer, and refuse services to enable it to adequately fund its provision of these services after running operational deficits on its water, sewer and refuse funds for years. The City is entitled to fund the costs of serving its utility customers through fees and charges, provided that it complies with the process set forth in Article XIII D of the California Constitution (Proposition 218) for increasing rates. The City complied with Proposition 218. The City commissioned rate studies for its utilities to examine the state of its utility funds, to determine the revenue necessary to adequately fund its utilities, and to recommend a fair but gradual approach to increasing its rates to enable it to recover costs. It conducted a public hearing and enabled residents and customers opposing the proposed rate increases to attend the hearing and to file written protests. It then implemented rate increases, but only after rightfully concluding that less than a majority of the eligible tenants or owners of City parcels opposed the rate increases. Although the City Council also increased the City's rates for street sweeping services, it rescinded the portion of its resolution that increased street sweeping rates. The City never collected increased rates for street sweeping services.

Petitioner Delano Guardians Committee now seeks to unravel the City's implementation of rate increases merely because a disgruntled minority opposes the rate increases and not because a violation of Proposition 218 on a scale monumental enough to reverse the rate increases occurred. Petitioner pretends that the City lacks the power to recover capital costs for its utilities through fees and charges when settled law authorizes the City to do so. Petitioner falsely declares that the City did not notify utility rate customers and residents about the proposed rate increases when it irrefutably did. Petitioner invites the Court to review some 596 protests on the theory that the City improperly counted them when even the most generous concession to Petitioner would still leave Petitioner far short of the majority opposition needed to block the rate increases. Aside from the 596 identified protests Petitioner contests, Petitioner daringly alleges that the City should have counted as valid an additional 625 or 645 unidentified protests solely because Petitioner's counsel determined that such protests were submitted to the City and that submission alone merits counting the protests as valid. Proposition 218 supports no such claim. Petitioner even accuses the City of inflating the number of parcels in the City so as to make harder the formation of a majority opposition to its rate increases despite accepting

in its own verified Petition that the City properly determined the number of protests needed to form a majority. All this and more will be thrashed out before the Court at trial.

The Court should dismiss the instant *Petition* on the grounds that it lacks merit, that the City has properly met its burden to disprove Petitioner's factual contentions, and that Petitioner is entitled to nothing by way of its *Petition*.

II. STATEMENT OF FACTS

The City of Delano is the second largest city in Kern County, California, and is located thirty-one miles north of Bakersfield and 70 Miles south of Fresno, California. The City has a service population of approximately 48,957 persons, not including the inmate population from Kern Valley State Prison.

All of the City's water supply derives from groundwater wells. The City's costs to provide water mounted due to federal and State mandates to decrease the allowable concentration of arsenic from 50 PPB to 10 PPB. It implemented an Arsenic Mitigation Project, which called for the construction of 10 new groundwater wells, the refurbishing of 2 existing wells, and the installation of wellhead treatment at 4 existing wells, with the aim of reducing arsenic levels in its drinking water. Additionally, much of the City's water pipes were old, deteriorated and in need of replacement. The City also needed to expand the capacity of its Waste Water Treatment Plant to meet State treatment wastewater treatment requirements. (AR41.)

As early as May 16, 2011, the City began exploring the matter of increasing its rates for water, sewer, refuse and street sweeping services. (AR 2.) Up until that point, the City had not been collecting sufficient revenue to fund the provision of these services and was running operational deficits on all of its utility funds.[1]

On August 24, 2011, the City retained Willdan Financial Services ("Willdan") to perform utility rate studies to assist the City in increasing utility rates to ensure the short- and long-term health and stability of its utility enterprise funds, as well as to fashion equitable cost-of-service rates. (AR 11-34, 181, 210, 231.)

[1] "The city's current two-year budget was adopted with the reality that the water, sewer, refuse, and street sweeping enterprise funds are running an operational deficit and that without adjustments each will not be able to provide the current levels of service." (AR 148 (November 19, 20102 City of Delano Staff Report).) *See also* March 1, 2013 Water Rate Study confirming existence of operational deficit (AR 181): "[t]he initial review of the City's existing rate structure and consumption data indicated that the utility was not collecting revenue to fund existing and projected expenditures (operations, maintenance, and capital) and target reserves. The existing rates are not sustainable as the utility is not generating sufficient revenues and is subsequently running an annual net loss. Running a net loss has brought the utility into a negative water fund cash balance."

Willdan's Water Rate Study affirmed that "[t]he initial review of the City's existing rate structure and consumption data indicated that the utility was not collecting revenue to fund existing and projected expenditures (operations, maintenance, and capital) and target reserves. The existing rates are not sustainable as the utility is not generating sufficient revenues and is subsequently running an annual net loss. Running a net loss has brought the utility into a negative water fund cash balance." (AR 181.) Its Sewer Rate Study likewise confirmed that "the City's existing rate structure suggested that it does not provide equitable rates that reflect the true cost of providing wastewater services to the City's customers. In addition, the existing rates fail to generate sufficient revenue to fund existing and projected expenditure (operations, maintenance, and capital) and reserve targets. The existing rates are not sustainable as the utility is not generating sufficient revenues and is subsequently running an annual net loss. Running a net loss has brought the utility into a negative sewer fund cash balance." (AR 210.) Willdan's Refuse and Street Sweeping Rate Study also confirmed that the sewer and street sweeping funds were inadequately capitalized and running at a deficit.

Willdan's utility rate studies set forth the methodology and approach for the City to implement utility rate increases. The studies proposed rate adjustments for water, refuse, sewer and street sweeping. (AR 148-153, 174-176, 204, 224, 247-248, 256, 258.) Willdan employed an approach to setting rates recommended by the American Water Works Association ("AWWA"), which consists of three parts. (AR 182-187, 211-216, 232-238 (overview of the AWWA rate setting process employed by the City).) First, Willdan performed a revenue requirement analysis, which consisted of examining the utilities' operating and capital costs to determine total revenue requirements and the adequacy of the City's existing rates. (AWWA, Principles of Water Rates, Fees and Charges (6th Ed. 2012) p. 4 [Exhibit A to Okadigbo Dec.]; AR 188-193, 217-221, 239-243 (revenue requirement analysis using customer account data).) This process entailed examining customer billing data to ascertain revenue requirements and then designing rates that spread the costs of each utility among customer classes. (*Ibid*; AR 193-197, 221-222, 243-244 (cost-of-service analysis), 197-205, 222-226, 244-247 (rate design analysis).) Second, Willdan performed a cost of service analysis, which entailed functionalizing, allocating and equitably distributing revenue requirements to various customer classes of service (e.g. residential, commercial), served by each utility. (*Ibid*; AR 193-197, 221-222, 243-244 (cost-of-service analysis).) Third, it performed a rate design analysis using the results from the revenue requirement and cost-of-service analysis to

establish cost-based water rates that met the overall rate-design goals and objectives of the City. (*Id.* at pp. 4-5; AR 197-205, 222-226, 244-247 (rate design analysis).)

On November 19, 2012, the City Council voted to approve sending notice of the proposed rate adjustments for water, sewer, refuse and street sweeping set forth in the Willdan studies to utility ratepayers and property owners and to begin the process set forth in Proposition 218 for increasing utility rate fees or charges. (AR 145.) The proposed rate adjustments were based on projected costs of utility operations for the ensuing five years, based on cost of service. (AR000169.)

On or about March 1, 2013, the City sent notice to all utility customers and property owners advising them of the City's rationale for increasing rates, the proposed rate increases, the fact that a public hearing on the rate increases would be held on April 15, 2013, their rights to attend the public hearing to protest the proposed rate increases, and their right to submit written protests objecting to the rate increases. (*Petition*, ¶ 22; Exhibit 1; AR 154-162, 421.) The City's notice explained its rationale for increasing utility rates first by informing customers that monthly rates billed to customers are the primary source of funding for each utility and that the rates are used to fund "costs related to system operations, capital projects debt service, administration, as well as costs related to prudent long-term operational and financial management of the utilities such as maintaining adequate reserves and funding future capital needs." (AR 154.) The notice further communicated that the Willdan studies revealed that "City's existing rates do not fully recover costs associated with the costs associated with operation, maintenance, and capital projects of each of the four utilities. As a result, the City has been drawing on operating reserves or borrowing from other revenue sources to fund utility expenses." (AR 154.) The notice also communicated that "[t]he proposed rates were calculated based on historical usage patterns and on projections of service costs in order to ensure that each customer is charged only for the cost of serving that customer." (AR 154; *Petition*, Exhibit 1.)

