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11 GLENDALE COALITION FOR BETTER GOVERNMENT, INC.

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF LOS ANGELES

14 GLENDALE COALITION FOR BETTER)
15 GOVERNMENT, INC., a California non-)
16 profit public interest corporation)

17 Petitioner and Plaintiff,)

18 v.)

19 CITY OF GLENDALE, a California public)
20 agency; and DOES 1 through 25, inclusive,)

21 Respondents and Defendants.)
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Case No.: BS153253

Hon. James C. Chalfant

**PETITIONER GLENDALE COALITION
FOR BETTER GOVERNMENT, INC.'S
OPENING BRIEF ON PETITION FOR
WRIT OF MANDATE**

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(2006) 39 Cal.4th 205 4

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(2015) 235 Cal.App.4th 1493 1, 5, 6, 7, 11, 14

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(2011) 198 Cal.App.4th 926 4, 5, 18

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(1963) 215 Cal.App.2d 472..... 21

Green v. Obledo,
(1981) 29 Cal.3d 126 21

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(2002) 97 Cal.App.4th 637 4

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(2002) 98 Cal.App.4th 1351 7

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(1974) 41 Cal.App.3d 397..... 20

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(1976) 17 Cal.3d 859 20, 21

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(2008) 168 Cal.App.4th 460 21

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1	(2011) 52 Cal.4th 155	21
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3	<i>Shapell Industries, Inc. v. Governing Board,</i> (1991) 1 Cal.App.4th 218	20
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5	<i>Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Cty. Open Space Auth.,</i> (2008) 44 Cal.4th 441.	2, 6, 7
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7	<i>Walker v. City of San Clemente,</i> (2015) 239 Cal.App.4th 1350	20
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9	<i>Windigo Mills v. Unemployment Ins. Appeals Bd.,</i> (1979) 92 Cal.App.3d 586.....	21
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INTRODUCTION

This lawsuit challenges water rates adopted by the City of Glendale (“City”) on August 5, 2014 by Resolution 14-130 (“Resolution”). The rates are not proportionate to costs and thus, violate constitutional restrictions put in place by Proposition 218. (Cal. Const., art. XIII D, § 6, subd. (b)(3).) Specifically, the rate structure arbitrarily imposes different rates on different customer categories and on customers within categories. The City defends the rate disparities based strictly on “peaking” factors, which allegedly account for the additional cost of meeting peak water demands. This is a ruse. The City and its rate consultant ignored peaking factors when the City (as a rate-paying customer) benefitted from it. And they manufactured peaking factors from whole cloth in order to justify inclining rate tiers within the Single Family Residential (“SFR”) and Multi-Family Residential (“MFR”) customer categories.

The true reason for the inclining tiers was revealed by the rate consultant:

The increasing cost design of the successive tiers is to encourage conservation and to be consistent with the requirements of California Constitution, Article X.

(AR 30:794.) But conservation goals do not justify rates that are not proportionate to cost. (See *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1510, as modified (May 19, 2015) (holding nothing in article X, section 2, requires water rates to exceed the true cost of supplying that water and article X does not trump subdivision (b)(3) of article XIII D.))

In addition, the water rates violate Prop. 218 because they recover the cost of public fire protection services. Prop. 218 explicitly prohibits using utility fees (i.e., property-related fees) to pay for fire services that are available to the public at large in substantially the same manner as they are to the utility ratepayers. (Art. XIII D, § 6, subd. (b)(5).) Fire protection services are available to people and property throughout the City, not just to water utility ratepayers.

The City has the burden of proving compliance with Prop. 218. (Cal. Const., art. XIII D, § 6, subd. (b)(5).) And in adjudicating this matter, the Court must exercise its independent review without giving any deference usually available in challenges to government action. (*Capistrano*, 235 Cal.App.4th at p. 1507 citing *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Cty. Open*

1 *Space Auth.* (2008) 44 Cal. 4th 441, 448-449.) As further discussed below, the City will be unable
2 to meet its burden that it complied with Prop. 218 with regard to its water rate structure. The Court
3 must invalidate the Resolution in its entirety and enjoin the City from further imposition of the rates
4 adopted thereby.

5 FACTS

6 Petitioner Glendale Coalition for Better Government, Inc. (“Coalition”) is a non-profit
7 public interest organization made up of numerous residents and taxpayers residing in the City of
8 Glendale. (Petition for Writ of Mandate (“Pet.”) ¶ 2.) The Coalition was formed by local residents
9 in response to community concerns about issues such as the rising cost of water and the imposition
10 of discriminatory water rates. (Pet. ¶ 3.)

11 Respondent City of Glendale is a California charter city. (Pet. ¶ 4; Answer to Petition
12 (“Ans.”) ¶ 4.) The City provides water service to a population of approximately 192,000 at 34,500
13 potable and recycled water meters within a service area of 31 square miles. (AR¹ 30:745, 747.) The
14 City is an “agency” subject to Prop. 218’s restrictions. (See Cal. Const., art. XIII D, § 2, subd. (a);
15 Cal. Const. art. XIII C, § 1, subd. (b).) The City’s water sources are (a) the Metropolitan Water
16 District (“MWD”) which represents 64% of its supply, (b) groundwater pumped from local wells
17 (30%) and (c) recycled water (6%). (AR 30:747.) The potable (non-recycled) water is a blend of
18 groundwater and purchased water. (AR 30:776.)