The notice included a rate sheet that broke down the proposed utility rates and the means for calculating the rates. (AR 155-157, 159-161.) In the case of water rates, the rate sheet shows water rates to be comprised of a commodity charge and a meter charge combined or a commodity charge and an unmetered charge combined. (AR 155, 159.) The commodity charge for a single family resident is based on where his or her water use falls within the tiered rate structure ($0.88 for Tier 1, $1.41 for Tier 2, and $2.10 for Tier 3). (AR 155, 159.) For example, every single family

resident using between 0 and 5 thousand gallons of water would pay $0.88 per thousand gallons in commodity charges. (AR 155.) The single family resident would also pay the flat rate meter charge corresponding to the size of his or her water meter. (AR 155.) Because the specified commodity charges and meter charges included in the notice applies to all parcel owners, Petitioner's claim in its moving papers that the notices "did not indicate which fees would apply to his or her parcel," (Petitioner's Brief, at p. 10, lines 10-12) is demonstrably false. The water rates payable by each and every residential parcel owner consisted of the specified commodity charge (depending on water usage) in addition to the applicable water meter charge (depending on the size of his or her water meter) or unmetered charge (in the case of residences without water meters). (AR 155, 159.)

In the case of sewer rates, the rate sheet clearly communicated that all single family residences would pay a *flat rate* -- $25.52 in 2014, $28.16 in 2015, $30.91 in 2016, $33.55 in 2017, and $36.19 in 2018. (AR 156, 160.) The notice also stated "[t]he monthly sewer bill for [a] single family home will increase from $16.06 per month to $25.52 per month." (AR 154, 158.) The rate sheet showed that non-residential accounts also paid a flat rate for sewer service -- $13.42 for 2014, $14.821 for 2015, $16.26 for 2016, $17.65 for 2017, and $19.08 for $2018. (AR 156. 160.) Lastly, multi-family, commercial, industrial and governmental property owners/tenants would pay the variable charges specified in the rate sheet. (AR 155, 160.) In the case of sewer rates, Petitioner's contention that "the notice to parcel owners or utility customers did not indicate which fees would apply to his or her parcel" is false in that the rate sheet clearly indicated the fees applicable to each parcel based on the type of residence. (AR 156, 160.) The sewer rate is a flat rate as evidenced by the rate sheet included in the notice. (AR 156, 160.) Every parcel in the City that consists of a single family residence will pay the same flat rate for sewer services of $25.52 in 2014, $28.16 in 2015, $30.91 in 2016, $33.55 in 2017, and $36.19 in 2018. (AR 156, 160.) The rate sheet included in the notice differentiated between the rates for single-family residences, non-residential, multi-family, commercial, industrial and governmental properties. (AR 156, 160.)

In the case of refuse rates, the City notified all parcel owners and/or utility customers that they could expect to pay a flat residential monthly refuse charge. (AR 156, 160.) In 2014, the monthly refuse charges was $11.57 for all parcels consisting of single family residences, $9.60 for apartment houses and mobile home parks (per unit) and $5.79 for motels and hotels (per unit). (AR 156, 160.) Parcels consisting of commercial enterprises were notified they would

pay a commercial monthly refuse charge of $13.96 in 2014, $15.22 in 2015, $16.49 in 2016, $17.26 in 2017, and $18.40 in 2018. (AR 156, 160.) In addition to the flat residential or commercial monthly refuse charges, as the case may be, the rate sheet further showed that all parcel owners were notified that they could expect to pay additional charges associated with the pickup of the bins (containers) in which they deposited refuse, which ranged from $6.98 per pick up for a 90 gallon bin to $41.88 per pickup for a container that is 3 cubic yard sized bin. (AR 156, 160.)

The City's notice informed utility rate payers and property owners that: "[y]ou may only submit a protest with respect to the rates of a utility if you are a customer of that utility or are the owner of property that is served by that utility." (AR 157, 161.)

The Kern County Assessor-Recorder's office verified that there were 9,284 parcels within the City of Delano, a fact accepted and pled by Petitioner in its *Verified Petition for Writ of Mandate*. (*Petition*, ¶ 25; Exhibit 2; AR 432.) To prevent the utility rate increases, the City Clerk needed to receive 4,643 valid written protests from parcel property owners or tenants on or before the April 15, 2013 public hearing, a fact accepted and pled by Petitioner in its *Verified Petition for Writ of Mandate*. (*Petition*, ¶ 25, Exhibit 2; AR 165, 432.)

On April 15, 2013, the City Council held a public hearing regarding the proposed utility rate increases and heard from persons who opposed the rate increases. (AR 164-165.)

The City received a total of 5,514 written protests as of April 15, 2013. (AR 432.) All of the written protests the City received were submitted on identical forms. (AR 5434-6496.) Every protest form submitted contained a line for the person protesting to write his or her name. (AR 5434-6496.) Underneath the space provided for a protester to state his or her name, the form communicated that the protestor should write his or her name as it appeared on their utility bills or property tax records. (AR 5434-6496.) Every form contained a notation at the bottom reading "cc: CRPE" beneath the line for the date. (AR 5434-6496.) It appears that the Center for Race, Poverty and the Environment ("CRPE"), Petitioner's counsel, prepared all of the protest forms submitted to the City and gave them, or made them available to, persons wishing to file a written protest. Most importantly, by requesting that persons submitting the protest list their name as it appeared on the City or County's official records, Petitioner's counsel indicated an understanding that persons submitting protests needed to state their names as listed in the City's utility account records or as identified on

the County's property ownership records. Persons submitting the forms prepared by Petitioner's counsel were on notice as such, not just from the protest forms but also as a matter of law.

The City Clerk initially determined that only 4,048 of the 5,154 protests submitted were valid. (AR 432.) The City rejected 1,466 written protests based on the following grounds: (1) the person submitting the protest was not listed on the Kern County Tax Assessor data or the City's account holder list; (2) the protest submitted was for an address that was not recognized on either the County Assessor's data list or the City's account holder list; (3) the protest submitted did not list an address; (4) the protest was not signed; (5) the signature on the protest did not match the name of the person submitting the protest; (6) the signature on the protest did not match the name of the person qualified to submit a protest (i.e. the utility customer identified on the City's account holder list or the parcel owner identified on the County Tax Assessor list); and (7) the protest was a duplicate (i.e. a protest had already been accepted as valid for the same parcel pursuant to Government Code § 53755(b).). (AR 432-433.) The City did not have the resources or practical ability to determine who was married to, or a member of the household, of any ratepayer of record as of April 15, 2013 nor at any other time. (AR 432.)

On or about April 29, 2013, the City Council passed Resolution No.2013-16 to increase utility rates for water, sewer, refuse and street sweeping services after determining that the City had properly notified utility rate payers and parcel owners of the rate increases, had conducted the public hearing required under law, had heard all objections, protests, or other written communications from owners of tenants subject to the rate increases at the public hearing, and that the City did not receive written protests from a majority of the parcel owners or tenants eligible to file protests. (AR 422.) The rate increases went into effect on July 1, 2013. (AR 422.)

On May 2, 2013, Petitioner's counsel submitted a request to inspect all written protests received by the City. (AR 433.) On June 3, 2013, CRPE requested the City recount the written protests submitted to the City in opposition to the rate increases. (AR 433.)

At no expense to CRPE, the City Clerk re-reviewed all protests that were previously deemed invalid. (AR 433.) The protests that had previously been determined to be valid were not re-reviewed or re-counted. As a result of the City Clerk's re-review, 85 protests previously counted as invalid were determined to be valid. (AR 433.) Consequently, the

City revised its number of valid written protests to reflect an additional 85 protests, thus yielding the determination that 4,133 written protests were valid. (AR 433.)