19 On August 5, 2014, the City adopted Resolution No. 14-130 adopting water rates and
20 charges for water service over four years (effective September 1, 2014) (AR 51:1240-1246; Pet. ¶
21 18; Ans. ¶ 18.) The City’s water rate structure is based on a Water Rate Cost of Service Update
22 2014 Final Report – July 15, 2014 (“Report”) prepared by third party consultant Bartle Wells
23 Associates (“BWA”). (AR 51:1240; 30:735-914; Pet. ¶ 19; Ans. ¶ 19.)

24 The Report developed water rates under a “Base Scenario,” which contemplated annual
25 water rate increases over five years as follows: 5%, 5%, 4%, 4%, 4%. (AR 30:815). But the Report
26 also offered alternate scenarios. (*Ibid.*) Ultimately, the City adopted rates proposed in “Scenario
27

28 ¹ AR is the Administrative Record to be lodged by the City on October 31, 2016.

1 5” that proposed 4% annual increases over four years.² (AR 48:1136 (August 5, 2014 Council
2 Meeting Transcript) (4:2-14 describing options); 48:1187 (54:2-16 (vote on 4% annual option).)

3 The adopted water rates are comprised of (a) fixed monthly charges (“customer charges”)
4 depending on water meter size and (b) variable charges based on the monthly consumption of water
5 (per Hundred Cubic Feet (“HCF”).) (AR 51:1243-1244.) Fixed monthly charges seek to recover
6 costs of “customer accounts, fire protection, and meters & service.” (AR 30:782.) Variable charges
7 seek to recover “base” costs, “max/extra capacity costs,” and “water supply costs.” (AR 30:777-
8 778, 788.)

9 With regard to the variable component of the rates, single family residential customers are
10 subject to four rate tiers; multifamily residential customers are subject to two rate tiers; commercial
11 customers are subject to a single rate; and irrigation customers are subject to a single rate. (AR
12 51:1243.) The SFR variable rate (consumption) charges for potable (non-recycled) water are
13 follows:

Single Family Residents	FY 14/15	FY 15/16	FY 16/17	FY 17/18
TIER 1 (0-6 HCF)	\$2.27	\$2.34	\$2.45	\$2.57
TIER 2 (6.1 – 12 HCF)	\$2.80	\$2.87	\$3.02	\$3.19
TIER 3 (12-.1 – 25 HCF)	\$3.18	\$3.25	\$3.43	\$3.63
TIER 4 (Over 25 HCF)	\$3.86	\$3.93	\$4.17	\$4.42

14 (AR 51:1243.)

15 The MFR variable rate charges for potable (non-recycled) water are as follows:

Multifamily Residents	FY 14/15	FY 15/16	FY 16/17	FY 17/18
TIER 1 (0-5 HCF)	\$2.38	\$2.45	\$2.56	\$2.69
TIER 2 (Over 5 HCFs)	\$3.52	\$3.59	\$3.75	\$3.97

16 (AR 51:1243.)

17 ² Alternate scenarios were offered only for the purpose of determining how much of the water
18 utility’s reserve fund should be depleted, maintained, or increased each year. (The greater the
19 annual increases, the greater the size of the reserve fund.) The same expenses and the same rate-
20 making analysis was apparently utilized under each scenario. Accordingly, the scenario ultimately
21 selected is not relevant for purpose of this litigation.

1 In other words, as SFR and MFR customers consume more water each month, they are
2 charged increasingly greater per HCF rates. This type of rate structure is sometimes referred to as
3 an “inclining block” structure. (AR 63:1459.)

4 ARGUMENT

5 **A. PROPOSITION 218’S MANDATES**

6 In 1996, the voters approved Prop. 218, the *Right to Vote on Taxes Act*, which added articles
7 XIII C and D to the California Constitution. The measure protects taxpayers by limiting the methods
8 by which local governments exact revenue from taxpayers without their consent. (*Howard Jarvis*
9 *Taxpayers Assn. v. City of Roseville* (2002) 97 Cal. App. 4th 637, 640 (“*Roseville*”).) Building on the
10 foundation laid earlier by Prop. 13 in 1978, Prop. 218 is a further limitation on government’s ability
11 to impose taxes. (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009)
12 179 Cal.App.4th 1358, 1365.) In adopting Prop. 218, the People declared that “Proposition 13 was
13 intended to provide effective tax relief and to require voter approval of tax increases. However,
14 local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases
15 that not only frustrate the purposes of voter approval for tax increases, but also threaten the
16 economic security of all Californians and the California economy itself. This measure protects
17 taxpayers by limiting the methods by which local governments exact revenue from taxpayers
18 without their consent.” (*Roseville*, 97 Cal. App. 4th at p. 640.)

19 Prop. 218 places a number of restrictions on fees and charges imposed property-related
20 services, like water service.³ The two relevant restrictions in this litigation are:

21 Article XIII D, section 6, subdivision (b)(3), which states:

22 **The amount of a fee or charge imposed upon any parcel or person as an**
23 **incident of property ownership shall not exceed the proportional cost of the**
24 **service attributable to the parcel.**

25
26 ³ (See *City of Palmdale v. Palmdale Water District* (2001) 198 Cal.App.4th 926, 934 (“All
27 charges for water delivery” incurred after a water connection is made “are charges for a property-
28 related service, whether the charge is calculated on the basis of consumption or is imposed as a
fixed monthly fee.”); see also *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205,
217.)

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and

Article XIII D, section 6, subdivision (b)(5), which states in relevant part:

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

To comply with subdivision (b)(3), the City must justify any inequality in the cost of providing water as between classes of customers. (See *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937.) The City must likewise justify any inequality in the cost of providing water *within* a class of customers (i.e., tiered rates.) (See *Capistrano*, 235 Cal.App.4th at p. 1506 (“To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels.”).) As *Capistrano* made clear, “[i]f the phrase ‘proportional cost of the service attributable to the parcel’ is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really is an ascertainable cost of service that can be attributed to a specific — hence that little word ‘the’ — parcel. Otherwise, the cost of the service language would be meaningless. Why use the phrase ‘cost of the service to the parcel’ if a local agency does not actually have to ascertain a cost of service to that particular parcel?” (*Id.* at p. 1505.)

One of the arguments asserted by the City of San Juan Capistrano in defense of its tiers was that the subsidized rates (at lower tiers) were justified or required by the water conservation mandates of article X, section 2, of the California Constitution. (*Capistrano*, 235 Cal.App.1493 at pp. 1508-1509.) The Court of Appeal, after recognizing California’s drought issues, flatly rejected that argument: It held that:

But nothing in article X, section 2, requires water rates to exceed the true cost of supplying that water, and in fact pricing water at its true cost is compatible with the article's theme of conservation with a view toward reasonable and beneficial use.

[citation omitted.]

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Thus in *Palmdale*, the appellate court perceived no conflict between Proposition 218 and article X, section 2, so long as article X, section 2 is not read to allow water rates that exceed the cost of service. Said *Palmdale*: “California Constitution, article X, section 2 is not at odds with article XIII D so long as, for example, conservation is attained in a manner that ‘shall not exceed the proportional cost of the service attributable to the parcel.’ (Art. XIII D, § 6, subd. (b)(3).) [citation omitted.] (*Capistrano*, 235 Cal.App. at pp. 1510-11.) In sum, conservation goals may not be used as the basis to charge more to customers who consume more.

The purpose of subdivision (b)(5) is to stop local governments from using property-related fees (which are not subject to voter approval) to fund governmental services (e.g. fire, police) that are paid with taxes (and are subject to voter approval). Because people (both residents and non-residents) and all types of properties (i.e. real property, personal property and vacant property) benefit from the availability of fire protection services, it is illegal to burden only water customers with the cost of such service.

B. BURDEN AND STANDARD OF REVIEW

The burden of proving compliance with Prop. 218 is on the City. (See art. XIII D, § 6, subd. (b)(5) (“In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.”); see also *Capistrano*, 235 Cal.App.4th at p. 1504.) Furthermore, an agency’s alleged violation of Prop. 218 is subject to a court’s independent review. (*Silicon Valley*, 44 Cal.4th at p. 450.) Thus, no deference is given to an agency’s administrative findings.

As articulated by Justice Bedsworth, writing for the unanimous Court in *Capistrano*, “[t]he appropriate way of examining the text of Proposition 218 has already been spelled out by the Supreme Court in [*Silicon Valley*].” Specifically:

“We ““must enforce the provisions of our Constitution and “may not lightly disregard or blink at ... a clear constitutional mandate.”” [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.] [¶] Proposition 218 specifically states

1 that "[t]he provisions of this act shall be *liberally construed to effectuate its purposes*
2 *of limiting local government revenue and enhancing taxpayer consent.*" [Citations
3 omitted.] ... Proposition 218 was designed to ... *make it easier for taxpayers to win*
4 *lawsuits; and limit the methods by which local governments exact revenue from*
5 *taxpayers without their consent."*

6 (See *Capistrano*, 235 Cal.App.4th at p. 1505 [italics in original]; see also *Howard Jarvis Taxpayers*
7 *Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1355; *Silicon Valley*, *supra*, 44 Cal.4th at p.
8 448; *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892.)

9 C. THE CITY IGNORED PEAKING FACTORS FOR ITS OWN BENEFIT

10 According to the Report, "[i]n order to provide adequate service to its customers at all times,
11 the [City's] water system must be capable of not only providing the average amount of water used,
12 but also supplying water at peak or maximum rates of demand. Therefore, rates are designed to
13 recover system expenses needed to provide both average and peak use." (AR 30:778.)

14 As summarized in the Report, "[v]ariable charges are levied on actual water use and recover
15 the blended water supply and Base + Max costs of providing water service." (AR 30:788.)
16 Importantly, the "variable charge is comprised of two components (1) an average cost for blended
17 Water Supply including groundwater, recycled water, and purchased MWD water and (2) the
18 peaking costs for each customer category." (AR 30:788-789.)

19 BWA analyzed 2012/13 water consumption data for 15 different customer classes,
20 including the City's own water consumption, "to evaluate each customer category's proportionate
21 demand on the system" (i.e. peaking factor) (AR 30:778.) According to BWA, "[w]ater
22 consumption patterns over the course of a year show that **each customer category has different**
23 **peak demands.**" (AR 30:778 [emphasis added].) By definition, the "peak ratio is calculated by
24 taking the highest use month over average annual use and represents the extra demand that each
25 customer category places on the system during times of maximum water demand." (AR 30:778,
26 895.)

27 The City calculated this ratio (i.e. "peaking factor") for the 15 customer categories as
28 follows (see AR 30:908):

1	City of Glendale	2.06
2	Commercial Business	1.52
3	Commercial w/ master meter	1.47
4	Common Use Areas for Apt.	1.39
5	Common Use Electric/Water	1.32
6	Condominium Units	1.42
7	No Facility	2.00
8	Industrial – Large Business	1.20
9	Irrigation Meters	1.84
10	Master Metered Residential	1.16
11	Multi-Family Residential	1.37
12	Multi-Family w/ master meters	1.47
13	Public Authority	2.19
14	Single Family	1.82
15	Small Business	1.25