On or about August 23, 2013, CRPE on behalf of the Petitioner Delano Guardians Committee filed the instant *Verified Petition for Writ of Mandate* ("*Petition*"), contending that the City violated Proposition 218 by the method and manner in which it implemented the rate increases. Petitioner claims that the City: (a) failed to notify property owners/utility rate payers that tenants of affected parcels are entitled to submit written protests (*Petition*, ¶ 64); (b) unlawfully increased the rates for street sweeping services without submitting the matter to a vote as required by Proposition 218 (*Petition*, ¶¶ 49-54); (c) failed to apprise parcel owners and tenants of the rate increases specific to their parcel (*Petition*, ¶¶ 46, 47); (d) unlawfully rejected 877 written protests submitted by tenants and/or property owners of affected parcels, resulting in the implementation of rate increases despite having received a majority opposition to the rate increases (*Petition*, ¶¶ 33, 66); and (e) is unlawfully recovering utility capital costs through fees and charges instead of through assessments, and therefore has bypassed the procedure for increasing property assessments provided for in Proposition 218. (*Petition*, ¶¶ 58, 60.)

Although Petitioner initially alleged that the City unlawfully rejected 877 protests, it abandons this claim in its *Memorandum of Point and Authorities* by failing to provide evidentiary support for it and by alleging new and different claims regarding the numbers and categories of protests it claims were unlawfully rejected. In this vein, Petitioner also abandons its claims about the sub-categories of the 877 protests it pled were unlawfully rejected. (*Petition*, ¶¶ 33-38). Again, Petitioner does not substantiate these claims in its *Memorandum of Points and Authorities*. Instead, Petitioner states different claims about the number and categories of protests it believes were unlawfully rejected. (Petitioner's Brief; Brostrom Decl.)

Petitioner now alleges in its *Memorandum of Points and Authorities* different numbers and categories of protests that the City allegedly wrongfully denied beginning with 645 unidentified protests it claims should have been accepted merely because they were submitted. (Petitioner's Brief, at p. 25.) Petitioner's counsel's declaration, however, upon which this claim is based, alleges that its counsel counted 625 such unidentified protests, not 645 unidentified protests. (Brostrom Dec., ¶ 5.)

Petitioner claims that the City unlawfully denied altogether an additional 596 protests. (Brostrom Dec., ¶¶ 6-12.) Included in this number were protests from persons who purportedly share the same last name as the parcel owners or utility rate payers of record. Proposition 218 entitles only parcel owners or tenants directly liable for paying utility bills to file protests. (Cal. Const., art. XIII D, ¶¶ 2(g), 6(a)(2.) Protests from persons who share the same last name as a utility ratepayer or parcel owner are not owners or utility ratepayers of record and do not meet the criteria under Proposition 218 for being counted as valid insofar as such persons are not the ratepayers or property owners of record. (*Ibid.*) Subtracting these 218 persons from the calculus, as the Court must, leaves 378 protests. Even if, for the sake of argument, the additional 378 protests is added to the 4,133 tally of protests the City has already accepted as valid, a majority opposition to the rate increases still would not have resulted. An additional 378 protests would have raised the number of "valid" written protests to 4,511. Given that the City needed at least 4,643 written protests to block the implementation of utility rate increases (assuming that 9,284 parcels exist), adding 378 protests to the 4,133 protests the City already accepted as valid still leaves Petitioner 132 protests short of majority opposition. (Cal. Const., art. XIII D, § 6, subd. (a)(2); AR 433.)

The City disputes Petitioner's assertions that it was required to have counted as valid all of the protests Petitioner alleges were wrongfully rejected and details the grounds for its opposition to Petitioner's claims further in the argumentative section of the instant brief.

On February 3, 2014, the City Council passed Resolution 2014-10 to rescind the increase in street sweeping service rate charges. (AR 457-58.) The City never collected fees from the increase in street sweeping service rates authorized by Resolution 2013-16. (AR 457-58.)

The facts asserted by Petitioner in support of the allegations in its *Petition* are either false, as evidenced by the administrative record (e.g. the contention that the City's notice to property owners and tenants did not include information to enable rate payers to calculate the proposed utility rate increases applicable to their parcels) or they fail to establish that the City violated Proposition 218 when it implemented the utility rate increases.

III. OVERVIEW OF PROPOSITION 218

In 1996, California voters passed Proposition 218, which added articles XIII C and XIII D to the California Constitution. The initiative was intended to close perceived loopholes in the restrictions on property taxes imposed by

Proposition 13. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838–839, 102 Cal.Rptr.2d 719, 14 P.3d 930; *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681, 86 Cal.Rptr.2d 592 (*Riverside*).) Articles XIII C and XIII D "allow 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." (*Riverside*, *supra*, at p. 682, 86 Cal.Rptr.2d 592.) 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. The second component of Proposition 218, 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.' (Cal. Const. art. XIII D, § 1.)" (*Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1378.) "Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges." (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640, 119 Cal.Rptr.2d 91 (*Roseville*).)

For new or increased property-related fees, Proposition 218 requires that notice be mailed to affected property owners, explaining the proposed fee and announcing a public hearing. (Cal. Const., art. XIII D, § 6, subd. (a)(1).) A record owner of a parcel under Proposition 218 is defined as "the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll ..." (Government Code § 53750(j).)

No formal balloting is required at the public hearing stage of the process. (*Ibid.*) Instead, "[a]t the public hearing, the agency considers all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." (Cal. Const., art. XIII D, § 6, subd. (a)(2).) If a majority protest does not occur, then the fee still may not 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" (Cal. Const., art. XIII D, § 6, subd. (c).) However, fees or charges for sewer, water, and refuse collection services are exempt from the requirement that they be submitted the electorate for approval. (Cal. Const., art. XIII D, § 6, subd. (c).)

For new or increased property assessments, article XIII D requires agencies to follow a different procedure than that established for fees and charges.[2]

IV. STANDARD OF REVIEW

This Court employs independent or *de novo* review with respect to determining whether or not the City has complied with Proposition 218 by the method and manner in which it levied fees or charges. (*Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 450.) Under the *de novo* standard, the City bears the burden of producing sufficient evidence to justify its utility rate increases. (*See, e.g. Beaumont Investors v. Beaumont-Cherry Valley Water District* (1985) 165 Cal.App.3d 227 (district bore burden to produce administrative record).) The City met its burden when it certified and lodged the Administrative Record.

The City also bears the burden of proving that it complied with Proposition 218 in any legal action challenging the validity of a fee or charge. (Cal. Const., art. XIII D § 6, subd. (b)(5).) However, the City's burden pertains only to questions of fact. (Evidence Code § 115 (defining burden of proof as "the obligation of a party to establish by evidence a requisite degree of belief *concerning a fact* in the mind of the trier of fact or the court." (*emphasis* added)).) The requirements of Proposition 218 are questions of law to be determined by this Court. As such, the parties are on equal footing with respect to arguments regarding the requirements of law.

The parties have few meaningful factual disputes given that the bulk of the facts are contained within the Administrative Record. Issues of law, however, cannot remain undecided since it is the Court's duty to declare the law.

V. THE CITY COMPLIED WITH PROPOSITION 218'S NOTICE REQUIREMENT BY NOTIFYING PARCEL OWNERS OF THE PROPOSED UTILITY RATES INCREASES APPLICABLE TO THEIR PROPERTIES, THUS PETITIONER'S FIRST CAUSE OF ACTION FAILS

Petitioner's first cause of action contends that the City failed in its obligation under Article XIII D, Section 6(a)(1) to "provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which

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[2] Agencies are required to obtain an engineer's report on the assessment and mail detailed notice to affected property owners, explaining the reason for and the method of calculating the assessment and identifying the amount chargeable to the owner's particular parcel. (Cal. Const., art. XIII D, § 4, subd. (b), (c).) The notice must provide the date, time, and place of a public hearing on the assessment, include a ballot "whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment," and conspicuously describe the procedures for tabulation of those ballots. (Cal. Const., art. XIII D, § 4, subd. (c), (d).) When tabulated at the public hearing, the ballots are weighted according to the proportional financial obligation of each affected parcel. (Cal. Const., art. XIII D, § 4(e).) If a majority of the weighted ballots oppose the assessment, it may not be imposed. (*Ibid.*)

the fee or charge is proposed for imposition [and] the amount of the fee or charge proposed to be imposed upon each." (Petition, ¶ 45, p. 8: Petitioner's Brief, at p. 10, lines 1-20.) This allegation is simply incorrect.