17 As emphasized by BWA, “[p]eaking costs are allocated to each customer category based
18 on their proportional average and peak demands. This allocation reflects the higher costs the
19 water utility incurs to meet additional demand due to peaking.” (AR 30:788-789.) In other
20 words, there is no dispute that the greater a category’s peaking factor, the greater the cost of
21 delivering the water to that customer category. Yet, BWA ultimately ignored its own breakdown
22 of peaking data by “collapsing” in Table 17 (AR 30:779) many customer categories with widely
23 disparate peaking factors (including its own category). Specifically, it collapsed the City’s
24 categories with high peaking factors (2.06 and 2.19) with several other low peaking categories
25 including “Small Business” (1.25) and “Industrial – Large Business” (1.20), to arrive at a combined,
26 arbitrary peaking factor of 1.52. (See Table 17, AR 30:779.) As a result, the City, with the highest
27 peaking factor categories (2.06 for “City of Glendale” and 2.19 for “Public Authority”), pays one
28 of the lowest per-unit costs for water service, while Master-Metered Residential customers with the

1 lowest peaking factor (1.16) pay one of the highest per unit costs next to Tier 4 Single Family
2 Residential customers. (AR 51:1243.)

3 Therefore, resting at the center of this litigation is the following paradox: Even though
4 BWA emphasizes that peaking factors (capturing increased seasonal or summer consumption costs)
5 are the only factor to determine disparate per-unit water charges as between customer categories,
6 and despite the fact that the Report provides empirical data regarding “diversity of demand among
7 classes,” BWA chose to ignore them. The result is that low peaking customers including Small
8 Business (1.25) and Industrial – Large Business (1.20) end up significantly subsidizing the City
9 whose peaking factor is far greater (2.06 and 2.19).

10 Likewise, it is safe to assume that water used by customers in the Irrigation category is for
11 outdoor use. At AR 30:790, the Report states that for single family residences outdoor water use
12 is designated for tiers 3 and 4. Curiously, the peaking factor for the Irrigation category (1.84) is a
13 tad more than the Single Family Residential peaking factor (1.82) (AR 30:779). Yet, the per-unit
14 charge for outdoor water consumption in the Irrigation category is \$2.95; but, for outdoor use the
15 per-unit charge for single family residences in Tier 3 and 4 is \$3.18 and \$3.86. It is precisely this
16 disparate per-unit cost for outdoor water charged to irrigation customers versus residential
17 customers that caused the courts in the *Palmdale* and *Capistrano* to strike down the water
18 ordinances.

19 Thus, when viewed in a transparent light, it becomes clear that the City has adopted a water
20 rate structure that effectively turns on its face Prop. 218’s requirement that water fees shall not
21 exceed the proportional cost of the service attributable to the ratepayer’s parcel. Indeed, the City’s
22 water rate structure demonstrates an inverse relationship between the charges to customer classes
23 and the cost of delivering water to them, all to the benefit of the City.

24 Importantly, the decision to collapse the City’s rates into the Commercial category was not
25 insignificant. Had the rates been properly designed using the available peaking data, the City would
26 have paid significantly more per unit. More specifically, the City’s peaking factor of 2.06 places it
27 at the approximate midpoint of the Single Family Residential Tier 3 and Tier 4 peaking factors
28 (1.82 and 2.31, respectively), which resulted in rates of \$3.18 (Tier 3) and \$3.86 (Tier 4) in FY

1 14/15. Using the City’s actual peaking factor and its rate-setting methodology, the City’s per unit
2 charge for water should be approximately \$3.52, which is roughly half way between SFR Tier 3
3 and SFR Tier 4 (not the uniform Commercial rate of \$2.81). Ultimately, the City gave itself a per-
4 unit subsidy of approximately \$0.71 per unit; an illegal subsidy it imposed on small businesses,
5 industry, apartment rentals, and single-family customers for its own benefit.

6 The City’s response to comments received by the Coalition in protesting the City’s water
7 rate structure is oversimplified and unavailing. (AR 31:916-918.) In sum, the City’s justification
8 for collapsing the City’s high peaking factors with those much lower is that the City and commercial
9 water users are both involved in “some sort of enterprise, either for profit or non-profit, private or
10 municipal,” and that charging customers based on BWA’s peaking factor analysis would result in
11 “confusion” and lead to increased customer service calls. Nonsense. The Report clearly identified
12 15 customer classes with widely-disparate peaking factors calculated to two decimal points. The
13 Report explained that the purpose of the peaking analysis in the first instance is to determine relative
14 impact of different customers on cost of service. At the end of the day, the City simply chose to
15 ignore the data that shows the **City imposes the greatest costs** for delivery of peak water.

16 In addition, while the City further claims that “commercial” customers use less
17 “discretionary” outdoor water as compared to residential users, and therefore argues that the
18 commercial collapsing is justified, the reality is that the City, as a municipal entity with demanding
19 public watering commitments and responsibilities, consumes large quantities of outdoor water, far
20 in excess of the typical private commercial sector business, and has chosen to disregard its impact
21 on the cost of delivering peak water by structuring its water rate classes based on common
22 nomenclature rather than cost of service (which, again, BWA explains is directly related to peaking
23 factors). The BWA data is clear that the City has the highest peaking factor, much higher than all
24 user classes, and therefore the City’s justification for collapsing itself for the benefit of a self-
25 serving subsidy is patently hollow. (AR 31:917.)

26 **D. SFR AND MFR TIERS ARE NOT BASED ON ACTUAL COST**
27 **DIFFERENTIALS**

28 Tiers are permissible under Prop. 218 so long as the price differentials are based on true

1 disparities in costs when providing water service at the various tiers. (*Capistrano*, 235 Cal.App.4th
 2 at p. 1511.) In other words, if it actually costs more to provide water service at Tier 4 than it does
 3 at Tier 3, that additional cost should be recovered from customers consuming water at Tier 4 levels.
 4 The central problem with the methodology utilized by the BWA is that while it established different
 5 peaking levels as *between* customer categories (a concept the Coalition accepts as appropriate), it
 6 is impossible to establish peaking disparities *within* customer categories (i.e. as between tiers). This
 7 forced BWA to make them up in order to justify increasing tiers. Because peaking factors are the
 8 City’s only stated justification for charging customers differently, the tiers are fatally flawed and
 9 not Prop. 218 compliant.

10 As step-by-step description of the “Base-Extra Capacity” method BWA used to develop the
 11 per HCF unit costs in the SFR tiers⁴ is necessary to demonstrate the point.

12 **1. Functional Costs Calculated**

13 First, BWA allocated projected annual expenses of the water system to seven functional
 14 components. The four functional components relevant for calculating variable (per HCF) costs
 15 (Base, Max, Groundwater, and MWD) were as follows:

16 **Figure A**

SIX YEAR AVERAGE (FY 14 – FY 19)			
Base	Max	Groundwater	MWD
\$4,195,753	\$5,903,781	\$7,868,694	\$23,702,567

20
 21 **\$10,099,534**

20
 21 **\$31,571,261**

22 (AR 30:776, Table 15.)

23 BWA also calculated the variable cost totals for FY 14/15 through FY 18/19. (AR 30:777,
 24 Table 16.) Because the Report utilized both the six-year average and the FY14/15 costs at times in
 25 developing SFR rates, the FY 14/15 totals are also highlighted here:

26
 27 ⁴ The same flawed methodology was used to develop the MFR tiers (AR: 30:794-796.) For the
 28 sake of brevity, that step by step process will not be described herein. But the Coalition objects to
 the tiers in the MFR customer category for the same reasons raised with regard to SFR tiers.

1 **Figure B**

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FISCAL YEAR 14/15			
Base	Max	Groundwater	MWD
\$3,460,003	\$4,868,515	\$6,488,872	\$19,546,183

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\$8,328,521

\$26,035,055

(AR 777, Table 16.)

“Base Costs” represent the costs that would be incurred if water consumption occurred evenly from day to day and from hour to hour, so that the system did not need extra capacity to meet peak demands. (AR 30:744, 774.) “Max/Extra Capacity” are costs incurred to meet water demands that exceed average (base) levels of use. (AR 30:744, 774.) “Groundwater” costs include those for pumping and production of groundwater. (AR 30:774.) “MWD” costs are attributable to direct and indirect costs of purchased water from the Metropolitan Water Department. (*Ibid.*)

2. Functional Costs Allocated to Customer Categories

After the total costs in each of the four functional components were determined, BWA allocated their costs to four different customer categories (SFR, MFR, Commercial, Irrigation) “based on their proportionate demand on each function.” (AR 30:777). BWA utilized 2012/2013 water consumption data to evaluate each customer category’s proportionate demand on the system, which allowed it to ascertain “average” (base) use and “peak” (max) use for each of the four customer categories.⁵ (AR 30:777.) The data used was as follows:

Figure C

Customer Category	Average Month (HCFs)	Peak Month (HCFs)
SFR	400,973	727,966
MFR	366,459	520,796
Commercial	187,517	285,440
Irrigation	46,060	84,954

(AR 30:778-779, Table 17.)

⁵ Peaking factors for additional customer categories were actually ascertained (and collapsed) as discussed above, but for purposes of this section, it is not relevant.

1 BWA then determined each customer category's proportionate share of total water
 2 consumption over an entire year as follows:

3 **Figure D**

Customer Category	Average Month (HCFs)	Annual Consumption	Percentage
SFR	400,973	4,811,675	40.1%
MFR	366,459	4,397,506	36.6%
Commercial	187,517	2,250,198	18.7%
Irrigation	46,060	552,720	4.6%
TOTAL		12,012,099	100%

10 (AR 30:779, Table 17.)

11 And then determined each customer category's proportionate share of "peak" or "max"
 12 consumption as follows:

13 **Figure E**

Customer Category	Peak Month (HCFs)	Percentage
SFR	727,966	45.0%
MFR	520,796	32.2%
Commercial	285,440	17.6%
Irrigation	84,954	5.2%
TOTAL	1,619,156	100%

19 (AR 779, Table 17.)

20 Using the percentages calculated in Figures D and E, total "base" costs and total "max"
 21 costs (Figure B) were allocated to each customer category as follows for FY 14/15:

22 **Figure F**

Customer Category	Base %	Base Costs	Max %	Max Costs
SFR	40.1%	\$1,385,973	45.0%	\$2,192,050
MFR	36.6%	\$1,266,672	32.1%	\$1,564,936
Commercial	18.7%	\$ 648,162	17.6%	\$ 856,957
Irrigation	4.6%	\$ 159,195	5.2%	\$ 254,575
TOTAL	100.0%	\$3,460,003		\$4,868,518

1 (AR 30:780, Table 18.) In other words, Table 18 (and Figure F) show how much of the total “base”
2 costs and how much of the total “max” costs are allocated to each of the four customer categories
3 for FY 14/15.

4 **3. Variable Rates Developed for SFR Tiers Based On Functional Costs**

5 After calculating and allocating functional costs to customer categories, BWA developed a
6 per HCF unit cost otherwise known as the variable charge. As explained above, “Variable charges
7 are levied on actual water use and recover the blended water supply and Base + Max costs of
8 providing water service.” (AR 30:788).