The notice sent by the City to property owners of record and utility customers of record included complete proposed rate tables for each of the four services subject to the notice. For water service, customers with water meters pay both a consumption rate (based on volume of water consumed) and a meter rate (based on the size of the customer's water meter). (AR 154-157.) The water rate table included in the notice included all proposed consumption rates (stated as a dollar amount per thousand gallons of water consumed), the proposed meter rates for all sizes of meters, and the proposed flat rates applicable to customers who do not have metered service. For the other services, which are charged as a flat rate to single family residential customers, the rate tables stated the proposed flat rates for single family customers, as well as the rates applicable to all other customers. (AR 154-157.)

All a customer needed to do in order to determine the rate proposed for his or her service was to look at these charts. No information was withheld from customers, nor are these charts misleading. The charts set forth the proposed rates applicable to each parcel, and therefore meet the requirements of Proposition 218.

In addition to including the charts, the City also included additional information that would be helpful to customers. It included an example of how the rate proposal would affect a typical single family home using 18 thousand gallons of water a month and it included a bar graph showing, on a year-by-year basis, the increase of rates for such a typical customer. This additional information hardly sugar-coated the extent of the proposed rate change. Indeed, a quick glance at the bar graph would show the recipient that over a five-year period the typical customer would see their monthly bill increase from less than $70 a month to more than $120 a month.

In order to assert, as Petitioner does, that the information provided by the City was insufficient, Petitioner ignores the complete rate tables included in the notice and acts as if the *only* information given to recipients was the 18 thousand gallons single family home example. There is no basis for this tunnel vision, as every recipient of the notice was provided with a complete rate table, including every rate applicable to the recipient.

Underlying Petitioner's argument seems to be an expectation that the City will somehow tell each customer the specific amount of his or her future monthly bills, rather than disclose the rates that will apply to the customer. Each month's bill is based on the amount of water consumed by the customer during the billing cycle. The City cannot know,

at the time it mails its notice, how much water will be used per month by the customer in the future. In fact, for any particular customer, the volume of water used typically fluctuates from month to month. Therefore, all that the City can do is inform customers of the rates that are proposed. The City did so in its notice by including the complete rate table, which permits each recipient to calculate not only what they will pay under current usage patterns, but also what they would pay if they changed their usage.

VI. PETITIONER'S SECOND CAUSE OF ACTION ALLEGING THAT THE CITY VIOLATED PROPOSITION 218 BY IMPOSING INCREASES FOR STREET SWEEPING SERVICES AS A FEES AND CHARGES WITHOUT SUBMITTING THE MATTER TO A VOTE BY PROPERTY OWNERS SHOULD BE DISMISSED ON GROUNDS OF MOOTNESS

Petitioner's second cause of action alleges that the City violated Proposition 218 by increasing fees for street sweeping services without submitting the matter to a vote by property owners. Although the City increased the rates for street sweeping services pursuant to Resolution No. 2013-16, it never collected any increased rates for street sweeping services and the City Council subsequently rescinded the portion of Resolution 2013-16 that regarded increasing the rates for street sweeping. (AR 455 (portion of minutes of City Council meeting on February 3, 2014 rescinding aspect of Resolution 2013-16 which had sought to increase rates for street seeping services), 457 (staff report affirming that City never collected rate increases for street sweeping services), 458 (City Council resolution rescinding portion of Resolution 2013-16 that increased the rates for street sweeping services).) The City's rescission of the rate increases for street sweeping services moots Petitioner's second cause of action.

The duty of the court is " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions or abstract propositions, or to declare principles of rules of law which cannot affect the matter in issue in the case before it.' " (*Colony Cove Properties, LLC v. City of Carson* (2010) 187 Cal.App.4th 1487, 1509, quoting *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.) A case " 'becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief.' " (*Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, quoting *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069.)

The City Council's rescission of the portion of Resolution 2013-16 that increased the rates for street sweeping services moots Petitioner's second cause of action because the Court can no longer issue a judgment of any practical effect, nor can it provide Petitioner effective relief. In *Colony Cove Properties, LLC v. City of Carson*, the court dismissed

as moot a cause of action in a writ petition that sought to invalidate a city's moratorium ordinance. The court held that the ordinance had expired prior to the hearing on the writ petition and no evidence established that the city planned to pass the ordinance again, thus petitioner's cause of action was moot. (*Colony Cove Properties, supra*, 187 Cal.App.4th at p. 1509.) A similar result of mootness was reached in *Wilson v. Los Angeles County Civil Service Commission* (1952) 112 Cal.App.2d 450. In *Wilson*, the court dismissed the plaintiff's petition to annul an eligibility list for a county clerk position with Los Angeles County on mootness grounds. The eligibility list expired before the matter reached the court and, therefore, any court decision would have been ineffectual. (*Id.* at p. 454.)

Like the ordinance in *Colony Cove* and the expired eligibility list in *Wilson*, the portion of the City's resolution increasing the rates for street sweeping services is no longer valid. It is mechanically impossible for the City to reinstate street sweeping rates under Resolution 2013-16 or to implement an increase in street sweeping rates without further involvement of the public, be it through public hearings, voting, or filing written protests. (Cal. Const., art. XIII D.) Petitioner's claim that the City is free to reinstate the portion of Resolution 2013-16 that increased street sweeping rates is simply untrue. In light of these facts, the Court would be performing a perfunctory function lacking in practical effect and of no effective relief to Petitioner were it to rule on Petitioner's second cause of action.

Although Petitioner cites to cases announcing that a claim may continue to present a live controversy even after a defendant has ceased the conduct that prompted litigation, the cases do not convey that the Court should resolve the type of moot and stale claims at issue here. It is true that a court may not dismiss a claim solely on the basis that the defendant has voluntarily ceased the challenged conduct. Nonetheless, the issue is whether the challenged conduct is likely to recur if the court dismisses a claim as moot. If the challenged conduct is not likely to recur, then a court will dismiss the claim as moot. Unlike the cases upon which Petitioner relies, here the challenged conduct is not likely to recur.

In *Marin County Board of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920 ("*Palsson*"), one of the cases cited by Petitioner, the court rejected the defendant's claim of mootness on the ground that the challenged practice at issue could easily be resumed. (*Id.* at p. 929.) *Palsson* involved a challenge to the bylaws on the membership to a board of realtors and to the denial of the plaintiff access to the board's multiple listing service to sell real estate. When the plaintiff contested the board's decisions, the board initiated a declaratory relief action seeking to validate its exclusion of the

plaintiff from membership. (*Id.* at p. 925.) The defendant filed a cross-complaint challenging the legality of the bylaws and of the denial of access to the multiple listing service. After the trial court ruled in favor of the board on all issues but before the matter was appealed to the California Supreme Court, the board voluntarily changed its bylaws to eliminate the condition that prevented the plaintiff from being a member of the board. The board then argued that the case was moot given the change in its bylaws. The California Supreme Court rejected the board's claim of mootness, holding that its voluntary change in the bylaws still left it free to return to its old practice. (*Id.* at p. 929.)

The *Palsson* court was persuaded to conclude that the plaintiff's counterclaims were not moot based on several factors that are absent here. First, the Court concluded that nothing prevented the board from amending its bylaws again so as to exclude the counter-claimant from being a member. In this regard, the Court took noted the board's aggressiveness in initiating litigation to vindicate its position that it acted lawfully, which aggressiveness it maintained past the trial stage at which it prevailed. This factor is absent here. The City never collected any monies for increased street sweeping rates and it rescinded the portion of Resolution 2013-16 related to increasing rates for street sweeping services. Also of note is that, as a private organization, the board in *Palsson* was free to change its bylaws without restraint whereas the City must actually follow the process for enacting a new resolution and increasing street sweeping rates set forth in Proposition 218 before raising street sweeping rates. (Cal. Const. art. XIII D.)

Second, the matter at issue in *Palsson* raised novel questions of law in the antitrust arena, as evidenced by the amicus briefs submitted by various private and public entities and similar cases were pending in various trial courts in the State at the time. Conversely, novel questions of law are not at issue here.

Third, the plaintiff's claim for damages as a result of the board's actions remained at issue regardless of the board's change in bylaws. No such issue exists on the facts here because the City never collected any monies from the rate increases for street sweeping services.

Fourth, the amendment of the board's bylaws still left unaddressed the issue of whether the board was entitled to deny the plaintiff access to its multiple listing service. (*Id.* at pp. 928-930.) Here, however, the City's rescission of rates for street sweeping services leaves no other issue for resolution under Petitioner's second cause of action.

Petitioner's citation to *Walling v. Helmerich & Payne, Inc.* (1944) 323 U.S. 37 is equally unavailing. Petitioner claims that *Walling* "recognize[d] that the likelihood of recurrence of a challenged activity is more substantial when the

cessation is not based upon a recognition of the initial illegality of that conduct." (Petitioner's Brief, at p. 15, lines 20-23.) However, *Walling* makes no such pronouncement. The *Walling* court found that the case at bar was not moot because, although the defendant had discontinued the use of the contracts being challenged for labor law violations, it had consistently urged that its actions were valid up until the point of appeal and, therefore, would be free to resume using such contracts in the future. The City, on the other hand, has not consistently urged that its increase of street sweeping rates pursuant to Resolution 2013-16 was valid. To the contrary, it rescinded the increase in street sweeping rates tied to Resolution 2013-16 and it never collected the increased rates. (AR 455, 457-58.)

As with *Walling*, Petitioner cites to *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, for a proposition that is not stated in the case. The court in *Eye Dog Foundation* did not declare that a claim should be dismissed as moot only when the occurrence of subsequent events renders it impossible for the court to grant any effective relief. Furthermore, that assertion is not deducible from *Eye Dog Foundation*. *Eye Dog Foundation* addressed whether or not a licensing statute was constitutional on its face and as applied to the plaintiff's operation. The statute remained at issue throughout the litigation, but the circumstance that caused the plaintiff to be denied a business license, unlawfully in the plaintiff's estimation, changed. The court nevertheless proceeded to resolve the matter because both parties agreed that the situation causing the initiation of litigation could easily recur – the defendant state agency was still enforcing the challenged statute and the plaintiff might easily fall short of the business licensing requirement in the future. (*Id.* at p. 542.) On the contrary, here, the City's rescission of rate increases for street sweeping services leaves nothing to litigate of any practical consequence. The City can no longer rely on Resolution 2013-16, or the process that led up to the passing of this resolution, to increase street sweeping rates.

VII. THE CITY DID NOT VIOLATE PROPOSITION 218 BY FUNDING CAPITAL IMPROVEMENTS THROUGH A UTILITY RATE INCREASE

Petitioner's third cause of action alleges that the City is unlawfully funding capital improvement projects through utility rate increases for water, sewer and refuse collection services instead of through an assessment. (*Petition*, ¶ 58.) Petitioner's *Memorandum of Points and Authorities* advances two arguments in support of this claim – (1) that the City is constitutionally required to funds the costs of capital improvements through an assessment and (2) that, even if the City were permitted to fund the cost of its sewer expansion project through fees and charges, its fees exceed the costs of providing services to existing utility rate payers and improperly require existing rate payers to fund the expansion of the

City's wastewater treatment plant. (Petitioner's Opening Brief, at pp. 16-20.) Petitioner's contentions, however, are unsupported by the law.

A. Proposition 218 Does Not Require the City to Collect Revenue for Capital Improvements Through a Property Assessment

It is true that the City is funding capital improvements (e.g. a wastewater treatment plant expansion and an arsenic mitigation project to provide safe drinking water to parcels within the City) through fees and charges. (AR 154.) However, Petitioner is incorrect in its assertion that the cost of capital improvements can be funded only through a real property assessment (governed by Article XIII D § 4 of the California Constitution), and not through a property-related fee or charge (governed by Article XIII D § 6 of the California Constitution). The City has the option of recovering such costs through a property-related fee even if it can recover them through property assessments. Like many municipal service providers, the City chose to include the costs of capital improvements in its user charges, which are a type of property-related fee or charge.

A property-related fee or charge under Proposition 218 is 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*." (Cal. Const., art. XIII D, § 2, subd. (e).) An assessment is defined as "any levy or charge by an agency upon real property that is based on the special benefit conferred upon the real property." (Cal. Const., art. XIII D, § 2, subd. (b).) The City's water charge is not an assessment because it is not "based on the special benefit conferred upon the real property." Under Proposition 218, "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." (Cal. Const., art. XIII D, § 2, subd. (i).) Furthermore, "general enhancement of property value does not constitute 'special benefit.'" (*Id.*) The City's water charge was not calculated based on "special benefit." Therefore, it is not an assessment under Proposition 218 and, most importantly, is not excluded from the category of "any levy other than an ad valorem tax, a special tax, or an assessment."

It is entirely appropriate under California law to fund the costs of a water, sewer or refuse collection enterprise, including the capital costs of that enterprise, with a property-related fee or charge. This principle is unquestioned under Proposition 218 case law. Indeed, when considering the provisions of Proposition 218 applicable to property-related fees, the court in *Howard Jarvis Taxpayers Association v. City of Roseville* stated:

> The theme of these sections is that fee or charge revenues may not exceed what it costs to provide fee or charge services. Of course, what it costs to provide such services includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, *and capital expenditures*. 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. (emphasis added) (*Howard Jarvis Taxpayers Association v. City of Roseville* (2002) 97 Cal.App.4th 637, 647-648.)

In, *Paland v. Brooktrails Twp. Cmty. Servs. Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, the court affirmed that public agencies may fund maintenance, operation and capital improvements through fees and charges *instead of through assessments*. (*Id.* at pp. 1369-70.) The *Paland* court even commented that funding capital improvements and maintenance and operation expenses through fees and charges presented less of a danger of government abuse than funding them through property assessments. (*Paland, supra*, 179 Cal. App. 4th at pp. 1369-70.) After exploring the distinction between fees and charges, on the one hand, and assessments, on the other, *Paland* held that Article XIII D recognized the need of public agencies to determine rates for water, sewer and refuse services and to allow public agencies to recoup operation, maintenance and capital expenditure costs without requiring the approval of a weighted vote by property owners that would otherwise be needed for property assessments. (*Ibid*; *see also Rincon Del Diablo Municipal Water District v. San Diego Water Authority* (2004) 121 Cal.App.4th 813, 819, ("[h]istorically, water rates are usually used to recover *all costs incurred with providing water*, including the costs of building, maintaining and improving the water system" (*Id.* at p. 819 (emphasis added); *Richmond v. Shasta Community Services Dist.*(2004) 32 Cal.4th 409, 427 (affirming that a fee for water service exists as long as it is imposed as an incident of property ownership and use); *Bighorn-Desert Water View Agency v. Virjil* (2006) 39 Cal.4th 205, 215.)

In short, Proposition 218 not only authorizes the City to fund the recovery of capital costs through fees and charges as part of the costs of providing service, it condones the City's choice to rely on fees and charges instead to recover such costs instead of through the more disfavored mechanism of property assessments. (*Ibid*; *Silicon Valley Taxpayers Assn. v. Santa Clara Open Space Authority* (2008) 44 Cal. App. 4th 431, 448 (California Supreme Court commented that Proposition 218 was designed to constrain the ability of local governments to impose assessments and to place extensive requirements on their ability to charge assessments).)

Petitioner attempts to vault well-established law authorizing the City to recover capital costs through fees and charges by ignoring *Richmond*, *Bighorn-Desert View Water Agency* and *Howard Jarvis Taxpayers Association v. City of Roseville* entirely, claiming that "courts have historically rejected attempts to fund capital improvements to water and sewer systems with user fees rather than special assessments." (Petitioner's Brief, at p. 17.) At best, this statement exhibits either wishful thinking or blind ignorance of the law as it is directly refuted by *Bighorn-Desert View Water Agency*, *Richmond* and *Howard Jarvis Taxpayers Association v. City of Roseville*, which collectively establish that all the required costs of providing water, sewer and refuse services, including capital expenditures, may be recovered through fees and charges pursuant to Article XIII D. (*Richmond, supra*, 32 Cal.4th at p. 427; *Virjil, supra*, 39 Cal.4th at p. 215; *Howard Jarvis Taxpayers Association v. City of Roseville, supra*, 97 Cal.App.4th at pp. 647-48).) It is plainly untrue that anytime the recovery of capital costs for public improvements is involved, funding must proceed through property assessments and not through fees and charges. Such a statement is nowhere to be found on the face of Article XIII D and the above-referenced cases refute such a claim. The cases upon which Petitioner relies in support of its claim that the City is forbidden from funding capital costs through fees and charges make no such assertion.