9 *Blended Supply Cost Component Developed*

10 The “blended water supply” is the “average cost for blended Water Supply including
11 groundwater, recycled water, and purchased MWD water.” (AR 30:788). The blended water
12 supply rate (FY14/15) is **\$2.19 per HCF** ($(\$6,488,872 + \$19,546,183) / 11,963,461$ annual HCF)
13 (AR 30:777 (Table 16), AR 30:798 (Table 25).) This same rate is charged to all four customer
14 categories. In other words, **each customer category is charged the same exact amount for the**
15 **costs of producing groundwater and recycled water, and for MWD costs.** (See AR 798, Table
16 25 (“As calculated in Table 25, the blended supply cost is the same for all customer categories. .
17 .”).) This is important to recognize because usage levels could require an agency to tap more
18 expensive water supplies, which in turn could represent a valid basis to charge customers different
19 rates. (See *Capistrano*, 235 Cal.App.4th at p. 1516 (“Nothing in our record tells us why, for
20 example, they could not figure out the costs of given usage levels that require City Water to tap
21 more expensive supplies, and then bill uses in those tiers accordingly. Such computations would
22 seem to satisfy Proposition 218 . . .”).) But the City declined to undertake such an analysis and all
23 customers pay the same water supply cost.

24 Because all customers pay this same per HCF unit “blended water supply” cost, the only
25 differences in the variable rates are attributable to differences in how Base costs and Max costs
26 were allocated to customer categories (as described above) and within customer categories with
27 respect to SFR and MFR customers. The balance of this section focuses on how Base costs and
28 Max costs were allocated to customers within the SFR customer category.

1 *Base+Max Cost Component Developed*

2 Within the SFR customer category, Base costs and Max costs were allocated to four
3 inclining block tiers using the following process.

4 First, with regard to the total Base costs allocated to SFR customers (\$1,680,693 six-year
5 average from Table 24A (AR 910))⁶, BWA reviewed the size of the four tiers it created (number
6 of HCFs in each tier) and ascertained their proportionate sizes. For example, Tier 1 is 6 HCFs, thus
7 its proportionate share is 6/44, with 44 being the alleged total number of HCFs⁷ in all four tiers. In
8 other words, the \$1,680,393 in Base Costs were allocated to each tier as follows:

9 **Figure G**

TIER	Size of Tier	Ratio	Percentage	Amount Allocated
TIER 1	6 HCFs	6/44	13.64%	\$ 229,144
TIER 2	6 HCFs	6/44	13.64%	\$ 229,144
TIER 3	13 HCFs	13/44	29.55%	\$ 496,480
TIER 4	19 HCFs	19/44	43.18%	\$ 725,595
TOTALS	44 HCFs		100%	\$1,680,393

10 (AR 30:795-796, 797, Table 15, AR 30:910, Table 24A.)

11 Second, BWA projected the annual consumption of water in each tier (i.e. “water sales”) in
12 each tier as follows:

13 **Figure H**

TIER	Percentage of Sales	Annual Sales (HCFs)
TIER 1	32.6%	1,568,261 HCFs
TIER 2	25.1%	1,206,291 HCFs
TIER 3	27.0%	1,297,325 HCFs
TIER 4	15.4%	739,798 HCFs
TOTAL	100%	4,811,675 HCFs

14 (AR 30:792, Table 22; AR 30:797, Table 24; AR 30:911, Table 24B.)

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27 ⁶ For reasons not entirely clear, BWA used the six-year averages for Base and Max costs rather
28 than using individual fiscal years (like it did for the blended water supply figure).

⁷ It is only “alleged” because Tier 4 has no upper limit, and thus it seems impossible to quantify.

1 Third, BWA referenced the overall “peaking factor” of 1.82 for SFR customers based on
 2 the data in Table 17 (AR 30:779). (Peak Month of 727,966 HCFs / Average Month 400,973 HCFs
 3 = 1.82.) It determined that this 1.82 peaking factor should be applied at Tier 3 because “the overall
 4 SFR average monthly consumption is about 18 hcf (400,973 hcf / 22,347 accounts) which lands in
 5 Tier 3.” (AR 30:795.)

6 Fourth, using the projected sales in Tier 3 from Figure H above (1,297,325 HCFs) it
 7 calculated the “peak consumption” in Tier 3 using the 1.82 SFR peaking factor as follows:

8 **Figure I**

Tier	Base Consumption	Peaking Factor	Peak Consumption
TIER 3	1,297,325 HCFs	1.82	2,361,131

9 (AR 795).

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 11 Fifth, **without any justification or reference to any data**, it determined that Tier 1 had no
 12 peaking, Tier 2 had a peaking factor of 1.26, and Tier 4 had a peaking factor of 2.31, and calculated
 13 peak consumption in each.

14 **Figure J**

TIER	Base Consumption	Peaking Factor	Peak Consumption
TIER 1	1,568,261 HCFs	1	1,568,261 HCFs
TIER 2	1,206,291 HCFs	1.26	1,518,657 HCFs
TIER 3	1,297,325 HCFs	1.82	2,361,131 HCFs
TIER 4	739,798 HCFs	2.31	1,706,623 HCFs
TOTAL	4,811,675 HCFs		

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 21 To reiterate, the assignment of 1, 1.26 and 2.31 peaking factors to Tiers 1, 2 and 4
 22 respectively was done without any supporting data or explanation. The reason there is no data or
 23 back-up supporting these intra-customer peaking factors is because the concept of assigning
 24 different peaking factors to tiers is nonsensical. Unlike a customer category where one can measure
 25 an average month of consumption and a peak month of consumption by reference to a group of
 26 customers’ billing records, **there is no data – and thus no ability – to calculate peaking within**
 27 **a tier**. The concept makes no sense and the M1 manual – which BWA cited and relied upon in the
 28 Report (AR 30:759, 782) – provides no support for it either. In fact, the M1 manual discusses at

1 length various techniques that may be used to develop peaking factors for **customer categories**,
2 but makes no reference to ascertaining peaking factors within tiers. (See AR 64:1661-1669.)
3 Indeed, the tidy “1” peaking factor in Tier 1 reflects that it was *manufactured* and not the product
4 of external data.