San Marcos Water District v. San Marcos School District (1986) 42 Cal.3d 154 ("*San Marcos*"), *County of Riverside v. Idyllwild County Water District* (1978) 84 Cal.App.3d 655 (*Idyllwild*"), and *Regents of the University of California v. City of Los Angeles* (1979) 100 Cal.App.3d 547 ("*Regents*"), all cases of the same ilk, do not apply here. These cases all address the matter of the conditions under which public entities may be exempted from utility rates imposed by other public agencies responsible for providing utility services. The cases all predate Proposition 218 and, as such, never confronted the issue of whether, and the extent to which, utility rates may be imposed through fees or charges, on the one hand, and assessments, on the other, within the Proposition 218 context.

Although *San Marcos*, *Idyllwild* and *Regents* forbade public agencies which provide utility services from charging other public agencies fees associated with the recovery of capital costs on the ground that such fees would were assessments, the California Supreme Court subsequently clarified in *Richmond* that the *San Marcos* definition of an assessment applied only within *the context of public agencies seeking to recover capital costs* from other public agencies. *(Richmond, supra*, 32 Cal.4th at p. 422.) The Court stated: "[i]n deciding what constituted an assessment in *San Marcos*, we sought to determine and effectuate the constitutional purpose for exempting public entities from

property taxes, a purpose that plays no role in interpreting the provisions of article XIII D that are at issue here." (*Ibid.*) Since public entity tax exemption issues are not in question here, *San Marcos*, *Idyllwild*, and *Regents* are irrelevant.

Federal Construction Company v. Ensign (1922) 59 Cal. App. 200, *Mills v. City of Elsinore* (1928) 93 Cal. App. 753, *Kane v. Wedell* (1921) 54 Cal .App. 516, *Galbioso v. Orosi Public Utility District* (2010) 182 Cal.App.4th 652 and *Keller v. Chowchilla Water District* (2000) 80 Cal.App.4th 1006 are not instructive either. None of these cases state that capital costs must be recovered through property assessments or that public agencies are barred from recovering capital costs through fees and charges.

Separate from the fact that *Ensign*, *Mills* and *Kane* all predate Proposition 218 do not declare that public agencies are forbidden from recovering capital costs through fees or charges, these cases all predate Proposition 218 by some 68 to 75 years. Therefore, they are insignificant since they did not interpret the provisions of Proposition 218. (*Silicon Valley Taxpayers Assn., supra*, 44 Cal.4th at pp. 451-52 (stating that Ensign and pre-Proposition 218 cases are not instructive on issue of whether or not special benefits are conferred on properties as a result of capital improvements).)

Galbioso merely addressed whether the pre-existing assessment at issue in the case were exempt from the new substantive requirements of Proposition 218 that became effective on January 1, 1997. *Keller* is irrelevant because it dealt with standby charges, which are automatically classified as assessments under Article XIII D, § 6(b)(4). The parties in *Keller* agreed that standby charges were at issue and merely sought to clarify whether or not the charges were exempted from the assessment procedures of Proposition 218 given that they were in place before the effective date of Proposition 218. These concerns are not at issue here.

Lastly, Petitioner's contention that the City is making short-term ratepayers subsidize long-term improvements to local properties in violation of Proposition 218 lacks merit. (Petitioner's Brief, at p. 19.) As an initial matter, even if Petitioner is correct that the City is making short-term ratepayers "subsidize long term improvements," this would not mean that the City is required to rely on assessments instead of fees. *Paland* establishes that as long as properties are connected to water, sewer and refuse services and it is only the unilateral act of the property owner (either in requesting termination of the service or failing to pay for the service) that causes these services not to be used, the service is

'immediately available" and a charge for the service is a fee rather than an assessment. (*Paland, supra,* 179 Cal.App.4th at p. 1370.)

B. The City Is Not Imposing Fees that Exceed the Cost of Providing Services, Nor is It Charging Each Parcel More Than the Proportional Cost of Service Attributable to Each Parcel.

Article XIII D, § 6 of the California Constitution mandates that "revenues derived from the fee or charge shall not exceed the funds required to provide the property related service." (Cal. Const., art. XIII D, § 6, subd. (b)(1).) It further specifies 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."

Petitioner does not allege that the City uses its sewer charges to fund costs that are not associated with providing sewer service, nor does Petitioner argue that it is imposing sewer charges to customers who do not receive sewer service. Instead, Petitioner claims that certain capital costs associated with the operation of the system cannot be recovered from sewer customers because they add to the capacity of the system.

Petitioner's claim is not supported by the law. The City does not dispute that, with the expansion of its wastewater treatment plant, the City's sewer system can accommodate future development. But the expansion did not create a separate sewer system for such development. All users of the sewer system use the entire, indivisible system, and the expansion was necessary to accommodate State mandated sewer treatment requirements with respect to sewage generated from all parcels in the City. (AR 42.)

The City also does not dispute that the costs of the expansion were factored into its sewer rates. These costs are now part of the cost of operating the sewer system, and are part of the cost of serving each customer of the system. Proposition 218 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." However, Proposition 218 does not require (or perhaps even permit) that customers who make equal demand upon the system be charged different amounts based on when they started using the system.

"Apportionment is not a determination that lends itself to precise calculation." (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App. 4th 586, 601 (citing *White v. County of San Diego* (1980) 26 Cal.3d 897, 903).) The California Supreme Court has held that "[t]he 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 Board* (2011) 51 Cal.4th 421, 438; *Griffith, supra*, 220 Cal.App. 4th at p. 601 (affirming that measurement of proportionality on a collective basis applies in the Proposition 218 context).)

The City can never truly and perfectly apportion the costs of providing utility services to its residents. At no point in time will any singular customer have lived through every incarnation of the City's construction, maintenance, or expansion of public improvements. There will always be parcels that have benefitted from public improvements for which property owners of a bygone era paid. The City's existing customers undoubtedly did not fully fund the initial construction of the City's public improvements some time near 1869 when the City was founded or near 1915, when it was incorporated. Petitioner fails to establish that Proposition 218 prohibits the City from apportioning all required costs of its sewer infrastructure among all residents equally (subject only to the applicable criteria in the rate sheet included in its notice to residents of the rate increases [AR 154-157].) As the court in *Paland* noted, it "is impossible for an agency to forecast the costs of operating and maintaining a system into the indefinite future for the purpose of charging all users their proportionate share of those costs at the time they first connect to the system." (*Paland, supra*, 179 Cal.App. 4th at 1371.)

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," the City's decision to fund capital improvements associated with providing sewer service to all customers, including the costs of the wastewater treatment plant expansion, was a reasonable way to apportion the cost of service. (*Ibid.*)

Petitioner misleadingly claims that the City estimated 74 percent of the wastewater treatment plant's new capacity will benefit new development and that the City has acknowledged that the sewer fund "should pay only 26% of the loan debt service." (Petitioner's Brief, at p. 20.) Petitioner then leaps to the unsubstantiated conclusion that "74 percent of the debt obligation associated with the wastewater treatment expansion is ineligible for imposition of fees as required by Proposition 218. (Petitioner's Brief, at p. 20.) Petitioner misconstrues the Administrative Record.

The City's Public Works Director stated in a staff report that "74% of the plant expansion cost is eligible for sewer impact fees (new development), and as long as the city experiences growth the sewer funds should only pay 26% of the loan debt service." (AR 42.) The statement clearly intended to convey to the City Council possible means of

funding the wastewater treatment expansion. That 74 percent of the plant expansion might have been eligible for sewer impact fees does not establish that the expansion benefited only 26 percent of existing residents. Although the Public Works Director expressed that the sewer fund "should pay only 26% of the loan debt service," the statement was grounded on the stated possibility that impact fees *might* fund 74 percent of the costs of the plant expansion. (AR 42.) The Public Works Director never stated that existing residents are required to pay only 26 percent of the costs of the wastewater treatment plant expansion as a matter of law. Certainly, all City residents benefit from the enhanced wastewater discharge capabilities that have been brought about by the plant expansion as a result of State mandates. (AR 42.) The fact that the expansion also "enabled the City to accept new developments" is of no consequence. Expressed differently, all residents are receiving "tangible service" from the expansion, contrary to Petitioner's claim. The City is entitled to apportion the costs of the wastewater treatment plant expansion as part of the costs of providing sewer service. The "revenues derived from [the City's sewer] fee or charge are required to provide the service and [are being] used only for the service." (*Howard Jarvis Taxpayers Association v. City of Roseville, supra*, 32 Cal.4th at 647-648.)