5 And even if it made sense to tie the 1.82 peaking factor to Tier 3 where average monthly
6 consumption is found (400,973 hcf / 22,347 accounts = approx. 17 hcf), it would not make sense
7 to then apply peaking factors where below average consumption is found. (e.g. in Tier 2.) The
8 only units of water that should be charged peaking costs are those at 17 HCFs and above.

9 BWA revealed the true purpose of assigning peaking factors to tiers as follows: “The rates
10 for these tiers are structured as inclining block tiers to send price signals to consumers and
11 encourage conservation of water consistent with Article X of the California Constitution.” (AR
12 31:918, see also 30:794 (“increasing cost design of the successive tiers is to encourage
13 conservation...”).). As explained above, this is not a valid justification to charge ratepayers
14 different amounts and violates Prop. 218.

15 Sixth, using relative “peak consumption” figures which were based on the bogus peaking
16 factors, BWA allocated the six-year average for “Max” costs of \$2,658,177 (AR 30:910, Table
17 24A)) to each tier as follows:

18 **Figure K**

Tier	Peak Consumption	Percentage of Peak	Amount
Tier 1	0	0	0
Tier 2	1,518,657 HCFs	27.18%	\$722,605
Tier 3	2,361,131 HCFs	42.26%	\$1,123,496
Tier 4	1,706,623 HCFs	30.54%	\$821,042
TOTAL	5,586,410 HCFs	100%	\$2,658,117

25 (AR 30:912, Table 24C)

26 Seventh, the Base cost allocations (Figure G) and the Max cost allocations (Figure K) were
27 totaled for each Tier.

1 **Figure L**

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Tier	Base Costs	Max Costs	TOTAL
Tier 1	\$229,144	\$0	\$229,185
Tier 2	\$229,144	\$722,605	\$951,807
Tier 3	\$496,480	\$1,123,496	\$1,620,063
Tier 4	\$725,595	\$821,042	\$1,537,814

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7 (AR 30:797, Table 24; AR 30:912 (Table 24C).)

8 Finally, the per HCF unit costs for each tier was calculated by dividing the total Base and
9 Max Costs by the base consumption in each tier as follows:

10 **Figure M**

Tier	Total Costs	Base Consumption	Per HCF cost
Tier 1	\$229,185	1,568,261	\$.146
Tier 2	\$951,807	1,206,291	\$.789
Tier 3	\$1,620,063	1,297,325	\$1.248
Tier 4	\$1,537,814	739,798	\$2.078

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16 (AR 30:797, Table 24.) This entire process was flawed because it was premised on the notion that
17 different peaking occurs within different tiers (or in the case of Tier 1, on the notion that no peaking
18 occurs in Tier 1.) The reality is that BWA manufactured these inclining peaking factors to send
19 conservation signals rather than “harmonizing” its conservation goals with the constitutional
20 mandates of proportionality and cost of service. (*Palmdale*, 198 Cal.App.4th 926, 936.)

21 In addition to the wholly unsupported peaking factors, the methodology contains another
22 critical error. With regard to allocating base costs⁸, the dollar amounts allocated to each tier (e.g.,
23 \$229,144 in Tier 1) were based on the **size** of tier (e.g., 6 HCFs in Tier 1). (See Figure G above.)
24 The size of the tiers is irrelevant when allocating cost. The absurdity of the concept is highlighted
25 by considering an example wherein a rate structure comprises two tiers as follows:

26 Tier 1 0 – 5 HCFs

27 Tier 2 6 – 20 HCFs

28 ⁸ Recall that base costs are those incurred under average demand conditions.

1 If 90% of water sales occurs in Tier 1, and 10% occurs in Tier 2, why should Tier 2
 2 customers pay 75% of the costs (15 HCFs / 20 Total HCFs) which is what would happen using
 3 BWA’s methodology. The level of consumption within a tier, not tier size, is what matters when
 4 allocating costs. The reason BWA used the size of the tiers (instead of the amount of *consumption*
 5 in the tiers) is because it understood that doing so would skew rates in favor of the smaller-sized
 6 tiers – which not coincidentally happened to be the lowest two tiers (Tiers 1 and 2).

7 **4. Rates Calculated for Fiscal Years**

8 Using the foregoing methodology, which largely used six-year averages, HCF rates were
 9 calculated in each of the fiscal years 14/15 through 18/19. For FY 14/15, the HCF rates were:

10 **Figure N**

Tier	Blended Water	Base+Max	Total
Tier 1	\$2.19	\$.12	\$2.31
Tier 2	\$2.19	\$.65	\$2.84
Tier 3	\$2.19	\$1.03	\$3.22
Tier 4	\$2.19	\$1.71	\$3.90

16 (AR 30:798, Table 25.)

17 As explained earlier, these rates were proposed under a Base Scenario (5%, 5%, 4%, 4%,
 18 and 4% annual increases.) The City ultimately adopted rates under Scenario 5 (4% increases over
 19 four years.) The only difference between the two scenarios is the amount of “surplus” available
 20 for the reserve fund (i.e. how much “profit” should the rates generate.) (See generally 48:1174-
 21 1186.) The methodology used to devise the rates under each was apparently the same.

22 **E. FIRE PROTECTION COSTS MAY NOT BE RECOVERED FROM WATER RATEPAYERS**

23 As discussed above, the water rates include a fixed monthly charge to recover “fire
 24 protection” costs, *inter alia*. (AR 30:782; see also Table 26 Base Scenario Monthly Charges (AR
 25 30:801).) Fire protection costs are those “related to direct fire flow and protection” associated with
 26 “hydrants, private fire services, and the additional capacity required in the system to accommodate
 27 fire flow volumes in case of an emergency.” (AR 30:775.) BWA allocated the cost of providing
 28 fire protection services as between public fire protection (82.9%) and private fire line protection

1 (17.1%). This allocation was based on the number of public fire hydrants and the number of private
2 fire line connections, and their relative demands on the water system. (AR 30:786.)

3 The City violated article XIII D, § 6, subd. (b)(5) when it allocated public fire protection
4 services to water customers. Section 6 subdivision (b)(5) specifically prohibits charging a utility
5 customer for a service that benefits the entire community, like fire protection services. (See Cal.
6 Const. art. XIII D, § 6, subd. (b)(5) (“No fee or charge may be imposed for general governmental
7 services including, but not limited to, police, fire, ambulance or library services, where the service
8 is available to the public at large in substantially the same manner as it is to property owners.”)
9 The fire protection services at issue here are available to non-residents who work in the City,
10 persons passing through or visiting the City, and residents who may not be water customers. They
11 are also available to protect personal property (e.g., vehicles), vacant lands (e.g., fields, forests) and
12 structures without water service (e.g. playgrounds, parking lots). In other words, fire protection
13 services are available to the public at large in substantially the same manner as they are to the
14 property owners paying the water rates. Thus, the cost of providing public fire protection service
15 should be allocated to the City or the Fire Department and funded through tax revenues, not water
16 rates.

17 **F. PETITION FOR WRIT OF MANDATE SHOULD BE GRANTED**

18 The Coalition’s petition for writ of mandate is governed by Code of Civil Procedure section
19 1085 (traditional/ordinary mandamus) because the setting of fees and charges is a legislative act.
20 (See *Kahn v. East Bay Mun. Util. Dist.* (1974) 41 Cal.App.3d 397, 409 (“fixing or refixing of rates
21 for a public service is legislative, or at least quasi legislative”); see also *Shapell Industries, Inc. v.*
22 *Governing Board* (1991) 1 Cal. App. 4th 218, 230 review denied (Mar. 19, 1992) (“In general if an
agency acts pursuant to legislative authority, review of the action is by ordinary mandamus.”).)

23 A writ of mandate lies “to compel the performance of an act which the law specially enjoins,
24 as a duty resulting from an office, trust, or station; . . .” (*Loder v. Municipal Court for San Diego*
25 *Judicial Dist.* (1976) 17 Cal.3d 859, 863.) Mandate lies to challenge validity of legislative action
26 as well. (*Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350, 1362.) Issuance of a writ
27 requires: “(1) A clear, present and usually ministerial duty upon the part of the respondent
28 [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that

1 duty [citation]." (*Loder*, 17 Cal.3d at p. 863 [citations omitted].) "A ministerial act is one that a
2 public official must perform in a certain manner pursuant to law "without regard to his or her own
3 judgment or opinion concerning the propriety of such act." (*Coachella Valley Unified School Dist.*
4 *v. State of California* (1997) 176 Cal.App.4th 93, 113 [citations omitted].) Mandate is an
5 "equitable proceeding designed to achieve justice where no other remedy is available." (*Windigo*
6 *Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 596; see also *Green v. Obledo*
7 (1981) 29 Cal.3d 126, 142.)

8 Here, the City had and has a clear and ministerial duty to comply with Prop. 218 and failed
9 and continues to fail to do so. The Coalition has a beneficial interest in the City's performance of
10 its duties because its members are water rate payers. (See *Mission Hospital Regional Medical*
11 *Center v. Shewry*, 168 Cal.App.4th 460, 480 (2008) ("The beneficial interest standard is so broad,
12 even citizen or taxpayer standing may be sufficient to obtain relief in mandamus. '[W]here a public
13 right is involved, and the object of the writ of mandate is to procure enforcement of a public duty,'
14 a citizen is beneficially interested within the meaning of Code of Civil Procedure section 1086 if
15 'he is interested in having the public duty enforced.'") (citation omitted)); see also *Save the Plastic*
16 *Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155, 166 (2011).) Furthermore, there is no
17 adequate remedy at law. (See C.C.P. § 1086 ("The writ must be issued in all cases where there is
18 not a plain, speedy, and adequate remedy, in the ordinary course of law."))

19 In addition, the Coalition is entitled to declaratory relief because there remains an actual
20 controversy between the Coalition and the City. (See C.C.P. § 1060; *Colusa Cnty. v. Strain*, 215
21 Cal.App.2d 472 (1963).) The Coalition alleges that the water fees and charges violate Prop. 218's
22 mandates (Article XIII D, § 6, subd. (b)(3) & (5).) The City claims that the rates comply with Prop.
23 218. (Pet. ¶¶ 54; Ans. ¶ 54.) A judicial declaration as to the party's respective rights and duties
24 is appropriate and necessary. (C.C.P. § 1060.)


25 Accordingly, the Court should (a) declare the Resolution and the rates adopted thereby
26 illegal and in violation of Prop. 218, (b) direct the City to invalidate, repeal and/or rescind the
27 Resolution in its entirety, and (c) enjoin the City from imposing, billing, or collecting the fees and
28 charges adopted by the Resolution.

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CONCLUSION

For all of the foregoing reasons, the Coalition respectfully requests that the Court grant the petition in its entirety.

DATED: August 26, 2016



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