In sum, Petitioner fails to establish that the City's chosen method of apportioning the capital costs for the provision of sewer services violates Proposition 218.

VIII. THE CITY'S REJECTION OF PROTESTS DID NOT PREVENT THE FORMATION OF A MAJORITY OPPOSITION TO BLOCK UTILITY RATE INCREASES

Dissatisfied with the fact that a majority opposition to the City's planned utility rate increases did not materialize even after a second counting of the protests at the urging of Petitioner's counsel, Petitioner invites the Court to review some 596 rejected protests to determine whether the City denied the formation of a majority opposition to the rate increases. Although Petitioner alludes to 645 or 625 additional protests that were allegedly unlawfully rejected, Petitioner fails to identify them, thankfully relieving the Court and the City of any burden to review these additional phantom protests. The City does not claim that its protest counting process was error free but whatever errors the City committed were minimal and do not merit undoing the City's implementation of rate increases for water, sewer, and refuse services because whatever protests were improperly rejected would not have made a difference in helping Petitioner achieve majority opposition to the rate increases. The City's implementation of water, sewer and refuse rate increases should be left intact; the City did not violate Proposition 218.

A. 9,284 Parcels Exist Within the City of Delano, Thus the City Properly Concluded that 4,643 Protests Were Required to Block the Proposed Utility Rate Increases.

The Kern County Assessor lists 9,284 parcels within the City, a fact accepted and pled by Petitioner in its verified *Petition*. (*Petition*, ¶ 25; Exhibit 2; AR 432.) To prevent the utility rate increases, the City Clerk needed to receive 4,643 valid written protests from parcel property owners or tenants on or before the April 15, 2013 public hearing, a fact accepted and pled by Petitioner in its verified *Petition*. (*Petition*, ¶ 25, Exhibit 2; AR 165, 432; Cal. Const. art. XIII D, § 6, subd. (a)(2).) Despite having accepted that there are 9,284 parcels with the City and that the City needed to receive 4,643 protests to block the then planned utility rate increases, Petitioner now suddenly claims that the City inflated the number of parcels within the City to set a high bar for a majority opposition to its proposed rate increases. (Petitioner's Brief, at p. 21.) The Court dismiss Petitioner's about turn that is directly contradicted by its own verified pleadings and in light of Petitioner's failure to petition the Court for an amendment to its Petition. The City's burden to establish the existence of 9,284 parcels and, consequently, the 4,643 protests needed to establish a majority is satisfied by Petitioner's pleadings.

Be that as it may, the City has produced a list of 9,284 separate parcels as part of the administrative record. (AR 627-787; *see also* Kraft Dec., ¶ 3; Rios Dec., ¶ 4, Exh. B.) The irrefutable existence of 9,284 parcels within the City, as accepted by Petitioner, means that the City did not err when it stated that only valid protests with respect to 4,643 valid protests would be legally sufficient to block the elected City Council from choosing to adopt the utility rate increases. (Cal. Const., art. XIII D, § 6, subd. (a)(2).)

Even if the City's utility accounts is used exclusively to determine the number of protests needed to block the rate increases, the City's account holder list contains 9,068 accounts, meaning that a majority opposition would consist of 4,535 protests. (AR 459-626.) However, since only 4,133 protests were recognized as valid, Petitioner would still be 402 protests short of a majority. Crediting Petitioner an additional 27 protests from the protests it has identified as being unlawfully rejected, which is most Petitioner could possibly be indulged, would leave Petitioner 375 protests short of a majority.

Petitioner's counsel engages in speculation and unfounded math to attempt discrediting the number of parcels and utility accounts in and with the City. The number of established utility accounts is 9,068. (AR 459-626.) Petitioner's counsel is not entitled to dismiss the number of utility accounts in the City merely because she cannot locate an address

for them. Likewise, Petitioner's counsel cannot disregard the fact that the City contains 9,284 parcels (AR 627-787) merely because she cannot locate addresses for some of the parcels. Even if the Court were to indulge Petitioner's counsel's contention that there are only 8,704 or 8,355 distinct parcels in the City (Petitioner's Brief, at p. 22), depending on whether the City's account holder list or the County Assessor list is relied upon, Petitioner would fail to establish a majority opposition to the rate increases. The total of 8,704 parcels would yield a majority opposition at 4,353 protests and a total of 8,355 parcels would present a majority opposition at 4,179 protests. The 4,133 protests the City recognized as valid falls short of both of these numbers. An additional 27 protests makes no difference.

B. Petitioner Fails to Identify the 645 or 625 Protests It Alleges Were Submitted by Persons Who Purportedly Affirmed, by Allegedly Signing the Protests, that They Reside at the Addresses for Which the Protests Were Allegedly Submitted.

Petitioner opens its assault on the City's protest counting methodology by claiming that 645 or 625 protests (depending on whether the Court relies on the declaration of Petitioner's counsel or on Petitioner's *Memorandum of Points and Authorities*) were unlawfully rejected from persons who purportedly affirmed, by signing the protests, that they live at the addresses for which they submitted the protests. But Petitioner's counsel fails to identify the 625 or 645 protests at issue, asking the Court to rely instead on the word of its counsel that this number and category of protests exists. (Brostrom Dec., ¶ 5; Petitioner's Opening Brief, at p. 24, lines 15-16.) Petitioner's failure to identify the 625 or 645 protests at issue relieves the City of any further obligation to refute with Petitioner's claims regarding these alleged protests. Even so, receiving protests from persons who claim to live at the addresses for which the protests are submitted is not a sufficient criteria for considering them valid under Proposition 218. Only property owners of record (as established on the tax assessment roll) or tenants directly liable for paying bills are entitled to file protests. (Cal. Const., art. XIII D, § 2, subd. (g); § 6, subd. (a)(2); Government Code § 53750(j).)

C. Petitioner Cannot Establish That a Recounting of all the Rejected Protests It Identifies Would Have Yielded a Majority Opposition to the City's Utility Rate Increases.

Disregarding the 625 or 645 alleged and unidentified protests referenced above, Petitioner identifies some 596 written protests it claims were improperly rejected. (Brostrom Dec., ¶¶ 6-12; Exhibits 2-8 attached thereto.) The City does not contend that its protest counting was error free. But more than an overwhelming majority of these protests were rightfully rejected; no more than 27 protests should be credited to Petitioner.

Of the 596 protests Petitioner puts in contention, 218 of them can be readily dismissed without review. The remaining 378 protests would not cause the formation of a majority opposition to the rate increases when added to the 4,133 protests the City has already accepted as valid. Petitioner would fall short of a majority whether the 9,088 utility accounts listed in the City's account holder list is used as a baseline or whether the County Tax Assessor list is used.

The 218 protests that the Court can readily dismiss are identified in Exhibit 8 of Petitioner's counsel's declaration. Petitioner submits that these protests should have been accepted because the persons submitting them share the same last names as the property owners or utility ratepayers of record. However, because Proposition 218 entitles only parcel owners of record or tenants directly liable for paying utility bills to file protests, a protest from someone who merely shares the same last name as a utility ratepayer or parcel owner of record is not required to be counted. (Cal. Const., art. XIII D, § 2 subd. (g), § 6, subd. (a)(2).) Subtracting these 218 persons from the calculus, as the Court must, leaves 378 protests. Assuming that the required majority needed to block the rate increases is 4,643 protests, based on the existence of 9,284 parcels confirmed by the County Assessor, adding 378 protests to the 4,133 protests the City already accepted would still leave Petitioner with only 4511 protests – 132 protests shy of a majority (4,643 protests minus 4,511). (Cal. Const., art. XIII D, § 6, subd. (a)(2); AR 433.) Using the 9,068 utility accounts established with the City as a baseline, a majority opposition to the protests would be formed by 4,535 protests. Petitioner would still be short 24 protests (4,535 protests minus 4,511 protests).

D. Petitioner's Claims Regarding the Numbers and Categories of Protests the City Allegedly rejected Unlawfully Lack Merit.

Each of Petitioner's remaining claims as to the numbers and categories of protests the City allegedly denied unlawfully cannot be established.

Petitioner's contention that the City rejected a total of 209 protests (88 alleged protests not included in County Assessor list plus 33 alleged protests not included in City's account holder list plus 88 protests not included on either list) because the addresses stated on the protest forms could not be located lacks merit. (Petitioner's Brief, at pp. 26-27; Brostrom Dec., ¶ 9, Exh. 5.) The City properly rejected 120 of these protests because the names stated on the protest forms did not match the names listed in the City's account holder list or in the County Assessor's list; they were not rejected for stating insufficient addresses. (See first three pages of Exhibit 5 attached to Brostrom Dec [all identifications of administrative record minus AR 5586].) The City is not required to accept a protest merely because of an address

match without even minimal proof that the person submitting the protests is a utility rate payer or a property owner. Subtracting the 120 properly rejected protests from the 375 protests that were already reduced from Petitioner's initial total of 596 protests leaves only 255 protests at play. Crediting Petitioner with 255 protests would leave Petitioner with only 4,390 accepted protests, further distancing Petitioner from the majority needed to block the rate increases (253 protests short using the County Assessor's list and 145 protests short using the City's account holder list). (Cal. Const., art. XIII D, § 6, subd. (a)(2).)

The remaining 89 protests the City rejected for not listing addresses recognized by either the City or County's records were properly denied. (AR 5586; see pages 4-5 of Exhibit 5 attached to Brostrom Dec.) The property tax assessment roll is the source for identifying parcels that exist in the City, which the County Assessor determines. (Government Code § 53750(j).) The City's utility accounts establish the existence of properties that receive utility service, which accounts the City used to derive its account holder list. Certainly, the fact that Government Code § 53755(a)(1) authorizes the City to send notice of rate increases to its utility rate customers using its utility bills affirms the authority of the City to use utility account information to determine the validity of protests. The City is entitled to assume that an address that is not recognized by either the City or County does not exist. Petitioner fails to identify any evidence that the parcels exist at the addresses for which the protests were submitted.

Petitioner's claim that the City unlawfully rejected 108 protests even though "they met all the City's criteria" is baseless. (Petitioner's Brief, at p. 25.) These protests include Petitioner's misleading claim that the City overlooked 42 protests from persons whose names appear verbatim in the City's account holder list or on the County Assessor's list. (*Ibid.*) Persons whose names did not appear on either list submitted 9 out of the 42 protests. (AR 5748, 6045, 6102, 6142, 6165, 6175, 6179, 6188, 6392.) 6 out of the 42 protests have already been counted as valid because different persons whose names appeared on the City's account holder list or on the County Assessor list submitted protests for the same address. (AR 6083 [valid protest under AR 4494], 6090 [valid protest under AR 4493], 6097 [valid protest under AR 4500], 6391 [valid protest under AR 1609], 6491 [valid protest under AR 4519], 6493 [valid protest under AR 4736].) The City initially rejected the remaining 27 protests on the ground that the addresses specified in the protests did not match any address recognized by the City or County. But, the City now concedes that all of these protests may be credited towards the total number of valid protests.

Petitioner further identifies, as part of the 108 protests it contends met all the City's criteria, 17 protests purportedly submitted from persons who signed their names in "substantially the same manner as they appeared in the City's records" fails. (Petitioner's Brief, at p. 25.) The City's criteria was not that the names on the protests "substantially" match the names in the City's account holder list or on the County Assessor list for the same addresses; it was that the names match. (AR 432-433.) The protest forms requested persons submitting the protests to state their name as it existed in the City's utility account records or in the County's property ownership records, yet this was not done. (AR 5434-6496.) Accordingly, the City properly rejected the protests.

The contention that the City improperly rejected 49 of the 108 protests that allegedly met all of the City's criteria for using a "maiden name, married, middle, or second last name not currently used by the person submitting the protest" is speculative. (Petitioner's Opening Brief, at p. 25.) There is no evidence that the persons who submitted these protests were using their maiden, married, middle, or second last names, or that the City knew or had reason to know, they were using their unofficial names. (AR 432, 459-787; Kraft Dec., ¶ 3; Rios Dec., ¶ 4, Exh. B attached thereto; Brostrom Dec., ¶ 8, Exh. 4 attached thereto.) Petitioner claims that the City never notified property owners or ratepayers that they needed to state their names as it appeared in the City's records and that the City cannot prove that it provided members of the public access to its records to enable them to properly identify their names on their protests. Frankly, the claim that a property owner would not know the name under which he or she registered his or her property or under which he or she pays his or her utility bills is thin and unsupported by the record. Furthermore, persons submitting the protests submitted forms that requested them to state their names as it appeared in City records. (AR 4534-6396.) The City did not have the resources or practical ability to determine who was married to, or a member of the household, of any ratepayer of record as of April 15, 2013 nor at any other time. (AR 432.) Because none of the protests identified the utility ratepayer or property owner of record stated in the City or County's records, the City properly rejected them.

As for Petitioner's claim that the City improperly rejected 49 protests submitted for parcels owned by businesses or entities, including trusts (Petitioner's Brief, at pp. 28-29; Brostrom Dec., ¶ 10, Exh. 6 attached thereto), the City properly rejected them because the City's records did not establish that the persons who filed the protests were entitled to them for the businesses or entities at issue. (AR 459-787; Kraft Dec., ¶ 3; Rios Dec., ¶ 4, Exh. B.)

Lastly, the contention that the City improperly rejected 12 protests submitted on behalf of deceased property owners should also be dismissed. (Petitioner's Brief, at pp. 28-29.; Brostrom Dec.¶ 11, Exh. 7 attached thereto.) The City and County's records did not reflect a property ownership transfer or a transfer of the utility account associated with the property to the person who submitted the protest. (AR 459-787; Kraft Dec., ¶ 3; Rios Dec., ¶ 4, Exh. B.) The City is not required to assume that a transfer of ownership or account occurred merely because a protest notes that the owner or account holder died. Furthermore, Petitioner fails to establish that the owners or utility account holders for any of these 12 properties died or that the persons who purportedly submitted protests on their behalf were entitled to file protests for them or that they were the new owners or utility account holders for the properties at issue.

IX. CONCLUSION

The instant Petition should be denied on the ground that the City has met its burden of refuting Petitioner's allegations of noncompliance with Proposition 218. The City properly notified customers and property owners of its utility rate increases, lawfully seeks to recover capital costs through fees and charges as part of the costs of providing water, sewer and refuse services, and complied with its obligations under Proposition 218 in the method and manner of its counting of protests to the rate increases. Insofar as the City committed any errors in the process of counting protests, such errors were minimal and do not warrant overturning the rate increases.

Dated: December 31, 2014

GARCIA HERNANDEZ SAWHNEY
& BERMUDEZ, LLP

By: _____
CHAKA C. OKADIGBO
Attorneys for CITY OF DELANO

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is Garcia, Hernández, Sawhney & Bermudez, LLP, 801 N. Brand Blvd., Suite 620, Glendale, California 91203.

On **December 31, 2014,** I served the following documents as follows:

CITY OF DELANO'S MEMORANDUM OF POINTS AND AUTHORIES IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF MANDATE

Ingrid Brostrom, Esq.
Brent Newell, Esq.
CENTER ON RACE, POVERTY & THE ENVIRONMENT
1999 Harrison Street, Suite 650
Oakland, CA 94612
Tel: (415) 346-4179
Fax: (415) 346-8723

( ) **BY MAIL**: I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Los Angeles, California.

( ) **BY FACSIMILE**: Before 5:00 p.m. on said date, I caused said document(s) to be transmitted by facsimile. The telephone number of the sending facsimile machine was 213-347-0216. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.

(X) **BY OVERNIGHT DELIVERY**: I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) being served.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed **December 31, 2014**, at Glendale, California.

SHYLA MARLIN